KATIPOTE SINSOONGSUD

LEGAL PROBLEMS CONCERNING ARBITRATION IN ADMINISTRATIVE INVESTMENT CONTRACTS
COMPARATIVE PERSPECTIVE BETWEEN THAILAND AND EUROPEAN UNION

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Tese no âmbito do programa de Doutoramento em Direito, ramo de Direito Público orientada pela Professora Doutora Suzana Maria Calvo Loureiro Tavares da Silva e apresentada à Faculdade de Direito da Universidade de Coimbra.

Novembro de 2021

Faculdade de Direito
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Marilyn and Davin…

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RESUMO

O Investimento Directo Estrangeiro (IDE) proporciona benefícios mútuos aos investidores e ao país que acolhe o investimento. É comumente aceite que o IDE é uma "coisa boa". A globalização fez com que o volume e os montantes do IDE atingissem níveis elevadíssimos e sem precedentes. Porém, nem tudo no IDE é positivo ou desprovido de problemas. O exercício dos poderes soberanos pelo Estado hospedeiro pode despoletar situações em que os investidores estrangeiros acabem por ser submetidos a riscos que estão para além das suas expectativas formadas no âmbito de um contexto e de uma lógica empresarial e comercial. É por essa razão que os Estados e as Organizações Internacionais têm procurado formas de proteger os investidores estrangeiros de actuações arbitrárias por parte dos Estados hospedeiros. Um desenvolvimento assinável deste processo foi a celebração de tratados internacionais de protecção do investimento estrangeiro, nos quais se contemplam diversos *standards* de protecção, que asseguram a posição do investidor contra actos discriminatórios por parte dos Estados de acolhimento. Se estes Estados de acolhimento violarem dimensões materiais de protecção dos direitos dos investidores contempladas naqueles Tratados, estes têm o direito de demandar o Estado hospedeiro através dos mecanismos da arbitragem internacional do investimento, aos quais o Estado hospedeiro se tenha vinculado.

É pacífico na doutrina que o direito do investimento estrangeiro se desenvolveu a partir (ou sob a égide) do direito internacional público. Contudo, o direito do investimento estrangeiro apresenta conexões relevantes com outras áreas do direito, incluindo com o direito administrativo. Desde a celebração do primeiro Tratado Bilateral de Protecção do Investimento entre a Alemanha Ocidental e o Paquistão (em 1959) até hoje, foram já celebrados cerca de 3.000 tratados internacionais de protecção do investimento em todo o mundo, e não é verdade que o sistema de resolução de disputas do ISDS se possa considerar isentos de críticas, pois são diversas as objecções apontadas a este modelo, as quais questionam a sua legitimidade. Entre os diversos apontamentos críticos ao modelo podemos destacar a inconsistência desta jurisprudência arbitral, a falta de mecanismos de recurso, a questionável independência dos árbitros, o incumprimento das decisões (inexecução das mesmas) por parte dos Estados hospedeiros e a falta de resposta adequada à tensão entre a protecção dos direitos dos investidores e o direito dos Estados a legislar e a regular. A questão coloca-se com especial densidade nos sistemas que adoptam um modelo de administração executiva. Nestes sistemas, normalmente os contratos administrativos têm um regime jurídico diferente dos contratos de direito privado. Um regime jurídico no qual estes contratos administrativos obedecem a vinculações de interesse público, o que explica as cláusulas e os poderes exorbitantes reconhecidos pelo legislador. Não raras vezes, o Estado é forçado a reagir para assegurar a prevalência do interesse público de modo a garantir a ordem pública, a efectivação de políticas públicas, a controlar flutuações económicas, a neutralizar a ameaça do terrorismo, a proteger o ambiente ou os direitos humanos. Estas intervenções fundamentadas no interesse público tendem a ser qualificadas como "risco não comercial" e, como tal, a consubstanciar uma violação dos *standards* de protecção do investimento estrangeiro, assegurados ao investidor no âmbito dos referidos tratados internacionais do investimento. Actuações que resultam depois na condenação dos Estados pelo uso legítimo que estes fazem do seu poder regulador.

O objectivo desta dissertação é analisar os problemas jurídicos da arbitragem do investimento no âmbito destes contratos administrativos. O trabalho busca fazer uma comparação entre a realidade jurídica da Tailândia, enquanto Estado soberano, e a União Europeia, que sendo uma entidade de natureza supranacional, dispõe hoje de competência reguladora em matéria de investimento estrangeiro, a qual lhe foi conferida pelos Estados-membros. No trabalho procuraremos salientar as dificuldades do uso da arbitragem nos

contratos administrativos em geral e nos contratos de investimento estrangeiro. A finalidade é perceber se a arbitragem pode ser considerada um meio adequado para solucionar diferendos que surjam no âmbito da execução de contratos administrativos de investimento. Analisaremos, também, algumas sugestões que têm sido veiculadas sobre a reforma do sistema ISDS. Essas sugestões visam ajudar a reforçar a legitimidade do sistema e conduzir a uma harmonização do direito internacional do investimento com o direito administrativo, pondo termo a episódios de desacordo e crise do modelo.

Palavras-chave: Investimento Directo Estrangeiro; Tratado Internacional de Investimento; Acordo Bilateral de Investimento; Mecanismo de Resolução de Conflitos entre Estados; Direito Administrativo Tailandês; Direito Administrativo Europeu; Competência da UE em matéria de Investimento Directo Estrangeiro.

ABSTRACT

Foreign Direct Investment (FDI) brings about mutual benefits to both foreign investors and the country in which such investments are made. It is generally accepted that FDI is considered a "Good thing". The effect of globalization increases both the volume and value of FDI at an unprecedented level. Yet, FDI does not always go smoothly. The exercise of host state sovereign powers might bring about unwanted investment situations in which foreign investments are exposed to risks beyond the scope of commercial expectations of foreign investors. In this connection, states and relevant international organizations have sought foreign investment protection against arbitrary actions from host states. One of the milestone developments is the conclusion of international investment agreements (IIAs), which those IIAs contain a variety of standards of protection, guaranteeing certain protections to foreign investors against discriminatory actions from the host state. If the host state violates substantive protections under IIAs, foreign investors have the right to initiate international arbitration against the host state according to their right to investor-state dispute settlement (ISDS) under IIA that their home state has concluded with the host state.

It is agreed by literature that international investment law has been developing in the realm of public international law; however, the essence of international investment law is also relevant to many areas of law, including administrative law. From the conclusion of the first bilateral investment treaty (BIT) between West Germany and Pakistan in 1959 until today that there are almost 3,000 international investment agreements concluded worldwide; there is no dispute that the system of ISDS is not perfect since there are weaknesses and criticisms toward the legitimacy of the system. There are problems *inter alia* inconsistency of arbitral interpretation/ award, lack of appellate mechanism, arbitrator independence, uncomplying to arbitral awards by the host state, and the constraint between foreign investment protection and host states' right to regulate. The problem seems to be more severe in jurisdictions where they embrace the strong idea of administrative law. Those jurisdictions usually separate administrative contract (Public contract) from private contracts. Such contracts usually have public interest implications and give certain privileges to the administration over private parties. Often, states are forced to act reactively to public interest reasons to maintain the order of their society, for example, unstable politics, economic fluctuations, terrorism, environment protection, or human rights protection. Those acts or regulatory changes might be seen as "non-commercial risks" that breach the IIA standards of protection, leading to a substantial award against the state for its legitimate regulatory actions.

This thesis shall analyze legal problems concerning arbitration in administrative investment contracts. The thesis shall make a comparison between Thailand as a sovereign country on the one hand and the European Union, which is the supranational entity that has exclusive competence over FDI on the other. The comparison should point out problems of using arbitration not only in administrative contracts but also in the use of investment arbitration in administrative investment contracts. As a result, the thesis should point out whether arbitration is proper and most suitable as a dispute settlement instrument in administrative investment contracts. In addition, the thesis shall suggest possible reform options for the ISDS system. These suggestions should help in enhancing the legitimacy system, leading to the harmonization of international investment law and administrative law, which have long been a history of ignorance and mistrust.

Keywords: Foreign Direct Investment; International Investment Agreement; Bilateral Investment Treaty; Inter-State Dispute Settlement; Thai Administrative Law; European Administrative Law; European Union Exclusive Competence Over Foreign Direct Investment.

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CHAPTER 1

INTRODUCTION

1.1 Comparing to Apparently Different Realities: Reasons

Globalization affects the increase of cross-border trade. The phenomenon of globalization also affects rapid growth in both value and volume of Foreign Direct Investment (FDI). FDI flows have grown up from 51.5 billion USD in 1980 to 1.95 trillion in 2017[1]. FDI is one of the critical factors in shaping the world economy, leading to economic wealth and prosperity, and enhancing the host state's rule of law[2]. Even it is undeniable that FDI causes specific problems such as creating a foreign monopoly, unemployment, increasing corruption, cultural disruption, violation of human rights, social and environmental harm, etc.[3] However, most literature pointed out that the overall benefits of FDI supersede its potential adverse effects[4]. The details of FDI shall be discussed in Chapter 3 and Chapter 6 of the thesis.

The rapid expansion of FDI causes concerns among capital export countries (Home State) that the investment of their nation might be facing undesirable situations, for example, discrimination or unfair expropriation from the capital import countries (Host State). On the other hand, the host states wish to attract FDI to their countries as they are well aware that FDI is one of the keys to driving the growth of their internal economy. Therefore, both the home state and host state conclude Bilateral Investment Treaties (BITs) aimed to promote FDI between both countries, which those BITs reciprocally contain specific standards of protection. Most of the time, an investor from the home state possesses the right to initiate international arbitration proceedings against the host state whenever they feel that the host state failed to perform its obligation under the BIT concluded with their home state. The right of an investor to initiate arbitration proceedings against the host state is an "open offer/ open acceptance" given by the host state

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[1] Global Foreign Direct Investment (Net Flow)'s statistics from year 1970-2017 from The World Bank's Data, available online at <https://data.worldbank.org>.

[2] FRANCK, Susan D., «Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law», *Pacific McGeorge Global Business & Development Law Journal* Vol. 19 Issue 2 (2007), 337-374;

[3] SORNARAJAH, Muthucumaraswamy, *The International Law on Foreign Investment*, 3rd Edition, Cambridge University Press, New York, 2010;

[4] POHL, Joachim, «Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence», OECD Working Papers on International Investment 2018/01 (2018), Available online at <www.oecd.org>. See also, OECD, «Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs», OECD Publication, available online at <www.oecd.org>.

under the BIT[5]. The details of BITs and arbitration shall be discussed in Chapter 3, Chapter 4, and Chapter 5 of the thesis.

Nowadays, there are problems arising from the BITs and investment arbitration under the function of investor-state dispute settlement (ISDS) provisions under BIT. Even it is known that BIT has been developing in the realm of public international law, in which the realm of public international law tries to issue the rule to control the adverse effects of the BITs while maximizing the benefits from using those BITs. However, when looking at procedural, substantive, and in practice, the area of BITs law is also relevant to private law, public law[6], and constitutional law[7]. This area of law applies to both common law and civil law countries in the same manner. This situation only causes more controversy and problems, especially in countries that have adopted a firm idea of administrative law and administrative contract (Public contract). Alongside, there are many critics of its systems, *inter alia* the limitation to host state regulatory power, the overlooking of public interest, transparency, the impartiality of arbitrators, the environmental and human rights issues, etc. Problems in this area of law create substantial challenges for both developed and developing countries. The details of issues of using BITs shall be analyzed in Chapter 6 of the thesis.

This thesis aims to analyze legal problems concerning arbitration in administrative investment contract. The analysis shall encompass a comparative study between Thailand and the European Union Context.

In the beginning, it is essential to note the legal nature of the European Union and its competence over foreign investment. Unlike the federal system, the European Union is a particular supranational legal entity[8]. It sits somewhere along the *continuum* between an international

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[5] *Ibidem.*

[6] Whether it is determined by domestic or international standards, the resolution of a regulatory dispute is intrinsically a matter of public law. For this reason, investment treaty arbitration most resembles the domestic adjudication of individual claims against the state under administrative or constitutional law. See, VAN HARTEN, Gus, *Investment Treaty Arbitration and Public Law*, 1st Edition, Oxford University Press, Oxford, 2008; See also, KINGBURY, Benedict, KRISCH, Nico &STEWARD, Richard B., «The Emergence of Global Administrative Law», *Law and Contemporary Problems* Vol. 68 Issues 3 &4 (2005), 15-62;

[7] VAN HARTEN, Gus, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration*, 1st Edition, Oxford University Press, Oxford, 2013;

[8] A federal system is one in which at least two levels of government-national and local-coexist with separate or shared powers, each having independent functions, but neither having supreme authority over the other. The best-known federal system is practicing in the U.S. In which American States have its full authorities over certain policy area such as education, taxes, road, and police. However, American States do not have power in certain areas, such as raising import or export taxes, creating their own currency, conclude treaty with other countries, or maintaining their own army.

On the other hands, even the European Union has some of the features of a federal system. However, the European member states could do almost everything that the U.S. model could not. For example, the European Member States could maintain their own military, more power over taxes policy when comparing to the U.S. model,

organization and a state, and it has been moving from the international organization closer to the state. These 28 (27 after Brexit) sovereigns nationals or so-called "European Member States" gave up important parts of their sovereign power to the European institutions, aiming to achieve their common value and similar objectives underpinned by the Treaties[9]. The European Union has its legal order, which it is separate from international law and forms an integral part of its national legal system[10]. The concept of the new and autonomous EU legal order *inter alia* has influent by the judgment of the Court of Justice of the European Union (CJEU) in the case of *Van Gend & Loos*[11]. It is fair to sum up that the European Union law characterizes with primacy, direct effect, uniform interpretation by the CJEU, and the transfer of competence to the EU in various fields (and ever-increasing areas)[12]. The details of the legal nature of the European Union shall be discussed in Chapter 2 of the thesis.

The European Union manages trade relations with third countries in the form of trade agreements. They are designed to create better trading opportunities, overcome related barriers, and contain a certain level of investment protection reciprocally. Besides, the European Union's

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and some of the member states still use their own currency. Meanwhile, power of the European institutions is considered fewer when compared to the U.S. federal government. See, MACCORMICK, John, *Understanding the European Union: Concise Introduction*, 7th Edition, Palgrave, London, 2017;

[9] The idea of sovereignty in the European Union is not eliminated, but rather the sovereignty of European member state has been re-distributed. In other word, the sovereign power was once monopolized by national governments in the member states, it is now shared by those governments and by the institutions of the European Union. The true sovereign power still lies with the people. See, JACKSON, John H., «Sovereignty: Outdated Concept or New Approaches», Wenhua SHAN, Penelope SIMONS &Dalvinder SINGH (Eds.), *Redefining Sovereignty in International Economic Law*, Hart Publishing, Portland, 2008;

[10] WEATHERILL, Stephen, *Law and Values in the European Union*, 1st Edition, Oxford University Press, Oxford, 2016;

[11] Case of NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration of European Court of Justice (ECJ) on 5 February 1963 established that provisions of the Treaty Establishing the European Economic Community were capable of creating legal rights which could be enforced by both natural and legal persons before the courts of the Community's member states (Principle of Direct Effect). Part of the ECJ judgement stated that "The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community". It is interesting to note that according to the aforementioned judgment, certain conditions must be met in order to have a direct effect. They must possess conditions of; Be sufficiently clear and unambiguous in its content for judicial application, establish an unconditional obligation, not depend on further measures being taken by the member state, and be capable of creating rights for individuals.

See also, Case 6/64, *Flaminio Costa v Enel ("Costa")* [1964] ECR 585., which represented a principle of supremacy of EU law. In which EU law is directly applicable, and the provision of the TFEU will override any inconsistent national legislation.

[12] GOVAERE, Inge, «Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic», Inge GOVAERE &Sacha GARBEN (Eds.), *The Interface Between EU and International Law: Contemporary Reflections*, Hart Publishing, Munich, 1st Edition, 2020;

trade policy is also used as a vehicle for the promotion of European principles and values, from democracy and human rights to environmental and social rights[13].

In the scheme of the European Union's competence over foreign investment, the European member states do not have the authority to conclude a trade agreement with a third country for their national interest because the entry into force of the Lisbon treaty has changed the European Union's roles to have exclusive competence over FDI. Nowadays, the Union may conclude an agreement with third countries or international organizations to achieve the Union's policies, and such agreement binds all Union institutions and member states[14]. Under Treaty on the Functioning of the European Union (TFEU) Article 207, the conclusion of trade agreements and the matter of the FDI are part of the Common Commercial Policy (CCP)[15]. Therefore, the

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[13] See the European Union's position in the world trade, available online at <ec.europa.eu>.

[14] Treaty on the Functioning of the European Union (TFEU) Article 216 stated that "1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States". See also, Treaty on the Functioning of the European Union (TFEU) Article 3 (2) also provided the similar language. See also, Treaty on the Functioning of the European Union (TFEU) Article 217 (ex Article 310 TEC).

[15] Treaty on the Functioning of the European Union (TFEU) Article 207 (Ex Article 133 TEC) stated that

"1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

authority to negotiate trade agreements with third countries belongs to the European Commission, with authorization from the European Council to start the negotiation with third countries alongside specific procedures under article 218 of the TFEU[16]. Nowadays, there are some international investment agreements that are concluded between the EU and third countries under new exclusive competence over FDI, for example, the Comprehensive Economic and Trade Agreement (CETA) concluded between the EU and Canada.

The phenomenon of the supranational legal entity of the European Union over FDI, along with the fact that the European Union is one of the biggest FDI importers and exporters, without a doubt, made the European Union become a dominant international player in the field of FDI[17].

On the other hand, Thailand, as an entirely national-sovereign state, has its supreme power over investment law. The Constitution of the Kingdom of Thailand section 178 regards BIT as a treaty with wide-scale effects on the security of the economy, society, or trade or investment of the country. Therefore, the authority to conclude a BIT belongs to the Royal Thai Government with a limitation to approval by the National Assembly and public participation in the process[18]. Nowadays, in practice, the Thai Ministry of Foreign Affairs (TMFA) is responsible for BIT

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5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation".

See also, LARIK, Joris, «Sincere Cooperation in the Common Commercial Policy: Lisbon, a "Joined-Up" Union, and "Brexit"», Marc BUNGENBERG, Markus KRAJEWSKI, Christian J. TAMS, Jörg Philipp TERHECHTE &Andreas R. ZIEGLER (Eds.), *European Yearbook of International Economic Law 2017*, Springer, Cham, 2017;

[16] Treaty on the Functioning of the European Union (TFEU) Article 218 (Ex Article 300 TEC).

[17] DIMOPOULOS, Angelos, *EU Foreign Investment Law*, 1st Edition Oxford University Press, Oxford, 2011;

[18] The Constitution of the Kingdom of Thailand section 178 stated that "The King has the Royal Prerogative to conclude a peace treaty, armistice, and other treaties with other countries or international organisations.

Any treaty which provides for a change in Thai territories or external territories over which Thailand has sovereign right or jurisdiction under a treaty or international law, or which requires the enactment of an Act for implementation, and other treaties which may have wide scale effects on the security of economy, society, or trade or investment of the country must be approved by the National Assembly. In this regard, the National Assembly shall complete its consideration within sixty days as from the date of receipt of such matter. If the National Assembly does not complete the consideration within such period of time, it shall be deemed that the National Assembly has given approval.

Other treaties which may have wide scale effects on the security of economy, society, or trade or investment of the country under paragraph two are treaties pertaining to free trade, common customs union, or the authorisation of natural resources utilisation, or which cause the country to lose rights over natural resources, in whole or in part, or on any other treaties provided by law".

There shall also be a law prescribing procedures for the public to participate in the expression of opinions and to obtain necessary remedy from the effects of conclusion of a treaty under paragraph three.

Where a question arises as to whether any treaty constitutes a case under paragraph two or paragraph three, the Council of Ministers may request the Constitutional Court to render a decision thereon. The Constitutional Court shall complete its decision within thirty days as from the date of receipt of such request".

matters. TMFA is responsible for the first meetings to gather information and recommendations from the public and relevant authorities regarding the conclusion of the BIT with other countries. Then, TMFA shall propose the BIT model to the Royal Thai Government and the National Assembly in accordance with the Constitution of the Kingdom of Thailand section 178[19]. The details of investment law both for the European Union and Thailand shall be discussed in Chapter 4 and Chapter 5 of the thesis.

Even though the thesis is not the comparison between two sovereign countries but rather the comparison between the European Union, which is the supranational entity on the one hand, and Thailand, as a sovereign country, on the other, however, we see that the EU law and Thai law in the scheme of FDI are comparable since the European Union is now acting as a state on FDI law policy, so as Thailand. Moreover, the comparison should point out the legal problems and difficulties for both the European Union, which is considered as the capital export countries. And the developing country like Thailand, whose economy relies on the FDI[20]. Besides, the comparison should point out best practices in the field of FDI both from the European Union and Thailand.

[19] See, articles regarding the Constitution from the Office of the Council of State, available online at, <krisdika.go.th>.

[20] See, Report of Thailand's FDI inflow and outflow by Thailand Board of Investment, available at <boi.go.th>.

1.2 Background and Problems

1.2.1 Globalization and Foreign Direct Investment (FDI)

Globalization enhances the connection and engagement of markets around the world. It brought a closer economic integration of all countries, resulting in the growing cross-border trade both in volume and variety of international trade in goods and services[21]. Globalization also allows the flow of global capital, to widen and rapidly spread technologies. It reflects the continuing expansion and creates a positive impact on the development of science and technology[22]. It is generally accepted that globalization produces a positive gain[23]. Apart from the development of science and technologies, globalization also makes the world become a more prosperous place, improving the standard of living (especially for developing countries) and also considered one of the tools to achieve human rights goals[24].

Globalization, broadly understood, includes domestic regulatory changes, business behavior changes, and technological changes that have merged domestic markets into international markets. The increasing of the interconnectedness of people challenges the sovereignty of states, as the Westphalian concept of sovereignty does not fit globalization anymore[25]. Therefore,

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[21] The council of Europe on its Assembly debate on 3 October 2007 (32nd Sitting, Document number 11366) define the globalization as "…the ever closer economic integration of all the countries of the world resulting from the liberalisation and consequent increase in both the volume and the variety of international trade in goods and services, the falling cost of transport, the growing intensity of the international penetration of capital, the immense growth in the global labour force, and the accelerated worldwide diffusion of technology, particularly communications."

[22] SHANGQUAN, Gao, *Economic Globalization: Trends, Risks and Risk Prevention*, United Nations Development Policy and Analysis Division Department of Economic and Social Affairs (2000), 1-10;

The article has showed that the globalization enhances the science and technology by illustrated that the cost of shipping and communication are substantial lower than the past "…Today's Ocean shipping cost is only a half of that in the year 1930, the current airfreight 1/6, and telecommunication cost 1%. The price level of computers in 1990 was only about 1/125 of that in 1960, and this price level in 1998 reduced again by about 80%. This kind of 'time and space compression effect' of technological advancement greatly reduced the cost of international trade and investment…"

[23] It is not overstatement to conclude that there are general acceptances that globalization produce a positive gain, especially "wealth of nation". However, it is interesting to note that there are also criticisms on the downside of globalization, for instance; the globalization undermining the important of the national state, declined of employment rate in developed countries, increasing the gap between riches and poor (some criticized that globalization create inequality), lower the competition of local companies, environmental degradation, and unfair working conditions. Globalization also limit government decision on imposing taxes measures and other measures against giant company. When looking at the site of giant economic operators, economic operators are freely to decide many things, such as their investment site, taxes site, production site, and they can "punish" particular country where there is not friendly to the investment. All such actions by giant company shall pass without any complaint or discussion to the parliament, without any decision from the government, or any change of the laws; nor has any public hearing. These situations raised concern that those giant economic operators have power beyond the political system. See, BECK, Ulrich, *What is Globalization?*, 1st Edition, Cambridge: Policy Press, Cambridge, 2000; See also, BOURGUIGNON, François, *The Globalization of Inequality*, 4th Edition, Princeton University Press, Princeton, 2015;

[24] EUROSTAT, *Globalisation patterns in EU trade and investment*, 2017th Edition, Publications Office of the European Union, Luxemburg, 2017.

[25] Westphalian sovereignty is the principle of international law that each nation state has sovereignty over its territory and domestic affairs, to the exclusion of all external powers, on the principle of non-interference in another country's

sovereignty as an international legal entitlement and the government's legitimacy should be both non-aggressive and minimally just[26]. Post Modern globalization is characterized by increasing economic, political, legal, and other limitations of political sovereignty and by the re-allocation of government powers to people and international organizations.[27] In the context of globalization, capitals are mobile, and market operators shall do everything to ensure the success of their own business; therefore, if the government's policies are not favorable to the operation of global markets, the investment will go elsewhere, because there is always other jurisdictions able to provide lower environmental or labor standards, or policies less constrained of private enterprise in other ways.[28]

The phenomenon of globalization increases both value and volume of Foreign Direct Investment (FDI)[29]. It is generally accepted that FDI creates positive gains for the country where such investments are made (Host State)[30].

Investment from foreign countries (Foreign Direct Investment – FDI) brings about mutual benefits to both foreign investors and the country in which such investments are made. On the one hand, foreign investors can seek new opportunities and new resources in new locations with favorable investment factors such as inexpensive labor costs, abundant natural resources, good infrastructures, and potential markets. In return, foreign investors can generate more revenues from such investments while keeping the costs of such investments at a minimum. On the other hand, the country in which such foreign investments are made (Host State) also benefits

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domestic affairs, and that each state (no matter how large or small) is equal in international law. See, JACKSON, John H., «Sovereignty: Outdated Concept… *id.*

[26] See articles in relation to common responsibilities of states for international law. See, FEYTER, Koen De, *Globalization and Common Responsibilities of States*, 1st Edition, Routledge, Oxfordshire, 2013; See also, COHEN, Jean L., *Globalization and sovereignty rethinking legality, legitimacy, and constitutionalism*, 1st Edition, Cambridge University Press, Cambridge, 2012;

[27] PETERSMANN, Ernst-Ulrich, «State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?», Wenhua SHAN, Penelope SIMONS &Dalvinder SINGH (Eds.), *Redefining Sovereignty in International Economic Law*, Hart Publishing, Portland, 2008;

[28] HOWSE, Robert, «Sovereignty, Lost and Found», Wenhua SHAN, Penelope SIMONS &Dalvinder SINGH (Eds.), *Redefining Sovereignty in International Economic Law*, Hart Publishing, Portland, 2008;

[29] Value of Foreign Direct Investment (Net Flow) has been growing up in skyrocket in the past decades. Global Foreign Direct Investment (Net Flow) worth 51.464 billion USD in the year 1980, and the value of Foreign Direct Investment (Net Flow) has been skyrocketing increase into 1.95 trillion in the year 2017. While the highest value of Global Foreign Direct Investment (Net Flow) was worth 3.111 trillion in the year 2012. See Global Foreign Direct Investment (Net Flow)'s statistics from year 1970-2017 in The World Bank's Data at, <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2017&start=1970>

[30] It is also important to note that Foreign direct investment (FDI) is one of the decisive elements driven national economic growth. Investment is the dynamic element of Gross Domestic Product (GDP), its increase domestic production and the employment within the country. Apart from employment benefit, FDI also allows technological transfer which could enhance capacity of industries competitiveness in the long term. See, COLLINS, David, *An Introduction to International Investment Law*, 1st Edition, Cambridge University Press, Cambridge, 2017;

from such foreign investments. The host state is able to increase employment opportunities for its people, taking advantage of technology transfer, developing its resources, raising the overall economy, and generating more national revenue[31].

However, investments from foreign countries do not always go smoothly. Unstable politics and economic fluctuations in the country where investments are made may bring about unwanted investment situations in which foreign investments are exposed to risks beyond the scope of commercial expectations of foreign investors. Exposure of foreign investments to the so-called "non-commercial risks" such as unfair expropriation (unlawful expropriation) or nationalization of foreign investments, restrictions on foreign exchange, restrictions on import of necessary equipment or raw materials, and prohibition of remittance of revenues or profits. Those situations mentioned above called for international attention, especially from the countries exporting such foreign investments to seek protection for their investors[32].

Among such non-commercial risks, expropriation or nationalization, as the terms are sometimes interchangeable, raises worldwide concerns, especially for developed or western countries whose investors seek investments in developing or least developed countries. Expropriation or nationalization refers to the exercise of sovereignty of a state to take aliens' business or property located in the territory of the expropriating or nationalizing state with or without compensation. Such expropriation or nationalization may be carried out directly against foreign investors' business or property through legislative action by the expropriating or nationalizing state entailing the outright forfeiture of the business or property of such foreign investors and often accompanied by none or inadequate compensation to the foreign investors. Even if such compensation is actually made, it maybe unreasonably delayed or in a local currency that is not readily coverable or acceptable for foreign exchange[33].

Expropriation or nationalization may also be carried out indirectly or gradually by the expropriating or nationalizing state entailing the same result as that of direct expropriation or nationalization. The term "creeping expropriation" is used to refer to such indirect or gradual expropriation or nationalization. Creeping expropriation is the term that has gained wide recognition to describe the variety of more subtle measures that can be taken by a state to interfere

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31 SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

32 *Ibidem.*

33 RATNER, Steven, «Compensation for Expropriations in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction», *American Journal of International Law* Vol. 111 Issue 1 (2017), 7-56; See also, AISBETT, Emma, KARP, Larry &MCAUSLAND, Carol, «Compensation for Indirect Expropriation in International Investment Agreements: Implications of National Treatment and Rights to Invest», *Journal of Globalization and Development* Vol. 1 Issue 2 (2010), 1-33;

with business operations and impair the rights of foreign investors without any requirement of transfer property right into the hand of the state since many regulatory measures were enacted to protect the public interest, but not to increase the wealth of the state itself[34]. For example, taxes that discriminate in substance, if not in form, against foreign-owned businesses may be imposed. Profits may be restricted by governmental price controls or reduced as a result of governmentally subsidized competition. In the said circumstances, the problem of securing legal protection is often aggravated by the difficulties of defining the violation of the investor's rights and of evaluating the amount of loss that has resulted therefrom[35].

There are many legal measures and other methods to protect FDI. For instance, protection of investments may be sought at an international level through international investment treaties such as Multilateral Treaties or Bilateral Investment Treaties (hereinafter referred to as BITs or BIT as the case may be). Also, the protection of foreign investments may be achieved through the provisions of investment contracts between foreign investors and the host state's agency. For example, the foreign investor might ask the contracting authority of the host state to include an arbitration clause in concession contracts[36]. Thus, the protection of foreign direct investment may be attained through insurance against non-commercial risks. Those insurance policies are provided by several companies, such as Lloyd of London in the United Kingdom. American Insurance Group, Chubb & Sons, Insurance Companies of North America, and Sweet & Crawford in the United States. Thus, Overseas Private Investment Corporation (OPIC), which is a state agency of the U.S. government also provides insurance against non-commercial risks including expropriation or nationalization for American investors either citizens or corporations.

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[34] DOLZER, Rudolf, «Indirect Expropriation: Conceptual Realignment», *International Law FORUM Du Droit International* Vol. 5 Issue 3 (2003), 155-165; See also, ISAKOFF, Peter D., «Defining the Scope of Indirect Expropriation for International Investments», *Global Business Law Review* Vol. 3 Issue 2 (2013), 189-210; See also, Ronald S. Lauder v. The Czech Republic, UNCITRAL, final award of 3 September 2001, para. 200.

[35] Private property may be expropriated, but only for legitimate reasons and against some form of fair compensation. There are tensions between protection of public policies and protection of individual properties. As mentioned in paragraph that expropriation might be carried out direct or indirect way. There are many BITs contained expropriation clause in it. For example, Agreement Between the Government of the Republic of Finland and the Government of the Federal Republic of Nigeria on the Promotion and Protection of Investments of 2005, Article 5 stated that "(1) Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised or subjected to any other measures, direct or indirect …". Agreement between the Lebanese Republic and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments of 1997, Article 5 (2) stated that "Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party".

See also, OECD, «"Indirect Expropriation" and the "Right to Regulate" in International Investment Law», OECD Working Papers on International Investment 2004/04, OECD Publishing.

[36] HINDELANG, Steffen, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, 1st Edition, Oxford University Press, Oxford, 2009;

1.2.2 Protection of Foreign Direct Investment under Bilateral Investment Treaty

Bilateral Investment Treaty (BIT) is an agreement between two states. BIT aims to promote investment and other cooperation between countries[37]. Most of the time, such treaties contained the settlement of dispute provisions that allowed foreign investors to initiate arbitration against the state when the state failed to perform its obligations under the BIT[38]. The first BIT was signed after the WWII period by West Germany and Pakistan in 1959[39]. By 1989, there were over 300 BITs concluded mostly between capital-exporting countries (Developed countries) and capital-importing countries (developing countries)[40]. Recently, BITs have been rapidly growing in the past forty years, with the number of almost 3,000 BITs globally concluded by 147 countries[41]. It is also interesting that the trend of concluding international investment agreements has been moving from BITs into free trade agreements (FTAs) and into regional trade agreements (RTAs), which are more innovative and secure a fair balance between foreign investment protection and host state's right to regulate. The details of investment agreements shall be discussed in Chapter 3 and Chapter 6 of the thesis. As a result of the boom of concluding BITs, FTAs and RTAs, there are substantial numbers of initiation of arbitral proceedings by foreign investors against host states every single year[42]. Statistics have shown that among 602 inter-state arbitrations, the decisions were in favor of host states by 35.7 percent, while 28.7 percent were decided in favor of foreign investors. The rest decisions were made in favor of neither party (no damage award), settled, or discontinued[43].

BITs play an essential role in neutralizing investment risks. In this connection, apart from classical standard protection under BITs as non-discriminatory treatment of investments

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[37] The question whether BITs do, in fact promote foreign investment flows has been subjected to considerable doubt in recent literature. For example, See, FRENKELA, Michael &WALTERA, Benedikt, «Do Bilateral Investment Treaties Attract Foreign Direct Investment? The Role of International Dispute Settlement Provisions», *The World Economy* Vol. 42 Issue 5 (2019), 1316-1342;

[38] The main investment protection standards included in BITs are protection against unlawful expropriation, fair and equitable treatment clauses, full protection and security clauses, nondiscrimination standards (Most-favored-nation and national treatment clauses) and the so-called 'umbrella' clauses. See, REINISCH, August, *Standards of Investment Protection*, 1st Edition, Oxford University Press, New York, 2008;

[39] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (1959).

[40] SALACUSE, Jeswald W., «BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries», *The International Lawyer* Vol. 24 No. 3 (1990), 655-675;

[41] See information and texts at <http://investmentpolicyhub.unctad.org/IIA>.

[42] See statistic in UNCTAD's website at, <https://unctad.org>.

[43] See statistics available online at, <https://investmentpolicyhub.unctad.org/ISDS>. It is also interesting to note that there is observation that state does not really "win" in ISDS, they just did not lose. MANN, Howard, «ISDS: Who Wins More, Investors or States?», *Journal of damages in international arbitration* Vol. 2 No. 2 (2015); Also available online at <https://www.iisd.org/itn/wp-content/uploads/2015/06/itn-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf.>.

underpinned by the principle of national treatment[44], most BITs further contain other standards of protections, which are, Most-Favor-Nation (MFN)[45], No expropriation without due compensation[46], and Fair and Equitable Treatment (FET)[47]. The detail of the standards of protection, including their problem, shall be discussed in Chapter 3 and Chapter 6 of the thesis.

1.2.3 Alternative Dispute Resolution (ADR) and Arbitration

Foreign Direct Investment (FDI) is also one of the significant causes driving the rapid growth of international arbitration[48]. Needless of any explanation that, the increase of FDI in a skyrocket manner also produces more disputes between foreign investors and host states. As mentioned, most BITs contain dispute settlement provisions that allow foreign investors to initiate arbitration against a state when it fails to perform its obligations under the BIT. Arbitration is one form of alternative dispute resolution (ADR) allowing parties to voluntarily solve their dispute by an impartial judge (So called "Arbitrator") of their own choosing rather than submit their dispute

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[44] National treatment is the commitment of a country to accord to foreign investors and to foreign controlled enterprises in its territory with treatment no less favorable than that accorded in similar situations to domestic enterprises (Non-discriminatory manners). However, there is an argument that National Treatment standard might not reach the expectation of foreign investors, since state treatment to its own national enterprises might deficient, for example, non-discriminatory way might still violate basic rights which might be essential to the development of investment. See, OECD, «National Treatment of International Investment in South East European Countries: Measures Providing Exceptions», CEFTA Issues Paper 2, available online at <www.oecd.org>. See also, CEFTA Secretariat, «National Treatment Restrictions and Review of Bilateral Investment Treaties», *CEFTA Issues Paper 2,* 2010, available online at <www.oecd.org>.

[45] Most-Favor-Nation treatment (MFN) ensuring that the parties will ensure treatment no less favorable than the treatment they provide in the other treaties in the area covered by the clause. MFN clauses have thus become a significant instrument of economic liberalization in the investment area. See, OECD, «Most-Favoured-Nation Treatment in International Investment Law», OECD Working Papers on International Investment (2004), available online at <www.oecd.org>.

[46] Guarantee against unfair expropriation is the standard of protection that usually involve in the investment arbitral proceedings. It is one of the core protections offered under international investment agreements which protect foreign investors against discrimination through expropriation. Generally, foreign investor's property can be expropriated by host state. However, subjected to conditions of for a public purpose, in a non-discriminatory manner, done under due process of law, and with compensation. It is also important to note that expropriation could be done in the form of "direct" or "indirect". Indirect expropriation involves total or near-total deprivation of an investment without a formal transfer of title or outright seizure. See, DOLZER, Rudolf &STEVENS, Margrete, *Bilateral Investment Treaties*, 1st Edition, Kluwer Law International, The Hague, 1995; See also, DESIERTO, Daine A., «The Outer Limits of Adequate Repatriation for Breaches of Non-Expropriation Investment Treaty Provisions: Choices and Proportionality in Chorzow», *Columbia Journal of Transnational Law* Vol. 55 Issue 2 (2017), 395-456;

[47] Fair and Equitable Treatment standard (FET) constitutes as one of the most important elements available to foreign investors to protect their investment in the host state. Apart from certain risks and uncertainties of different interpretation of FET by arbitral tribunal, FET standard played an important role to assure that foreign investors shall not subjected to the unfair treatment by host state which such foreign investment was made. FET obliges host state to act with consistently, transparency, reasonably, free from ambiguity, ensure due process, and good faith by not failing investor's legitimate expectation. Even there are diversity debate and formulate in the BITs, it is widely accepted that FET also linked to minimum standard of international customary law. See, OECD, «Fair and Equitable Treatment Standard in International Investment Law», OECD Working Papers on International Investment (2004), available online at <www.oecd.org>.

[48] DUGAN, Christopher F. et all, *Investor-State Arbitration*, 2nd Edition, Oxford University Press, Oxford, 2011;

to the public court[49]. Parties agreed in advance that if there is any dispute arising from their contract, they will refer their dispute to arbitration. The decision of arbitrators is usually final and binding. Thus, enforcement is widely accepted by courts on a global scale[50].

1.2.4 General Idea of Administrative Law

To put the idea of public interest in a simple phrase, it could be summed up as the interest of the public comes before the interest of the private to ensure the execution of effective public duties and, at the same time, and no less importantly, that the rights of individuals are protected. The notion of public interest is highly protected by administrative law. There is a broad acceptance of the idea of administrative law on a global scale, but the practice of administrative law is different by country[51]. National legal systems are familiar with either a specialized administrative court system or special procedural rules on administrative law disputes between citizens and administrative authorities[52]. Administrative litigations are different from civil litigations both in the procedural and governing law, depending on the practices of various jurisdictions. The details regarding administrative law shall be investigated throughout Chapter 2 of the thesis.

In the scheme of enforcing an arbitral award, both in domestic and international arbitration, national courts act as the last guardian to ensure that the public interest is not violated in the arbitral proceedings. It is a very common circumstance that the winning party will ask for a national court to issue an order against the losing party to honor the arbitral award, and *vice versa*; the losing party usually ask the national court to set aside an arbitral award as the way not to comply with the arbitral award. It is usual for the losing party to keep appealing arbitral award as much as the law permits them. However, there are very limited grounds for the national court to set aside the arbitral award since there are conventions and treaties functioning to limit the ground of

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[49] Arbitration has its good reputation of flexibilities in which allowed parties to choose their own governing rules, procedure, venue and language during arbitral proceeding. The enforcement regime is also attracting parties to choose arbitration as the dispute resolution mechanism because arbitration is widely accepted in the global scale. Arbitration also the business-like atmosphere to the parties because arbitration can keep the confidentiality between parties, thus parties could, by their consent, settle their dispute during the arbitration proceedings. See, COLLINS, David, An Introduction… *id.*

[50] It is not an overstatement to conclude that arbitration is globally accepted. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (So called "New York Convention") has 159 state parties to the convention, in which they are obligated to recognize an arbitral award as binding and enforce such foreign arbitral awards. See, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), text available at <http://www.newyorkconvention.org>.

[51] KINGBURY, Benedict, KRISCH, Nico &STEWARD, Richard B., «The Emergence of… *id.*

[52] JANS, J. H., PRECHAL, Sacha &WIDDERSHOVEN, Rob J.G.M., *Europeanisation of Public Law*, 2nd Edition, Europa Law Publishing, Amsterdam, 2015;

national court to set aside the arbitral award[53], especially The Convention on the Recognition and Enforcement of Foreign Arbitral Awards or so-called "New York Convention"[54].

1.2.5 Problems of using Arbitration in Administrative Investment Contract

The rapid expansion of international trade is eroding the host state's sovereign regulatory power (especially for developing countries[55]). The monopoly power of states to exercise their power within their territory under the old concept of sovereignty has been discredited in many ways[56]. There is the vast amount of literature agreeing that the phenomenon of globalization is challenging the sovereignty of states[57]. States are not totally free to regulate (Even for the purpose of public interest) in their own territory. Therefore, the ISDS mechanism is criticized for resulting in the loss of the host state's right to regulate for legitimate purposes. As a result, it might lead to the situation of regulatory chill effect where states refuse to enact a regulator measure due to the fear of international arbitration by foreign investors as a consequence of those legitimate regulatory measures. The detail of the constraint between the state's right to regulate for legitimate purposes and international investment protection shall be discussed in Chapter 6 of the thesis.

For example, in the case of expropriation, it is clear that there are tensions between public interest and private property protection. A state might have to expropriate lands for the greater benefit of the public, but such expropriation might be made on foreign investors' property.

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53 BERMANN, George A., *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts*, 1st Edition, Springer Publishing, New York, 2017;

54 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), text available at <http://www.newyorkconvention.org>.

55 SORNARAJAH, Muthucumaraswamy, «The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat and Impact on State Sovereignty», Wenhua SHAN, Penelope SIMONS &Dalvinder SINGH (Eds.), *Redefining Sovereignty in International Economic Law*, Hart Publishing, Portland, 2008;

The literature pointed out that investment arbitration put a certain level of difficulties for developing countries to regulate, even for purpose of public interest. However, it is also worth to mention here that investment arbitration also put certain level of difficulties to developed countries to regulate even for purpose of public interest. An example could be found in an attempt of the European Union to reform ISDS system. It is fair to conclude that globalization and investment arbitration eroding state power of state both developed states and developing states to regulate. The details of this issue shall be discussed throughout the thesis.

56 The idea of sovereignty is one of the oldest concepts of modern international law; it accompanied and fostered the rise of modern state. However, until today, there are controversies, and also debates among scholars regarding to concept of sovereignty. Some scholars argue that the idea of states as autonomous and independent entities is collapsing under globalized world. However, even there are challenging on concept of sovereignty, several literatures are pointing out the important of the sovereignty concept. For instant, the concept of "sovereignty" is still the central idea when thinking about international relation, in particular under the concept of international law. See, FASSBENDER, Bardo, «Sovereignty and Constitutionalism in International Law», Neil WALKER (Ed.), *Sovereignty in Transition*, Hart Publishing, Portland, 2006;

57 MACCORMICK, Neil, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth: Law, State, and Practical Reason*, 1st Edition, Oxford University Press, Oxford, 2001;

Foreign investors might not satisfy with such an order by the government and decide to initiate arbitration against the host state (The right to arbitration might be concluded in a contract between investor and state, or investors have such right protected by international treaties). In the end, when the dispute goes to the arbitral proceedings, arbitrators might not share the same view with judges from national courts and then award to a foreign investor without proper implementation of the public interest implication in the award that they have made.

This situation, as mentioned above, brought up one question, whether foreign investors have better protections than national firms. Also, some literatures have shared a concern that an outcome of public-private arbitration might come from an exclusively private law framework[58]. This situation raises important questions, notably whether the public interest is protected in investment arbitration[59].

The recent explosion of investment treaty arbitration creates new issues, above all because of the manner in which states have delegated core powers of the courts to private arbitrators. The mixture of various legal fields in investment arbitration became a controversy when the system's mixture of private arbitration and public law undermined insecurity, accountability, and openness in judicial decision-making when applying investment arbitration law[60].

It is very interesting to note that there are several recent literatures pointing out that the national court could share a better view of protection which is not offered in the BITs[61]. Also, as a matter of principle, states should be the one who works to address problems for all investors, domestic or foreign, and indeed for all citizens, not an arbitrator[62].

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[58] BREKOULAKIS, Stavros &DEVANEY, Margaret B., «Public-Private Arbitration and the Public Interest Under English Law», *Modern Law Review* Vol. 80 Issue 1 (2017), 22-56;

[59] There are several concerns from Thai and International Scholars about the arbitration in the administrative dispute, since arbitration has overlooked through many issues such as, Environmental concerns, Human rights, Economic development, and Regulatory space and bilateral treaties. See, SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

[60] VAN HARTEN, Gus, Investment Treaty Arbitration… *id.*

[61] VIÑUALES, Jorge E., «International investment law and natural resource governance», Elisa MORGERA &Kati KULOVESI (Eds.), *Research Handbook on International Law and Natural Resources*, Edward Elgar Publishing, Cheltenham, 2016;

[62] VAN HARTEN, Gus, Sovereign Choices… *id.*

It is also worth to mentioned that there are progressive in improving the transparency in ISDS mechanism. One of big example is UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration which came into force on 1 April 2014. The Rules on Transparency apply in relation to disputes arising out of treaties concluded prior to 1 April 2014, when Parties to the relevant treaty, or disputing parties, agree to their application. Thus, the Rules on Transparency are also available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, and in ad hoc proceedings. These rules are a huge step to increase the transparency in ISDS mechanism. See texts available online at, <https://www.uncitral.org>.

Investor-state Dispute Settlement (ISDS) has a considerable amount of literatures intimating that investment law may be in a veritable "legitimacy crisis[63]". Apart from the significant criticism that investment arbitration is limiting host state's sovereign power to regulate, there are still various critics on investment arbitration, for example, the confidentiality of international arbitration, in which some literature consider them as a strong point of international arbitration[64], on the contrary, there are wide pieces of literature criticizing that the confidentiality of international arbitration is one of the weaknesses of the ISDS[65].

Thus, there seems to be a gap between international investment law and development[66]. Also, some literature pointed out that ISDS sometimes appears to be one-sided protection to foreign investors. It has overlooked many essential aspects, such as the development of states, environmental protection, and human rights[67].

There are also many other critics, such as procedural issues in ISDS[68], the right of foreign investors to initiate an international arbitration against the host state without exhaustion the local remedies[69], lack of appellate mechanisms, and the lack of uniform code referring to the specific obligation of an arbitrator to strike a fair balance between the right of investor and right of the

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[63] BROWER, Charles N. &SCHILL, Stephan W., «Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law?», *Chicago Journal of International Law* Vol. 9 No. 2 (2009), 471-498;

There is the criticism that there is a huge gap between international investment law and development. Bridging the gap is not only practically difficult, but structurally impossible because the system as such is fundamentally flawed and detrimental to the development of developing countries. As Professor Sornarajah addressed "the episode of investment treaty arbitration, which began with AAPL v. Sri Lanka in 1990, brought out the worst tendencies in international law and in international lawyers. The neoliberal age sought to use international law instrumentally in order to advance the precepts of its own market-driven agenda. It sought to construct a law that was conducive to liberal flows of foreign investment. The ethos for it was created by international financial institutions – the International Monetary Fund and the World Bank – which saw in instruments like BITs the means of purveying the tenets of neoliberalism. They encouraged these treaties. … These premises were acted upon by arbitrators who enhanced the scope of the law that was contained in the treaties … This was an age in which international law served the interests of greed. The sooner that situation is ended, the better for the credibility of international law. … It is time that international law is redirected to serve man's need rather than his greed…". See, SORNARAJAH, Muthucumaraswamy, «The Neo-Liberal… *id.*

[64] COLLINS, David, An Introduction… *id.*

[65] VAN HARTEN, Gus, «A Critique of Investment Treaties», Kavaljit SINGH &Burghard ILGE (Eds.), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, Both Ends, Amsterdam, 2016;

[66] SCHILL, Stephan W., TAMS, Christian J. &HOFMANN, Rainer, *International Investment Law and Development: Bridging the Gap*, 1st Edition, Edward Elgar Publishing, Cheltenham, 2015;

[67] VIÑUALES, Jorge E., «International Investment… *id.*

[68] There is criticism on arbitration for lacking an appellate mechanism and the inconsistency and unpredictability of certain arbitration awards that are rendered. See, SORNARAJAH, Muthucumaraswamy, «A Coming Crisis: Expansionary Trends in Investment Arbitration, Appeals Mechanism in International Investment Disputes», Karl P. SAUVANT (Ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, Oxford, 2008;

[69] In many treaties' interpretation, foreign investor could submit their dispute to arbitration without exhaustion of local remedies. It seems like foreign investors have got a better protection than individuals from host state. See, SCHWEBEL, Stephen M. &WETTER, J. Gillis, «Arbitration and Exhaustion of Local Remedies», *American Journal of International Law* Vol. 60 Issue 3 (1966), 484-501;

host state to regulate in the public interest[70]. Thus, the issue of arbitrator selection as freedom of choice by the parties also seems to be a problem since there might be a question of judicial independence and accountability. In this connection, the arbitrator's decision is also subject to the criticisms of incoherent interpretation of terms and case law because the arbitral award could not be set out as the precedents, even if the two cases with similar backgrounds or disputes arose from the same investment agreements. Although some significant/ big cases with famous arbitrators might have an impact on later cases than the others[71].

It is undeniable that problems of the ISDS mechanism have become more prominent nowadays. There is a case of a 22-year dispute between the Costa Rica government and US investors. Costa Rica's government has issued an order to expropriate the land located next to the national park, aimed at preserving the biodiversity of that area. However, the disputed land has been acquired by the majority-owned US investors running a tourist resort. After the Costa Rica government issued the order, the US investors in this case submitted the dispute to the arbitral tribunal under ICSID rules by the ISDS clause under Costa Rica-US BIT. In the final award, the arbitral tribunal issued an award against Costa Rica in the amount of 16 million USD. It is interesting to note that the claimant does not argue the lawfulness of expropriation but instead claims that the compensation offered by the Costa Rica government was insufficient[72].

There are recent efforts from the EU to reform the ISDS mechanism[73]. There are a set of EU proposals for the establishment of a permanent multilateral investment court, a permanent court for resolving investment disputes with full-time adjudicators, and an appeal mechanism. The proposal to establish a permanent multilateral court is to overcome the weaknesses of the ISDS mechanism, hoping that *inter alia* the permanent multilateral court could enhance the predictabilities and consistency of decisions, eliminate the critics of the impartiality of arbitrators in the ISDS mechanism, and increase the effectiveness of the procedure[74]. Also, the recent trade agreements between the EU and its major trading partners emphasize the EU's intention to

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[70] Gebhard BÜCHELER, *Proportionality in Investor-State Arbitration*, 1st Edition, Oxford University Press, Oxford, 2015;

[71] There are critics that while judges earn their salary from their working basic, without any special motivations. The arbitrators can earn income from activities beyond their adjudicative role. This provides a basis for reasonable suspicion of bias in the investment treaty system. See, VAN HARTEN, Gus, «A Critique… *id.*

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

[73] Speech by European Commissioner for Trade, MALMSTRÖM, Cecilia on 22 November 2018 regarding to the Multilateral Investment Court to create predictability and consistency in investment dispute. Available online at <trade.ec.europa.eu>.

[74] The European Union's proposal of establishing a permanent multilateral investment court to UNCITRAL Working Group III of 18 January 2019, available online at <http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf>.

improve the trade dispute settlement mechanism. In EU-Canada Comprehensive Economic and Trade Agreement (CETA)[75], as well as the EU-Vietnam Free Trade Agreement (EVFTA)[76], introduced the permanent tribunals with fixed numbers of members appointed from the EU and Canada/Vietnam, together with members from neutral countries[77]. Members of the tribunal shall be paid monthly retainers to ensure availability and will be required to conform to specific standards of independence. Both agreements also contain an appellate mechanism, with an appellate tribunal formed in a similar manner to the lower tribunal. The detail of the multilateral investment court and the EU's new model trade agreements shall be discussed in Chapter 5 and Chapter 6 of the thesis.

It is also worth mentioning Argentina's situation; Argentina is one of the FDI importer countries. Argentina faced a financial crisis during 2001 and 2003. There are many arbitral proceedings initiated by foreign investors against Argentina, and many of those proceedings were about Argentina's measures to survive its financial crisis[78]. Yet, the arbitral awards from the ISDS mechanism aggravated Argentina's economy. The amount of damage awarded by the arbitral tribunal was substantial to Argentina's economy[79]. Until now, Argentina has been a respondent state to the international arbitration by International Investment Agreements (In short, "IIAs") mechanism for 60 pending and concluded cases. Meanwhile, the FDI exporter countries like the USA has been respondent state for 16 cases. Meanwhile, the USA nationals have been a claimant state for as many as 166 cases. The United Kingdom has been a respondent state for 1 case. Meanwhile, the United Kingdom nationals have been a claimant state for 78 cases. In comparison, Germany has been a respondent state for 3 cases. Meanwhile, German nationals have been a claimant state for 61 cases. These situations and cases mentioned above led to the termination of

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[75] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union [and its Member States (Entered into force provisionally on 21 September 2017).

[76] There were negotiations of EU-Vietnam Free Trade Agreement (EVFTA) between EU and Vietnam from 2012-2015, until now, the agreement is undergoing final legal review, and the European Commission hope that the agreement could be ratified in 2019. See Legislative schedule of agreement, available online at <http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-vietnam-fta>.

[77] Article 8.27 of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union [and its Member States (Entered into force provisionally on 21 September 2017).

[78] BURKE-WHITE, William W., «The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System», *Asian Journal of WTO and International Health Law and Policy* Vol. 3 Issue 1 (2008), 199-234;

[79] There are many substantial arbitral awards against Argentina. For Example, in CMS Gas Transmission Company v. The Argentine Republic (ICSID Case No. ARB/01/8), arbitral tribunal issued an arbitral award in the amount of 133.2 million USD against Argentina, in Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), arbitral tribunal issued an arbitral award in the amount of 128 million USD against Argentina, or in BG Group Plc v. The Republic of Argentina (UNCITRAL Arbitration Rules), in which arbitral tribunal issued an arbitral award in the amount of 185.2 million USD against Argentina (All the awards from aforementioned cases are without calculation of interest and costs).

BITs by some countries. In the past decade, several countries, especially the FDI importer countries like Ecuador, Bolivia, South Africa, Indonesia, and India, have terminated their BITs with their trading partner. Interestingly, the value of FDI inflow and FDI stock in their countries does not seem to decrease but instead continues to increase after the termination of the BITs[80].

The proportionality of risk sharing between the host state and foreign investors is also an important point that we wish to investigate throughout the thesis. The scenario of risk sharing between the host state and foreign investors, for instance, in the concession contracts or Public-Private Partnership (PPP), in which such contracts usually are long-term contracts (Up to 20 or 30 years), such contracts possess the characteristic of dynamic nature over time. In other words, the contracting authority of the host state might not be able to maintain its promise given in the contract, which concluded many years ago (The contract might have been concluded by governments before them), due to the reason of public interest. There are external factors that are beyond the control of the host state; for instance, terrorism, transnational crime, human rights, or climate change might leave the host state no other choice but to change its policy to find solutions to those specific circumstances. By doing so, in the aspect of the host state, such changing of policy is needed in order to maintain the best interest of the public. Meanwhile, foreign investors might have seen those policies as non-commercial risks or political risks, in which host states are responsible for maintaining foreign investor's legitimate expectation under the BITs. Failing to maintain such legitimate expectation might cause the host state in jeopardized to be in arbitral proceedings under its obligation under the BITs.

"Should the state alone be responsible for non-commercial risk caused by an external factor beyond the control of the host state?". We object to this point of view.

There are more problems and critics on investment arbitration, in which those problems and critics shall be discussed in detail throughout the thesis.

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[80] SORNARAJAH, Muthucumaraswamy, *Resistance and Change in the International Law on Foreign Investment*, 1st Edition, Cambridge University Press, Cambridge, 2015; See also, Global Trade Watch, "Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows", available online at <https://www.citizen.org/sites/default/files/pcgtw_fdi-inflows-from-bit-termination_0.pdf>. See also, CERVANTES-KNOX, Kate &ELINOR, Thomas, "Ecuador terminates 12 BITs - a growing trend of reconsideration of traditional investment treaties?" in DLA Piper, available online at <https://www.dlapiper.com/en/mexico/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-trend>.

1.3 Overview of Thailand's Situation

Thailand is one of the FDI destinations[81]. Thailand has many advantages attracting FDI, for instance, its Location in the center of ASEAN territory, good infrastructure[82], rich resources, low-cost labor[83], and many other good reputations[84]. The Royal Thai government recognizes FDI as one of the main factors to drive its economy forward[85]. Thai laws in relation to investment possess accountable and predictable nature to ensure investors' trust and create a good atmosphere for investment. The Royal Thai Government also gave huge taxes benefits to investors[86]. In some instances, investors are eligible for taxes exemption for 15 years[87].

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[81] In each year, FDI flowed in Thailand from other countries across the world. In 2017, FDI has flowed to Thailand in the amount of 273,255 million THB (Roughly 7.5 billion Euros). In 2012 is the golden year of FDI in Thailand, Thailand has attracted FDI in value of 494,520 million THB (Roughly 13 billion Euros), which accounted for 3.59 percent of GDP of that year. (By this mean, FDI in Thailand refers to a threshold of 10 per cent of equity ownership to qualify an investor as a foreign direct investor.) See FDI reports, and statistics at Bank of Thailand's website at, <http://www.bot.or.th>.

[82] See information of Thailand's infrastructures from the Thai Board of Investment, available online at <http://www.boi.go.th>.

[83] The average minimum wage of normal labor in Thailand is 300 Bath (Roughly 8 Euros) per day (8 Hours of work according to Thai Labor Protection Act B.E.2541 (1998), the amounts are different in the different territory.) See details of minimum wage in National Wage Committee's Notification Re: Minimum Wage Rate (No.9).

[84] Survey by the United Nations Conference on Trade and Development (UNCTAD) has ranked Thailand at the 8th best FDI host economy in the world for 2014-2016. See, UNCTAD World Investment Prospect Surveys, available online at, <https://unctad.org/en/PublicationsLibrary/webdiaeia2015d4_en.pdf>.

[85] Investment is the dynamic element of Gross Domestic Product (GDP), its increase domestic production and the employment within the country. Thailand does not have enough savings to trigger sufficient investment within the country, therefore FDI has an important role on internal investment of Thailand. Apart from employment benefit, FDI also allows technological transfer which could enhance capacity of industries competitiveness in the long term. See, Thailand FDI Report by Academic Bureau of the Secretariat of the House of Representatives of Thailand, digital file available online at, <http://library2.parliament.go.th/ejournal/content_af/2557/may2557-2.pdf>.

[86] Due to the high competition on taxes measure to attract FDI among countries in late 2008, Thailand has reduced its corporate taxes from 30 percent to 20 percent in 2012 (Lowest cooperate income taxes in ASEAN territory). Even this measure created substantial loss to collectable revenues, but it is claim as unavoidable circumstance, otherwise Thailand would not be able to compete to other country in the ASEAN territory (In area of taxes measure to attract FDI) like Vietnam, Indonesia, or Singapore, if Thailand have not done so. See, ATHIPHAT, Muthitacharoen, «Tax Incentives, International Tax and FDI: Evidence from South-East Asia», *eJournal of Tax Research* Vol. 17 No. 1 (2019), 63-82;

Thailand also uses tax holiday measure to attract FDI. It is interesting to be note that business which has an important to Thai economy, society, national securities, R&D purposes, or activities that using substantial numbers of labors and funding, are eligible to request for taxes holiday measure under Thai Investment Promotion Act B.E.2520 (4th Revision on B.E.2560). If FDI meet requirements under Thai Investment Promotion Act B.E.2520 (4th Revision on B.E.2560), investors could apply to Thailand Board of Investment (BOI) for exemption of cooperate taxes, import duties on machinery, import duties on raw material using in Research and Development purpose, and import duties on raw material using in export purpose. Duration of taxes holiday measure are depending on the conditions set by Thai Investment Promotion Act B.E.2520 (4th Revision on B.E.2560), which has the range from 3-10 years. See details of Thai Investment Promotion Act B.E.2520 (4th Revision on B.E.2560) at <https://www.boi.go.th>.

[87] On February 1, 2018, the Thai Parliament approved the law for trade and investment in the Eastern Economic Corridor (EEC). With the EEC, Thailand hopes to develop its eastern provinces into a leading ASEAN economic zone. According to the Thailand Board of Investment, As of January 1, 2018, the EEC has attracted US 9.3 billion of FDI. EEC allows tax holiday measure to investors for 15 years, which is the longest period to have taxes holiday under Thai law. See, Eastern Economic Corridor Act B.E. 2561 (2018).

1.3.1 Thailand and Bilateral Investment Treaty

Thailand also took further steps to create a business-like atmosphere by concluding BITs with its major trading partners[88]. Almost all BITs between Thailand and other countries provide standards of protection to foreign investors who make an investment in Thailand. We normally encounter the standards of protection; for example, Fair and Equitable Treatment Standard (FET)[89], National Treatment (NT), Most Favored Nation Treatment (MFN)[90], Protection of unfair expropriation[91], and several more protections which shall be discussed in the Thesis.

It is also important to mention that almost all of the BITs that Thailand concluded with other countries also provided provisions that allow foreign investors to initiate arbitration against Thailand when Thailand or its contracting authorities failed to perform its obligation given by the BITs[92] (Dispute settlement provisions).

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[88] Data of 3 March 2019, Thailand has concluded 44 BITs with other countries (39 BITs in force), and Thailand also concluded 27 treaties with investment provisions-TIPs (23 treaties in force). See information and texts on Ministry of Foreign Affairs of Thailand's website at, <http://www.mfa.go.th/business/th>.

[89] Fair and Equitable Treatment Standard (FET) is the standard of treatment which normally appear in BITs that Thailand concluded with other countries. For Example, Agreement between the Government of the Republic of Croatia and the Government of the Kingdom of Thailand on the Reciprocal Promotion and Protection of Investments of 2000, Article 3 (2) stated that "Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall 'be accorded fair and equitable treatment in accordance with international law and provisions of this Agreement". See text of the Croatia-Thailand BIT, available on Ministry of Foreign Affairs of Thailand's website at, <http://www.mfa.go.th/>.

[90] National Treatment and Most-Favored-Nation treatment are the standards of protection, which normally appears in BIT between Thailand and other countries. For example, Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments of 2002, Article 3 (1) stated that "Neither Contracting Party shall subject investments in its territory owned or controlled by investors of the other Contracting Party to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State". See, Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments of 2002, text available online at <http://www.mfa.go.th/>.

[91] Expropriation or Nationalization are not prohibited under the BIT, as long as such expropriation or nationalization was done in non-discriminatory manners, for the public purpose, with the due process of law, and with adequate prompt and effective compensation without undue delay. The term protection against unfair expropriation is normally seen in BITs between Thailand and other countries. For example, Agreement between the Government of the Kingdom of Thailand and the Government of the Argentine Republic for the Promotion and Reciprocal Protection of Investments of 2000, Article 6 (1) stated that "Neither of the Contracting Parties shall take directly or indirectly any measure of nationalization or expropriation or any other measure having the same effect against investments in its territory belonging to investors of the other Contracting Party, unless the measures are taken for public purpose, on a non-discriminatory basis and under due process of law. The measures are accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment affected by any or such measures, shall be paid without delay and shall be effectively realizable and freely transferable". See text of Argentina-Thailand BIT available on Ministry of Foreign Affairs of Thailand's website at, <http://www.mfa.go.th/business/th>.

[92] The article of settlement of dispute between a contracting party and an investor of the other contracting party normally appeared in BITs between Thailand and other countries. Procedure and arbitration institution are different by different BITs. For example, Agreement between the Government of the Kingdom of Thailand and the Government of the Kingdom of Sweden on the Promotion and Protection of Investments of 2000, Article 9 (2) stated that "If any such dispute cannot be settled within six months following the date on which the dispute has been raised through written notification, the dispute may, at the selection of the investor concerned, be submitted to

There are attempts to initiate arbitration proceedings against the Royal Thai Government by foreign investors from time to time. Many times, contracting authorities of Thailand or the Royal Thai Government managed to find an amicable solution with foreign investors before the dispute went to arbitration proceedings. However, there are several disputes that could not be settled by amicable solutions and were able to find their way to arbitration proceedings. For example, in the case of *Walter Bau AG V. Thailand*, in which German investors initiated arbitration against Thailand under UNCITRAL rule by their right protected under Thailand-Germany BIT of 2002. In this case, the arbitral tribunal found Thailand breached the Fair and Equitable treatment standard, and then awarded German investors for the amount of 29.20 million euros[93]. The details of *Walter Bau AG V. Thailand* and other cases shall be discussed in Chapter 4 of the thesis.

1.3.2 Thai Arbitration

Thailand has been wide open to arbitration. Thai legal practitioners consider arbitration as one of the tools to help Thai courts with their caseloads (Case Management). Thai Arbitration Act B.E. 2545 (2002) is the Act governing arbitration issues in Thailand. The Act allows Thai contracting authorities to conclude arbitration clauses with private parties[94] (Both National and Foreign).

Thailand has several arbitration institutes facilitating and providing arbitration rules to anyone who wishes to have arbitration proceedings under the institution. Thailand by Office of the Judiciary aims to promote Thailand to be the region's center (hub) of arbitration in the same manner as Hong Kong or Singapore. Thai law in relation to arbitration has rapid development in the past decades in order to achieve the goal of promoting Thailand as a center (hub) of arbitration in the region[95]. Thai Arbitration Institute (TAI), under the Office of the Judiciary, is a significant arbitration institute in Thailand. So far, since its establishment in 1990 until 2017, TAI has

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arbitration…" See text of the BIT between Thailand and Sweden on Ministry of Foreign Affairs of Thailand's website at, <http://www.mfa.go.th/>.

93 Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand, UNCITRAL (formerly Walter Bau AG (in liquidation) v. Kingdom of Thailand), final award of 1 July 2009, para. 17.1. Text available at <www.italaw.com>.

94 Thai Arbitration Act B.E. 2545 (2002) Article 15 stated that "In any contract made between a government agency and a private enterprise, regardless of whether it is an administrative contract or not, the parties may agree to settle any dispute by arbitration. Such arbitration agreement shall bind the parties.".

95 Thailand revised and continue to be revising the Act to facilitate and encouraging foreign parties to choose Thailand as a place or seat of arbitration. One part of the declaration from Court of Justice no. ศย 016/ ว 324 of 24 December 2017 stated that "The revision of Arbitration Act shall develop arbitration system of Thailand. It will increase Thailand's capacity and competitiveness to be the arbitration center of the region". See, Declaration from Court of Justice no. ศย 016/ ว 324 of 24 December 2017, available online at <http://www.jla.coj.go.th/doc/data/jla/jla_1496284178.pdf>.

facilitated 2,345 disputes (Both Arbitration between private parties and also arbitration in the administrative contract), in which the overall disputes are worth an amount of 25.694 billion USD.

It is interesting to mention that recent Thai Cabinet Resolutions were against the idea of using arbitration in administrative contracts[96]. However, it does not change the fact that the Thai authorities are entitled to conclude an arbitration clause with private parties empowered by the Thai Arbitration Act B.E. 2545 (2002).

Thus, Cabinet Resolutions regarding arbitration have nothing relevant to arbitration under the BITs. Foreign investors who made an investment in Thailand are enjoying their right to initiate arbitration under the BITs. Therefore, due to the uprising trend of the number of international arbitrations initiated and to be initiated by foreign investors under the BITs, the Royal Thai Government has appointed the Committee of Foreign Direct Investment, chaired by the assigned deputy prime minister. The main tasks of the Committee are to propose strategic suggestions regarding the improvement of FDI to the Cabinet, protect FDI in an effective manner, with consistency, and create integrity between FDI and Thai government authorities. In case there is an initiation of international arbitration by a foreign investor, the Committee will act as the key person from Thailand to resolve the investment dispute between foreign investors and the Royal Thai Government[97].

1.3.3 Thai Administrative Law

As Thailand has developed a strong idea of public law, Thailand has a "Dual Court" system, in which civil and administrative matters are governed by different courts. Thai Parliament has approved the Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999). By virtue of the aforementioned Act, Thailand has established Administrative Court governing administrative issues. Act on Establishment of the Administrative

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[96] Thai Cabinet Resolution on 28 July 2009, and on 14 July 2015 concluded that the contract between authority and foreign investors, whether it is administrative or not, should not put arbitration clause in such contract. However, when problem arose, necessities, or unavoidable request from foreign investors, authority shall request permission from the Cabinet to conclude arbitration clause in their contract, in case-by-case basis.

It is interesting to note that there are highly debates among Thai legal scholars regarding to the legal status of the Cabinet Resolution, because Cabinet Resolution possess an enforcement and punishment nature. However, there is classic judgment (Supreme Court Judgment no. 559/2496 (1953)) ruled that "Government can exercise its power in anyway, but not relating to judicial and legislative power". Thus, the government always took this classic judgment when consider their Cabinet Resolution. Therefore, the side which argue that Cabinet Resolution is not the law is holding more solid argumentation in this regard. See the meeting report from the Thai Office of the Council of State at, <http://www.krisdika.go.th>.

[97] Regulations of the Office of the Prime Minister on the operation of Foreign Direct Investment (FDI), of 2019 (In force, 28 February 2019).

Court and Administrative Court Procedure B.E. 2542 (1999) and its fellow Acts regarding administrative law laid down both substantive and procedural rules of Thai administrative matters[98]. Those aforementioned Acts laid down all of the core principles of administrative law; such as, the principle of legality, judicial review, administrative appeal, legitimate expectation, legal certainty, timeliness, transparency, and many more, which shall be discussed in the thesis[99]

Thailand makes a clear distinction between private contract and administrative contract. The idea of the Thai administrative contract is based on the unequal status between parties. The unequal status between parties is based on the main idea that government authorities must possess administrative power to maintain the interest of the public. The Resolutions of the Supreme Administrative Judges of 6/2544 (2001) gave a clear explanation of the Thai administrative contract, in which the resolutions stated that "…Administrative contract must possess with two characteristics. First, at least one of the parties must be an administrative agency or person acting on behalf of the State. Second, such a contract must exhibit the characteristic of a concession contract, a contract providing public services, or a contract for the provision of public utilities or the exploitation of natural resources. If the contract aims to create equal status between parties, thus, in case such contracts do not possess those two characteristics, as mentioned earlier, such contracts are regarded as private contracts. This is to execute administrative powers and arrange public services."

1.3.4 Problems of using Arbitration in Thai Administrative Contract

Even the Thai legal society agrees that arbitration is a great tool to reduce the caseload to the court. However, there are high debates among Thai legal practitioners and scholars on the issue of using arbitration in the administrative contract. The knowledge and experiences of an arbitrator to judge administrative cases are in question by many pieces of literature. It is in doubt whether arbitrators could always truly safeguard the public interest implication when delivering an arbitral award. Also, in most Thai public law scholars' minds, arbitration is only proper for contract among private parties. It is commonly believed that administrative matter which has a relation with public interest needs to be governed by administrative laws, not private law[100]. The enforcement

[98] The fellow Acts which governing Thai Administrative Law matter, for example, Administrative Procedure Act B.E. 2539 (1996), Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure B.E. 2543 (2000), and Official Information Act, B.E. 2540 (1997).

[99] PHAKEERAT, Vorachet, *Basic Principle of Administrative Laws and Administrative Actions*, 2nd Edition, Winyuchon Publishing, Bangkok, 2003;

[100] ARUNOTIVIVAT, Yeam &SINGKANET, Banjerd, «Alternative Dispute Settlement in Administrative Contract through Arbitration», *Journal of Roi Et Rajabhat University* Vol. 14 No. 3 (2020), 131-138;

regime of arbitration is also criticized by many legal scholars since there are some areas that arbitral awards that could not intervene in the same manner as the court decision, for example, the changing of details of administrative contracts, rights and obligations of parties concerning public interest, and national securities[101]. There are more criticisms of using arbitration in Thai administrative contract, which shall be discussed throughout the thesis.

[101] Academic Bureau of the Administrative Court of Thailand, *Grounds for set aside the arbitral awards in administrative contracts*, 1st Edition, Researching and Counseling Fund of Administrative Court, Bangkok, 2016;

1.4 Overview of the European Union's Situation

Post-modern globalization is characterized by increasing economic, political, legal and other limitations of political sovereignty and by the re-allocation of government powers to people and international organizations. When referring to the concept of sovereignty, the European Union (EU) is the best example of changes and development in the field of sovereignty nowadays. EU member states have given away and seem to continue to give away some of their important areas of sovereign power to supranational institutions in order to achieve common values underpinned under the Treaties[102].

1.4.1 The European Union's Foreign Direct Investment and Bilateral Investment Treaty

It is not an overstatement to conclude that the EU is one of the most important players both as FDI investors and FDI recipients. In 2016, the value of the EU's inward FDI stock was worth 8.6 trillion USD. That value accounts for 52 percent of the EU's GDP of the same year. Most of the EU's inward FDI stock came from EU major trading partners, such as the USA, Switzerland, and the British Virgin Islands. While the value of the EU's FDI stock outward was worth roughly 10.2 trillion USD, which represented 62 percent of the EU's GDP of the same year. The major destinations of EU investment abroad are the USA, Bermuda, Switzerland, and Brazil[103].

Like most countries, EU member states conclude BITs with other countries. Their aim was to encourage investments by offering reciprocal guarantees against political risks which might negatively affect those investments. Those BITs concluded between EU member states offer several standards of protection to the foreign investors, for example, Fair and Equitable Treatment Standard (FET), National Treatment (NT), Most Favored Nation Treatment (MFN), Protection against unfair expropriation, etc. Thus, those BITs also allow foreign investors to initiate arbitration against host states when protected foreign investors feel that the host states failed to fulfill their obligations under investment agreements that the home state of the investor has concluded with the host state. Until now, EU member states have concluded more than 1,300 BITs with other countries (Extra-EU BITs). In which more than 170 BITs are in force between

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[102] DASHWOOD, Alan et all, *European Union Law*, 6th Edition, Hart Publishing, Oxford, 2011; See also, CRAIG, Paul &DE BÚRCA, Gràinne, *EU Law: Text, Cases, and Materials*, 5th Edition, Oxford University Press, Oxford, 2011; See also, WIND, Marlene, *Sovereignty and European Integration: toward a post-hobbesian order*, 1st Edition, Palgrave Macmillan, New York, 2001;

[103] See the statistics of EU FDI stock, EU FDI stock categorized by countries and activity report by OECD, available online at <https://ec.europa.eu/>.

EU member states (Intra-EU BITs). Most of them date back to 1990, when one or both countries were not yet members of the EU.

It is worth to mention that after the entry into force of the Lisbon Treaty in 2009, FDI fell within the common commercial policy of the EU. Therefore the competence to negotiate BITs between EU member states has been shifted to the European Commission[104]. However, EU member states that wish to enter into BIT negotiations with third countries could ask for authorization from the Commission. Commission has limited grounds to refuse such petitions; those grounds are for the purpose of protecting the EU single market policy[105]. According to the Commission, by mid-2016, it gave 93 authorizations to open new negotiations and 41 to open re-negotiations, mostly for the ground either to eliminate clauses that could jeopardize the supremacy of EU law or to provide better protection for EU investors abroad[106].

1.4.2 The European Administrative Law

There are acceptances of administrative law's concept throughout European member states. National legal systems in Europe are familiar with either a specialized administrative court system or special procedural rules on administrative law disputes between citizens and administrative authorities[107]. At the European Union level, even though there is no establishment of the authoritative catalog of general principles of EU administrative law, however, many rules and/or principles of EU laws that focus on administrative procedures or are especially relevant to

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[104] CREMONA, Marise, «Distinguished Essay: A Quiet Revolution-The Changing Nature of the EU's Common Commercial Policy», Marc BUNGENBERG, Markus KRAJEWSKI, Christian J. TAMS, Jörg Philipp TERHECHTE &Andreas R. ZIEGLER (Eds.), *European Yearbook of International Economic Law 2017*, Springer, Cham, 2017;

[105] Article 9 of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, stated that "1. The Commission shall authorise the Member States to open formal negotiations with a third country to amend or conclude a bilateral investment agreement unless it concludes that the opening of such negotiations would:

(a) be in conflict with Union law other than the incompatibilities arising from the allocation of competences between the Union and its Member States;
(b) be superfluous, because the Commission has submitted or has decided to submit a recommendation to open negotiations with the third country concerned pursuant to Article 218(3) TFEU;
(c) be inconsistent with the Union's principles and objectives for external action as elaborated in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union; or
(d) constitute a serious obstacle to the negotiation or conclusion of bilateral investment agreements with third countries by the Union……."

[106] SCHACHERER, Stefanie, in Investment Treaty News, «Can EU Member States Still Negotiate BITs with Third Countries?», available online at <https://www.iisd.org/itn/2016/08/10/can-eu-member-states-still-negotiate-bits-with-third-countries-stefanie-schacherer/>.

[107] DRAGOS, Dacian C. &MARRANI, David, «Administrative Appeals in Comparative European Administrative Law: What Effectiveness?», Dacian C. DRAGOS &David MARRANI (Eds.), *Alternative Dispute Resolution in European Administrative Law*, Springer, Berlin, 2014;

administrative law are mainly embedded in the EU Treaties (For example, in the area of public procurement, competition, and state aid)[108]. The system of EU administrative law, which governs the implementation of Union law is often referring as "European Administrative Law"[109]. The use of administrative law is not only for governing the administrative stage of the application of Union law but also the rules and principles concerning judicial review in administrative law of cases within the EU.

1.4.3 Alternative Dispute Resolution in European Administrative Law

There is a wide practice of Alternative Dispute Resolution (ADR) throughout the European Union continent (mediation, conciliation, ombudsmen, arbitration, and complaints boards), especially for commercial disputes among private parties. ADR is usually faster and more straightforward than resolving a dispute in court. However, the main ADR tool for resolving administrative disputes within the EU is an administrative appeal. An administrative appeal is good governance by allowing EU administrative authorities to correct unlawful acts, prevent the caseload to the court (Case Management), and create a good atmosphere between public

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[108] There are wide range of principles of administrative law enshrined though EU law. For example, Article 298(1) of the Treaty on the Functioning of the European Union (TFEU) provided rule that the institutions, bodies, offices, and agencies of the Union must support of an open, efficient, and independent European administration. The aforementioned article stated that "In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration".

Article 41 of the Charter of Fundamental Rights of the European Union enshrined right to good administration, the aforementioned article stated that "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union….".

Also, Article 52(1) of the Treaty on the Functioning of the European Union (TFEU) stated that (1) of the Charter of Fundamental Rights guarantee the principle of legality of EU administration, the aforementioned article stated that "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.".

It is also important to mention that the right to good administration has been developing in case-law which enshrined inter alia the principle of EU good administration as a general principle of law. For example, See, Judgment of the Court (Fourth Chamber) of 31 March 1992 on Jean-Louis Burban v European Parliament, Case C-255/90 P. See also, Judgment of the Court of First Instance (First Chamber) of 19 March 1997 on Estabelecimentos Isidoro M. Oliveira SA v Commission of the European Communities, Case T-73/95, para. 32. See also, Judgment of the Court of First Instance (First Chamber, extended composition) of 18 September 1995 on Detlef Nölle v Council of the European Union and Commission of the European Communities (Case T-167/94). More detail of principle of good administration shall be discussed in Chapter 2 of the thesis.

[109] The term "European Administrative Law" was introduced by Jürgen Schwarze at the end of the eighties, and the term "European Administrative Law" is widely used until today. See, WIDDERSHOVEN, Rob J.G.M., «Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity?», *Review of European Administrative Law* Vol. 7 Issue 2 (2014), 5-18;

authorities and privates[110], while still securing fair access to justice[111]. EU administrative appeal has both mandatory and facultative appeals before the right to administrative trial[112].

1.4.4 Practice of Arbitration in the European Union

Arbitration laws and rules of EU member states have roots from the UNCITRAL Model Law on International Commercial Arbitration and several other international and transnational sources of law. Arbitration is one form of ADR available for EU administrative disputes[113]. Even though there is a general perception within the EU of not welcoming arbitration in administrative matters (EU arbitration is mainly used for commercial disputes), however, there are existences of arbitration as a dispute resolution mechanism within EU administrative disputes. For example, German authority rarely uses arbitration to settle administrative disputes. Meanwhile, French authorities are able to conclude arbitration clauses with the private party when specifically allowed

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[110] COMBA, Mario &CARANTA, Roberto, «Administrative Appeals in the Italian Law: On the Brink of Extinction or Might They Be Saved (and Are They Worth Saving)?», Dacian C. DRAGOS &Bogdana NEAMTU (Eds.), *Alternative Dispute Resolution in European Administrative Law*, Springer, Berlin, 2014;

[111] There are widespread of practicing ADR in Administrative matters by European Union member states. For example, in Germany, the country in which administrative law has always been quite open to alternative dispute resolution. Mediation is possible in German Administrative law. Mediation is almost solely use in the context of the planning of large-scale projects. Arbitration is a rare case; German Administration seems only to use arbitration to settle complex administrative disputes.

Meanwhile in France, where the ideal of administrative law is so strong with specialized Administrative Courts and Conseil d'Etat governing administrative matter. France administrative law might not so welcome with the practices of ADR in administrative matter, since in most of French legal scholars' mind, administrative law needs its special tools to resolve its special disputes related to special areas of public life. However, there is a practice in French administrative law in which allow its citizen to bring an administrative appeal to the authority who execute the power, or to the hierarchically superior authority. Thus, Mediation and Conciliation are widely use in French Administrative law. Apart from power of Administrative Court to initiate the conciliation. French system also has mediation officer in some government authorities. Finally, Arbitration in French administrative law is prohibited unless there is specific statute provides otherwise.

Thus, in Serbia's Administrative Law system, it's allowed administrative appeals. Also, Serbian Public-Private Partnership and Concession Act allow its authorities and private party to conclude arbitration as dispute settlement mechanism.

There are wide literatures explaining practices of ADR in European Administrative matter. See, DRAGOS, Dacian C. &NEAMTU, Bogdana, *Alternative Dispute Resolution in European Administrative Law*, 1st Edition, Springer, Berlin, 2014;

[112] MAGIERA, Siegfried &WEIß, Wolfgang, «Alternative Dispute Resolution Mechanisms in the European Union Law», Dacian C. DRAGOS &Bogdana NEAMTU (Eds.), *Alternative Dispute Resolution in European Administrative Law*, Springer, Berlin, 2014;

[113] UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006). See also, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

by law[114]. In Portugal, legal entities governed by public law might enter into arbitration agreements when authorized by law, or such agreements within the private law framework[115].

Thus, BITs concluded between EU member state and a third state (Extra-EU BITs) also allow foreign investors, on a reciprocal basis, to initiate arbitration against EU member states when EU members states or its authorities fail to fulfill their obligation given by BITs[116]. Investment agreements concluded at the EU level (For example, CETA) also gives the right to foreign investors to initiate international arbitration against EU member states in a reciprocal manner. In addition, there are cases of intra-EU BITs (Concluded between EU member states themselves before the entry of the Lisbon treaty) that have been facing controversy in the past decade due to the specific nature of the EU legal system. All the detail of EU arbitration, including particular problems from EU investment arbitration, shall be discussed in Chapter 5 and Chapter 6 of the thesis.

1.4.5 Problems of using Arbitration in European Administrative Law

There are both critics and supporters of the ISDS mechanism within the EU legal society. However, it is fair to say that the ISDS mechanism is not so warmly welcome in EU legal society. Among supporters who defend that ISDS, *inter alia*, is effective by ensuring the rights of foreign investors and encouraging cross-border trade between states. On the contrary, the critics point out to the public backlashes on the ISDS mechanism for its unaccountability, limitation of host state public policy's space, the impartiality of arbitrators, the appealed mechanisms, the finality, consistency and timing of awards, the overlook of environmental and human rights issues, the ensuring of proper and adequate protection of public interest in arbitral proceedings, and more critics which shall be discussed throughout the thesis[117]. Those critics are convinced that the ISDS mechanism is facing a legitimacy crisis; it is not only convincing to legal scholars but also to the public of EU society.

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[114] BOUSTA, Rhita &SAGAR, Arun, «Alternative Dispute Resolution in French Administrative Proceedings», Dacian C. DRAGOS &Bogdana NEAMTU (Eds.), *Alternative Dispute Resolution in European Administrative Law*, Springer, Berlin, 2014;

[115] Article 1 (5) of Portuguese Voluntary Arbitration Law 2011 (In force since 14 March 2012) stated that "The State and other legal entities governed by public law may enter into arbitration agreements insofar as they are authorised to do so by law, or if such agreements concern private law disputes."

[116] According to Article 207 of Treaty on the Functioning of the European Union (TFEU), Extra-EU BITs remain into force until their expiry, termination or substitution with a new agreement.

[117] Directorate General for Internal Policies: Policy Department C: Citizen's Right and Constitutional Affairs, *Legal Instruments and Practice of Arbitration in the EU*, European Parliament, 2014, Available online at <www.europarl.european.eu/studies>.

One of the good examples of public dissatisfaction with international arbitration appeared in the Transatlantic Trade and Investment Partnership (So called "TTIP") negotiated between two dominant economic players worldwide as EU and the United States. TTIP contains a clause of dispute settlement by arbitration. The ISDS mechanism brings attention and criticism from legal scholars and legal practitioners. The reaction of the EU against ISDS has been so strong, especially in 2014 which led to the suspended negotiations on the investment pillar of TTIP. The Commission has launched a public consultation on investment protection and investor-state dispute settlement in the TTIP[118]. There are various negative comments on the ISDS mechanism in the TTIP, such as, "ISDS mechanism has put profit and cooperate right before people, environment and democracy. The system gives investors an exclusive right to sue state when public authorities made the democratic decisions for public interest", or "ISDS works like a global legal straitjacket that makes it very, very difficult and expensive for governments to regulate corporations, it is dangerous for democracy[119]". However, there are two sides of opinion regarding the ISDS mechanism in TTIP. In contrast, the critics' side argues that the ISDS mechanism in TTIP would create a problematic situation for the state to regulate its market for the public interest[120]. The supporter side argues that TTIP would result in a positive outcome of economic growth[121].

Moreover, the use of BITs within the EU (Intra-EU BITs) has been presenting an apparent problem in itself in this past decade. The EU member states and ECJ have to treat EU law as an autonomous legal order. EU member states must adopt their national law to implement legally binding union acts[122]. The problem of the ongoing validity of Intra-EU BITs is controversial. Especially, for the issue of securing the supremacy of EU law since it is undesirable for the EU to

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[118] Commission staff working report: online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), available at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>.

[119] AMES, Paul, «ISDS: The most toxic acronym in Europe», available online at <https://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe>.

[120] MONBIOT, George, on the Guardian, "This transatlantic trade deal is a full-frontal assault on democracy", available online at <https://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy>.

[121] Apart from the claim that TTIP would result the positive outcome of economic growth, there are also wide literature supporting ISDS mechanism in TTIP. There is the respond from supporter side against the critics on ISDS mechanism. For example, the supportive side arguing that the BIT's provision does not interpret in favor to investor since the statistical evidence showed that states has won more in international arbitration, or the claim that investment disputes lead to a diversion of public money from public goods and services was encountered by a defense that there is no proof that the domestic judicial systems are cheaper than international arbitration. See, European Federation for Investment Law and Arbitration (EFILA), "A response to the criticism against ISDS", available online at <https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf>.

[122] Treaty on the Functioning of the European Union, Article 291.

allow an international arbitral tribunal to decide the EU law question. Thus, those international arbitral tribunals could not ask for a preliminary ruling from the CJEU, in which the aforementioned situation caused concerns to the EU legal society whether the EU law would be uniform and consistent with the presence of an international arbitral tribunal. It is also worth to mention that the problem of the validity of intra-EU BITs is only specific to BITs between EU member states, not to other third parties outside the EU[123].

There are some lengthy disputes about the compatibility of Intra-EU BITs with the supremacy of EU law between the European Commission and EU member states. In *Micula v. Romania*[124], award of December 2013, the Micula brothers claimed that Romania withdrew investment incentives[125], in the context of Romania's accession to the European Union. In the merit, the Arbitral tribunal found Romania breached its obligation under Romania-Sweden BIT (2002) and then awarded in favor of the Micula brothers for the amount of 376.40 million Romanian Leu (approximately 104.9 Euros)[126]. After the award, Romania made a partial payment during 2014, yet, the European Commission issued a suspension injunction in October 2014, calling for Romania to suspend the remaining amount due under the award[127]. Later, in March 2015, the European Commission adopted a decision concluding that the compensation paid by Romania constituted illegal State aid[128], and ordered Romania not to pay any further sums of the award and to recover any sums already paid[129]. The decision of the European Commission indicated that within the EU, even the enforcement of ICSID awards cannot be entirely certain to have the enforcement of arbitral awards within the EU, if such award would lead to the violation of a fundamental provision of EU law[130].

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123 DRAGIEV, Deyan, «2018 In Review: The Achmea Decision and Its Reverberations in the World of Arbitration», Kluwer Arbitration Blog (2018), available online at <http://arbitrationblog.kluwerarbitration.com/>.

124 Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20.

125 According to the claimants, at the time of investing they relied on a legislative incentives regime that Romania had put in place to attract foreign investment by granting investors exemptions from customs duties and profit tax. The claimants contended that Romania had committed itself to keeping these incentives in place until at least 2009. However, Romania has Revoked those incentives in 2004 which is 5 years prior the commitment made by Romania. See, Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, award of 11 December 2013, para. 137-172 &255-256.

126 Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, award of 11 December 2013, para. 1329.

127 The European Commission letter to Romania on State Aid Investigation of 1 October 2014.

128 Under Article 107 of the Treaty of the Functioning of the European Union (TFEU), state aid is any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings. As a matter of principle, EU State aid rules require that illegal State aid is recovered in order to remove the distortion of competition created by the aid. See state aid rule in Article 107 of the Treaty on European Union and the Treaty on the Functioning of the European Union.

129 European Commission Decision 2015/1470 of 30 March 2015.

130 Many literatures agreeing in the same way that EC decision in *Micula* case, has increasing the risk of Intra-BITs for being unenforceable within EU. Some literatures pointing out that the investors should seeks to enforce their

Thus, the landmark judgment of the Court of Justice of European Union (CJEU) in *Achmea v. Slovak Republic*[131], has created a significant impact on the future of Intra-EU BITs. In *Achmea's* judgment, the arbitral tribunal found that Slovakia's policy of liberalization of its health insurance market violated Slovakia's obligation under the 1991 Netherlands-Slovakia BIT[132], and ordered Slovakia to pay around 22.1 million euros of damage to Achmea. However, Slovakia challenged the award in the German court, arguing that Intra-EU BITs are incompatible with EU law. The German Federal Court of Justice later referred questions on the compatibility with EU law of the BIT's arbitration clause to the CJEU for a preliminary ruling. Then, the CJEU judgment on 6 March 2018 concluded that the arbitration clause in Netherlands-Slovak BIT is contrary to EU law, undermined the supremacy of EU law, and therefore, inapplicable. This landmark decision led to the declaration of EU member states that they would commit to terminating their Intra-EU BITs in the future[133]. Finally, the EU member states reached an agreement on a plurilateral treaty for the termination of intra-EU bilateral investment treaties (Intra-EU BITs)[134], in which the said agreement already came into force on 29 August 2020. More detail on intra-EU BITs shall be discussed in Chapter 5 and Chapter 6 of the thesis.

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award outside the EU, since courts in the jurisdictions outside the European Union are not bounded by EU law. There are several cases that court outside the EU allowed for enforcement of awards notwithstanding the respondent State's position that the award was inconsistent with EU law. For example, the decision of the Southern District Court of New York in Ioan Micula, et al. v The Government of Romania, Case No. 15-CV-15 Misc. 107, Order and Judgment dated 21 April 2015. See, STOYANOV, Marie, "Increased enforcement risk in intra-EU investment treaty arbitration", available online at <http://www.allenovery.com/publications/en-gb/lrrfs/continental%20europe/Pages/Increased-enforcement-risk-in-intra-EU-investment-treaty-arbitration.aspx>.

Thus, it is also interesting to note that there is no declaration of the European Commission against the EU energy charter treaty arbitration on state aid ground. Therefore, investors who holding favorable awards issued in renewable energy cases still stand a chance of avoiding Micula-type State aid issues when enforcing awards within the EU. See, KENDE, Tamás, «Arbitral Awards Classified as State Aid under European Union Law», *ELTE Law Journal* Vol. 2015 Issue 1 (2015), 37-56; See also, ALESSI, Monica et all, «Suspended in legal limbo: Protecting investment in renewable energy in the EU», available online at <http://aei.pitt.edu/93252/1/PI2018_03_Alessi_Nunez_Ferrer_RenewableInvestors_0.pdf>.

[131] Judgment of the Court (Grand Chamber) of 6 March 2018 on Slowakische Republik v Achmea BV (Case C 284/16).

[132] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 1991.

[133] Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, available online at <https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf>.

[134] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union of 5 May 2020 (SN/4656/2019/INIT).

CHAPTER 2

ADMINISTRATIVE LAW AND ADMINISTRATIVE CONTRACT

2.1 Concept of Thai Administrative Law

The concept of Thai Administrative Law is the first point that we wish to investigate in the thesis. However, it is essential to note here at the beginning of this chapter that it is not possible to examine details in all aspects of Thai Administrative Law, which have a broad range of legal regimes, procedural rules, legal issues, etc., in one chapter. Therefore, we would like to keep our focus on specific parts of Thai Administrative law that are relevant to the thesis topic; by doing so, the topic of Thai Administrative Law shall cover three major parts, which are a general idea of Thai administrative law, the differences between civil litigation and administrative litigation, and the concept of Thai Administrative Contract.

Before getting to the concept of Thai Administrative Law, it is worth mentioning that Thailand respects the doctrine of separation of powers by exercising its sovereign power through three branches empowered by the Constitution of the Kingdom of Thailand[135]. Those three branches are the executive branch, the legislative branch, and the judicial branch[136]. The executive branch is administered by the Prime Minister of Thailand as the head of the Royal Thai Government[137]. The Royal Thai Government enforces the laws enacted by the legislative branch,

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[135] JUMPA, Manit, *Manual to Constitution Law*, 1st Edition, Winyuchon Publishing, Bangkok, 2019;

[136] Thailand respects the doctrine of separation of power by divided its sovereign power into 3 branches, so called National Assembly, the Council of Ministers and the Courts. As appears in the Constitution of the Kingdom of Thailand Section 3 stated that "Sovereign power belongs to the Thai people. The King as Head of State shall exercise such power through the National Assembly, the Council of Ministers and the Courts in accordance with the provisions of the Constitution.

The National Assembly, the Council of Ministers, Courts, Independent Organs and State agencies shall perform duties in accordance with the Constitution, laws and the rule of law for the common good of the nation and the happiness of the public at large."

[137] The Royal Thai Government headed by Prime Minister has main duty to carry out the administration of the state affairs. The Constitutional of the Kingdom of Thailand Chapter 8 laid down details regarding to the Councils of Ministers. The Constitutional of the Kingdom of Thailand section 158 stated that "The King appoints the Prime Minister and not more than thirty-five other Ministers to constitute the Council of Ministers having the duties to carry out the administration of the State affairs in accordance with the principle of collective responsibility.

The Prime Minister must be appointed from a person who is approved by the House of Representatives by the virtue of the Constitutional of the Kingdom of Thailand section 159.

The President of the House of Representatives shall countersign the Royal Command appointing the Prime Minister.

The Prime Minister shall not hold office for more than eight years in total, whether or not holding consecutive term. However, it shall not include the period during which the Prime Minister carries out duties after vacating office.".

or the so-called the "National Assembly of Thailand", which consists of 700 members (500 members of the House of Representatives and 200 members of the Senate[138]).

The judicial branch of Thailand, or "Courts," possesses with power to decide cases within its jurisdiction. The Constitution of the Kingdom of Thailand chapter 10 has formed four courts, which are, the constitutional court[139], the court of justice[140], the administrative court[141], and the

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138 The Constitutional of the Kingdom of Thailand Chapter 7 laid down details regarding to the National Assembly. National Assembly consisted with 700 members which divided in to 500 members from the House of the Representatives and 200 members from the House of Senates as appears in the Constitutional of the Kingdom of Thailand section 79 stated that "The National Assembly consists of the House of Representatives and the Senate.

Joint or separate sittings of the National Assembly shall be in accordance with the provisions of the Constitution.

No person shall concurrently be a Member of the House of Representatives and a Senator.".

139 The Constitutional of the Kingdom of Thailand Section 200, stated that "The Constitutional Court consists of nine judges of the Constitutional Court appointed by the King from the following persons:

(1) three judges in the Supreme Court holding a position not lower than Presiding Justice of the Supreme Court for not less than three years elected by a plenary meeting of the Supreme Court;

(2) two judges of the Supreme Administrative Court holding a position not lower than judge of the Supreme Administrative Court for not less than five years elected by a plenary meeting of the Supreme Administrative Court;

(3) one qualified person in law obtained by selection from persons holding or having held a position of Professor of a university in Thailand for not less than five years, and currently having renowned academic work;

(4) one qualified person in political science or public administration obtained by selection from persons holding or having held a position of Professor of a university in Thailand for not less than five years, and currently having renowned academic work;

(5) two qualified persons obtained by selection from persons holding or having held a position not lower than Director- General or a position equivalent to a head of government agency, or a position not lower than Deputy Attorney- General, for not less than five years.

In the case where the Presiding Justice of the Supreme Court cannot be elected under (1), the plenary meeting of the Supreme Court may elect a person from those who have held a position not lower than Judge in the Supreme Court for not less than three years.

The period under paragraph one shall be counted to the date of election or the date of application for selection, as the case may be. In a case of unavoidable necessity, the Selection Committee may announce a decrease of the period of time under paragraph one or paragraph two, but the decrease shall not result in a period of less than two years".

140 The Constitutional of the Kingdom of Thailand Section 194 stated that "The Courts of Justice have the powers to try and adjudicate all cases except those specified, by the Constitution or the law, to be within the jurisdiction of other Courts.

The establishment, procedures, and operations of the Courts of Justice shall be in accordance with the law thereon".

141 The Constitutional of the Kingdom of Thailand Section 197 stated that "Administrative Courts have the powers to try and adjudicate administrative cases arising from the exercise of administrative power provided by law or from the carrying out of an administrative act, as provided by law.

There shall be a Supreme Administrative Court and Administrative Courts of First Instance.

The jurisdiction of the Administrative Courts under paragraph one does not include rulings made by Independent Organs pursuant to the direct exercise of their powers under the Constitution.

The establishment, procedures, and operations of the Administrative Courts shall be in accordance with the law thereon".

military court[142]. Conceptually, each court works independently from the other, specifically on their jurisdiction given by the Constitution of Thailand.

Thailand has developed a strong idea of public law in the past three decades. Thailand has a "Dual Court" system in which civil and administrative matters are governed by different courts. Thai parliament has approved the Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999). By the virtue of aforementioned Act, Thailand has established administrative courts governing administrative issues. Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) and its fellow Acts regarding to administrative law laid down both substantive and procedural rules of Thai administrative matters[143]. Those aforementioned Acts laid down all of the core principles of Thai administrative law, such as the principle of legality, judicial review, administrative appeal, legitimate expectation, legal certainty, timeliness, transparency, and many more[144]. The details of the Thai administrative court shall be discussed later in this chapter.

Thai administrative law is an important field of law in Thai legal society. As mentioned, there have been considerable developments in Thai administrative law within the past three decades. The main reason for its important and rapid development is the expansion of the role of Thai administrations which is not only limited solely to the exercise of powers given by laws but also their duties to arrange public services[145].

Many Thai legal scholars tried to simplify the definition of "Thai Administrative Law". Professor Dr. Borwornsak Uwanno refers to the term "Thai Administrative Law" as "Administrative Law is the law determining the status and the relationship between Administrations itself, or the status and relationship between Administration and private party" [146]. Dr.Phokin Phollakun refers to the term "Thai Administrative Law" as "Administrative Law is a branch of public law, laid down the principle organizing the public administration, arranging the public services. Thus, Administrative Law is one of the tools limiting the power of administration.

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142 The Constitutional of the Kingdom of Thailand Section 199, stated that, "Military Courts have the powers to try and adjudicate cases involving offenders who are subject to the jurisdiction of the Military Courts and other cases, as provided by law.

The establishment, procedures, and operations of the Military Courts as well as the appointment and removal of judges of Military Courts shall be as provided by law".

143 The fellow Acts which governing Thai Administrative Law matter, for example, Administrative Procedure Act B.E. 2539 (1996), Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure, B.E. 2543 (2000), and Official Information Act, B.E. 2540 (1997).

144 PHAKEERAT, Vorachet, Basic Principle… *id.*

145 Constitution of the Kingdom of Thailand B.E. 2560 (2017) Chapter V: Duties of the State.

146 UWANNO, Borwornsak*, Public Law: The Evolutions of Public Law*, 3rd Edition, Nithithum Publishing, Bangkok, 1995;

In addition, Administrative Law is relevant to the issue of personal management within the administration"[147]. Professor Dr. Voraphot Visarujpitch refers to the term "Thai Administrative Law" as "Administrative Law is the law determining the relationship between administrations themselves, or between the administration and private party. Modern administrative law is based on two major principles, which are, the principle of legality of the administrative act, and the principle of judicial review of the legality of the administrative act[148]"[149].

Based on the previous paragraph, we would like to conclude that Thai administrative law is a group of laws aimed at creating the structure of administration, organizing the public administration, and controlling and limiting the exercise of powers of administration.

Administrative Law which aims to create the structure of administration refers to the tool not only to establish Thai administration but also to lay down the scope of powers and structure within the administration itself. Thai law regarding the creation of administration, for example, Government Administration Act, B.E. 2534 (1991), Reorganization of Ministry, Sub-Ministry, and Department Act, B.E. 2545 (2002), Bangkok Metropolitan Administration Act, B.E. 2528 (1985), Civil Service Act, B.E. 2551 (2008), etc[150].

The Administrative Law organizing the public administration refers to a set of laws that helps the administration to fulfill its true objective, which is to arrange activities responding to public needs. The needs of the public usually refer as the term "General Interest" or "Public Interest" (We would like to refer to the term "Public Interest" throughout the thesis). The needs of the public or public interest could be divided into two main categories. First, the security and safety of life, body, and property. Second, well-being, both physical and mental[151].

The guarantee of security and safety in life, body, and property is the task of the Royal Thai Government to maintain national security. For example, the Royal Thai Government have to combat crime and prevent riot or civil war. In order to achieve those targets, the Royal Thai Government must develop the quality of the military and develop the relationship with foreign countries[152]. Meanwhile, the goal of the Royal Thai Government to achieve the well-being of

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147 PHOLLAKUN, Phokin, in document by Office of the Administrative Court of Thailand "Thai Administrative Law" of the seminar between Thailand and Germany on 19-23 August 2002.

148 Since the administrative act affect to the rights of private party, therefore the laws are the source and limitation for administration when administration exercise their power. See, VISARUJPITCH, Voraphot, *Introduction to the Administrative Court*, Winyuchon Publishing, Bangkok, 2001;

149 VISARUJPITCH, Voraphot, *General Idea of Thai Administrative Law*, 2nd Edition, Winyuchon Publishing, Bangkok, 1998;

150 *Ibidem.*

151 *Ibidem.*

152 Constitution of the Kingdom of Thailand B.E. 2560 (2017) Section 52.

people in the nation could be achieved by arranging public welfare for its people. For example, providing educational services, sports, leisure, medical care, good public transportation, telecommunications, equal access to electricity and clean water, economic stability, distribution of wealth to people, etc.[153]

In order to respond to public needs (Public Interest), Thai administrations always play their role as "Regulators" or as "Providers". As a "Regulator", Thai administrations exercise power given under the laws to control social or economic activities[154]. For example, a private party must have authorization from the administration to legally and entitle to start some particular businesses or some particular industrial enterprises (For example, telecommunications service or mining[155]). Another example would be the case where a private party must have prior authorization from the administration before creating buildings in order to pass some safety requirements for the purpose of ensuring public safety. Besides, the administration might play its role in controlling an exchange rate, regulating the interest rate of financial institutions, or controlling activities in the stock market. On the other hand, the administration can play its role as a provider. As a "Provider", the administration might provide goods and services responding to public needs (Public Interest) by itself. For example, the administration might generate and sell electricity to the public, or the administration might build its own hospitals to serve public health purposes. However, one way or another, even Thai administrations choose to play their role as "regulators" or "providers", administrations must exercise their power to issue the regulations, administrative acts, and conclude the contract with the administrations among themselves or with the private party. Such acts of administration to issue regulations, administrative acts, or conclude contracts are limited by law (Principle of Legality)[156]. If the administration exercises its power without the law to empower them, or the administrations exercise powers that exceed the power given by law (Ultra Vires), or contradict the law, those rules, orders, or acts could potentially be declared unlawful act by the Administrative Court of Thailand.

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[153] Constitution of the Kingdom of Thailand B.E. 2560 (2017) Section 54. See also, Constitution of the Kingdom of Thailand B.E. 2560 (2017) Section 55.

[154] MATHCHAMADON, Phanarat, *Administrative Law*, 1st Edition, Winyuchon Publishing, Bangkok, 2020;

[155] Constitution of the Kingdom of Thailand B.E. 2560 (2017) Section 58. See also, Constitution of the Kingdom of Thailand B.E. 2560 (2017) Section 60.

[156] Administrative Law in relation to organizing the public administration could summed up as any laws empowered administration to issue regulation, administrative order, or administrative act. It also includes to any law regarding to procedural for issue regulation or administrative order, any law regarding to enforce the regulation or order, any law determining the procedural to choose the contractor, conclude the contract, or enforce the contract, any law determining liabilities of administration. Those kinds of laws appear in the Constitution of the Kingdom of Thailand, Acts, and Regulations. See, HONGSIRI, Ruthai, *The Administrative Court & Litigation in Administrative Court*, 9th Edition, Winyuchon Publishing, Bangkok, 2018;

Administrative Law aimed to control and limit the powers of administration refer to a set of law aimed to limit acts from administration under the principle of legality. Those laws, for example, Act on Establishment of the Administrative Court and Administrative Court Procedure, B.E. 2542 (1999), Official Information Act, B.E. 2540 (1997)[157].

2.1.1 General insight of the term "Administrative Act", "Limitation of Administration Power", and "Public Service"

Considering the topic of our thesis, there are three terms within the regime of Thai administrative law in which we would like to elaborate in this chapter. Those terms are; Administrative Act, Limitation of Administration power, and Public Services. The elaboration of these three terms is not only critical to the further analysis of the thesis but also will benefit readers to have a better understanding of Thai administrative law.

2.1.1.1 Administrative Act

The term "Administrative Act" could sum up as a result of the exercise of administrative power by an administration[158]. An administrative act does not include any act in the meaning of legislation or judicial decision[159]. The administrative act is the exercise of powers in the executive

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[157] The main objective of Thai Official Information Act is to increase the public participation to enhance transparency of administration. The Act laid down the duty to Thai Administration to reveal information to public, along with the procedural of such execution.

[158] Administrative act is the exercise the power by the administration empowered by law. For example, the official exercise his power under Building Control Act, ordering private party to demolish their building in which the building does not meet the safety standard, and there is no way to renovate them to meet the standard given by law. More example, such as the official not permitting private party to leave Thailand, the permission to driving licenses, the permission to private party to build cemetery, the approval of civil status, the issue of title deed, etc. All of those aforementioned situations are administrative act, because there is the exercise of power by administration, the exercised of those power are empowered by law.

If there is an action from administration, in which such action is not empowered by law, such action is not consider as administrative act. For example, the official from Ministry of Justice is typing the official document, an official from public enterprise sending the bill to customer, or an official driving a car to send the official document. Those aforementioned examples are not considered as an administrative act, because all of those acts are not an act of exercise power given by the law. See, RATTANASKAWONG, Kamolchai, *Administrative Law*, 5th Edition, Winyuchon Publishing, Bangkok, 2003;

[159] Administrative act is the exercise power in the executive manner of the state. Therefore, the exercise of power of state in the manner of legislation or judicial decision are not consider as an administrative act. For example, the Thai cabinet approval to the prime-minister to sign the economic partnership agreement between Thailand-Japan is not an administrative act. That situation considers as the exercise of power by the cabinet in relation of foreign affairs, which is empowered by the Constitutional of the Kingdom of Thailand. Therefore, that cabinet resolution is not an administrative act. See, Thai Supreme Administrative Court Order no. 178/2550 (2007).

However, it is worth to mention that some action by Thai legislative bunch (The National Assembly of Thailand) might constitute as an administrative act, when such action is empowered by law (not empowered by a constitution). For example, the National Assembly of Thailand approval of the appointment of the secretary general

branch manner; in other words, the administrative act is the exercise of power by "The Royal Thai Government" or the administrations. The Royal Thai Government is a group of ministers who carry out the administration of state affairs. Alongside with administration, possesses with officials and resources to carry out the tasks given by the Royal Thai Government.

The administrative act is the exercising of power by an administration in the way to establish rights and duties to a private party, or in the way to modify or extinguish the right of a private party[160]. It results in the limitation or effect on the rights of the private party. Therefore, the administrative act could only be done when empowered by law (Principle of Legality). Such administrative act must be done within the framework of the law; if the administration exercises its power without the law to empower them, or the administration exercises its power exceeds the power given by law (Ultra Vires), or contradict the law, those administrative act could potentially be declared as an unlawful act by Administrative Court of Thailand.

In order to truly understand the true meaning of the administrative act. There are two points worth to make an investigation, which is, "The definition of Administration", and "The Administrative Power".

2.1.1.1.1 The Definition of Administration

In general, Thai administration refers to any administration or official within the administration under the supervision of the prime minister or under the supervision of any ministers. Nowadays, administration in Thailand can be categorized into three groups, which are, administrations under the executive branch and its officials, independent organs including their officials[161], and independent administrations and their officials.

Administrations under the executive branch and its officials refer to members of the Council of Ministers consisting of prime ministers and other ministers. The term also refers to

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of the office of the council of state, the approval of the appointment of the secretary general of the office of the narcotics control board, etc. Those appointments are administrative acts, since the appointment was empowered by an act, not the constitution.

Thus, some private parties are able to exercise an administrative act, if such action is empowered by law. For example, the Lawyer Council of Thailand is using administrative power under Lawyer Act, B.E. 2528 (1985) to issue and approve lawyer licenses. Those action is considered as an administrative act.

[160] RATTANASKAWONG, Kamolchai, Administrative Law… *id.*

[161] Independent organs (Independent Regulatory Agency) are organs established by the Constitution of the Kingdom of Thailand for the purpose of independent work by such organs without political interference. The Constitution of the Kingdom of Thailand B.E. 2560 (2017) section 215 stated that "An Independent Organ is an organ established for the independent performance of duties in accordance with the Constitution and the laws.

The performance of duties and exercise of powers by an Independent Organ shall be honest, just, courageous, and without any partiality in exercising its discretion.".

administrations that are under the supervision (Both direct and indirect supervision) of ministers. For example, ministry or department under the supervision of the minister, local authorities under the supervision of the minister of interior, public enterprises under the supervision of the prime minister or minister, or other administration such as public universities, securities exchange commission (SEC), war veterans organization under the supervision of minister.

Independent organs and their officials refer to independent regulatory agencies established by the Constitution of the Kingdom of Thailand or Act. The main objective of independent organs is to perform their specific duties in accordance with the constitution and the laws in an independent manner and without any political interference[162]. Therefore, the independent organs are different from other administrations in the sense that they are independent organs but do not work under the supervision of the minister. There are many independent organs under the constitution[163], for example, the election commission, ombudsman, the national anti-corruption commission, the state audit office of the kingdom of Thailand, etc. It is important to note that any act by independent organs shall consider as the "Administrative Act" only when such exercise of power is under the law, not the constitution, because the exercise of power under the Constitution does not consider as an "Administrative Act"[164].

Independent administrations and their officials refer to administrations that do not function under supervision from the minister. Those independent administrations are responsible for the general affairs of the administration. The independent administrations are responsible for general affairs of the judicial branch, for example, the office of the court of justice, the office of the administrative court, and the office of the constitutional court. The independent administrations are responsible for general affairs of the legislative branch, for example, the secretariat of the house of representatives, and the secretariat of the senate. Thus, the independent administrations are responsible for the general affairs of the independent organs, for example, the office of the election commission, the office of the national human rights commission, and the office of the ombudsman.

2.1.1.1.2 The Administrative Power

Administrative power is a power of the executive branch, possessed to carry out the administration of state's affairs. Therefore, the exercise of the power of the state in the manner of

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[162] Constitution of the Kingdom of Thailand B.E. 2560 (2017) Section 215.

[163] Constitution of the Kingdom of Thailand B.E. 2560 (2017) Chapter 12.

[164] RATTANASKAWONG, Kamolchai, Administrative Law… *id.*

legislation or judicial decision does not constitute an administrative act. However, not all acts from the executive branch are considered administrative act. Since the exercise of power by the Royal Thai Government to fulfill its duties under the constitution is not constituted as an administrative act. The exercise of power by the Royal Thai Government shall consider as an administrative act only when the exercise of such power is given by the law, not the constitution[165]. For example, the decree dissolving the House of Representatives is not an administrative act since the decree is the performance of duties of government with the parliament, guaranteed by the Constitution[166].

The exercise of administrative power in Thailand can be divided into two types in general, which are, the exercise of administrative power in the form of an "administrative act", and the "by-law".

Administrative act refers to the exercise of power under the law by an official to establish juristic relation between the person (i.e., State agency and the individual[167]) to create, modify, transfer, preserve, extinguish or affect the individual's status of rights or duties, permanently or

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[165] *Ibidem.*

[166] Constitution of the Kingdom of Thailand B.E. 2560 (2017) Section 103.

[167] Administrative Procedure Act B.E. 2539 (1996) section 5 paragraph 3 stated that "administrative act means;

(1) The exercise of power under the law by an official to establish juristic relation between person (i.e., State agency and the individual) to create, modify, transfer, preserve, extinguish or affect the individual's status of rights or duties, permanently or temporary, such as giving an order or permission or approval, deciding an appeal, certifying and registering, but shall not include the issuance a by-law

(2) Other acts as prescribed in the Ministerial Regulation".

Later, there was an issuance of the Ministerial Regulation Number 12 of B.E. 2543 (2000). In which the regulation has expand the meaning of the term administrative act. The regulation stated that "These following acts shall be considered as the administrative action

1. Any procedures regarding to following rights

(1) An order to accept or not to accept the offer of hire, exchange, rent, purchase, or giving

(2) The permission to purchase, hire, exchange, rent, sell, rented, or giving

(3) Order to terminate the consideration process to the offer

(4) Order to blacklisting".

2. The decision to give or not to give a scholarship.

temporary, such as giving an order[168], or permission[169], or approval[170], deciding an appeal[171], certifying and registering[172], but shall not include the issuance a by-law.

By-law refers to the royal decree, the ministerial regulation, the notification of a ministry, the ordinance of a local government, rule, regulation, or any other provisions of general applicability without addressing to a specific case or person[173]. There are similarities between the term "Administrative act", and the term "By-Law". However, the main difference between the term "By-Law" and the term "Administrative act", is that the term By-Law aims for general applicability without addressing to a specific case or person. Examples of By-Law, such as, the prohibition of smoking on public transportation[174], the rules forcing every driver to fasten the seatbelt[175], the rules forcing the building contractor to build the emergency exit in the high building[176], etc.

In sum, administrative power is the power in the executive manner empowered by any law but the Constitution. However, when looking into the decision from the Administrative Court, Judicial Court, and the Committee on Jurisdiction of Courts, it appears that there are two specific circumstances, that even there is the exercise of administrative power by an administration, but

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168 The order could refer to the order for an individual to do something, and also refer to the order for an individual not to do something. For example, the authorized officials might order everyone not to entered to the specific place for the safety reason. See, VISARUJPITCH, Voraphot, General Idea… *id.*

169 The Permission, for example, the permission to foreigner to enter to kingdom of Thailand or staying in Thailand, the working permit, the permission to establish the car inspection center, the permission to driving licenses, etc. See, *Ibidem.*

170 The Approval, for example, the approval to graduation certificate, the approval of resignation of the government officials, the approval to reclaim the medical expenses of the government officials, etc. See, *Ibidem.*

171 The deciding an appeal, for example, the appeal of administrative act to the administration. See, *Ibidem.*

172 The certifying and registering, for example, the certifying of the civil status, the certifying of right to land, and the certifying of right to use the land. See, *Ibidem.*

173 Administrative Procedure Act B.E. 2539 (1996) section 5 paragraph 4 stated that "By-law means a Royal Decree, Ministerial Regulation, Notification of a Ministry, ordinance of a local government, rule, regulation or any other provisions of general applicability without addressing to a specific case or person".

174 Notification of the Ministry of Health of B.E. 2561 (2018).

175 Vehicle Act, B.E. 2522 (1979).

176 Ministerial Regulation No. 4 B.E. 2526 (1983).

such action is not considered as an administrative act. Those circumstances are the criminal justice processes[177], and the civil justice process[178].

2.1.1.2 Control and Limit power of an Administration

The administrative act affects and limits the rights and liberty of the other. Therefore, the administrative act must follow the principle of the legality of the administrative act. The administration could only exercise its power only within the scope empowered by law. If an act of administration is not empowered by law, the administration or its officials do not have the right to execute such act[179]; otherwise, such administrative act shall consider as an illegal act.

The control and limited power of an administration could define as two categories. The control and limit power of an administration could be achieved during a pre-executing period (Protective Measure), or the control and limit the power of an administration could be achieved during the post-executing period (Remedy Measure)[180].

Pre-executing period (Protective measure) refers to the situation that the administration takes a measure to ensure that their future administrative act shall be lawful. In the pre-executing period, Thai administrations could ask for advice from a superior organization; for example, the administration could seek advice from the Office of the Council of State for the revision of by-laws or for legal advice. Pre-execution protection could be achieved through the participation of

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177 The criminal justice process is not considered as an administrative act. The criminal justice process refers to the gathering of evidence and other process in the criminal case by the authorized officials. For example, the issuance of a prosecution order, the detention order, the act of the correctional officer to bring the prisoner to imprisonment or execution. Even all those acts are empowered by the Criminal Procedure Code or Correction Act, but all of those acts are not the "Administrative Act". But rather the criminal justice process. See, the decision of the Committee on Jurisdiction of Courts no. 6/2545 (2002).

However, it is worth to make a clarification that the exercise of administrative power by the police officer for the purpose to maintain public order is not a criminal justice process. But rather considering as an "Administrative Act". For example, the police officer disbands the unlawful protest with force. Those act by police officer is an administrative act. See, the Injunction Order from the Administrative Court of Thailand no. 1605/2551 (2008).

178 The civil justice process is the act of an execution officer in the means to ensure that the judgement from the Court of Justice shall be implemented. For example, forfeiting order, freezing properties order, sell by auction order, and the conclusion of contract after auction. Those examples, even it is the exercise power from administration, but they are not considered as an administrative act, but rather called the civil justice process. See, the decisions of the Committee on Jurisdiction of Courts No. 19/2550 (2007), No. 18/2558 (2015) and No. 89/2559 (2016).

179 Supreme Court Judgment no. 720/2505 (1962) stated that "It is true that Ministry of Interior has an order to its officials not to register a marriage certificate to illegal immigrant with Thai citizen. However, since the order does not empower by law, therefore such order only binding between Ministry of interior and its officials. Such order does not bind to the private party. Therefore, the district chief must register a marriage certificate for Mr. P and Mrs. C (the immigrant)".

180 UWANNO, Borwornsak, «The Mechanism Controlling Administrative Power», *Administrative Law Journal* Vol. 13 (1995), 13-14;

the public; by doing so, the public might have an objection before the administration issue an administrative order, the administration might make a consultation with the relevant private party, or the administration might make a public hearing before executing an administrative order. The pre-executing protection could be achieved by the openness of the information to the public. Thus, the reasoning in the administrative act is considered as pre-executing protection too[181]. Those objections/ suggestions from public consultation could give a better view for the administration to decide the most suitable administrative act with fewer mistakes.

Post executing period (Remedy Measure) refers to the remedy after the administrative act was already done. The injured party also has the right to make an administrative appeal to the administration (Administrative appeal)[182]. If the result of the administrative appeal does not satisfy the injured party, the injured party could bring the dispute to the Administrative Court of Thailand, which is the main organization that plays an important role in controlling, investigating, and deciding the administrative act of Thai administrations. The details of the Administrative Court and the administrative appeal shall be discussed later in this chapter.

2.1.1.3 Public Services

Public services are one of the main tasks of the State to provide for its people. According to studies from literature in relation to public services in Thailand, we could divide public services into two categories, which are primary function and secondary function[183].

In primary function, the state must prevent and resolve the dispute/ disaster. In other words, the state must maintain public order both within the community and from external factors. The maintaining of public order within the community refers to ensuring public safety both in life and for their property. Such assurance could be achieved through the arrangement of an adequate police force, the assurance of economic stability, or the assurance of public morale. The

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[181] In Thailand, Administration must give the reason to the public whenever the administration executes the administrative act. There are only few exceptions that the administration does not have to give the reason when execute the administrative act. The Administrative Procedure Act B.E. 2539 (1996) section 37 stated that "A written administrative act and the written confirmation thereof must also contain reasons, and such reasons shall at least consist of the following

(1) Material facts;

(2) The legal grounds referred to; and

(3) The grounds and justification for exercising the discretion

……..".

[182] See detail in 2.1.2.2.3 (Administrative Appeal).

[183] EIAMYURA, Chanchira, *Public Enterprise in Thai law: the historical and analysis*, thesis, Thammasat University Library (1986), 5-6;

maintaining of public order from external factors refers to the threat from other states (Both intentionally and unintentionally). For example, the military invasion from other states, or the dumpling market from foreign enterprises, which led to the end of domestic enterprises. Those external factors could be avoided by, for example, the increase of military capacity, or concluding a bilateral or multilateral treaty with other states[184].

In secondary function, the state must support public welfare both physically and mentally. The state also has a duty to distribute wealth equally to its people. The secondary function could be achieved by, for example, providing education, public transportation, leisure, arts, quality control of food and drugs, etc[185].

It is agreed by Thai scholars that the definition of public services in Thailand has substantial influences from Dr.Prayul Karnjanadul, in which he refers to the term "Public Services" as, "Public Services refer to enterprise within the management or in control of administration, perform their duties/ functions for the purpose to serve the public interest[186]".

The definition of public services given by Dr.Prayul Karnjanadul, public services could simply explain that public services are enterprises in direct management or in direct control of the administration. However, since certain enterprises need high technology, a huge amount of investment, and a high number of labors, in which, Thai administrations have not always possessed those elements. Therefore, the Thai administration sometimes gives its authority to private parties to carry on specific public services. By doing so, the administration will play its role in monitoring, control the quality of public services provided by private parties, including safety and price control of such public services arranged by private parties, for the purpose of arrangement of public services to the public in an efficient manner[187].

Dr.Prayul Karnjanadul also further stated that public services must be carried out for the public interest[188]. By doing so, the administration must arrange public services for the purpose of public interest. Such public services could not be done for the benefit of an individual or a

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184 BORAMANANTHA, Nanthawat, *Principle of Administrative Laws in relation to Public Services,* 5th Edition, Winyuchon Publishing, Bangkok, 2017;

185 *Ibidem.*

186 KARNJANADUL, Prayul, *Description of Administrative Law*, 5th Edition, Chulalongkorn University Press, Bangkok, 2006;

187 The studied from the Ministry of Finance indicated that since 1957 until now, Thai Administrations have increased the role to private party to arrange public services to the public. Thai Administrations have given private party to carry on public services by 9 methods, which are, Contracting-Out, Rented out, Concession or Franchising, Public Offering of Shares or Private Sale of Shares, Joint-Venture, Build-Own-Operate: BOO, Reorganization into component parts or fragmentation, Sale of State Owned Enterprises Assets/ Liquidation, and Deregulation. See, Studies report from ministry of finance, available online at, <www.mof.go.th>.

188 KARNJANADUL, Prayul, Description of… *id.*

particular group of people. The administration must provide public services for the public on an equal treatment and non-discrimination basis, in which all the people can have access to the services equally (Principle of equality).

It is important to note that public services in Thailand must be in accordance with three principles, which are, the principle of consistency[189], the principle of equality[190], and the principle of administrative adaptation[191].

2.1.2 Different between Administrative Law and Civil Law

2.1.2.1 The Differences in Characteristics between Administrative Law and Civil Law

There are differences in characteristics between administrative law and civil law. The difference in characteristics could define as follows.

The party to the dispute is the main difference between administrative law and civil law. In administrative law, at least one of the parties to the dispute must be an administration

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[189] Public Services in Thailand must be done in respect of principle of consistency because the public services are necessary to people's well-being. It is obvious that people needed to use public services all the time, therefore, it is the task for administration to ensure that such public services shall remain available for the needed of people. The principle of consistency is governing both for administration and private party who is in charge for arranging public services (Either empowered by law, or by concluded administrative contract). If private party who providing public services failed to provide such service in the consistency manner, there will be a punishment according to the contract concluded. For example, officials in Electric Agency could not commit strike for asking the raised, because such strike shall create a huge burden to the people, thus, such strike shall constitute as contradiction to the principle of consistency. See, SONGSERMSUP, Vanphen, *The organization of Public Enterprise and the Public Services in Thailand*, Thammasat University Library (1996), 7-8;

[190] All people have equal right to public services, state cannot provide public services for the benefit of an individual. The principle of equality regarding to public services appears in the Constitution of the Kingdom of Thailand section 27 stated that, "All persons are equal before the law, and shall have rights and liberties and be protected equally under the law.".

[191] The good public services must subject to the proper adaptation and adjustment. In Thailand, the administration possessed right to adapt or adjust the clause of the administrative contract without the permission from the third party, since the party to the contract (Administration-Private) are not consider as equal in the administrative contract. Administration could make unilateral change for the properness of economy situation, up to date situation, and social situation with aim to conserve the public interest. For example, the Bangkok Metropolitan concluded the contract with private party in which the private party must provide 3 buses a day in Bangkok city center. Afterward, there is needed from the people to use more buses and the 3 buses are not enough for the needs of people anymore. Therefore, the Bangkok Metropolitan possessed the power to ask private party to increase 3 buses a day to 5 buses a day and made an extra payment as agreed in the contract. Bangkok Metropolitan has right to give such order without the consent from the private party.

Also, third party who has an effect from such adaptation or adjustment could not refuse to comply with administration act on the basis that third party used to have certain rights before the administrative act. However, third party is entitling to compensation from such administrative act. See, SAWANGSAK, Charnchai, *Explanation of Act on the Establishment of Administrative Court and Administrative Court Procedure*, 11th Edition, Winyuchon Publishing, Bangkok, 2019;

(Administration with another administration, or administration with a private party) [192]. Meanwhile, in civil law, the dispute occurs exclusively between private parties, not the administration. However, it is important to note that not every contract between Thai administrations and private parties shall be regarded as an administrative contract. Since the status between the parties (Public-private) are not an exclusive element to define the public-private contract as an administrative contract. It is possible that contract between Thai administrations and private parties could be regarded as private contract, therefore, those contracts do not fall within the jurisdiction of the administrative court due to the essence of contracts/ disputes being purely private[193].

The way to create the juristic act is another difference between Thai administrative law and Thai civil law. Thai administrations could only exercise their administrative act only when such administrative acts are empowered by law (The principle of the legality of the administrative act). Unlike civil law, where an act is considered legal as long as such juristic act is not prohibited by law[194]. In civil law, even though there is no specific law in some areas, parties can make an agreement as long as such an agreement does not breach public order or good morals[195].

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[192] However, it is important to note that some private party has been given the power by specific law to carry out a specific task for the executive branch. In which sometime some private party could have constituted an administrative act. For example, the Lawyer Council of Thailand is using administrative power under Lawyer Act, B.E. 2528 (1985) to issue and approve lawyer licenses. Or private car inspection company have an authority to issue MOT test certificate for the car which has been used for more than 7 years, those authority of the private car inspection company empowered by the Vehicle Act, B.E. 2522 (1979).

[193] However, there are possibilities that administration could engage in the civil litigation with private party. Particularly, when the dispute is exclusively as the civil dispute. The purchase contract between administration and the private party, such contract might be regards as the civil contract. See, Supreme Administrative Court order no. 233/2560 (2017) stated that "….Even the administration have purchase contract with the private party to buy electronic part for providing the electricity for the public, but such contract is regarding solely as the purchasing the electronic part, such contract is not directly to benefit to the public. Such contract is contract aimed to create the equal status between parties. Therefore, such contract is not an administrative contract, but only civil contract. The matter is not in the Jurisdiction of the Administrative Court".

There are many other Administrative Court Orders/ Decisions ruled that some contract between administration and private parties are not regarded as administrative contract. For example, the purchasing contract of incinerator is not administrative contract (Supreme Administrative Court Order no.423/2546 (2003)), purchasing computers (Supreme Administrative Court Order no. 132/2544 (2001)), and purchasing of CCTV cameras (Supreme Administrative Court Decision no. 96/2558)). It is interesting to note that all of aforementioned decisions laid down the same reasoning with Supreme Administrative Court Order no. 233/2560 (2017), in which those contracts entered by the parties in an equal status and such contracts do not directly serve public interest.

[194] The Constitutional of the Kingdom of Thailand section 25 paragraph 1 stated that "As regards the rights and liberties of the Thai people, in addition to the rights and liberties as guaranteed specifically by the provisions of the Constitution, a person shall enjoy the rights and liberties to perform any act which is not prohibited or restricted by the Constitution or other laws, and shall be protected by the Constitution, insofar as the exercise of such rights or liberties does not affect or endanger the security of the State or public order or good morals, and does not violate the rights or liberties of other persons". Also, the Civil and Commercial Code Section 150 stated that "An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals".

[195] Thai Civil and Commercial Code B.E. 2535 (1992) Section 151 stated that "An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good moral".

The objective schemes between administrative law and civil law are different. In administrative law, the administrations exercise their power for the purpose of public interest. Meanwhile, in civil law, private parties almost, if not always, act for their own private interest.

Also, the equality between parties in the field of administrative law and civil law is also different. In civil law, both parties are in equal status, entering into an agreement on their own will (Freedom of Contract). On the contrary, for administrative law, the administrations exercise their power under the law for the purpose of serving the public interest[196]. The parties are not in equal status. Under the principle of administrative adaptation, Thai administrations possess with the power to change the details of the administrative contract for the purpose of the public interest without the requirement of prior consent from the private party as in a private contract (Administrative unilateral termination/ alteration).

The control and limit of power are other differences between administrative law and civil law. Unlike civil law, where the parties are free to act as long as their act is not prohibited by laws. In contrary, in administrative law, there are mechanisms under the law to control and limit of the administration power to guarantee that the administrative acts are in accordance with the principle of legality of administrative acts, both in procedural and substantive. For example, the control and limit of the administrative act could be achieved through the participation of the public, the administrative appeal, the investigation by a special committee under a specific law, or the judgment from the Administrative Court. In comparison, there is no such control in a civil contract.

In administrative law, the remedy and adjustment from the unlawful administrative act are also different from the civil law. In civil law, if there is a dispute between parties, the injured party must bring the dispute to the court of justice for adjudication/ enforcement. On the other hand, in administrative law, the adjustment and remedy could be made by an administration itself, by

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[196] There are many Thai scholars tried to give the definition of the term public interest in order to know the boundary and the limitation of the term. Prof. Dr. Jit Sethabuth refer to the term as "It is hard to define the term public interest, and I doubt that there would be anyone who can gave a precise definition to it. However, I can say that the term will be use when there is conflict of interest between public interest and individual interest. In this case, public interest shall prevail. Thus, this term tends to protect the public. Therefore, the parties could not agree to ignore the public interest." See, SETHABUTH, Jit, *Commercial Law, Juristic Act, and Obligation*, 1st Edition, Sangthong Press, Bangkok, 1969;

Prof. Dr. Senee Pramoth refer to the term as "The public interest is the clause enforce to individuals in order to tell them that the society stands above them. To ensure the well-being of society. In which, society shall protect the individuals." See, PRAMOTH, Senee, *Introduction to Civil and Commercial Law*, 1st Edition, Sangthong Press, Bangkok, 1966;

Prof. Dr. Wiriya Kirdsiri refer to the term as "Public interest is not specifically relevant to the parties, but related to interest of state and society. Especially, regarding to the protection of people's security, protection of political and economy. No one has right to cause harm to the public." See, KIRDSIRI, Wiriya, *Introduction to Civil and Commercial Law*, 1st Edition, Thammasat University Press, 1974;

terminating an action on their own consideration. Thus, administrative appeal as the mandatory appeal before the right to administrative court could give an opportunity for the administration to correct its wrongful decisions and help to reduce the caseload to the court (Detail of Thai administrative appeal shall be discussed later in this chapter). In addition, the adjustment and remedy in administrative law could also achieve through the decision from the administrative court as the main organization governing administrative issues in Thailand.

2.1.2.2 Different between Civil Litigation and Administrative Litigation

2.1.2.2.1 Administrative Court of Thailand

The administrative act always affects the right and liberty of the private party. As mentioned, the administrative act from an administration must be in accordance with laws (Principle of Legality). If the administrative act was done without law empowering it, or such administrative act was done over the scope of their power given by law (Ultra vires), such administrative act shall be revoked or canceled by Administrative Court in accordance with the law.

Thailand has a "Dual Court" system in which civil and administrative matters are governed by different courts. Thai Parliament has approved the Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999). By the power of the aforementioned Act, Thailand has established Administrative Court governing administrative issues[197]. The power

[197] There was an attempt to establish the Administrative Court for a long time in Thai legal society. The attempt to establish the Administrative Court could be divided into 3 periods, which are, the first period, the middle period, and the present period.

The first period (1933-1973) was the period of controversy and uncertainty for the establishment of the Administrative Court. In the first period, Thailand just changed from the absolute monarchy system into democracy. There are the ideal of establish of Administrative Court to govern administrative issues in Thailand by Pridi Banomyong (Luang Pradist Manudharm). However, there was a huge influence from the European Colonization, therefore there was a fear among Thai legal society that the establishment of the new "Court" shall led to Thai political intervention by the colonization power. Therefore, instead of establishment of the Administrative Court, Thailand has enacted the Council of State Act B.E. 2476 (1933). By the power of aforementioned act, Thailand has established the Council of State following the ideal of Conseil d'Etat of France. In which the Council of State of Thailand at that time has duties to draft laws and made a judgement in certain administrative disputes.

The middle period (1974-1995) was the period to find the conclusion whether the administrative court should be a branch within the judicial court or the administrative court should be independent from the judicial court accordance to dual court system. During the middle period, there was many proposals to the cabinet to form the administrative court. However, those proposal were either rejected, or have a chance to considered by the cabinet due to the unstable politics of that period.

The present period (1995-Present) is the period that there is the establishment of the Administrative Court as a dual court, reaffirmed by the Constitution. The Constitution of the Kingdom of Thailand B.E. 2540 (1997) affirmed the existence of Administrative Court as independent judicial organ from the Court of Justice. Later in 1999, the parliament has approved the Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999). Then, the Administrative Court started to operate since 9 March 2001 until today. See, Administrative Court of Thailand, «The development of Thai Administrative Court», available online at

and duty of the Administrative Court are stated in the Constitutional of the Kingdom of Thailand section 197, as it is written "Administrative Court have the power to try and adjudicate administrative cases arising from the exercise of administrative power provided by law or from the carrying out of an administrative act, as provided by law".

There are two tiers of Administrative Court, which are, the Supreme Administrative Court, and Administrative Courts of First Instance[198]. The Supreme Administrative Court has jurisdiction over appeal cases from an Administrative Court of First Instance and other specific cases as prescribed by laws[199]. Meanwhile, Administrative Courts of First Instance have jurisdiction over disputes where at least one administration is a party to the dispute[200]. The Administrative Courts of Thailand is the main organization exercising administrative judicial power to achieve justice in

<www.admincourt.go.th>. See also, SAWANGSAK, Charnchai, *Description of Administrative Law*, 27th Edition, Winyuchon Publishing, Bangkok, 2018;

198 The Constitution of the Kingdom of Thailand B.E. 2560 (2017) section 197 paragraph 2. Until today, there is a Supreme Administrative located in Bangkok. Thus, there are 15 Administrative Courts of First Instance located in major cities throughout Thailand. See, <www.admincourt.go.th>.

199 Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) section 11 stated that, "The Supreme Administrative Court has the competence to try and adjudicate the following cases:

(1) the case involving a dispute in relation to a decision of a quasi-judicial commission as prescribed by the General Assembly of judges of the Supreme Administrative Court;

(2) the case involving a dispute in relation to the legality of a Royal Decree or a by-law issued by the Council of Ministers or with the approval of the Council of Ministers;

(3) the case prescribed by the law to be within the jurisdiction of the Supreme Administrative Court;

(4) the case in which an appeal is made against a judgment or an order of an Administrative Court of First Instance.".

200 Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) section 9 stated that, "Administrative Courts have the competence to try and adjudicate or give orders over the following matters:

(1) the case involving a dispute in relation to an unlawful act by an administrative agency or a State official, whether in connection with the issuance of a by-law or an order or in connection with any other act, by reason of acting without or beyond the scope of powers and duties or inconsistently with the law or the form, process or procedure which is the material requirement for such act or in bad faith or in a manner indicating unfair discrimination or causing an unnecessary process or an excessive burden to the public or amounting to an undue exercise of discretion;

(2) the case involving a dispute in relation to an administrative agency or a State official neglecting official duties required by the law to be performed or performing such duties with unreasonable delay;

(3) the case involving a dispute in relation to a wrongful act or any other liability of an administrative agency or a State official arising from the exercise of power under the law or from a by-law, an administrative order or any other order, or from the neglect of official duties required by the law to be performed or the performance of such duties with unreasonable delay;

(4) the case involving a dispute in relation to an administrative contract;

(5) the case prescribed by law to be submitted to the Court by an administrative agency or a State official for mandating a person to do a particular act or refraining therefrom;

(6) the case involving a matter prescribed by the law to be under the jurisdiction of Administrative Courts.

The following matters are not within the jurisdiction of the Administrative Courts:

(1) the action concerning military disciplines;

(2) the action of the Judicial Commission under the law on judicial service;

(3) the case within the jurisdiction of the Juvenile and Family Courts, Labour Courts, Tax Courts, Intellectual Property and International Trade Courts, Bankruptcy Courts or other specialised Courts.".

accordance with the principle of the rule of law, enhance good practices within administrations, and create a good balance between individual rights and public interest[201]. Until today[202], there are 154,267 cases filed to Administrative Courts, with 128,629 cases concluded (83.38 Percent of total cases filed)[203].

The procedure in administrative litigation is simpler when compared to civil litigation. The simplicity in administrative litigation is considered as a strong point of administrative litigation with aimed to give adequate protection to individuals. In administrative litigation, the filing of cases is not subjected to court fees except for the filing of a case for an order to pay money or to deliver property[204]. Filing of the administrative dispute is also simple, as it could be made by the

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[201] Foreword by President of the Thai Supreme Administrative Justice Hon. PATANGTA, Piya, in "Administrative Courts and Office of the Administrative Court 2017". Available online at <www.admincourt.go.th>.

[202] The Administrative Court Annual Report 2019. Available online at <www.admincourt.go.th>.

[203] (Data of 31 May 2019) Since the establishment of Administrative Courts on 9 March 2001, the Central Administrative Court which has Jurisdiction in Bangkok and 11 cities around them, has the most cases filed with the number of 49,574 Cases. The Supreme Administrative Court has 44,923 Cases filed. Disputes regarding to personal management and benefits has been filed the most with the number of 32,110 cases, following with expropriation and torts with the number of 24,676 Cases, Building and Environmental Disputes with the number of 19,787 Cases, Public Procurement and Administrative Contract with the number of 17,480 Cases, fiscal and budget disciplinary with the number of 12,520 Cases, and etc. Ministry of Interior has been sued the most with 8,638 Cases, following with Ministry of Ministry of Natural Resources and Environment with 4,195 Cases, Ministry of Ministry of Finance with 2,599 Cases, Ministry of Agriculture and Cooperatives with 2,563 Cases, Ministry of Transport with 2,483 Cases, etc. See information at, <www.admincourt.go.th>.

[204] Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) section 45 stated that, "A plaint shall be written in polite and courteous language and shall contain the following:

(1) the name and address of the plaintiff;

(2) the name of the administrative agency or of the State official concerned which gives rise to the filing of the case;

(3) all acts constituting the cause of action as well as necessary facts and circumstances in connection therewith;

(4) the relief sought by the plaintiff;

(5) the signature of the plaintiff which, in the case of the filing of a case on behalf of another person, must also be accompanied by an instrument of authorisation. If any plaint does not contain the full items under paragraph one or is ambiguous or incomprehensible, the Office of the Administrative Courts shall give advice to the plaintiff for the purposes of correction or amendment of the plaint. In this instance, the date of the submission of the initial plaint shall be reckoned for the purpose of the computation of the period of prescription.

In the case where several persons wish to file an administrative case for the same cause of action, such persons may jointly submit a single plaint and appoint one among themselves to represent every plaintiff in the proceedings. In such case, an act of the person representing the plaintiffs in the proceedings shall be deemed to bind every plaintiff.

The filing of a case is not subject to Court fees except that the filing of a case for an order to pay money or deliver a property in connection with the circumstance under section 9 paragraph one (3) or (4) shall be subject to Court fees in accordance with the amount in dispute at the rate as specified in Schedule 1 annexed to the Civil Procedure Code for cases in which the relief applied for is computable in a pecuniary amount.

In the proceedings, a party may act on his or her own motion or appoint a practicing lawyer or any other person with such qualifications as specified in the Rule prescribed by the General Assembly of judges of the Supreme Administrative Court to represent the party in filing a case or carrying out any act.".

injured party with or without a lawyer. Thus, the submission could be made both through the competent court and by registered post[205].

2.1.2.2.2 Administrative Judge, Accusatorial System and Inquisitorial System & Checked-Balance of decision between Administrative Judges

There are administrative judges adjudicating administrative law disputes in Thai administrative courts (Those administrative judges, sometimes referred to as "Specialized Judges"). Administrative judges possess with wide range of specialists who possess with excellent legal knowledge, along with full of experience with administration prior to the administrative judge's examination. The knowledge and experiences of administrative judges ensure that the complex administrative dispute shall be handled professionally and in accordance with the laws.

The judge's examination in administrative court has more requirements than the Judges examination in the Judicial Court. The minimum age of the applicant must be over 35 years of age (45 years for the Supreme Administrative Court). The applicants must have specializations and meet all requirements as stated by the Act on the Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999)[206].

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[205] Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) section 46 stated that "A plaint shall be submitted to a competent official of an Administrative Court. In this instance, a plaint may be submitted by registered post, and, for the purpose of the computation of the period of prescription, the date of the delivery of a plaint to the postal officer shall be deemed as the date of submission of the plaint to an Administrative Court.".

[206] The qualification of Supreme Administrative Judges is stated in the Act on the Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999) section 13, stated that, "The person eligible for appointment as a judge of the Supreme Administrative Court shall have the following qualifications:

(1) being of Thai nationality;

(2) being not lower than forty-five years of age;

(3) being qualified in the fields of law, political science, public administration, economics or social science or in the administration of State affairs in accordance with the Rules prescribed by the J.C.A.C.; and

(4) having one or more of the additional qualifications as follows:

(a) being or having, in the past, been a Law Councilor, a Petition Councilor or a Councillor of State;

(b) serving or having, in the past, served in a position not lower than President of a chamber of an Administrative Court of First Instance;

(c) serving or having, in the past, served in a position not lower than that of Judge of the Supreme Court of Justice or its equivalent or a Judge of the Supreme Military Court;".

(d) serving or having, in the past, served in a position not lower than that of Regional Chief Public Prosecutor or its equivalent;

(e) serving or having, in the past, served in a position not lower than that of Director-General or its equivalent or any other equivalent position in a State agency as prescribed by the J.C.A.C.;

(f) being or having, in the past, been a lecturer in law, political science, public administration, economics, social science or in the subject related to the administration of State affairs in a higher education institution and holding or having, in the past, held the position of Professor or Honorary Professor;

Thai administrative trial is based on the inquisitorial system. Unlike the judicial trial in Thailand, which use the accusatorial system, where the judicial judges play their roles mainly in the judgment from evidence and witnesses provided by parties to the dispute (Judges play their roles as a referee). In the administrative trial, administrative judges are actively involved in proof of facts by taking their role to investigate the case, for the purpose not only of deciding the dispute but also achieving justice and a fair balance both for an individual and the society. Administrative judges with a full of experience normally have a lot of influence on the case. Administrative judges shall call for evidence (Most of the time, they are in possession of the administration) and witnesses as much as they have seen as necessary[207]. Those pieces of evidence and witnesses summoned by

(g) being or having, in the past, been a practicing lawyer for not less than twenty years with experience in administrative cases in accordance with the Rules prescribed by the J.C.A.C."

The qualification of a Judge in the Administrative Court of first instance is stated in the Act on the Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999) section 18, stated that, "The person eligible for appointment as a judge of an Administrative Court of First Instance shall have the following qualifications:

(1) being of Thai nationality;

(2) being not lower than thirty-five years of age;

(3) being qualified in the fields of law, political science, public administration, economics, social science or in the administration of State affairs in accordance with the Rules prescribed by the J.C.A.C.; and

(4) having one or more of the additional qualifications as follows:

(a) serving or having, in the past, served as a petition commissioner or secretary to Law Councillors in the Office of the Council of State for at least three years;

(b) serving or having, in the past, served for at least three years in a position of administrative-case official of the class prescribed by the J.C.A.C.;

(c) serving or having, in the past, served for at least three years in a position not lower than that of judge of the Civil Court or Criminal Court or its equivalent or judge of the Central Military Court;

(d) serving or having, in the past, served for at least three years in a position of Provincial Public Prosecutor or its equivalent;

(e) serving or having, in the past, served for at least three years in a position not lower than Level-8 government official or any other equivalent position in a State agency, as prescribed by the J.C.A.C.;

(f) being or having, in the past, been a lecturer in law, political science, Public administration, economics, social science or in the subject related to the administration of State affairs in a higher education institution and holding or having, in the past, held a position not lower than Associate Professor or Honorary Associate Professor for at least three years;

(g) having graduated with a master degree in public law and serving in a State agency for at least ten years since the graduation at that level, or having graduated with a doctoral degree in public law and serving in a State agency for at least six years since the graduation at that level;

(h) being or having, in the past, been a practicing lawyer for not less than twelve years with experience in administrative cases in accordance with the Rules prescribed by the J.C.A.C.

The provisions of section 14 and section 16 shall apply *mutatis mutandis* to judges of an Administrative Court of First Instance.".

[207] Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) section 55 paragraph 3 and 4 stated that "In the trial and adjudication, the Administrative Court may examine and inquire into facts as is appropriate. For this purpose, the Administrative Court may hear oral evidence, documentary evidence or experts or evidence other than the evidence adduced by the parties, as is appropriate.

The oral evidence or the expert summoned by the Administrative Court for testimony or opinions shall be entitled to remuneration in accordance with the rules and procedure prescribed in the Royal Decree.".

the administrative judges might be apart from evidence and witnesses purposed by parties to the administrative trial[208].

Thus, in administrative litigation, there is a special system to check and balance administrative dispute decisions between administrative judges. In administrative litigation, there will be a judge (Appointed by the President of the Administrative Court, or the President of the Supreme Administrative Court, depending on which court have jurisdiction over the dispute), who is not on the panel in the administrative trial, shall give his or her opinion to the case and send them to the panel. Those opinion has no legal effect on the panel's decision but rather help the panel to make a more accurate decision and enhance the check and balance of administrative dispute decision[209].

2.1.2.2.3 Administrative Appeal

In Thailand, the injured party has the right to file an administrative appeal to the administration that did or omitted an administrative act. The administrative appeal aimed to give protection to the public by giving rights to the injured party to ask directly to the administration to correct their wrongful act. The remedy and adjustment from the administration itself are usually faster and simpler than bringing the dispute to the court since there is a timeframe for administrations to reply to an administrative appeal within thirty days after receiving such an appeal, with a possible extension for another thirty days[210]. Thus, by doing so, it keeps a good atmosphere between the administration and individuals. The administrative appeal also enhances the good control within the administration because administrations must carry multiple tasks within the time limit. Many times, Thai administrations do not really know what they need to buy or what is the best to precisely serve public needs, or such public needs might change over time due to its dynamic nature. Therefore, the administrations might have done an unlawful or unappropriated administrative act (Unintentionally in most cases). An administrative appeal is a tool that allows those administrations to correct wrongful administrative act on their own. Finally, the administrative appeal is good case management by helping to reduce the caseload to the

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[208] The ideal of using inquisitorial system in administrative trial is to achieve the justice both for an individual and the society, since the important evidence and witnesses in administrative trial are in the possession of the administration. The role of the administrative judges could enhance and ensure a fairness and better protection to the public than using the Accusatorial system in civil dispute. See, the article on the topic of «The inquisitorial system» by the Administrative Court of Thailand, available online at, <www.admincourt.go.th>.

[209] Administrative Court of Thailand, «The Judge who makes the conclusion», available online at <www.admincourt.go.th>.

[210] Administrative Procedure Act, B.E. 2539 (1996) section 45.

administrative court[211]. An administrative appeal is different procedural between administrative litigation and civil litigation since there is no such requirement of appeal as a pre-condition before the right to civil litigation.

It is also important to note that the injured party must exhaust administrative remedy as a pre-condition before the right to file their case in administrative court. In other words, the administrative appeal is a mandatory appeal before the right to administrative trial. Act on the Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999) section 42 only allows the injured party from administrative act to bring the dispute to administrative court after exercising their right to administrative appeal[212]. If there is no specific law provided for a particular matter (For example, the administrative act done by the minister or quasi-judicial committee)[213], an administrative appeal shall be made through the administration who made such an administrative act within fifteen days after the administrative act affect to the injured party[214]. After filing of administrative appeal, an administration shall take the consideration of the appeal, then notify to the applicant without delay[215].

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211 However, apart from benefit from administrative appeal of reducing caseload to the court. Some Thai scholars also share their concern that the administrative appeal might be a "Trap" for administrative litigation, by erasing rights of the private party to the access of administrative litigation. See, SINGHSUWONG, Supawat, «Administrative Appeal», available online at <http://www.public-law.net/publaw/view.aspx?id=1866>.

212 Act on the Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999) section 42 stated that, "Any person who is aggrieved or injured or who may be inevitably aggrieved or injured in consequence of an act or omission by an administrative agency or a State official or who has a dispute in connection with an administrative contract or any other case falling within the jurisdiction of the Administrative Court under section 9 may, provided that the redress or alleviation of such grievance or injury or the termination of such dispute requires a decree as specified in section 72, file a case with the Administrative Court.

In the case where the law provides for the process or procedure for the redress of the grievance or injury in any particular matter, the filing of an administrative case with respect to such matter may be made only after act has been taken in accordance with such process and procedure and an order has also been given thereunder or no order has been given within a reasonable period of time or within such time as prescribed by law.".

213 The administrative act issue from Minister or the quasi-judicial committee is not subjected to administrative appeal before the right to administrative trial. Since Minister and quasi-judicial committee are in the highest chain of command (There is no higher authority than Minister and quasi-judicial committee in the executive branch). Therefore, if the administrative act is issued by Minister of quasi-judicial committee, the injured party has right to file the dispute directly to the Administrative Court. See, Administrative Procedure Act, B.E. 2539 (1996) section 44 paragraph 1 stated that, "Subject to section 48, in the case where any administrative act is not issued by a Minister and there is no law specifically providing for an administrative appeal proceeding, the participant may appeal against the administrative act by filling the appeal with the issuing official within fifteen days as from the date he or she is notified thereof.". See also, Administrative Procedure Act, B.E. 2539 (1996) section 48 stated that, "The participant shall have the right to appeal against the administrative act of any committee, whether or not established by law, to the Petition Council under the law on the Council of State both on matter of facts and matter of law within ninety days as from the date he or she is notified of such act. If such committee is a quasi-judicial committee, the right to appeal and the period of appeal shall be in accordance with the provision of the law on the Council of State".

214 *Ibidem.*

215 Administrative Procedure Act, B.E. 2539 (1996) section 45 stated that, "The official under section 44 paragraph one shall, not more than thirty days as from the date of receiving the appeal, finish consideration of the appeal and notify the appellant without delay. If he or she concurs with the appeal, whether in whole or in part, he or she shall alter the administrative act as he or she thinks fir within the said period.

2.1.3 Concept of Thai Administrative Contract

In order to arrange public services, Thai administrations have two methods to bring public service into action. First, Administration could either enact By-Law or make an administrative order empowered by law. Or second, the administration could bind with the private party by contract. In case the administration chooses to conclude a contract with a private party, such contract could be regarded as a private contract, or an administrative contract. It is very important to understand and be able to recognize the differences between civil contract and administrative contract because the differences between the two kinds of these contract lead to the differences in applicable law, different courts, and different procedures.

Thailand makes a clear distinction between private contract and administrative contract. The idea of the Thai administrative contract is based on the unequal status between parties. The unequal status between parties is based on the main idea that administrations must possess administrative power to arrange public services. In which public services must respect three main principles, which are, the principle of consistency, the principle of equality, and the principle of administrative adaptation[216].

Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) give the definition of administrative contract, in which section 3 paragraph 9 states that "administrative contract includes a contract at least one of the parties of which is an administration or a person acting on behalf of the State and which exhibits the characteristic of a concession contract, a contract providing public services or a contract for the provision of public utilities or for the exploitation of natural resources"[217]. Thus, the Resolutions of the Supreme Administrative Judges of 6/2544 (2001) gave a clear explanation of the nature of Thai administrative contract, the resolutions stated that "Administrative contract must possess with two characteristics. First, at least one of the parties of which is an administration or person acting on

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If the official under section 44 paragraph one does not concur with the appeal, whether in whole or in part, he or she shall forthwith report his or her opinions and reasons to the person authorized to consider the appeal within the period specified in paragraph one. The authorized person shall finish his or her consideration of the appeal within thirty days as from the date of the receiving the report. If, by reason of necessity, the consideration cannot be finished within such period, the authorized person shall notify the appellant inwriting before the expiration of such period. For this purpose, the period shall be extended for not more than thirty days as from the expiration of such period.

Any official to be authorized to consider an appeal under paragraph two shall be prescribed in the Ministerial Regulation.

The provision of this section shall not apply to the case otherwise prescribed by a specific law.".

[216] SAWANGSAK, Charnchai, Explanation of Act… *id.*

[217] Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) section 3 paragraph 9.

behalf of the State. Second, such contract must exhibit the characteristic of a concession contract, a contract providing public services, or a contract for the provision of public utilities or for the exploitation of natural resources. If the contract aimed to create the equal status of parties, thus, in case such contracts do not possess those two characteristics, such contracts are regarded as private contracts. This is for the purpose of execution of administrative powers and arrange the public services[218]."

Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) only gave the definition of the term "administrative contract". Therefore, it is the task of the Thai Administrative Court to make the interpretation, reshape, determine, and lay down principles that the Thai Administrative Contract must recognize[219].

There are eleven kinds of contract that Thai administration usually concludes with the private parties, which are, construction contract[220], renovation and repair contract[221], renting of building contract [222], administrative contract in relation to education and government

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218 "Administration" refers to Ministry, a Sub-Ministry, a Department, a Government agency called by any other name and ascribed the status as a Department, a provincial administration, a local administration, a State enterprise established by an Act or a Royal Decree or any other State agency and shall include an agency entrusted to exercise the administrative power or carry out administrative acts"

"A person acting on behalf of state" refer to an "official" which are a government official, an official, an employee, a group of persons or a person performing duties in an administrative agency. Thus, the term "A person acting on behalf of state" also referring to a quasi-judicial commission, a commission or a person empowered by law to issue any by-law, order or resolution affecting persons. See, Supreme Administrative Court Judgment no. 12/2545 (2002).

219 PHOLLAKUL, Phokin, «Description of administrative contract», available online at <www.public-law.net>.

220 For example, Supreme Administrative Court Order no. 443/2545 (2002) ruled that "Building Contract of the building of department of labor protection and welfare between the administration and private party is an administrative contract. Since the building is regarding as a tool to provide the public services". See also, Supreme Administrative Court Order no. 264/2547 (2004), 265/2547 (2004), 335/2547 (2004), 718/2549 (2006), and 118/2551 (2008) have ruled in the same way that "The contract to build the building for education services aimed for public interest. Thus, contracts have clauses that gave some privileges to the administration, in which it could not be encountered in the civil contract. Therefore, it considers as administrative contract". See also, Supreme Administrative Court Order no. 115/2548 (2005) ruled that "The contract to build fire station between the administration and the private party is administrative contract, since the objective of the fire station is for the public interest".

221 For example, Supreme Administrative Court Judgment no. 8/2559 (2016) ruled that "The chemical building of Chulalongkorn University is in the purpose to provided public services. Therefore, the contract is regard as administrative contract". See also, Supreme Administrative Court Order no. 751/2557 (2014) ruled that "The aquaculture is the public services providing utilities for the public. Therefore, the dispute in this case is the dispute regarding to the breach of administrative contract".

222 For example, Supreme Administrative Court Order no. 977/2548 (2005) ruled that "The contract between Airports of Thailand PCL (AOT) and private party allowing private party to rent the space within Chiang Mai airport to do the parking space business is consider as an administrative contract. This contract is the contract between administration and private party to provide public services benefiting public who come to use Chiang Mai Airport".

scholarship [223], administrative contract in relation to public health [224], hiring contract [225], telecommunications contract [226], loan agreement [227], administrative contract in relation to agricultural[228], clean-up services contract[229], etc.[230]. However, it is important to note that all of those aforementioned contracts are not always regarded as administrative contracts, if such contracts do not possess characteristics as stated in the Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) section 3 paragraph 5 along with the clarification from the Resolutions of the Supreme Administrative Judges of 6/2544 (2001).

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[223] For example, Supreme Administrative Order no. 418/2550 (2007) ruled that "The contract that allow government officer to have a study aboard-leave aimed to ensure that the officer shall come back and continue his or her work as require by the administration. This contract is considered as an administrative contract". See also, Supreme Administrative Court Judgment no. 643/2555 (2012) ruled in the same manner for the study leave (Domestic institution).

[224] For example, Supreme Administrative Order no. 536/2556 (2013) ruled that "The contract between Child Support Center under the supervision of Khum-Khan District and private party, in which private party agree to provide lunch for children in Child Support center is consider as an administrative contract. The Child Support Center hired private party for the purpose of public services by enhance the development of mentality and physically of the children within their care. In which, children within their care must have good and clean food for the children development in accordance with the purpose of Child Support Center. Therefore, this contract is regard as an administrative contract in accordance with the Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) section 3 paragraph 5".

[225] For example, "Plaintiff is the temporary contract employee working in the matter of politic, diplomacy, and economy as ordered by the Royal Thai Consulate-General, Karachi, Pakistan. Those work by Royal Thai Consulate-General is consider as public services. Therefore, the hiring contract between the Royal Thai Consulate-General, Karachi, Pakistan and the plaintiff is considered as an administrative contract. The Administrative Court have jurisdiction over the dispute, in which the plaintiff claiming that the Royal Thai Consulate-General failed to make a payment as stated by the contract". See also, Supreme Administrative Court Order no. 76/2558 (2015) ruled that "Contract between public university and lecturer has the main aim to provide the education services for the public. Those contracts are administrative contract".

[226] For example, Supreme Administrative Court Order no. 622/2545 (2002) ruled that "Joint venture between TOT Public Company Limited and private party aimed to extend the phone services is administrative contract. Because one party to the contract is an administration established by Act on Telephone Organization of Thailand B.E. 2497 (1954) in accordance with Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) section 3 paragraph 5. Thus, the contract is characterizing for a contract for the provision of public utilities".

[227] For example, Supreme Administrative Court Order no. 42/2555 (2012) ruled that "Loan Agreement between Cooperative Promotion Department and Charoen Sin Agriculture Cooperative is administrative contract. Both parties are administration. Thus, the action that Cooperative Promotion Department is the middle organization giving loan to farmers to buy fertilizer is consider as public services".

[228] For example, Supreme Administrative Court Order no. 720/2549 (2006) ruled that "Contract between Warehouse Organization which is administration at one side, and private party at another, for the purpose of keeping cassava that exceed Warehouse Organization capacity is administrative contract. The action of private party is considered as administration allows private party to arrange public services".

[229] For example, Supreme Administrative Court Order no. 848/2548 (2005) ruled that "Contract between Pattaya City Hall and private party is administrative contract. One of the parties is an administration in accordance with Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) section 3 paragraph 5. Thus, the contract is characterizing for a contract providing public services".

[230] Many more administrative contracts which are not in the first 10 categories, for example, Service Contract for building Crane (Supreme Administrative Court Order no. 25-26/2559 (2016)), Purchasing and setting for traffic light control system Contract (Supreme Administrative Court Order no. 240/2557 (2014)), Building of Wastewater treatment factory Contract (Supreme Administrative Order no. 318/2555 (2012)), Temporary Management Contract of Dock (Supreme Administrative Court Order no. 889/2548 (2005)), Hire Contract Board Counting for General Election (Supreme Administrative Court Order no. 313/2549 (2006)).

Certain Administrative Court decision regarding to the interpretation of the administrative contract is worth to mention here, for example, the order of the adjudication committee for power and duty of court no. 10/2545 (2002) stated that "This contract in dispute regards to renovate and reconstruction contract between Lung-Suan hospital and private party. In which such a contract is a contract between the administration and the private party. The aim of the contract is to renovate and reconstruct of Lung-Suan hospital from a 60-beds capacity to a 90-beds capacity. Public health is one of the objectives of public services. Thus, all people are able to use the service from the hospital in an equal manner[231]. This contract is an administrative contract. And consequently, fall within the jurisdiction of the Administrative Court[232]". In a similar way, the order of the adjudication committee for power and duty of court no. 25/2545 (2002) stated that "The contract that government official concludes with Bangkok Metropolitan, in which parties agreed that the official shall come back to serve for Bangkok Metropolitan after his graduation with no less than twice of the period he took for the studied. The official agreed to pay sums in accordance with the contract in case he failed to come back to fulfill his obligation. This contract is an administrative contract, because there is a clause that gave a privilege to the administration in which such clause could not be found in a civil contract. Thus, the work of an official is considered as the public services".

However, there are certain cases that the Administrative Court found that the contract that the administration has concluded with private parties is not regarded as an administrative contract, but rather regarded them as a civil contract; for example, Supreme Administrative Order no. 5/2545 (2002) ruled that "Hiring Contract for an advisor to design and inspect the school building, and renovate and reconstruction of school sports center, is not an administrative contract. Since the administration and private party agreed to the contract in an equal manner in accordance with civil code". Supreme Administrative Order no. 50/2545 (2002) ruled that "Contract to paint the building and change light bulbs of the post office is not affect to any means of public services. This contract is a civil contract. Both parties agreed to the contract in an equal status". Supreme Administrative Order no. 61/2545 ruled that "Contract purchasing the Electric Generator in this case is not an administrative contract. Even the product shall be used in the hospital since both

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[231] It is interesting to note that even some kind of contract, in which public could not have equal access are consider as administrative contract too. For example, the contract to build the science lab is consider as an administrative contract too. See, the adjudication committee for power and duty of court no. 18/2545 (2002).

[232] The minority opinion of this order seen the contract of renovating and reconstructing of the hospital as a private contract, because the private party only has his payment after the delivery of finished building in the manner of civil contract. The private party does not have any right or duty to deliver public service after the delivery of those building. Thus, the contract does not have any kind of privilege clause to the administration to the contract, but rather, the clause of the contract looks familiar to the civil contract. See dissenting opinion in the adjudication committee for power and duty of court no. 10/2545 (2002).

parties agreed on an equal status without any privilege clause for the administration. Thus, the electric generator is not considered as accessible by the public, and the electricity is not considered as the decisive tool for the hospital operation".

2.2 Concept of the European Investment Administrative Law on Foreign Investment

2.2.1 General Concept of the European Administrative Law

As we noted at the beginning of this chapter on the topic of Thai Administrative Law that it is not possible to examine all details of Thai administrative law in one chapter; therefore, we did specifically examine Thai Administrative Law solely related to the topics of our thesis on 2.1. In a similar manner, we would like to note here that it is not appropriate to examine all aspects of the EU law, which comprise complexity, a broad range of legal aspects, and court decisions. Therefore, the second part of this chapter shall limit the scope of study on the EU law in relation to our thesis topic, which are, the general idea of the EU legal system, the idea of the European Administrative Law and some of its legal doctrines, and the idea of the European Administrative Contract specifically in the area that related to our thesis topic.

The European Union has its own legal order, in which it is separate from international law and forms an integral part of the legal systems of the member states. The European Union is not a federation, but rather a particular supranational legal entity[233]. It sits somewhere along the *continuum* between an international organization and a state, and it has been moving from the international organization closer to the state[234]. These 28 (27 after Brexit) sovereigns nationals or so-called "European Member States" gave up important parts of their sovereign power to the European institutions, aiming to achieve their common value and similar objectives underpinned by the Treaties[235]. In other words, the principle of conferral characterized the nature of the European Union's sovereignty and the limit certain areas of their sovereignty to the European

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[233] A federal system is one in which at least two levels of government-national and local-coexist with separate or shared powers, each having independent functions, but neither having supreme authority over the other. The best-known federal system is practicing in the U.S. In which American States have its full authorities over certain policy area such as education, taxes, road, and police. However, American States do not have power in certain areas, such as raising import or export taxes, creating their own currency, conclude treaty with other countries, or maintaining their own army.

On the other hands, even the European Union has some of the features of a federal system. However, the European member states could do almost everything that the U.S. model could not. For example, the European Member States could maintain their own military, more power over taxes policy when compared to the U.S. model, and some of the member states still use their own currency. Meanwhile, power of the European institutions is considered fewer when compared to the U.S. federal government. See, MACCORMICK, John, Understanding the European… *id.* See also, CRAIG, Paul &DE BÚRCA, Grâinne, EU Law:… *Id.* See also, SCHÜTZE, Robert, *European Union Law*, 2nd Edition, Cambridge University Press, Cambridge, 2018;

[234] *Ibidem.*

[235] The idea of sovereignty in the European Union is not eliminated, but rather the sovereignty of European Member State has been re-distributed. In other word, the sovereign power was once monopolized by national governments in the member states, it is now shared by those governments and by the institutions of the European Union. The true sovereign power still lies with the people. See, JACKSON, John H., «Sovereignty: Outdated Concept… *id.*

Even legislative power in many areas has been transferred to the Union's institutions, however, the EU Member States still have the important role to enforce such laws. See, CHAMON, Merijn, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, 1st Edition, Oxford University Press, Oxford, 2016;

Union's legal order. The Treaties made member states renounced an important part of their national sovereignty in favor of EU institutions in order to achieve common values and similar objectives of integration aimed at peace, security, and prosperity within the European continent[236].

The European Union's legal order is based on its own source of law. Primary legislation is at the top of the hierarchy and is represented by the Treaties and general legal principles, in which there are binding in their entirety and directly applicable in all member states[237]. Followed by international agreements concluded by the Union in which there are binding the Union and member states and considered as an integral part of Union law[238], and secondary legislation based

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[236] Treaty on the European Union (TEU) Article 5 stipulating general. It is rules binding Union law, including, the principle of conferral of (limited) competences, principle of subsidiary and proportionality. Every measure taken by the Union must respected to the limitation of conferred competence, and the member state must oblige accordingly.

See also, Treaty on the European Union (TEU) Articles 2–6, in which those articles determining the competences of the EU.

[237] Judgment of the Court of 15 July 1964 on Flaminio Costa v E.N.E.L. – Case 6-64. The Court established the principle of the primacy of Community law over conflicting national provisions, thus affirming its binding character which is a fundamental requirement of the rule of law and – according to at least some schools of legal theory – of law itself. In other word, the Judgment represent a principle of supremacy of EU law. In which EU law is directly applicable, and the provision of the TFEU will override any inconsistent national legislation.

Thus, the landmark decision of *Van Gend & Loos* (Judgment of the Court of 5 February 1963 on NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration - Case 26-62) established that provisions of the Treaty Establishing the European Economic Community were capable of creating legal rights which could be enforced by both natural and legal persons before the courts of the Community's member states (Principle of Direct Effect). Part of the ECJ judgment stated that "The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community". It is interesting to note that according to the aforementioned judgment, certain conditions must be met in order to have a direct effect. They must possess conditions of; Be sufficiently clear and unambiguous in its content for judicial application, establish an unconditional obligation, not depend on further measures being taken by the Member State, and be capable of creating rights for individuals.

Furthermore, the Court the Court insisted on adequate and effective remedies for individual loss caused as the result of a breach of Community law. See, Judgment of the Court of 10 April 1984 on Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, Case 14/83, para. 28. See also, MAGEN, Amichai &PECH, Laurent, «The rule of law and the European Union», Christopher MAY &Adam WINCHESTER (Eds.), *Handbook on the Rule of Law*, Edward Elgar Publishing, Cheltenham, 2018;

[238] Article 216 (1) of the TFEU laid down the boundary of power of the EU to conclude international agreements with one or more third countries. The Article distinguished into 2 categories, which are the competence that already granted by the Treaties (the specific treaty making competences is provided for by the Treaties. Ex. Accession to the European Convention on Human Rights Article 6 para. 2 of the TEU, sphere of culture under article 167(3) of the TFEU, and public health policy under article 168(3) of the TFEU), and the implicit external agreement (Necessary for attaining one of the objectives of internal Treaty competence, competence is provided for in a legislative act, and in case if Member States agreements are likely to affect common rule or alter their scope). See, Treaty on the Functioning of the European Union (TFEU) Section 216 (1). See also, GEIGER, Rudolf, DANIEL-ERASMUS, Khan &MARKUS, Kotzur, *European Union Treaties: A Commentary*, 1st Edition, Hart Publishing, Munich, 2015;

It is interesting to note that the European Court of Justice (ECJ) has affirmed the EU's implicit external competences in the landmark decision of the Judgment of the Court of 31 March 1971 on the Commission of the European Communities v Council of the European Communities (ERTA Judgment), European Agreement on Road Transport - Case 22-70, para. 16. Then, later supplemented in the Judgment of the Court of 14 July 1976 on Cornelis Kramer and others (Kramer Judgment) - Joined cases 3, 4 and 6-76, para 19/20. In which these decisions referred

on the treaties, in which there are various types of secondary legislation with different applications regarding its nature[239]. In general, the EU member states in a mutually sincere manner shall ensure fulfillment of their obligations arising from the Union Treaties and from the acts of the Union institutions[240]. Alongside with the Commission (As a guardian of the treaty[241]), monitoring that all European Union member states are properly applying EU law to their national laws[242].

The European Union has been aware of the increasingly direct confrontation between the private party and Union's administrations. The European Union value that their citizens are

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that the Union had an implicit treaty making competence for attaining certain aims in cases in which the Union institutions were provided with competences to act in the internal sphere for reaching such aims.

239 There are various types of the secondary legislation, so called, regulations, directives, decisions, recommendations, and opinions. See, Treaty on the Functioning of the European Union (TFEU) Article 288 (Ex. Article 249 TEC).

Regulations have a general application binding in their entirety (Union institutions, Member States, and private persons) and directly applicable. Regulations are directly applicable as the date of entry into force without the needs for Member States to transpose into their national laws.

Meanwhile, directives are binding to any or all Member States whom they are addressed. Member States have to transposes directives to their national law within time limited by directives. Directives leave national authorities to choose their own form and method to transpose such directives into their national law. Member States has duty to impose directives in the sincere manner to make sure that directives are effective in their national laws. In case that national failed to transpose directives correctly and efficiently to their national laws, private persons are entitled to the right to seeks compensation from a member state which did not comply with the EU law. See, Andrea Francovich and Danila Bonifaci and others v Italian Republic of the European Court of Justice (CJEU) on 19 November 1991 - Joined cases C-6/90 and C-9/90, para. 46.

Decisions, recommendations and opinions can be made by various EU institutions acting alone or with others e.g. by the Council, the Council together with the Parliament or the Commission. Decisions are generally concerned with the implementing of other legislation. They are binding specifically on specific entities or person in which decisions, recommendations and opinions addressed to them (Member States, natural or legal persons). Recommendations and opinions do not confer any rights or obligations on those to whom they are addressed. However, if that Member State has adopted decisions into act. Those decisions may be directly applicable on the same basis as directives.

240 The Treaty on European Union (TEU) Article 4 (3).

241 Judgment of the Court of 11 August 1995 on Germany v Commission, Case no. 431/92, para. 22.

242 Treaty on the Functioning of the European Union (TFEU) Article 258 (ex Article 226 TEC). The infringement procedure under article 258 authorized the Commission to deliver a reasoned opinion to the Member States when the Commission seen that the Member State failed to fulfill its obligation under the Treaties. Thus, if the State concerned does not comply with such reasoned opinion, the Commission may bring the dispute to the CJEU. This article made the Commission to be so called; "The guardian of the Union". See, ECJ Judgment of the Court (Fifth Chamber) of 1 February 2001 on the Commission of the European Communities v French Republic - Case C-333/99, para. 23. Moreover, the Commission has a certain margin of discretion on whether it should take action on a specific infringement, however the Commission are obligate to initiate an infringement procedure (Even the breach was minor) when its appear that the Member State failed to obligate to their duties under the Treaties. See, Order of the Court of First Instance (Second Chamber) of 12 November 1996 on Syndicat Départemental de Défense du Droit des Agriculteurs (SDDDA) v Commission of the European Communities - T 47/96, para. 2. See also, Judgment of the Court (Sixth Chamber) of 17 July 1997 on Commission of the European Communities v Italian Republic - Case C-43/97, para. 8. For the general discussion, See, BALDWIN, Robert, CAVE, Martin &LODGE Martin, *Understanding Regulation: Theory, Strategy, and Practice*, 2nd Edition, Oxford University Press, Oxford, 2013;

Thus, the Member States themselves also bound to monitor the compliance of others Member States to the EU's Treaties, if one or more Member States foreseen that other Member States failed to fulfill their obligations under the Treaties, they may bring the dispute to the CJEU under Article 259 of the TFEU. In addition, for the purpose of EU's laws supremacy, Member States are not allowed to submit cases in the boundary of the EU's jurisdictions to other international or national court or tribunal. See, Judgment of the Court (Grand Chamber) of 30 May 2006 on Commission of the European Communities v Ireland - Case C-459/03, para. 132.

entitled to expect a high level of transparency, efficiency, access to information, swift execution, and responsiveness from the Union's administration to their complaints by their rights under the Treaties. The protection of private rights against EU administrations could be found in the context of EU law. The system of EU administrative law, which governs the implementation of Union law is often referring as "European Administrative Law"[243].

There are acceptances of administrative law's concept throughout Europe. National legal systems in Europe are familiar with either a specialized administrative court system or special procedural rules on administrative law disputes between citizens and administrative authorities[244].

At the European Union level, a number of rules and/or principles of EU laws that focus on administrative procedures or are especially relevant to administrative law are mainly embedded in the primary law, case law of the Court of Justice of the European Union (CJEU), international agreements concluded by the Union[245], secondary legislation, soft law and unilateral commitments by the Union's institutions, and decisions made by the European Ombudsman. Those aforementioned sources create substantial numbers of principles and/or rules of EU administrative procedure, such as, the principle of subsidiary, non-discrimination, judicial review, proportionality, duty to give reasons, access to documents, transparency, etc.[246].

There are three EU administrative law principles that consider as the umbrella principles[247]; which are the "Rule of law" under Article 2 of the Treaty on European Union (TEU)[248], the "Right to good administration" under article 41 of the Charter of Fundamental Rights of the European Union (Charter)[249], and the principle of "Sincere cooperation" under Article 4(3) of the Treaty on

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243 The term "European Administrative Law" was introduced by Jürgen Schwarze at the end of the eighties, and the term "European Administrative Law" is widely used until today. See, WIDDERSHOVEN, Rob J.G.M., «Developing Administrative Law… *id.*

244 DRAGOS, Dacian C. &MARRANI, David, «Administrative Appeals… *id.*

245 For example, United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), adopted on 25 June 1998. Aarhus Convention guarantees the right of everyone to receive environmental information that is held by public authorities, the right to participate in environmental decision-making, and the right to review procedures to challenge public decisions that have been made without respecting environmental law and the two aforementioned rights.

246 CRAIG, Paul, *EU Administrative Law*, 3rd Edition, Oxford University Press, Oxford, 2018;

247 *Ibidem.*

248 Treaty on European Union (TEU) Article 2. See more details in 2.2.3.1 (Principle of Rule of Law).

249 See, the Charter of Fundamental Rights of the European Union Article 41.

In addition, the definition of principle of Good Administration also understood as the tool to ensure the efficient and effective use of EC economic resources, duty to use the authoritative powers according to the procedural rules established by EC law, and the prohibition of "Mal administration". In which the Ombudsman report in 1997 defines the term "Maladministration" as "Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it". See more details in 2.2.3.2 (Principle of Good Administration).

European Union (TEU)[250]. Thus, besides these three umbrella principles, there are more principles in relation to the administrative procedure in EU legislation[251]. However, it is not possible to examine all of the principles in one chapter. Therefore, we will aim our study based on three umbrella principles in relation to our thesis topic, in which we shall examine them in the last part of this chapter.

Principles and/or rules regarding to administrative law have developed and seem to continue developing in the sector-specific procedure (Sector specific approach). The European Union has no coherent and comprehensive set of codified rules of administrative law. In other words, there is no establishment of the authoritative catalog of general principles of EU administrative law, even though there is a clear existence in certain sectorial areas such as competition and state aid. The lack of a general code in the field of EU administrative procedures brought concerns among the EU legal society[252]. The reasons for such concerns, *inter alia*, are the difficulties for citizens to understand their administrative rights under Union law, the problem in

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[250] Treaty on European Union (TEU) Article 4 (3). See more details in 2.2.3.3 (Principle of Sincere Cooperation).

[251] There are more principles in relation to administrative procedure embedded in the primary legislation. For example, article 298(1) of the Treaty on the Functioning of the European Union (TFEU) provided rule that the institutions, bodies, offices and agencies of the Union must support of an open, efficient and independent European administration. Meanwhile, article 296(2) of the TFEU required reasoning for legal acts. Article 15 of the Treaty on the Functioning of the European Union (TFEU) enshrined the principle of transparency including right of access to documents, Article 18 of the Treaty on the Functioning of the European Union (TFEU) stated nondiscrimination on national basis, and many more other protections provided by the TFEU.

Thus, in the Charter of Fundamental rights of the European Union (The Charter), which with entry into force of the Treaty of Lisbon acquired the same legal status as the Treaties, has more principle regarding to administrative procedural, for example; rights of access to documents under article 42 of the Charter, equality before the law under article 20 of the Charter, non-discrimination under article 21 of the Charter, right to refer to Ombudsman under article 43 of the Charter, right to an effective remedy and to a fair trial under article 47 of the Charter, presumption of innocence and right to defense under article 48 of the Charter, and principle of legality of EU administration under article 52 of the Charter.

[252] In response to concern with the lack of codification rules of administrative procedural principles, there are proposal and recommendation to codify the European Administrative Procedure Act or something in common. With aim to ensure the right to good administration and ensuring an open, efficient and independent EU civil service. Alongside with reference to the legal basis of article 41 of the Charter and Article 298 of the TFEU, there is a model rules on EU administrative procedure developed by the Research Network on EU Administrative Law (ReNEUAL). ReNEUAL pointed out the needs to simplify EU administrative law by codify principles in the "recitals" of the directive. See, ReNEUAL Model Rules on EU Administrative Procedure Updated Version 2015 for publication in print by Oxford University Press (2017), available online at <http://reneual.eu/images/Home/ReNEUAL--Model-Rules-update-2015_rules-only-2017.PDF>. See also, In-depth analysis on the topic of «The General Principles of EU Administrative Procedural Law» from Directorate General for internal policies, Policy Department C: Citizens' rights and Constitutional Affairs, Legal Affairs (2015).

Thus, the European Parliament resolution of 9 June 2016 has adopted the proposal for a regulation for the European Parliament and of the Council for an open, efficient, and independent European Union administration. The purposed regulation by the European Parliament aim to codify and simplify the principles and/or rules regarding to EU Administrative Law for Union's institution. See, European Parliament Resolution of 9 June 2016 for an open, efficient, and independent European Union Administration (2016/2610(RSP)).

However, even there are efforts to codify EU administrative procedural act. Principles and/or rules regarding to EU administrative law still developing in the sector specific procedure until today.

balancing between effective administration and protection of individual rights, and the resolving administrative issues in a case-by-case approach[253]

2.2.2 The European Union's Competence over Foreign Investment

The European Union manages trade relations with third countries in the form of trade agreements. They are designed to create better trading opportunities, overcome related barriers, and contain a certain level of investment protection reciprocally. Besides, the European Union's trade policy is also used as a vehicle for the promotion of European principles and values, from democracy and human rights to environmental and social rights[254].

As it appeared in the Treaty on European Union article 5 that the limit of the European Union's competence is governed by the principle of conferral. Under the principle of conferral, the competence must be exercised with respect to the principle of subsidiary in which the decisions shall be taken as closely as possible to the citizen and that constant checks are made to verify that action at the EU level is justified in light of the possibilities available at national, regional or local level, and except for the exclusive competence, the EU must not take action unless such action shall be more effective than national, regional, or local levels. Thus, actions by the EU must be done in respect of the principle of proportionality, in which the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties[255].

The entry of the Lisbon Treaty has significantly altered the determination of the EU's competence over foreign direct investment (FDI). It made an FDI fall under the external exclusive competence of the European Union[256]. In which, article 207 of the TFEU provided that the

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253 European Parliament Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)). See also, European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610(RSP))

254 CRAIG, Paul, EU Administrative… *id.*

255 Treaty on the European Union (TEU) Article 5 (Ex article 5 TEC). See also, <https://eur-lex.eu>. See also, MACCORMICK, John, Understanding the European… *id.* See also, CHAMON, Merjin, EU Agencies:… *id.*

256 The distribution of competences between the EU and EU countries also applies at international level. Where the EU negotiates and concludes an international agreement, it has either exclusive competence or competence which is shared with EU countries. The European Union has a special legal personality. Under the principle of conferral, the EU has authority to negotiate and conclude the international agreements, and it shall be binding all the EU member states.

It is important to distinguish whether the EU external competence in each matter is exclusive or shared. The exclusive competence is when the EU alone has the power to negotiate and conclude the agreement. Article 3 of the TFEU laid down the specific area of the exclusive competence. For example, in the matter of EU's FDI is consider as exclusive competence because FDI is considered as the common commercial policy (CCP). Therefore, the competence to conclude the new BIT is belongs to the European Commission, with the approval from the Council in accordance with procedures in the article 218 of the TFEU.

conclusion of tariff and trade agreements relating to foreign direct investment fell within the scope of the common commercial policy (CCP)[257]. Thus, Article 3(1) (e) TFEU provides that the EU has exclusive competence in the field of the CCP.

The negotiation and conclusion of EU international investment agreements (IIAs) are done by the European Commission, subjected to prior authorization from the European Council, acting as a decision-making body. Alongside with the European Parliament, to a certain extent, as a co-decision-making body. The conclusion of EU IIAs shall be done in respect of specific rules according to the conclusion of the international agreements under article 218 of the TFEU[258].

Article 218 of the TFEU provides for significant exceptions by creating general links with the procedural characteristics of the substantive power-conferring provisions. Especially, for article 207 of the TFEU, in which the article explicitly competence on the regulation of foreign direct investment as part of the common commercial policy (CCP)[259]. Article 207 of the TFEU is an indispensable legal basis for the conclusion of EU IIAs, in which the article covers the establishment and post-establishment treatment and operation of foreign investment. Thus, article 207 of the TFEU also distinguishes itself from other substantive power-conferring provisions and provides its own autonomous rules for the negotiation of EU IIAs. Therefore, with its new competence, without doubt, made the EU became a new and important actor in the field of

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Meanwhile, shared competence refers to agreements that required the consents from the EU member states. See, Article 4 of the Treaty on the Functioning of the European Union (TFEU), in which the article set out the framework of shared competence.

257 Treaty on the Functioning of the European Union (TFEU) Article 207 (Ex Article 133 TEC). See also, REINISCH, August, «The Division of Powers Between the EU and Its Member States "After Lisbon"», Marc BUNGENBERG, Jorn GRIEBEL &Steffen HINDELANG (Eds.), *International Investment Law and EU Law*, Springer, Heidelberg, 2011;

258 Treaty on the Functioning of the European Union (TFEU) Article 218 (Ex Article 300 TEC). The article contains procedure of the Union to conclude the international agreements. Also, the article contains rules on a preventive judicial control before the Union entering into the agreement (TFEU Article 218 para. 11).

259 Treaty on the Functioning of the European Union (TFEU) Article 207 (Ex Article 133 TEC). The article regulated the content and the procedure of the common commercial policy (CCP), which is cooperate in Part Five of the TFEU regarding to External Action of the Union. CCP is strengthening the Union's general foreign policy objective (democracy, human rights, rule of law).

Regarding to foreign direct investment (FDI), which is a part of CCP, the term FDI is refers to the activity of foreign investors to acquisition of control over a company by mean of acquiring either majority of shares or the company as such, with intention to exercise significant influence over such company. The term is not covering the portfolio investment which foreign investors only aimed to the increasing of the value of share. Thus, it is important to note that the term also exclude the treaty making competence of the member state. Especially, the ability to conclude the bilateral investment treaties (BITs) since such competence already transferred from the member states to the Union. See, GEIGER, Rudolf, DANIEL-ERASMUS, Khan &MARKUS Kotzur, European Union Treaties… *id.*

international investment policy and law[260]. More detail of the EU's exclusive competence over FDI shall be discussed in detail in Chapter 5 of the thesis.

2.2.3 Umbrella Clauses in the European Union Investment Administrative Law

Despite a huge argument that a good legal system is not the number one reason that made foreign investors to invest in a host country, but rather a significant business opportunity that helps in attracting foreign direct investment. In other words, a chance to make a good return on their investment would be the number one factor to make foreign investors decide to make the investment in a host country, not a perfectly legal system. (For certain, also without obvious obstacles to the investment, such as war, severe social unrest, economic crisis, or legislative actions that appear to be against FDI). However, it is undeniable that if two host countries offer equal business opportunities to foreign investors, more likely that foreign investors shall decide to invest in a host country with a better legal system. A legal and judicial system that includes consistent, modern legislation and effective and efficient courts and regulatory institutions that interpret and enforce the laws in a fair and transparent manner is a desirable and laudable goal and, all things being equal. A country that has such an ideal system will attract more FDI than one that does not. Additionally, a foreign investor will generally prefer a country whose legal system is developed, fair, open, and transparent than one in which the rule of law is absent[261].

As mentioned in 2.2.1 that there are three EU administrative law principles that consider as an umbrella principle, in which those three principles are, the "Rule of law" under Article 2 of the Treaty on European Union (TEU), the "Right to good administration" under article 41 of the Charter of Fundamental Rights of the European Union (Charter), and the principle of "Sincere cooperation" under Article 4(3) of the Treaty on European Union (TEU). These three umbrella principles are contained and defined by a series of sub-principles. Each of these sub-principles is developed and referred to in CJEU case law as specifically identifiable principles conferring rights on individuals and/or obligations on public bodies. It is important to emphasize that it is not possible to identify all of the EU administrative law principles in one chapter. Therefore, we would like to identify specifically on these three umbrella clauses in the EU investment administrative law.

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[260] HINDELANG, Steffen &MAYDELL, Niklas, «The EU's Common Investment Policy – Connecting the Dots», Marc BUNGENBERG, Jorn GRIEBEL &Steffen HINDELANG (Eds.), *International Investment Law and EU Law*, Springer, Heidelberg, 2011;

[261] HEWKO, John, «Foreign Direct Investment: Does the Rule of Law Matter?», available online at <https://carnegieendowment.org/files/wp26.pdf>.

2.2.3.1 Principle of Rule of Law

In a landmark judgment of *Les Verts*[262], for the first time, the European Court of Justice famously referred to the European Community (EC) as "a community based on the rule of law" [263]. Neither the Member States nor the EC institutions can avoid review of the conformity of their acts[264]. The European Union executes its actions in regard to the principle of the rule of law. Besides, the EU also plays its role as "an exporter" of the principle of the rule of law to third countries[265], mainly through the conclusion of international agreements[266].

The amendment of the Lisbon Treaty has amended the wording of articles 6, 7, and 49 of the previous TEU. In line with the defunct Constitutional Treaty, the Lisbon Treaty refers to all the principles that used to be mentioned in article 6 (1) of the previous TEU as values. It also offers an inflated list of those values upon which the EU is said to be founded. The entry of the Lisbon Treaty has changed article 6 of the TEU, becoming article 2 of the TEU nowadays. In which, article 2 of the TEU stated that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the

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[262] Judgment of the Court of 23 April 1986 on Parti écologiste "Les Verts" v European Parliament - Case 294/83.

Following the *Les Vert* Judgment, the European Court of Justice also reaffirmed the political and legal nature of the European Union, qualifying the European Economic Treaty of "the constitutional charter of a community based on the rule of law" which established the new legal order. See, Opinion of the Court of 14 December 1991. - Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty. - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area. - Opinion 1/91.

[263] Judgment of the Court of 23 April 1986 on Parti écologiste "Les Verts" v European Parliament - Case 294/83, para. 23.

[264] *Ibidem.*

[265] There is criticism that the EU could not claim its success as the "exporter" of the concept of rule of law, since the EU only promote a broad concept of rule of law, in which the concept is already widely accepted by the international communities. See, PECH, Laurent, «Promoting the Rule of Law Abroad: on the EU's Limited Contribution to the Shaping of an International Understanding of the Rule of Law», Dimitry KOCHENOV &Fabian AMTENBRINK (Eds.), *The European Union's Shaping of the International Legal Order*, Cambridge University Press, Cambridge, 2013; See also, Statement on behalf of the EU and its Member States by Gilles Marhic, Minister Counsellor, Delegation of the EU to the UN, at the Sixth Committee on Agenda item 83: The Rule of Law at the national and international levels (10 October 2014).

However, there are literatures supporting that the EU is the exporter of its common policy which are, principles of democracy, the rule of law, and fundamental rights. Those obligations to the Union to export its value as confirmed by Articles 21, 3(5), and 8 of the TEU. For examples, See, CREMONA, Marise, «Values in EU Foreign Policy», Panos KOUTRAKOS &Malcolm EVANS (Eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World*, Hart Publishing, Munich, 2011; See also, BÁRD, Petra et al., *An EU mechanism on Democracy, the Rule of Law and Fundamental Rights*, in CEPS Papers in Liberty and Security in Europe, 2016;

[266] The European Parliament repeatedly indicate that the conclusion of international agreements with third countries should include the clause of democracy, rule of law and human rights, as well as social and environmental standards. See, European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)).

Agreements that promote the EU principles aboard, for example, the signing of the partnership agreement between the EU and members of the African, Caribbean and Pacific Group of States (ACP countries) signed in Cotonou on 23 June 2000 (Contonou Agreement). See, Contunu Agreement Article 9.

rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"[267]. There have been continuous efforts from European institutions to encourage the EU member state's compliance with the values enshrined in Article 2 of the TEU[268].

The principle of the rule of law guarantees fundamental rights and values, allows the application of EU law, and supports an investment-friendly business environment. Despite negative claims that the principle of the rule of law is characterized with uncertainty and complexity[269], it is generally accepted that the principle is considered as a "good thing"[270]. The principle is not only considered as a good thing for legal and political points but also for its contribution to economic growth[271]. In other words, the principle of the rule of law helps states to be more properly governed with peaceful, and at the same time, with sustainable economic development.

The first intention of the creation of the rule of law is to prevent the governors from exercising their powers without limitation. The idea of the rule of law was enshrined in the 17th century, as legal scholars at the moment attempted to limit the power of the monarchy, within the idea of "government of law, and not of men"[272]. The principle believes that people are equal before

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[267] Treaty on European Union (TEU) Article 2. The article laid down a "fundamental value" which is the self-conception of the Union. According to word in Article 2, the word "values" appears to be into two different levels, which are, the principle of a free democracy (Principle of freedom, principle of democracy, and human rights in general), and values which is governing civil society (Pluralism, non-discrimination, tolerance, justice, and equality between men and women). Both groups depend on each other. Also, Article 2 provides an obligation of the Union to respect and promote the "Value", because without the creation of such obligation, the value would be senseless. See, GEIGER, Rudolf, DANIEL-ERASMUS, Khan &MARKUS Kotzur, European Union Treaties… *id.*

[268] European Commission, Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final/2, 19 March 2014.

[269] Even there are increasing of the use of rule of law to assure the stability, order and economic development, combating corruption, upholding human rights, promoting legal reforms, and improving access to justice. However, there are critics such as the rule of law create a ruling elite that has the power to manipulate through the law. As Harvard law Professor Morton J. Horwitz, strongly criticized that "By promoting procedural justice [the rule of law] enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage". See, HORWITZ, Morton, «The Rule of Law: An Unqualified Human Good», *Yale Law Journal* Vol. 86 Issue. 3 (1977), 591; Also, the uncertainty about what the essence of the rule of law actually is. See also, CAROTHERS, Thomas, «The Rule-of-Law Revival», Thomas CAROTHERS (Ed.), *Promotion the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington D.C., 1st Edition, 2006; See also, CAROTHERS, Thomas, «The Problem of Knowledge», Thomas CAROTHERS (Ed.), *Promotion the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington D.C., 1st Edition, 2006;

[270] PECH, Laurent, *Rule of law as a guiding principle of the European Union's external action*, Centre for the Law of EU External Relations (CLEER) working paper 2012/13, Hague, 2013;

[271] *Ibidem.*

[272] The idea of "government of law, and not of men" has been spoken since an early time. The idea played crucial rules in the development of the concept of rule of law. The idea of "government of law, and not for men" in an early modern period was captured by James Harrington in *The Commonwealth of Oceana* (1656), one part quote "Whether a Commonwealth be rightly defined to be Government of Law and not of Men, and Monarchy to be the Government of from Manor few Men, and not of Laws" (Empire of laws, not of men. Later, the idea was quoted up by the 2nd U.S. president, John Adams in the 1780 Massachusetts state constitution.

the laws. People must be able to aware in advance that the law intended for them to perform or not perform actions, and what is the consequences if one's did not comply with those laws. The good idea of the rule of law, followed by the creation of many public law principles, for example, the principle of no punishment without law **(***nullum crimen, nulla poena sine lege*), and the rule against double punishment[273].

In the EU (Also in many countries, including Thailand), despite lacking conceptualizing, single and authoritative document clarifying what the rule of law entails and how one may assess a country's adherence to this principle in theory as well as in practice[274]. Yet, it is generally agreed that the principle of the rule of law may refer to the principles of separation of powers[275], legality (including a transparent, accountable, and democratic process for enacting law)[276], legal certainty[277],

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273 PHAKEERAT, Vorachet, «State and Public Law», *Project of Materials for Faculty of Law Thammasat University* (2014), 159-190;

274 For a general idea of related principles to the EU's Rule of Law, See, KONSTADINIDES, Theodore, *The Rule of Law in the European Union: The Internal Dimension*, 1st Edition, Hart Publishing, Oxford, 2017. See also, SCHROEDER, Werner, «The European Union and the Rule of Law-State of Affairs and Ways of Strengthening», Werner SCHROEDER (Ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart Publishing, Oxford, 2016;

275 Charles de Secondat Montesquieu, a famous French political thinker referred the term of doctrine of separation of power as "There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals". The doctrine of separation of powers can simply explain as the exercise of powers through three branches, which are, legislative, executive and judiciary. The doctrine of separation power can be seen both in EU government (In certain levels) and within the national of each EU member states. See, CONWAY, Gerard, «Recovering a Separation of Powers in the European Union», *European Law Journal* Vol. 17 No. 3 (2011), 304–322;

276 Principle of legality could also refer as the supremacy of law. Modern principle of legality was introduced by the British constitutional lawyer Professor A.V. Dicey in his Introduction to the Study of the Law of the Constitution (1885). The principle required that all people must obey the laws. This requirement applies not only to individuals, but also to authorities, public and private. In so far as legality addresses the actions of public officials, it requires also that they require authorization to act and that they act within the powers that have been conferred upon them. Legality also implies that no person can be punished except for the breach of a previously enacted or determined law and that the law cannot be violated with impunity. Law should, within the bounds of possibility, be enforced.

277 Legal certainty is essential to the confidence in the judicial system and the rule of law. Legal certainty ensuring the trust of investors, in which they can expect the stable and the enactment of law in the consistence manner. Legal certainty requires that legal rules are clear and precise. Thus, the principle of rule of law must aim at ensuring that situations and legal relationships remain foreseeable. Legal certainty also linked to the legitimate expectation, whereas promise by the state to the individual should be honored. Besides, the retroactively also against the principle of legal certainty. See, MARTÍN RODRÍGUEZ, Pablo, «The principle of legal certainty and the limits to the applicability of EU law», *Cahiers de Droit Europeen* Vol. 52 No. 1 (2015), 115-140;

See, Judgment of 12 February 2015 on Parliament v Council - C-48/14, para. 45 stated that "the principle of legal certainty requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law" See also, the Charter of Fundamental Rights of the European Union Article 52.

non-discrimination and equality before the law[278], access to justice[279], judicial review[280], and the independence of the judiciary[281].

Even though the principle of the rule of law has been used for the purpose of assuring stability, order, and economic development, the Council of Europe also links the rule of law as an important tool to fight corruption, organized crime, and money laundering[282]. Also, the EU recognizes the rule of law as an "interrelated trinity of concepts", where the rule of law always supports with the concept of democracy and human rights. In other words, the EU believes that there can be no rule of law without democracy and respect for human rights; meanwhile,

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[278] Non-discrimination and equality before the law have strong foundations in the European Union. The Treaty alongside with directives and other initiations gave the power to the European Union to combat with discrimination and inequalities in based on sex (including gender identity), racial or ethnic origin, religion or belief, disability, age, and sexual orientation.

The term non-discrimination means that the laws refrain from discriminating against individuals or groups. Any unjustified unequal treatment under the law is prohibited and all persons have guaranteed equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The aim of non-discrimination law is to give fair and equal opportunities to all the people in the society. According to the principle, individuals in the similar situations should be equally protected. The Treaty prohibited discrimination on the ground of nationality. See, the Treaty on the Functioning of the European Union prohibits (TFEU) Article 10.

The term equality before the law means that everyone is subject to the same laws, with no individual or group having special legal privileges. See, the Charter of Fundamental Rights of the European Union article 20. See also, the Charter of Fundamental Rights of the European Union article 21.

[279] Access to justice could simply define as the guarantee of everyone's right to go to court, or to an alternative dispute resolution body, and to obtain a remedy when their rights are violated. However, it is interesting to note here that EU access to justice is facing a challenge in several factors, including a lack of rights awareness and poor knowledge about the tools that are available to access justice. See, report from the European Union Agency for Fundamental Rights at <https://fra.europa.eu>. See also, article 47 and article 48 of the Charter.

In the EU, effective access to justice is considered to be a core fundamental right, as well as a general principle of EU law. See, <https://fra.europa.eu>, See also, CUNIBERTI, Gilles, «The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance, and Efficiency», *International Comparative Law Quarterly* Vol. 57 Issue 1 (2008), 25-52; For general discussion, see the study by the European Parliament Policy Department for Citizens' Rights and Constitutional Affairs on the topic of «Effective Access to Justice», available online at, <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596818/IPOL_STU(2017)596818_EN.pdf>.

[280] Judicial review is the mechanism that allow courts to review the legality of acts or decisions from authorities. For the EU judicial reviews, See, the Treaty on the Functioning of the European Union Article 263 (ex Article 230 TEC).

[281] The independence of judiciaries requires the independent and impartial of the judiciary. Independence means that the judiciary is free from external pressure and is not controlled by the other branches of government, especially the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. See, Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies). See also, <https://www.coe.int/en/web/commissioner/-/the-independence-of-judges-and-the-judiciary-under-threat>.

[282] Memorandum of Understanding between the Council of Europe and the European Union of 23 May 2007, para. 9.

democracy could not happen without the rule of law and the respect of human rights, and *vice versa*, human rights goals could not be achieved without the rule of law and democracy[283].

The concept of the rule of law is not only enshrined at the EU level, but also appears in the EU member states domestic law. There are divergences of understanding and different languages to the notion of the rule of law in each member state. In other words, the term the rule of law of each member state is not always synonymous with the exact meaning of the term British rule of law. The notion of the rule of law appears in the terminology of EU member states, the arguably influential ones as, Rule of Law (British)[284], Rechtsstaat (German)[285], and Etat de Droit

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[283] The concept of the "Rule of Law", along with democracy and human rights, makes up the three pillars of the Council of Europe and is endorsed in the Preamble to the European Convention on Human Rights. See, Preambles and Article 3 of the Statute of the Council of Europe.

[284] British's concept of rule of law is unique with the longest-running continuous tradition of the rule of law. The early concept of British's rule of law was described by Albert Venn Dicey, a famous British jurist and constitutional theorist. His famous book of "An Introduction to the Study of the Law of the Constitution", first published in the year 1897, has explored un-codified concept of British's Constitution of that period. His book represented three fundamental meanings of rule of law, which are; "that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.", "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.", and "is pervaded by the rule of law on the ground that the general principles of the constitution … are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.". See, DICEY, Albert Venn, *An Introduction to the Study of the Law of the Constitution*, 10th Edition, Palgrave Macmillan, London, Copy rights from 1979; See also, BINGHAM, Tom, *The Rule of Law*, 1st Edition, Penguin UK, London, 2011;

Even there are extensive and diverse of the idea of rule of law, Professor Paul Craig offers a useful synthesis which also discerns three modern meanings. Those three meanings are, (1) the rule of law and lawful authority, (2) the rule of law and guiding conduct, and (3) the rule of law, justice and accountable government.

The rule of law and lawful authority refers to a legal foundation to support the actions from the government. Actions by government without foundation would regards as unlawful by the UK courts, since the government does not have the authorities to execute such actions. Meanwhile, Professor Paul Craig refers the rule of law and guiding conduct as laws that properly passed by parliament, with proactive manners (not retrospective). Thus, the law should be clear, fair, relatively stable, equally and generally applied, with independent judges. In other word, he summed up that "laws should be capable of guiding ones conduct in order that one can plan one's life". Finally, with some challenges, Professor Paul Craig refers the rule of law, justice and accountable government as the exercise power of courts to control the government's actions. See, CRAIG, Paul, «Rule of Law», available online at <https://publications.parliament.uk/>.

The concept of rule of law also enshrines in the UK's Constitutional Reform Act. See, Constitutional Reform Act 2005 Article 1.

[285] The concept of "Rechtsstaat" does not always reflect the English language notion of the British's Rule of Law. The term Rechtsstaat is originated in Germany in 1798. Recht stands for law (Also mean rights in German language), and Staat stands for state. Due to the link that the concept of Rechtsstaat establishes between law and the state, it is common understanding that Immanuel Kant is the spiritual father of the German term, although he was not really using the term. Later, by Johan Wilhelm with help from Robert von Mohl simplified that the Rechtstsstatt was use for the purpose in opposition to the notion of "police State" (Polizeistaat). Mohl mentioned that "organiz[ing] the living together of the people in such a manner that each member of it will be supported and fostered, to the highest degree possible, in the free and comprehensive exercise and use of his strengths". See, KOMMERS, Donald P. &MILLER, Russell A., *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd Edition, Duke University Press, Durham, 2012;

Rechtsstaat refers to the exercise of governmental power is constrained by the law. The idea of German Rechtsstaat was vague during 18th and 19th century. The word did come to use in the 19th century, after the post-Nazi, Rechtsstaat returned to, and richly amplified, a normative characterization based on the fundamental value, inscribed in Article 28(1) of the German Basic Law of 1949. The German Basic Law of 1949 Article 28 (1) stated that "The constitutional order in the Länder must conform to the principles of a republican, democratic and social

(French)[286]. Also, the notions appear in other member states such as, Stato di diritto (Italy), Estado de derecho (Spain)[287], and Estado de direito (Portugal)[288].

2.2.3.2 Principle of Good Administration

The principle of good administration is one of the European Union's core principles. The principle of good administration is an important principle to create and maintain the trust of the

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state governed by the rule of law within the meaning of this Basic Law". With constitutional practice, the concept of Rechtsstaat has evolved into a constitutional principle informing all the activities of the state under the law. It also includes fundamental organizational principles, e.g.: the separation of powers, the constitutional judicial review undertaken by the German Constitutional Court or Bundesvervassungsgericht, the principles of legality, fair procedure, and legal certainty, and the principle of proportionality.

Until today, the concept of Rechtsstaat also heavily influenced European legal doctrine in countries such as Italy, France, Netherland, Spain and Portugal. See, GOSALBO-BONO, Ricardo, «The Significance of the Rule of Law and its Implications for the European Union and the United States», *University of Pittsburgh Law Review* Vol. 72 Issue 2 (2010), 231-290;

[286] There is an absent of the term rule of law in French's legal history. Not until the year 2005, there is no statute authoritatively and explicitly referred to the rule of law as a principle of the British Constitution. The French Constitution continues to lack any express reference to the principle of Etat de droit, a term commonly used nowadays as the equivalent of the English rule of law.

The concept of French rule of law (Etat de Driot) was popularized during 19th century by famous legal scholars such as Duguit and Carré de Malberg in order to promote the idea of judicial review of statutory law (With a huge influence from the experiences from United States and German). The popularized of the concept used in the purpose of opposition to the notion of Etat de police (police state). They believed that the Etat de droit was designed to limit the power of the majority Parliament and protect the rights and liberties of the individual against arbitrary action of it.

It is agreed by many literatures that a huge influences of French concept of Etat de Driot occurred on 8 November 1977 when the President of the French Republic, Valéry Giscard d'Estaing gave his famous speech in the Conseil Constitutionnel, quote, "When each authority, from the modest to the highest, acts under the control of a judge who insures that this authority respects the entirety of formal and substantive rules to which it is subjected, the Etat de droit emerges". His speech confirms that principle of Etat de Driot protected a fundamental idea of judicial review of statutory law by the conseil constitutionnel, which elevated the status and importance of the Constitution and constitutionally based decision-making in the political life of the nation, and the limitation of executive power by court. See, PECH, Laurent, «Rule of Law in France», Rendall PEERENBOOM (Ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.*, Routledge, London, 2004; See also, GOSALBO-BONO, Ricardo, «The Significance… *id.*

[287] Spanish Constitution of 1978 with Amendments through 2011, Article 1 (1) stated that "Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system". Thus, the preamble of Spain's constitution also confirms the embracement of rule of law, saying that "Consolidate a State of Law which ensures the rule of law (Estato de dereecho) as the expression of the popular will".

It is also interesting to note that article 9 (3) of Spanish constitution representing a clear account of the formal elements at the heart of the principle of the rule of law, the article stated that "The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favourable to or restrictive of individual rights, the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities".

[288] Portuguese Constitution also contained the principle of Rule of Law (Estado de Direito). See, Constitution of the Portuguese Republic Article 2 stated that "The Portuguese Republic is a democratic state based on the rule of law (Estado de direito), the sovereignty of the people, plural democratic expression and political organisation, respect for and the guarantee of the effective implementation of the fundamental rights and freedoms, and the separation and interdependence of powers, with a view to achieving economic, social and cultural democracy and deepening participatory democracy".

citizens, and at the same time, create an impact on the living standard of citizens. The principle could be deemed as an instrument for enhancing transparency, legal certainty, and predictability in administrative procedures [289]. Thus, the principle of good administration helps in evading unreasonably complicated, formalistic, and long-lasting administrative procedures. It could create a good result in political and social stability[290]. The concept of good administration or sound administration is applied to the public authority's action. The principle aims to legally protect individuals in their contact with public authorities. Citizens should be able to expect for legitimacy and the quality of administrative decisions, alongside with their participation and contribution in the process.

The principle of good administration has been seen as an open-ended notion, an umbrella notion, and a notion of double status. The reason behind that is because from one point of view, the principle could be regarded as a fundamental right for individuals in their relationship with administrative authorities, while from another point of view, the principle is regarded as a general principle or an administrative obligation, whereas the principle stands for requirement or standard for public authorities to take appropriate measures in the administrative matters. It is also important to note that there is no unanimous definition for the concept of good administration in EU law[291]. However, a comprehensive understanding of the notion of the principle of good administration in EU administrative law could be achieved when we investigate the primary EU legislations, the contributions of the European Courts (Case laws), recommendations from various institutions, and the implementation of the principle in the EU's national's levels.

It is worth to mention that Resolution (77) 31, issued by the Council of Europe in which the aforementioned resolution was an important first step toward establishing and defining the notion of good administration in the European Union. Even though the concept of good administration is not explicitly included in the resolution, but there are core principles of good administration within the solution. The Resolution as a result, established certain fundamental principles and standards for the EU's countries to regulate the relationship between individuals and administrative authorities [292]. Afterward, the Council of Europe continued to issue

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[289] CURTIN, Deirdre &DEKKER Ige, «Good Governance: Concept and its application by the European Union», Deirdre M. CURTIN &Ramses A. WESSEL (Eds.), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*, Intersentia, Tilburg, 2005;

[290] MUSTAFA, Areean, «Comprehension of the Principle of Good Administration in the Framework of EU Administrative Law», *Journal of University of Human Development* Vol. 3 Issue 1 (2017), 259-267;

[291] CRAIG, Paul, EU Administrative… *id.*

[292] The Resolution aimed to protect individual who have a contact with an administration by put requirement to implementation of principles to administration. As appendix to the Resolution stated that "The following principles apply to the protection of persons, whether physical or legal, in administrative procedures with regard to any individual measures or decisions which are taken in the exercise of public authority and which are of such nature as

Recommendations to clarified good administration and its sub-principles[293]. Until recently, due to the lack of the EU Administrative Procedure Code, the European Parliament has issued the Resolution requested the Commission to submit a proposal of a regulation on a European Law of Administrative Procedures[294]. The resolution was also favored by The Committee on Legal Affairs of the European Parliament[295].

Every literature would mention The Charter of Fundamental Rights of the European Union (The Charter) when discussing the EU's principle of good administration. The Charter was enacted in 2000, and then became legally binding on the EU member states upon the entry into force of the Treaty of Lisbon in December 2009. The Charter is considered as the first Charter of fundamental rights at the international level which has explicitly documented the principle of good administration as covering subjective procedural rights[296]. The Charter aimed to protect the fundamental rights of the citizens. Such protection also included the "right to good administration", which is codified in article 41 of the Charter. The right to good administration is laid down in the Charter title on citizens' rights. The first paragraph of Article 41 of the Charter protected that every person shall have their affairs handled impartially, fairly and within a reasonable time by all Union institutions, including bodies, offices, and agencies. While paragraph two amplified that the right to good administration also included the right to be heard, access to documents, and obligation to the administration to give a reason. The third paragraph guarantees that compensation shall be made to citizens when damage causes by the administration. And

directly to affect their rights, liberties or interests (administrative acts). In the implementation of these principles the requirements of good and efficient administration, as well as the interests of third parties and major public interests should be duly taken into account. Where these requirements make it necessary to modify or exclude one or more of these principles, either in particular cases or in specific areas of public administration, every endeavour should nevertheless be made, in conformity with the fundamental aims of this resolution, to achieve the highest possible degree of fairness". The following principles were stated in the Resolution, which are; I. Right to be Heard, II. Access to Information, III. Assistance and Representation, IV. Statement of Reasons, and V. Indication of Remedies. See, Resolution (77) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities (Adopted by the Committee of Ministers on 28 September 1977, at the 275th Meeting of the Ministers' Deputies).

293 For example, See, Recommendation No. R (80) 2 of the Committee of Ministers Concerning the Exercise of Discretionary Powers by Administrative Authorities (Adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies). See also, Recommendation No. R (87) 16 of the Committee of Ministers to Member States on Administrative Procedures Affecting a Large Number of Persons (Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies). See also, Recommendation No. R (2000) 10 of the Committee of Ministers to Member States on Codes of Conduct for Public Officials (Adopted by the Committee of Ministers at its 106th Session on 11 May 2000).

294 European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL))

295 Committee on Legal Affairs, Draft Report with Recommendations to the Commission on a Law on Administrative Procedure of the European Union, 2012/2024, 21 June 2012, Rapporteur Luigi Berlinguer.

296 There is the speculation that the Charter would play a tremendously prominent role in the future codification of administrative procedural rules in Europe. See, SOLÉ, Juli Ponce, «EU Law, Global Law and the Right to Good Administration», Edoardo CHITI &Bernado Giorgio MATTARELLA (Eds.), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*, Springer, Heidelberg, 2011;

fourth paragraph assures every person's right to write to the EU institution in one of the languages of the Treaties, and to get an answer in the same language[297].

The European Court of Justice (ECJ) is a dominant player in the development, defining, and recognition of the principle of good administration within the EU[298]. There was a long development of the principle of good administration by the ECJ before the Charter came into force. Among many sub-principles developed by the ECJ, for example, the principle of care or due diligence was used by the ECJ overlapping with the principle of good administration in many numbers of cases[299]. Meanwhile, the right to be heard which is considered to be an important sub-principle to the principle of good administration also frequently invoked in the EU case law[300]. Thus, an obligation to state the reason for an administrative decision which is an important administrative procedural principle also has a long development by the ECJ[301].

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[297] The Charter of Fundamental Rights of the European Union Article 41 (2000/C 364/01). The article is based on the existence of the European Union and the rule of law whose characteristics are developed through the case law which enshrined *inter alia* the right to good administration. See, GEIGER, Rudolf, DANIEL-ERASMUS, Khan &MARKUS Kotzur, European Union Treaties… *id.*

[298] The terminology of good administration is not necessarily the same in all case-law, for example, "good administration", See, Judgment of the Court (First Chamber) of 4 July 1963 on M. Maurice Alvis v Council of the European Economic Community - Case 32-62, para. 1. See also, Judgment of the Court (Grand Chamber) of 6 September 2017 on Intel Corporation v Commission - C-413/14 P, para. 21. The term "sound administration", See, Judgment of the Court of First Instance (Third Chamber) of 6 December 2001 on Aera Cova and Others v Council and Commission – Case T-196/99, para. 22. The term "proper administration" See, Judgment of the Court of First Instance (First Chamber, extended composition) of 18 September 1995 on Detlef Nölle v Council of the European Union and Commission of the European Communities – Case T-167/94, para. 8.

[299] Judgment of the Court of First Instance (First Chamber, extended composition) of 18 September 1995 on Detlef Nölle v Council of the European Union and Commission of the European Communities - Case T-167/94. In this case, the court recognized that the principle of care is subjective rights to individual against administrative authorities. A part of decision quoted (para. 7) "where the Community institutions have a wide power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case".

[300] Judgment of the Court of 23 October 1974 on Transocean Marine Paint Association v Commission of the European Communities - Case 17-74. In Transocean, the court has recognized that the right to be heard as a general principle of the EU law. ECJ reviewed that the Commission has violated the right to be heard by gave a decision in an adversary affected to the Transocean Marine Paint association without giving an opportunity to the Association to comment on the matter. See also, Judgment of the Court of 13 February 1979 on Hoffmann-La Roche & Co. AG v Commission of the European Communities - Dominant position - Case 85/76. In this case, the court observed that the right to be heard is a fundamental principle of community law which must be respected.

[301] Judgment of the Court of 21 November 1991 on Technische Universität München v Hauptzollamt München-Mitte - Case C-269/90. The decision of the court guaranteed the importance of the obligation to state reason, right to be heard, and principle of care. Paragraph 27 of the decision quoted "In the instant case, it must be stated that the Commission's decision does not contain a sufficient statement of the scientific reasons capable of justifying the conclusion that the instrument manufactured in the Community is equivalent to the imported instrument".

Thus, it would be useful to give more explanation that failure to state reason for the administrative decisions would consequently be considered as an infringement of an essential procedural requirement. Therefore, such an infringement can led to the annulment of administrative decisions as being insufficiently reasoned. See, Judgment of the Court of 4 July 1963 on Federal Republic of Germany v Commission of the European Economic Community - Case 24-62. In this case, the court ruled that due to the vagueness and the inconsistency of the statement of the reasons for the decision, the Court decided to annul some part of decisions of the Commission.

Among several codes and guidelines defining the meaning of the principle of good administration[302], it is generally accepted that the European Code of Good Administrative Behavior Proposed by the European Ombudsman and approved by the European Parliament on 6 September 2001 is a prominent step in defining the term EU good administration[303]. The Code is intended to serve as a guide for interaction between the public, citizens, businesses, or civil sector organizations regardless of their nationality or their country of origin. However, it is important to note that the code has no binding nature due to the non-legislative of the EU Ombudsman; therefore, the Code only has a status as a guideline for the Union's legislative and executive institutions and organs regarding the consideration of the principles of good administration. Also, the Code could be considered as a detailed account or the clarification of articles 41 and 42 of the Charter[304], but again, with no binding status, but rather the guideline.

In the Code, the principles of good administration in the EU institutions and bodies were defined. Many sub-principles of the principle of good administration were defined in the Code, and those sub-principles are lawfulness, absence of discrimination, proportionality, absence of an abuse of power, impartiality and independence, objectivity, legitimate expectations, consistency and advice, fairness, and courtesy[305]. Furthermore, the Code also contains the procedural rules of good administration, such as, the administration duty to reply to letters in the language of the citizen, acknowledgment of receipt and indication of the competent official, obligation to transfer to the competent service of the institution, the right to be heard and to make statements, the reasonable time limit for taking decisions, the duty to state grounds for decisions, the indication to appeal possibilities, notification of the decision, data protection, requests for information, requests for public access to documents, keeping of adequate records[306].

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302 There are several important guidelines, for example, See, Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public. See also, Guide to the Obligations of Officials and other Servants of the European Parliament (Code of Conduct). See also, Public service principles for the EU civil service (framed by the European Ombudsman in 2012). Besides, there are several major international organizations tried to define the term of good governance, for example, Good Governance by World Bank, good governance by the IMF, and good governance by international institutions and the WTO. See, WOUTERS, Jan &RYNGAERT, Cedric, «Good Governance: Lessons from International Organizations», Deirdre M. CURTIN &Ramses A. WESSEL (Eds.), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*, Intersentia, Tilburg, 2005;

303 BATALLI, Mirlinda, «Principles of Good Administration under the European Code of Good Administrative Behavior», *Pécs Journal of International and European Law* Vol. 2018 Issue 1 (2018), 26-35;

304 The Ombudsman also stated within the Code regarding to its elements that "overlap, however, with the fundamental right to good administration, which is enshrined in Article 41 of the Charter of Fundamental Rights of the European Union".

305 The European Code of Good Administrative Behavior Proposed by European Ombudsman and approved by the European Parliament on 6 September 2001, Article 4 to Article 12.

306 The European Code of Good Administrative Behavior Proposed by European Ombudsman and approved by the European Parliament on 6 September 2001, Article 13 to Article 24.

Finally, it is worth to mention that there is wide acceptance of the principle of good administration at the EU's national's level. The Swedish government by the Swedish Agency for Public Management has conducted a survey on the regulation of good administration in the member states of the European Union. The survey pointed out that a core set of principles of good administration is widely accepted among the member states, with enactments as general and legally binding rules in constitutional or statutory legislation[307]. For example, the Spanish Constitution Article 105 enshrines the right to be heard and the right to access documents[308], or the Constitution of Finland article 21 guarantees the right to have one's affairs handled impartially and fairly within a reasonable time[309], also Portuguese Constitution article 13 which assured their citizens on the doctrine of non-discrimination[310].

2.2.3.3 Principle of Sincere Cooperation

The principle of Sincere Cooperation is laid down in Article 4(3) of the TEU, in which the article created a mutual legal obligation between the EU and its member states to assist each other in carrying out tasks that flow from the Treaties in mutual respect[311]. The principle of sincere cooperation is a key constitutional principle of EU law determining a relationship between the member states of the European Union and the EU institutions[312]. The principle of sincere cooperation has been taken into consideration in the different facets of the EU action. It has been

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307 The Survey pointed out that the following of principles of good administration are embraced by a majority of the Member States; The principles of lawfulness, non-discrimination, proportionality, right to have one's affairs handled impartially and fairly with the reasonable time, right to be heard, right to access to the documents, obligation to state reasons in writing for all decisions, rights to remedies, obligation to be notified, and service minded. See, the survey commissioned by the Swedish Government from the Swedish Agency for Public Management on the Principles of Good Administration in the Member States of the European Union, available online at <http://www.statskontoret.se/>.

308 The Spanish Constitution Passed by the Cortes Generales in Plenary Meetings of the Congress of Deputies and the Senate held on October 31, 1978, Ratified by the Spanish people in the referendum of December 6, 1978 Sanctioned by His Majesty the King before the Cortes on December 27, 1978, section 105.

309 The Constitution of Finland (11 June 1999) Section 21.

310 The Constitution of the Portuguese Republic Seventh Revision (2005) Article 13 (Principle of equality).

311 The Treaty on European Union (TEU) Article 4 (3). The article establishes the mutual loyal cooperation between the Union and Member States. For the Union, the Union's institutions must respect the fundamental interests of the Member States. It will not make a disloyal expansion of its competence. A most importantly, the Union have a duty to assist the Member States to transposing and implementing of Union law correctly.

Meanwhile, the Member States also have a loyal duty to take all necessary measure to ensure fulfillment of their Treaty obligations. Furthermore, Member States generally have to assist the Union in the achievement of its task. See, Judgment of the Court of 24 March 1994 on Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland - Case C-40/92 para. 31.

Thus, Member States have to refrain to any measure, regardless of whether measure falls within the scope of Treaty, and in all their activities that which could jeopardize the attainment of the Union's objectives. See cases below.

312 KLAMERT, Marcus, *The Principle of Loyalty in EU Law*, 1st Edition, Oxford University Press, Oxford, 2014;

established to ensure the internal functioning of the Union, as well as its external action. Especially, the principle has a particular significance for the EU's external relations considering the complex mix of exclusive, shared, parallel, and *sui generis* competences in this particular area[313]. It is interesting to note that when we investigated cases law from the European Court of Justice, it appeared that the court had given the term of sincere cooperation in various terms, such as, "the duty of genuine cooperation"[314], "the obligation to cooperate in good faith"[315], and "the principle of the duty to cooperate in good faith"[316]. The principle of sincere cooperation has been developed by the European Court of Justice into a key mechanism determining the EU's external representation and – *mutatis mutandis* – the scope for individual member state action[317].

In the absence of a general rule expressly provided for in the Treaty, governing relations between the member states and the (then) European Communities, the CJEU recognized the principle of sincere cooperation, as a unifying legal principle, initially on Article 5 of the Treaty of the European Economic Community (TEEC), later Article 10 of the Treaty of the European Community (TEC), and until today, Article 4 (3) of the TEU. The scope of the principle of sincere cooperation also encompasses the relationship between national and EU legal systems. In the absence of a specific treaty rule governing the relationship, it is Article 4 (3) TEU which ultimately serves the purpose of guaranteeing the unity of the EU legal order[318].

In the sphere of EU external relations, this basically implies that sincere cooperation refers to the member states to act as "trustees of the Union interest"[319]. The principle of sincere cooperation is "of general application" of the EU legal order, which covers, *inter alia*, all the

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313 Even the EU's competences have been established, however in many cases, problems may arise from the institutional framework of the international co-operation at stake. See, EECKHOUT, Piet, *EU External Relations Law*, 2nd Edition, Oxford University Press, Oxford, 2011;

314 Judgment of 14 July 2005 on Commission v Germany - C-433/03, EU:C:2005:462, paragraph 64.

315 Judgment of 20 April 2010 on Commission v Sweden - C-246/07, EU:C:2010:203, paragraph 77.

316 Judgment of 27 February 2007 on Segi and Others v Council, C-355/04, EU:C:2007:116, paragraph 52.

317 HILTON, Christophe, «Mixity and coherence in EU external relations: The significance of the duty of cooperation», Christophe HILTON &Panos KOUTRAKOS (Eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, Hart Publishing, Oxford, 2010; See also, ELEFTHERIA, Neframi, «The duty of loyalty: rethinking its scope through its application in the field of EU external relations», *Common Market Law Review* Vol. 47 Issue 2 (2010), 323-357; See also, CASOLARI, Federico, «The Principle of Loyal Cooperation: A 'master key' for EU external representation?», Steven BLOCKMANS &Ramses A. WESSE (Eds.), *Principles and Practices of EU External Representation: Cleer Working Paper 2012/5*, T.M.C. Asser Institute, The Hague, 2012;

318 LANCEIRO, Rui Tavares, «The implementation of EU law by national administrations: Executive federalism and the principle of sincere cooperation», *Perspectives on Federalism* Vol. 10 Issue. 1 (2018), 71-99;

319 This is particular when the EU is internationally disabled from exercising its competences. For example, in the event that an international organization which only allow state as a member. See, CREMONA, Marise, «Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union», EUI Working Paper (2009), 1-26;

branches of the EU external action (including the Common Foreign Security Policy)[320]. The principle operates as a constitutional safeguard for the protection of the EU's interests[321]. The principle of sincere cooperation is limited to other constitutional principles such as conferral, subsidiarity, and proportionality[322].

The case law of the CJEU on the principle of sincere cooperation has evolved through time. The principle has an important role in assessing the implementation by the member states of mixed agreements in the international arena, and, more generally, in defining the constraints on the exercise by the member states of their external action in domains of shared competence[323]. In the field of EU's exclusive competence, it is well established that member states cannot intervene in areas falling under the exclusive competence of the community[324], unless specifically authorized[325]. However, the principle of sincere cooperation also plays no less important role in the field of the EU's non-exclusive competence.

In this regard, it is worth to mention the case of Commission v Greece, decided in 2009[326]. In this case, Greece submitted a proposal for the implementation of the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention) to the Maritime Safety Committee of the International Maritime Organization (IMO). Significantly, the EU is not a member of the IMO since, by virtue of the IMO Convention, membership is only open to states. Likewise, the Union cannot accede to Conventions agreed upon within the framework of the IMO. Later, the Commission decided to bring an action against Greece, since the subject matter falls within the exclusive competence of the community.

In this case, the court concludes that the principle of loyalty imposes upon member states a substantive duty of result, which requires not to act unilaterally at the international level. In other words, the court established that an international agreement concerning the exclusive competence

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320 *Ibidem.*

321 KLAMERT, Marcus, The Principle of Loyalty… *id.*

322 Judgment of the Court (Second Chamber) of 1 October 2009 on Commission v. Council - Case C-370/07, para. 52. See also, Article 5 of the Treaty on European Union (TEU).

323 VAN ELSUWEGE, Peter, «The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations», Marton VARJU (Ed.), *Between compliance and particularism: Member State interests and European Union law*, Springer, Cham, 2019;

324 Judgment of the Court of 31 March 1971 on Commission of the European Communities v Council of the European Communities - European Agreement on Road Transport. - Case 22-70, para. 17.

325 Judgment of the Court of 15 December 1976 on Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs - Case 41-76, para. 22. See also, Judgment of the Court of 17 October 1995 on Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany - C-70/94, para. 12.

326 Judgment of the Court (Second Chamber) of 12 February 2009 on Commission of the European Communities v Hellenic Republic – C45/07.

of the European Union excludes member states from taking action. In one part of the judgment, the court held that "*[t]he mere fact that the Community is not a member of an international organisation in no way authorises a Member State, acting individually in the context of its participation in an international organisation, to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty*[327]".

Furthermore, the court also clarified that the so-called AETR-effect not only applies with respect to the conclusion of international agreements, but also regarding the adoption of positions within international organizations[328].

Following the logics of the aforementioned cases, it is fair to conclude that the principle of sincere cooperation is a far-reaching principle in order to ensure the unity and bargaining power of the EU's international representation, and the uniform application of the EU legislation. In other words, the principle of sincere cooperation helps to represent the unity of the EU member states[329], ensuring that the EU member states and the EU institutions assist each other in fulfilling its objectives under the Treaties, ensuring supra-national legal entity of the EU, and to ensure coherence and harmony of EU's external relations. Any international actions by EU member states that "might"/ "potentially" affects implications for the EU's internal legislation could be annulled by the court under the ground of sincere cooperation. As observed by Delgado Casteleiro and Larik, "…the duty of since co-operation in external relations manifests itself indeed rather often as a duty for the member states to keep silent, unless told to speak by the EU institutions"[330].

In the scheme of the relationship between sincere cooperation and the EU's exclusive external relation, specifically in the field of Common Commercial Policy (CCP). As mentioned, that it is already well established by the Treaty that the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, etc., are regarded as CCP[331], in which CCP fell within the exclusive competence

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[327] Judgment of the Court (Second Chamber) of 12 February 2009 on Commission of the European Communities v Hellenic Republic – C45/07, para. 30.

[328] AETR effects refer to a prohibition for the Member States to exercise their external competences when those actions would risk affecting internal Union rules or alter their scope. In other word any international action with (potential) implications for the EU's internal legislation requires the involvement of the EU's institutions. See, CREMONA, Marise, «Extending the reach of the AETR principle: Comment on Commission v Greece (C-45/07)», *European Law Review* Vol. 34 Issue 5 (2009), 754–768. See also, AETR ruling, Judgment of the Court of 31 March 1971. - Commission of the European Communities v Council of the European Communities - Case 22-70.

[329] VAN ELSUWEGE, Peter, «The Duty of… *id.*

[330] DELGADO CASTELEIRO, Andrés &LARIK, Joris, «The duty to remain silent: Limitless loyalty in EU external relations?», *European Law Review* Vol. 36 Issue 4 (2011), 524–541;

[331] The Treaty on the Functioning of the European Union (TFEU) Article 207.

of the Union[332]. The entry of the Lisbon Treaty and the recent judgment of the CJEU have already confirmed the exclusive nature of the CCP[333]. Therefore, the infringement of the EU's exclusive competence by a member state represents in itself a violation of the Treaties, which does not require an additional finding on disloyal behavior[334].

Finally, it is worth to mention cases regarding principle of sincere cooperation and BITs, and those cases are, Commission of the European Communities v Republic of Austria[335], Commission of the European Communities v Kingdom of Sweden[336], and Commission of the European Communities v Republic of Finland[337], all decided in 2019. These three cases have a similar question of the application of article 351 TFEU (Former Article 307 TEC)[338], which related to rights and obligations of member states arising from agreements concluded before 1 January 1958, or in other words, rights and obligations of member states under international agreements with one or more third countries, or international organization before entering the European Union. The article aimed to assure that the application of the EC Treaty does not affect the duty of the member States concerned to respect the rights of non-member countries under an earlier agreement and to perform its obligations thereunder[339].

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[332] The Treaty on the Functioning of the European Union (TFEU) Article 3 (1).

[333] Judgment of the Court (Grand Chamber) of 18 July 2013 on Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon - Case C-414/11. In this judgment, the court ruled that the CCP, as amended by the Lisbon Treaty, and in contrast to the pre-Lisbon case law, extends over the entire area substantively covered by the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). See also, DIMOPOULOS, Angelos, «The compatibility of future EU investment agreements with EU law», *Legal Issues of Economic Integration* Vol. 39 Issue 4 (2012), 447-472;

[334] LARIK, Joris, «Sincere Cooperation… *id.*

[335] Judgment of the Court (Grand Chamber) of 3 March 2009 on Commission of the European Communities v Republic of Austria - Case C-205/06.

[336] Judgment of the Court (Grand Chamber) of 3 March 2009 on Commission of the European Communities v Kingdom of Sweden - Case C-249/06.

[337] Judgment of the Court (Second Chamber) of 19 November 2009 on Commission of the European Communities v Republic of Finland - Case C-118/07.

[338] The Treaty on the Functioning of the European Union (TFEU) Article 351 (ex Article 307 TEC). The article is exclusively intended to safeguard the legal rights of the third states, thereby expressing the Union's respect for an international law (Principle of *Pacta sunt Servanda*). The article wants to protect Member States from colliding obligations emanating from international law and Union law. The member States must omit the act which infringe Union law. See, Judgment of the Court of 14 January 1997 on The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England - C-124/95, para. 53.

Thus, the article also laid down a duty to Member States to reconcile their treaty obligations towards third states with Union law by regular notice of termination or negotiation their prior agreement that conflict with the Union's laws. Also, the article also formulated a special rule concerning a most-favoured nation clause in favour of third states in the Member States' former treaties, such favour may not be forwarded to third parties because this internal preference must be seen in the entirely of the Union. See, GEIGER, Rudolf, DANIEL-ERASMUS, Khan &MARKUS Kotzur, European Union Treaties… *id.*

[339] KLABBERS, Jan, *Treaty Conflict and the European Union*, 1st Edition, Cambridge University Press, Cambridge, 2009;

In the aforementioned cases, the court held in a similar manner that Austria, Sweden, and Finland failed to take appropriate steps to eliminate incompatibilities with the Treaty concerning the provisions on the transfer of capital (Transfer of Fund) contained in the bilateral agreements at issue[340]. The BIT provisions in question allow investors from each signatory country to move capital freely into and out of the territory of the other signatory. The court considered that such unrestricted free movement of capital was incompatible with certain provisions in the EC Treaty that empower the Council to restrict such payments to, or from third countries.

It is important to note that the court did not explicitly apply the principle of loyal co-operation, but rather directly ruled that member states in the dispute have failed to comply with Article 351 TFEU (former Article 307 TEC). However, Advocate General Maduro delivered his opinion on the cases that the obligation of member states to eliminate incompatible provisions to the Treaty is an expression of the duty of loyal cooperation[341].

[340] In these judgments, the court requested member states in disputed obligated to take appropriate steps to eliminate incompatibilities between the pre-existing agreements. Even if such incompatibilities may never arise at issue. See, Judgment of the Court (Grand Chamber) of 3 March 2009 on Commission of the European Communities v Republic of Austria - Case C-205/06 para. 44. See also, Judgment of the Court (Grand Chamber) of 3 March 2009 on Commission of the European Communities v Kingdom of Sweden - Case C-249/06 para. 35. See also, Judgment of the Court (Second Chamber) of 19 November 2009 on Commission of the European Communities v Republic of Finland - Case C-118/07 para. 28.

[341] Joined opinion of Mr. Advocate General Poiares Maduro delivered on 10 July 2008.

CHAPTER 3

ARBITRATION AND INTERNATIONAL INVESTMENT AGREEMENTS

3.1 Historical Perspectives of Foreign Direct Investment

For the purpose of achieving a clear understanding of the topic of arbitration and international investment agreements, an introduction to a historical background is important. It is known that foreign investment was first established a long time ago. At an early age, as early as 1500 BC, in Phoenicians civilization and continued ever since[342]. Later, foreign investment appeared in the famous Silk Road that connected trade between Europe and Asia from the 2nd century BC until the 18th Century. The Silk Road brought commercial activities between East and West, alongside with others development such as language and cultural and religious expansion.

Afterward, during the Colonial Period (From the 15th Century onwards), West European colonial powers started to establish permanent colonies for trade missions, seeking for abundant resources and a cheaper labor force (Also for the reason of religious expansion)[343]. It is widely agreed by many literatures that foreign investment in the colonial period offered a high privilege to foreign investors. At that time, the host state usually gave better protections to foreign investors from colonial powers than its local investors, because those foreign investors were able to carry their own laws[344]. Therefore, there was no need for the growth of a separate system of international investment law for the protection of foreign investments.

In the post-colonialism period, foreign investment and its protection were in the period called "Gunboat Diplomacy"[345]. This situation occurred during the mid-18th Century when many autonomous states such as, the USA, Brazil, India, and many states in Asia started to fully be obtained full sovereignty and imposed their own law into their own territory. The Gunboat Diplomacy period or diplomatic

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[342] Phoenicians was a civilization from 1500 BC (Until now it is in the territory of Israel and Palestine). They traded by ship with Greeks and established trading for wood and textiles. Moreover, Phoenicians also established outpost around the Eastern Mediterranean from which they could sell products from their homeland. In which, the established of outpost are correctly described as a direct investment in foreign states.

[343] For example, the established of East India Company by the Dutch in 1602, or the establishing colonies in South Africa and South America by Portuguese and Spanish.

[344] The system of extraterritoriality caused as much resentment as colonialism. In Asia, such enclaves existed in China, Thailand and Japan. For example, Thailand was forced to conclude "The Bowring Treaty" with Britain in April 1855. The Treaty made Thailand lost extraterritorial right. In which the treaty granted right to people from Britain who committed wrongdoing in Thailand to use the court in their own country. The consequences of the Bowring Treaty forced Thailand to conclude treaties in the same manner with other 14 colonials' superpower in following years.

[345] HOOD, Miriam, *Gunboat Diplomacy 1895-1905: Great Power Pressure in Venezuela*, 1st Edition, Unwin Hyman, London, 1983;

protection represented the effective protection by the home state's military force, who stepped up for the interest of their investors abroad[346]. Yet, some colonial power at the time were able to find legal justification to use force to protect their investors aboard, although such justifications are subject to substantial criticisms these days[347].

However, diplomatic protection by force presented problems and weaknesses. It considers as the centuries-old tradition of enforcing foreign investors' protection and has serious draw-back from both states and foreign investors' perspectives[348]. It could end the business/ development opportunity both for states and foreign investors, thus; created adverse-affect to people in the host state (For example, labor or local business related to foreign investment) since the business relationship usually ended up badly after the exercise of diplomatic protection. In addition, diplomatic protection considers as aggressive and ineffective in many cases. An investor who has a good relationship with the home state government seems to secure a better chance for such protection; meanwhile, an investor who is in opposition to the home state government has fewer chances when compared to those investors favored by the home state government. Diplomatic protection also relies on the relationship between two states. Moreover, the weaker states are less likely to challenge an unlawful action from the more powerful states and such attempts to resort to diplomatic protection could be on pause anytime since there is nothing to guarantee the commitment from the home state to pursue such diplomatic protection.

In the late 20th Century, there was a wave of expropriations by sovereign nations. Those circumstances have brought attention to capital exported countries (home states) to seek a new kind of protection for their investors abroad[349], with less force but in a more innovative manner. Considering the fact that at that time, no international organizations were able to bring up any tangible guidelines or multilateral investment agreements[350]. Therefore, states came up with the development of an international mechanism to resolve the dispute between the foreign investor and host state by concluding international

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346 For example, the Suez Crisis during 1956-57, which lead to Egypt invasion by Israel, British and French aimed to remove Egypt's president at that time who just nationalized the canal.

347 SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

348 SCHILL, Stephan W., *The Multilateralization of International Investment Law*, 1st Edition, Cambridge University Press, Cambridge, 2009; See also, BUTLER, Nicolette &SUBEDI, Surya, «The Future of International Investment Regulation: Towards a World Investment Organisation?», *Netherlands International Law Review* Vol. 64 No. 1 (2017), 44-69;

349 Especially, in Arab countries with abundant oil resources and also in Latin America. For example, Libya expropriated many foreign firms starting with British Petroleum in 1971. See, HAIGHT, G. Winthrop, «Libyan Nationalization of British Petroleum Company Assets», *The International Lawyer* Vol. 6 No. 3 (1972), 541-547;

350 During late 19th Century, there were initiations by several international organization to create international mechanisms to settle foreign investments. However, many states especially those newly sovereignty were reluctant to join in those mechanisms mainly because those states were reserve their sovereignty and rights to manage their own law and resources. The initiation by international organization at the time for example, the initiation from the OECD to purpose the Multilateral Agreement on Investment (MAI). The negotiation started on 1995 but discontinued in 1998 by the aforementioned reason. The initiation by international organization at that time, proved to be less successful than the conclusion of bilateral treaties between states. See, <www.oecd.org>.

treaties among themselves. One major development is the conclusion of Bilateral Investment Treaties (BITs). The first BIT was signed after the WWII period between West Germany and Pakistan in 1959[351]. The conclusion of BITs seems to be successful at the time. By 1989, there were over 300 BITs concluded between capital-exporting countries and developing countries[352]. Recently, BITs have been rapidly growing in the past forty years, with the number of almost 3,000 BITs globally concluded by 147 countries[353]. There are substantial numbers of initiation of arbitral proceedings by foreign investors against host states every single year. Statistics have shown that among 602 inter-state arbitrations, the decisions were in favor of host states by 35.7 percent, while 28.7 percent were decided in favor of foreign investors. The rest decisions were made in favor of neither party (no damage award), settled, or discontinued[354]. In which the details of the international investment agreements (IIAs), especially for the BITs shall be discussed later in part 3.2 of this Chapter.

Until today, there are more than 80,000 multinational companies operating globally collectively controlling almost a million foreign affairs. The global flows of FDI have grown up from 51.5 billion USD in 1980 to 1.95 trillion in 2017[355]. If ranked by the GDP, some multinational enterprises have more value than many countries[356]. The power of Multinational Corporation is huge and continue to be increasing. Especially for those Multinational Corporations from the US and the European Union which invested in huge capitals, and then possess substantial bargaining power toward the host state (Mostly in developing countries)[357]. In some cases, the power of Multinational Corporations is huge, and they can manipulate legal outcomes, especially through a dispute settlement method. Multinational Corporations are able to create principles of law that are generally favorable to them. All of the studies agreed in the same direction that it was obvious that

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351 Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (1959).

352 SALACUSE, Jeswald W., «BIT by BIT:… *id.*

353 See information and texts at <http://investmentpolicyhub.unctad.org/IIA>.

354 See statistics available online at, <https://investmentpolicyhub.unctad.org/ISDS>. It is also interesting to note that there are observations that state does not really "win" in ISDS, they just did not lose.

See, MANN, Howard, «ISDS: Who… *id.*

355 See Global Foreign Direct Investment (Net Flow)'s statistics from year 1970-2017 in The World Bank's Data at, <https://data.worldbank.org>.

356 For example, Facebook which was found in 2004 made a revenue of 18 billion Dollar in 2015, which worth more than 17.7 billion Dollar of Cambodia's GDP of the same year. Or Vodafone which made revenue of 60 billion Dollar in 2015, more than Uruguay's GDP in the same year of 55 billion Dollar. Or US's retailer Walmart which earned 486 billion Dollar in 2017, more than Belgium's GDP of the same year at the number of 468 billion Dollar. If Walmart were a country, it would be ranked 24th in the world by GDP. See, <www.businessinsider.com>.

357 It has been pointed out that there are some multinational corporations from developing states as well. However, they are nowhere near as large as US and European multinational corporations and cannot wield the same degree of influence. See, SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

Multinational Cooperation could bring about such outcomes through pressure on the host state that they made an investment[358].

There are many initiations by states[359], and international organizations[360], trying to find a new (better) model of IIAs, for the main reason to overcome weaknesses of the old model of IIAs (Ex. State's right to regulate, account for public interest, transparency, environmental protection, human rights protection, consistency and predictability of interpretation of substantive protections, arbitrator selection, etc.). Those efforts of reforms are dynamic and diverse. Nowadays, trends have been moving from bilateral nature into a mega-regional nature, with more specific details of substantive protection and contexts, in order to enhance predictability, coherence, and to overcome the weaknesses of old model IIAs. We could make a preliminary conclusion regarding to current reforms of IIAs that most of the new IIAs tend to include sustainable development center reform that preserves the state's right to regulate, while maintaining foreign investors' protection alongside with ensuring responsible investment from them[361]. Thus, there are more developments of dispute settlement mechanisms in the new generation of IIAs. Many more examples regarding to new trends of IIAs shall be examined later in this Chapter and Chapter 6 of the thesis.

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358 ZERK, Jennifer A., *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, 1st Edition, Cambridge University Press, Cambridge, 2006;

359 Number of countries are playing major roles in the reforming of IIAs either by concluding new bilateral treaties or presenting its own new models of BITs. For example, Brazil has proposed its new bilateral treaty model in 2015, or India also presented its own bilateral treaty in the same year. For details, See, United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2011: Non-Equity Modes of International Production and Development, available online at <www.unctad.org>.

In the scheme of treaty conclusion, the European Union have made a reformation by concluding a modern IIAs, for example, Comprehensive Economic and Trade Agreement (CETA). In which CETA has overcome many weaknesses of old model BITs. Especially, the appointment of arbitrator by introduced the permanent tribunals with fixed numbers of members appointed from the EU and Canada, together with members from neutral countries.

360 United Nations Conference on Trade and Development (UNCTAD) is a key player in the scheme of development and reforms of IIAs. UNCTAD is responsible for trade, investment, and development issues. UNCTAD has been given advises for systematic and sustainable development-orient reforms of IIAs. In 2015, UNCTAD has initiated a comprehensive roadmap for IIA reform, which cover five key reform areas, which are, (1) safeguarding the right to regulate, (2) reforming dispute settlement mechanism, (3) promoting and facilitating investment, (4) ensuring responsible investment, and (5) enhancing system consistency. See, United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2016: Investor Nationality - Policy Challenges, available online at <www.unctad.org>.

361 TUERK, Elisabeth, BAUMGARTNER, Jorun &ATANASOVA, Dafina, «Trends and Reform Debates», Markus KRAJEWSKI &Rhea Tamara HOFFMANN (Eds.), *Research Handbook on Foreign Direct Investment*, 1st Edition, Edward Elgar Publishing, Cheltenham, 2019;

3.2 Arbitration in International Investment Agreements (IIAs)

3.2.1 The Concept of Foreign Direct Investment

Although we strongly support that the idea of the BITs law is relevant to many areas of law, which are, private law, administrative law, and constitutional law. However, there is consensus among scholars, pointing to the same direction that the BITs law (Or International Investment Law) is best described as a field of public international law[362]. This branch of law is one of the oldest branches of international law, which remained undeveloped until the 20th Century[363]. Public international law involves with *inter alia* commercial activities of multinational enterprises operating in foreign states. The operation of a multinational enterprise sometimes has conflicts with the host state's laws/ regulations, for example, licensing requirements, labor, or environmental standards. Whenever such a situation/dispute occurs, the multinational enterprise could either seek a remedy through the domestic court of the host state or they can seek a remedy through an international tribunal. Those rights to international arbitration came either directly from an investment contract or from an international investment agreement that their home state has concluded with their home state.

Nowadays, globalization affects the increasing international arbitration cases between foreign investors and host states[364]. More cases have brought more criticisms from those relevant parties (States, investors, and scholars) on the downside of international arbitration, and there are calling for reforms of the system[365]. In which we will examine those criticisms in Chapter 6 of the thesis. Apart from those criticisms, there is also wide literature supporting the use of international

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362 SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

363 COLLINS, David, An Introduction… *id.*

364 There are 983 known cases treaty-based Inter-State Arbitration, with 647 cases concluded, 332 pending, and 4 unknowns. There are 230 cases decided in favor of states, 191 cases decided in favor of foreign investors, 14 cases decided neither in favor to any parties, 139 cases settled, 73 discontinued cases (Data of 31 July 2019). See data from United Nations Conference on Trade and Development (UNCTAD), available at <investmentpolicy.unctad.org>.

365 There has been a call to reform of Investor-State Dispute Settlement (ISDS) system, especially for its consistency, predictability, efficiency, and transparency by different international organizations in the past years. A major development representing in the new model of investment treaties by the EU and its counterparts, such as, Comprehensive Economic and Trade Agreement (CETA), or EU-Vietnam FTA. In which those treaties move away from old model of the BITs, for example, there are a specific list of arbitrators by both parties in which there will be a payment to make sure of availabilities of those arbitrators.

Moreover, such reforms also being push by work of international organizations such as the United Nations Commission on International Trade Law (UNCITRAL) comprises with member States, observer States, as well as observer intergovernmental and non-governmental organizations, with a meeting in the 2 years basis to tackle the problem regarding to ISDS system.

Thus, there are ongoing discussion on the Working Group III: Investor-State Dispute Settlement Reform in order to tackle the weaknesses of the current inter-state dispute settlement system. See detail and progress available online at, <https://uncitral.un.org/en/working_groups/3/investor-state>.

arbitration to solve disputes between foreign investors and host states[366]. It is fair to say that either the support side or the critic side, they are both agreed that there are issues with international investment agreements (Especially, those old versions), which are characterized with vague terms and inconsistencies result[367].

It is appropriate to start with the definition of "Direct Investment", because the term "Direct Investment" excludes foreign investments which are illegible for protection under investment agreements. Direct investment does not include "portfolio investment". In other words, it does not embrace investments that are lacking of personal management. For example, a situation where a foreigner or foreign company buy a certain amount of shares or stocks in a large public company. That aforementioned situation is not considered as a direct investment because it is simply not "Direct". In addition, the World Trade Organization (WTO) provides a widely accepted definition of direct investment, which the WTO refers to the term as an acquisition of at least ten percent of shares in the firm, in order to interfere with effective choice in the management of it[368].

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366 The majority of supportive sides argue that Investor-State Dispute Settlement (ISDS) gave benefits to protection for foreign investors against unfair, discriminatory and arbitrary measures adopted by foreign governments. Thus, ISDS also play major roles of upheld the "rule of law" in developing countries. See, LAVRANOS, Nikos, «The Proven Benefits of ISDS and BITs – Even for SMEs and Small Claims», available online at <http://arbitrationblog.kluwerarbitration.com/>. See also, VÁRADY, Tibor, «On the option of a contractual extension of judicial review of arbitral awards or: what is actually pro-arbitration?», *Collected Paper of Zagreb Law Faculty* Vol. 56 No. 2-3 (2006), 455-478;

367 The trends are moving out from old model BIT representing by the conclusion of new model of multilateral treaties and propose of new models by international organization. See, SUSAN Elizabeth Martins Cesar de Oliveira, «Is the Death of the TPP Good News for Brazil? Mega-Regional Agreements and the Quest for Development 'Policy Space'», *Journal of World Trade* Vol. 51 Issue 5 (2017), 859-882; See also, FORERE, Malebakeng Agnes, «Move away from BITs framework: A need for multilateral investment treaty?», World Trade Institute Working Paper No. 15/2017 (2017).

368 Foreign investment involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets. The World Trade Organization (WTO) provided a definition of Foreign Direct Investment (FDI) as follows;

"Foreign direct investment (FDI) occurs when an investor based in one country (the home country) acquires an asset in another country (the host country) with the intent to manage that asset. The management dimension is what distinguishes FDI from portfolio investment in foreign stocks, bonds, and other financial instruments. In most instances, both the investor and the asset it manages abroad are business firms. In such cases, the investor is typically referred to as the "parent firm" and the asset as the "affiliate" or "subsidiary".

There are three main categories of FDI:

1. Equity capital is the value of the MNC's investment in shares of an enterprise in a foreign country. An equity capital stake of 10 per cent or more of the ordinary shares or voting power in an incorporated enterprise, or its equivalent in an unincorporated enterprise, is normally considered as a threshold for the control of assets. This category includes both mergers and acquisitions and "greenfield" investments (the creation of new facilities). Mergers and acquisitions are an important source of FDI for developed countries, although the relative importance varies considerably.

2. Reinvested earnings are the MNC's share of affiliate earnings not distributed as dividends or remitted to the MNC. Such retained profits by affiliates are assumed to be reinvested in the affiliate. This can represent up to 60 per cent of outward FDI in countries such as the United States and the United Kingdom.

3. Other capital refers to short or long-term borrowing and lending of funds between the MNC and the affiliate".

It is also important to know what kind of investments are eligible for protection under the investment agreement[369]. The term "investment" generally defines in a wide sense in investment agreements[370]. In addition to those definitions contained in investment agreements themselves, the definition of direct investment was also given by one of the most cited arbitral tribunal decisions in *Salini v Morocco*[371] (Also known as the Salini test). In which, the investment must, (1) involve the transfer of funds or the contribution of money or assets, (2) with a certain duration, (3) have the participation of the individual transferring the funds in the management and risks associated with the project, and (4) bring economic contribution to the host state[372]. Even though the Salini test is not binding to future arbitral proceedings, yet the doctrine was followed by many arbitral tribunals, and plays an important role as the doctrine helps to interpret the term investment in investment arbitration[373].

It is generally agreed by economists that investment from foreign countries (Foreign Direct Investment – FDI) offers more advantages than disadvantages. FDI brings about mutual benefits to both foreign investors and the country in which such investments are made. Foreign investors can seek new opportunities and new resources in new locations with favorable investment factors such as inexpensive labor costs, abundant natural resources, good infrastructures, and potential markets. Foreign investors are able to generate more revenues from such investments while keeping the costs of such investments at a minimum. Host states also enjoy benefits from such

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See also, TRAKMAN, Leon, *Regionalism in International Investment Law*, 1st Edition, Oxford University Press, Oxford, 2013;

369 Even though it is not so relevant in the legal field, it is interest to mention that economists often distinguish foreign direct investment into 2 types, which are, Merger and acquisition, and Greenfield investment. Merger and acquisition refer to activities that foreign firms purchasing all or a portion of shares of the local firms. Normally, merger and acquisition bring the loss of jobs since foreign company usually reconstruct the firms to make them become more competitive. Meanwhile, Greenfield investment refers to foreign investor or foreign firm create new project or company from nothing (Start from zero). For example, oil field, mine, factories. Host states prefer Greenfield investment more than a merger and acquisition, because the Greenfield investment brings total new capitals, lots of hiring to the locals, and more revenues that host states could make. See, United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2018: Investment and New Industrial Policies, available online at <www.unctad.org>.

370 For example, 2012 U.S. Model Bilateral Investment Treaty define the term investment as "means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk…..". Also, the model further supply with a non-exclusive list of specific form of type of investments, for example, an enterprise, licenses rights, or intellectual property rights.

371 Salini v Morocco (ICSID Case No Arb/00/04), Decision on Jurisdiction of 23 July 2001.

372 Salini v Morocco (ICSID Case No Arb/00/04), Decision on Jurisdiction, 23 July 2001, para. 52.

373 For example, article 25 of ICSID Convention which state that "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment". The article itself does not contain the definition of investment. Therefore, ICSID tribunals thus generally apply the Salini test, or a modified version thereof. See, <www.icsid.worldbank.org>.

investments by being able to increase employment opportunities for its people[374], taking advantage of technology transfer, developing their infrastructures (Ex. Dams, electricity, and highways), and raising their overall economy by generating more national revenue[375]. Thus, local firms could also develop both in terms of quantity and quality by the presence of foreign firms (through competition) because local firms must "step up their game" to be more competitive and viable in the market.

3.2.2 Characteristic of International Investment Agreements

Bilateral Investment Treaty (BITs) are international agreements between two states, that aim to promote foreign direct investment (FDI), along with other cooperation between countries. The question of whether BITs are in fact, really promote foreign investment flows has been subjected to considerable doubt in recent literature[376]. However, as we already suggested that the trend of concluding BITs between states is still going up[377].

BITs have a similar pattern that could be generally categorized into three categories, which are, scope (Preamble)[378], substantive provisions, and dispute settlement provisions. The scope or preamble aimed to explain the overreaching purpose of the BITs, alongside with provisions that define the terms of "investment" and "investors" for the purpose of clarification of what nature of commercial activities tended to be covered by the treaty[379].

Substantive provisions contain provisions that guarantee the rights of foreign investors against discrimination by the host state through three major standards, which are, the National Treatment standard (NT), Most Favored Nation standard (MFN), and Fair and Equitable

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374 Increasing job opportunities refers to both direct job creation and indirect job creation. Direct job creation refers to hiring labor from host state by foreign company. Meanwhile, indirect job creation could refer to the creation of job by the presence of foreign company, such as restaurants near the compound, the increase of apartment rentals rates, or any other services for workers.

375 SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

376 FRENKELA, Michael &WALTERA, Benedikt, «Do Bilateral Investment Treaties… *id.* See also, YACKEE, Jason Webb, «Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment», *Law & Society Review* Vol. 42 Issue 4 (2008), 805-832;

377 See statistics of conclusion of international investment agreements, available online at, <www.investmentpolicy.unctad.org>.

378 Scopes are usually the reciprocal encouragement and protection of investment flows between the two states. Following by an identification of the types of property which are protected and the nature of the link of nationality to one of the parties that entitles the foreign investor to the protection of the treaty.

379 The text of treaties is normally interpreting by arbitral tribunal according to Article 32 of the Vienna Convention on the Law of Treaties of 1969 as the supplementary aid to the interpretation of its provision. This is helpful in many Arbitral Proceedings. For example, the studies have shown that particularly in the case of developing countries, their government have little understanding when they concluded international agreements with other countries.

Treatment standard (FET). In addition, there is protection against unfair expropriation provided by BITs that also considered one of the most important standards of investment provisions under BITs. Thus, there are other standards of protection (Less important than the first four we have mentioned) such as, Full Protection of Security (FPS), along with other miscellaneous protections such as transfer of funds, hiring personals, and others which shall be discussed later in this chapter.

Apart from that, the main feature of BITs is the dispute settlement provisions. The feature of dispute settlement provisions covers both state-state, and investor-state dispute settlement (In short, "ISDS"). More details shall be discussed later in this chapter.

Before ending this part, it is important to emphasize that even the majority part of this thesis shall bring up studies on BITs; however, we shall also bring up some studies in relation to Regional Trade Agreements (RTA). The term RTA (Also known as Free Trade Agreements – FTAs) is the term refers to trade or investment agreements between three or more countries. These RTAs (FTAs) also contain an investment chapter, in which the investment chapters tend to be longer and more innovative than BITs. The trends these days have been moving forward from bilateral relations towards regional and mega-regional negotiating tables[380]. RTAs (FTAs) represent a desire for deeper economic cooperation not only by promoting foreign direct investment, but also enhancing other cooperation in certain areas such as, trade, intellectual property, competitions, environmental protection, human rights, the rule of law, agriculture, and culture and traditional protection. Nowadays, there are many RTAs in force, but it is not appropriate to examine all of them. Some of them such as, the Energy Charter Treaty (ECT)[381], the Canada-USA-Mexico Agreement (CUSMA), the North America Free Trade Agreement (NAFTA)[382], the Transatlantic Trade and Investment Partnership (TTIP)[383], the Association of Southeast Asian Nations

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[380] United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2012: Towards a New Generation of Investment Policies, available online at <www.unctad.org>. See also, TUERK, Elisabeth, BAUMGARTNER, Jorun &ATANASOVA Dafina, «Trends and… *id.*

[381] The Energy Charter Treaty (ECT) provides a multilateral framework for energy cooperation, designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources. ECT was signed in December 1994 and entered into legal force in April 1998. Currently there are fifty-three Signatories and Contracting Parties to the Treaty. ECT covering all aspects of commercial energy activities including trade, transit, investments, and energy efficiency. ECT also providing dispute resolution procedures. See, <www.energycharter.org/>.

[382] The North America Free Trade Agreement (NAFTA) is an agreement between USA, Canada and Mexico which came into effects on 1 January 1994. NAFTA's purpose was to encourage economic activity among North America's three major economic powers. Chapter 11 of the NAFTA also contain provisions designed to protect cross-border investors and facilitate the settlement of investment disputes. Foreign investors with the national of NAFTA signatories could initiate arbitration against other NAFTA signatories (Host State) when host state break their obligation under the NAFTA.

[383] The Transatlantic Trade and Investment Partnership (TTIP) is a proposed trade agreement between USA and the EU. The TTIP negotiations were launched in 2013 with the aim of promoting trade and multilateral economic growth. TTIP would be the biggest trade negotiation which ever be concluded, because it is the conclusion of trade

Comprehensive Investment Agreement (ACIA)[384], the Regional Comprehensive Economic Partnership (RCEP), and the EU-Canada Comprehensive Economic and Trade Agreement (CETA)[385], shall be referred to from time to time in the thesis.

3.2.3 Standard of Protections under IIAs

International Investment Agreements (IIAs) grants substantive protections, and also an access to dispute settlement provisions when protected foreign investors feel that states failed to perform their obligation provided in the substantive part of the investment treaty (The detail of dispute settlement provision shall be discussed later in 3.2.4 of this chapter). Substantive protections are generally referred to as standards of protection under the IIAs, which comprise with variety of standards of protection under them[386]. Standards of protection guarantee non-discrimination action from the host state against protected foreign investors. Foreign investors from the home state could expect to enjoy those standards of protection under the IIA. Among many standards of protection, the standard of Fair and Equitable Treatment (FET), National Treatment (NT), Most-Favored-Nation Treatment (MFN), and guarantee against unfair Expropriation are standards of protection that usually involve in arbitral proceedings. The detail of each standard of protection shall be examined in detail in the following part.

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agreement between two biggest economies. In which, TTIP would set a great example for future of international trade agreements.

However, the negotiation of the TTIP ended without conclusion at the end of 2016. A Council of Europe decided in 2019 stated that "The negotiating directives for the Transatlantic Trade and Investment Partnership must be considered obsolete and no longer relevant". See, Council Decision no. 6052/19 of 15 April 2019, «COUNCIL DECISION: authorising the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods».

384 The ASEAN Comprehensive Investment Agreement (ACIA) came into effect on 29 March 2012 to support a free, open, transparent and integrated investment regime in the Association of Southeast Asian Nations (ASEAN).

Section B of the ACIA provide articles regarding to investment dispute between an investor and a member state. In which allow investor of ACIA Member State to initiate arbitration against host state when host state failed to fulfill its obligation under the ACIA.

385 Comprehensive Economic and Trade Agreement (CETA) is a free trade agreement between Canada and the European Union and its Member States which entered into force provisionally on 21 September 2017. The agreement removing 98 percent of the preexisting tariffs between the parties.

Thus, CETA also representing a development of Inter-State Dispute Settlement mechanism by introduced the permanent tribunals with fixed numbers of members appointed from the EU and Canada, together with members from neutral countries. Members of the tribunal shall be paid monthly retainers to ensure availability and will be required to conform to specific standards of independence. Both agreements also contain an appellate mechanism, with an appellate tribunal formed in a similar manner to the lower tribunal. See, article 8.27 of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States (Entered into force provisionally on 21 September 2017).

386 MCLACHLAN, Campbell, SHORE, Laurence &WEINIGER, Matthew, *International Investment Arbitration: Substantive Principles*, 2nd Edition, Oxford University Press, Oxford, 2017;

It is adequate to note in this part about the general idea of the standards of protection under the IIAs. Standard of protections under the IIAs are not really a norm, but rather sit somewhere between rules and principles. IIAs only define a general sense of each standard of protection. Therefore, the duty to interpret/ explore those standards belongs to the international arbitrator/s in each arbitral proceeding, in which they mostly constitute in a one-time appointment manner. It is important to note that investment treaty arbitration awards are not constituted as binding precedents for any other future investment dispute, neither to those future investment disputes that arise from the same IIA, nor to the future investment disputes that share an identical background[387]. In the same manner, the interpretation of each standard of protection in one investment arbitral proceeding, is not binding to other arbitral proceedings to follow the same interpretation of the prevision investment arbitration award. This situation led to criticisms regarding to the uncertainty, unpredictability, and incoherence of the system. Much more examples of this situation shall be illustrated in the following part of the chapter.

3.2.3.1 Protection against Unfair Expropriation

As stated earlier that after many countries gained their full independence during the 18th and 19th Century, they started to impose their own law, including in the area of FDI, into their own territory. Thus, many of the United Nations Resolutions at that time were in favor of newly independent nations possessing full sovereign power to control FDI in their own territory[388]. These

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387 PARVANOV, Parvan P. &KANTOR, Mark, «Comparing U.S. Law and Recent U.S. Investment Agreements», Karl P. SAUVANT (Ed.), *Yearbook on International Investment Law &Policy 2010-2011*, 1st Edition, Oxford University Press, New York, 2012, at 744;

388 The United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over National Resources, 1962 recognizes that every state has permanent sovereignty over national resources located within its territory. With respect to expropriation or nationalization of foreign owned business or property, Resolution 1803 (XVII) states in paragraph 4 that nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases, the owner shall be paid appropriate compensation, in accordance with the rules in force in the state talking such measure and in accordance with international law. See, General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources".

Later, on February 1974, the United Nations General Assembly Resolution 3171 (XXVIII) on Permanent Sovereignty over Natural Resources 1974 was adopted. The resolution reaffirms the principles laid down in Resolution 1803 (XVII). With further reaffirm right of states to permanent sovereignty over all their natural resources, and also right to nationalization with compensation.

In May 1974, the United Nations General Assembly Resolution 3210 (S-VI) on declaration on the Establishment of a New Economic Order, 1974 was adopted. Resolution 3210 (S-VI) again reaffirms the full permanent sovereignty of every state over its natural resources and all economic activities.

In December 1974, the United Nations General Assembly Resolution 3281 (XXIX) on the Charter of Economic Rights and Duties of States, 1974 was adopted. Insofar as expropriation or nationalization of foreign investments is concern, Resolution 3281 (XXIX) reaffirms that each state has the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. With appropriate compensation. It should be noted that there

circumstances led to waves of nationalization of foreign business in the upcoming years, especially by South America and Middle East countries[389]. In response to the wave of expropriations and nationalizations, there was rapid growth in the conclusion of the international investment agreements (IIAs, but mostly BITs at the early time), to protect against unfair expropriation and discrimination measures toward foreign investors by host states.

Nowadays, under customary international law, the state cannot expropriate a foreign national's property unless such expropriation is done for the public purpose, in a non-discriminatory manner, done under due process of law, and with prompt, adequate, and effective compensation[390]. The term "compensation" in the area of international arbitration deserves elaboration since the term has been calling attention from legal scholars in the field. Even though the concept of the "Hull formula" of prompt, adequate, and effective compensation in the event of the expropriation of foreign property usually came up in IIAs provision and in the arbitral proceedings[391]. However, there are other similar terms as "effective compensation" appearing in IIAs, which are, "compensation"[392], the payment of "just compensation"[393], or "appropriate

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were 104 states voting in favor of Resolution 3281 (XXIX), 16 states including the United States and other developed states voting against the Resolution. The United States together with other 13 developed states attempted in vain to amend the Resolution.

389 Especially, in Arab countries with abundant oil resources and also in Latin America. For example, Libya expropriated many foreign firms starting with British Petroleum in 1971. See, HAIGHT, G. Winthrop, «Libyan Nationalization… *id.*

390 PELLET, Alain, «Police Powers or the State's Right to Regulate», Meg KINNEAR, Geraldine R. FISCHER, Jara Minguez ALMEIDA, Luisa Fernanda TORRES &Mairée Uran BIDEGAIN (Eds.), *Building International Investment Law: The First 50 Years of ICSID*, Kluwer Law International, Alphen aan den Rijn, 2016;

An example of clause against unfair expropriation is illustrate in Comprehensive Economic and Trade Agreement (CETA) Article 8.12 stated that "1. A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation ("expropriation"), except:

(a) for a public purpose;

(b) under due process of law;

(c) in a non-discriminatory manner; and

(d) on payment of prompt, adequate and effective compensation".

391 Hull formula was named from Cordel Hull, who served as the United State Secretary of State between 1933 and 1944. He engaged series of diplomatic exchange with Mexico, in which he shared the view that "No government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefore". See, LOWENFELD, Andreas F., *International Economic Law*, 2nd Edition, Oxford University Press, Oxford, 2008;

392 Article 4(2) of German Model BIT of 2004.

In famous *Sabla* case held that "acts of a government in depriving an alien of his property without compensation impose international responsibility" See, Marguerite de Joly de Sabla (United States) v. Panama of 29 June 1933.

393 Agreement between the Government of the Republic of Cyprus and the Government of the Hungarian People's Republic on Mutual Promotion and Protection of Investments of the 24 May 1989, Article 4(1).

compensation"[394]. Many recent literatures point out in the same direction that the amount of compensation is no longer a controversial issue since many IIAs (Especially, those newly concluded) always contain rather detailed rules on the appropriate level of compensation, as well as also on the valuation methods concerning the expropriated property[395].

The term "expropriation" in the IIAs could be categorized into two types, which are "direct expropriation" and "indirect expropriation". The term direct expropriation is rather simple and straightforward[396]; it refers to an activity by the host state to directly transfers the legal title of foreign owned into the asset of the host state itself[397]. The perfect example of direct expropriation is the action of nationalization, which means a massive or large-scale taking of private property in all economic sectors or on an industry – or sector-specific basis. Nationalization mainly occurred during the 70s and 80s, mostly by those newly gained independent states, as they regarded nationalizations as an integral part of their decolonization process[398].

Today, however, nationalization has become infrequent to very rare. Recently, expropriation claims are more frequently involved 'indirect' expropriation. The terminology of "indirect expropriation" is not fully uniform; the other similar terms as, creeping[399], constructive, disguised, consequential, regulatory, or virtual expropriation also appear in arbitral proceedings[400]. Indirect expropriation involves total or near-total deprivation of an investment without a formal transfer of title or outright seizure. The notion was recognized in international law long before the appearance of investment treaties[401]. Until today, the majority of IIAs have clearly distinguished

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394 Agreement between the Government of the Republic of France and the Government of Hong Kong for the reciprocal promotion and protection of investments of 30 November 1995, Article 5(1).

395 REINISCH, August, «Legality of Expropriations», August REINISCH (Ed.), *Standards of Investment Protection*, Oxford University Press, Oxford, 1st Edition, 2008;

An example of detailed rules on compensations, See, Article 8.12 of the Comprehensive Economic and Trade Agreement (CETA). See also, Article 1110 of the North America Free Trade Agreement (NAFTA).

396 Similar terms such as; "dispossession", "taking", "deprivation" or "privation" are also used. See, DOLZER, Rudolf &STEVENS, Margrete, Bilateral Investment… *id.*

397 In cases of direct expropriation, there is an open, deliberate and unequivocal intent, as reflected in a formal law or decree or physical act, to deprive the owner of his or her property through the transfer of title or outright seizure. See, United Nations Conference on Trade and Development (UNCTAD), Expropriation: UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2012;

398 For example, the oil industry nationalization in Venezuela in 1976, or the Abadan Crisis in which started with Iran nationalized their old industry from the British investor. See also, *Ibidem.*

399 Generation Ukraine v. Ukraine (ICSID Case No. ARB/00/9), awarded of 16 December 2003. The arbitral tribunal qualified this special form of expropriation as coming "with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property".

400 STERN, Brigitte, «In Search of the Frontiers of Indirect Expropriation», Arthur W. ROUVINE (Ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007*, Martinus Nijhoff Publishers, Leiden, Vol. 1, 2007;

401 The term of indirect expropriation even appeared in an early literature as Professor G.C. Christie noted that "There are several well-known international cases in which it has been recognized that property rights may be so

the difference between the terms direct expropriation and indirect expropriation[402]. It is important to note that the big difference between direct and indirect expropriation is that indirect expropriation might give no benefit at all to the host states themselves from such indirect expropritary action. Due to indirect expropriation may be applicable to regulatory measures aimed at protecting the environment, health, and other welfare interests of society, but it does not always result in increasing the wealth of the state itself[403]. Thus, in the arbitral proceedings, states are likely to refuse to acknowledge the expropriation measure and will not offer compensation to the aggrieved investor. It leaves the task to the arbitral tribunal to identify whether such measure or conduct by the state constitutes an expropriation or not[404]. In sum, the most difficult question today for the arbitral tribunal is not whether the requirements of direct expropriation are met, but rather if there is an indirect expropriation which is a challenging task for the arbitral tribunal to

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interfered with that it may be said that to all intents and purposes those property rights have been expropriated even though the State in question has not purported to expropriate". See, CHRISTIE, G.C., «What Constitutes a Taking of Property under International Law?», *British Year Book of International Law* Vol. 38 (1962) , 307-338;

Thus, in the early ages of investment treaties, there are early arbitral decisions constituted a term (or similar term to) indirect expropriation, even before a modern IIAs even classified them. For example, See, Starrett Housing Corporation v. Iran, Interlocutory Award (Award No. ITL 32-24-1) of 19 December 1983, para. 66.

[402] For examples, See, Article 1110 of the North America Free Trade Agreement (NAFTA). See also, Annex 8 A of the Comprehensive Economic and Trade Agreement (CETA) providing a great example of distinction between the term direct and indirect expropriation. Thus, also expand into the area of non-compensable government regulatory measure. The article stated,

"The Parties confirm their shared understanding that:

1. Expropriation may be direct or indirect:

(a) direct expropriation occurs when an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure; and

(b) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

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

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

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

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

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

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

[403] LO, Chang-Fa, «Plain packaging and indirect expropriation of trademark rights under BITs: does FCTC help to establish a right to regulate tobacco products?», *Medicine and Law* Vol. 31 Issue 4 (2012), 521-552;

[404] United Nations Conference on Trade and Development (UNCTAD), Expropriation: UNCTAD… *id.*

weigh on whether *inter alia* the effect of the measure is disproportionate to the public interest pursued[405].

Among many forms of indirect expropriation already mentioned in the previous paragraph, the term "Creeping Expropriation" is worth to make an elaboration on in this part. The term creeping expropriation is a form of indirect expropriation that refer to the series of actions by the government, that each action is not qualified as expropriation by itself but effected to the decreasing of the value of the foreign investment over a period of time[406]. In other words, each action of states is resulting as slowly kills foreign investors' business. Those series of actions always, as a result, avoiding the payment of compensation to foreign investors by the host state when the dispute has arisen. The OECD famously provided the term creeping expropriation as the incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of the investment or the deprivation of control over the investment. The series of separate state actions, usually taken within a limited time span, are then regarded as constituent parts of the unified treatment of the investor or investment[407]. Certain actions from states that are considered as creeping expropriation by international arbitral tribunals, such as, the appointment of government supervisor[408], or the issues of regulation such as taxation[409], or stop work order[410]. Creeping expropriation also shrine unique problems, which

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405 SHIRLOW, Esme, «Deference and Indirect Expropriation Analysis in International Investment Law: Observations on Current Approaches and Frameworks for Future Analysis», *ICSID Review* Vol. 29 Issue 3 (2014), 595-626;

406 SLOANE, Robert D. &REISMAN, W. Michael, «Indirect Expropriation and its Valuation in the BIT Generation», *British Yearbook of International Law* Vol. 74 Issue 1 (2003), 115-150;

407 World Investment Report 2003: FDI Policies for Development: National and International Perspectives by United Nations Conference on Trade and Development (UNCTAD).

408 Phillips Petroleum Company Iran v. The Islamic Republic of Iran, the National Iranian Oil Company (IUSCT), Award of 29 June 1989, Case No. 39, para. 100. In this case, the arbitral tribunal ruled that the indirect expropriation by Iran was done in the series of action, which does not always relevant solely to the enactment of regulations. In the tribunal's views, Iran has taken many measures to deprive the capability of Philips Petroleum to do the business, including the announcement of incoming oil industry nationalization, reduce production rates, and also appointment the director by Iranian's authority.

409 S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2, award of 8 August 1980, para. 4.18-4.29. In the arbitral awards, the arbitral tribunal found that Congo *inter alia* defaulted on its financing obligations, unilaterally fixed the prices for bottles of mineral water bottles below the level agreed upon at the initial meeting of PLASCO's Board of Directors, failed to establish the preferential tax regime contemplated by the joint venture, neglected or refused to call regular meetings of the Board, and failed to adopt protectionist measures limiting the import of mineral water.

410 Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana, Award on Jurisdiction and Liability of 27 October 1989, para. 81. The dispute in this case related to the development of hotel resort by the claimant. The investment by the claimant was made under the framework of Ghana Investment Center (GIC), in which parties agree to use arbitration under the UNCITRAL rule to resolve the dispute. The dispute has arisen, and in the view of arbitrators, the issuance of stop work order and the denied of entry to Ghana to the claimant was constituted an expropriation. The tribunal, quote "…What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr. Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr. Biloune in promoting, financing, and managing

are (i) the liability which refer to which stages of government's action is deemed expropriatory as a matter of law and (ii) the valuation which refer to at what date that the expropriation should have start to calculate in the compensation.

In addition, there is a new challenge to distinguish the line between indirect expropriation and governmental regulatory measures that are not requiring compensation (In other words: non-compensable regulatory measures, or valid government regulation). Non-compensable regulations refer to the exercise of the state's police powers or its right to regulate for the public interest, which could lead to a significant impairment of businesses[411]. Some action does not require compensation, as Professor M. Sornarajah stated that "…non-discriminatory measures related to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the efficient functioning of the state"[412]. The modern IIAs have specific clarifications of the term non-compensable regulatory measure as those new model IIAs are more innovative in striking a fair balance between foreign investment protection and the host state's right to regulate[413]. In addition, arbitral tribunals are already recognized the concept of non-compensable regulatory measures as states must regulate for the public interest[414]. Therefore, there seems to have less problem for the arbitral tribunal to interpret those terms these days, since modern IIAs already tackle this issue, alongside with its precedents. Even though there are some critics of "inconsistencies" in the way some arbitral tribunals have

MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr. Biloune's interest in MDCL, unless the Respondents can establish by persuasive evidence sufficient justification for these events."

411 NEWCOMBE, Andrew, «The Boundaries of Regulatory Expropriation in International Law», *ICSID Review* Vol. 20 Issue 1, 1-57;

412 SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

413 Modern IIAs tends to give a clarification of the term non-compensable regulatory measure. For example, See, Article 11(3)(B) of the Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment. Aforementioned article stated that "Non-discriminatory regulatory actions by a Contracting 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, except in rare circumstances". See also, Article 6(6) of the Agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Singapore on the Promotion and mutual Protection of Investments stated that "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute expropriation". In similar, See, Annex 8 A of the Comprehensive Economic and Trade Agreement (CETA)

414 Partial Award in Saluka Investments B.V. v. The Czech Republic of 17 March 2006, para. 255, stated that "It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulation that are aimed at the general welfare". Other arbitral tribunal also gave the same words. See also, Methanex Corporation v. United States of America of 3 August 2005, para. 7.

distinguished legitimate non-compensable regulations and indirect expropriation requiring compensation[415].

3.2.3.2 Fair and Equitable Treatment

Fair and Equitable Treatment (FET) is generally considered as the most important standard of protection offered by the IIAs. As we already mentioned that nationalizations are rarely occur in the present days; therefore FET standard has become a popular litigation strategy in modern days[416]. The FET standard exists in most of IIAs[417]. There are variations of languages of the term FET standards by the different IIAs[418], which might affect to the outcome of the interpretative process, especially by states and arbitral tribunals. The trend of newly concluded IIAs tends to either avoid putting the FET standard (But rather put the National Treatment standard, for example, the Singapore model of IIA), or to give more precise details to FET standard in the treaties (For example, in CETA and CUSMA). The main reason that states put

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[415] A careful examination reveals that, in broad terms, they have identified the following criteria which look very similar to the ones laid out by the recent agreements: i) the degree of interference with the property right, ii) the character of governmental measures, i.e. the purpose and the context of the governmental measure, and iii) the interference of the measure with reasonable and investment-backed expectations. Ie. Some take legitimate expectation, proportionality, and economic activity. See, OECD, «"Indirect Expropriation"… *id.*

[416] United Nations Conference on Trade and Development (UNCTAD), Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2012.

[417] For some IIAs without FET standard may well indicate that the States parties to the agreement are unwilling to subject their regulatory measures to review under this standard. However, despite the absence of the FET obligation in a treaty, the international minimum standard still exists in customary law. However, investors have to find the way to enforce them through other standards of protection. See, *Ibidem.* For IIAs without FET standard, see for example, Singapore-Australia Free Trade Agreement (SAFTA) of 2003.

[418] According to the United Nations Conference on Trade and Development (UNCTAD), there are 5 main approaches of FET standard in different international investment agreements, which are;

(1) In some investment agreements, there might not be provided FET standard of protection at all.

(2) FET standard standalone without any reference to international law. Mostly appear in old model of the BITs. This simply mean that states are obliged to FET standard. For example, See, Article 3 of the Belgium-Luxembourg Economic Union-Tajikistan Bilateral Investment Treaty of 2009.

(3) FET link to the international law. In which it will ensure that arbitral tribunal shall interpret FET standard according to principles of international law, including, but not limited to, customary international law. For example, See, Article 2(3) of Bahrain - United States of America Bilateral Investment Treaty of 1999. See also, Article 3(2) of the Agreement between the Government of the Republic of Croatia and the Government of the Sultanate of Oman on the Promotion and Reciprocal Protection of Investments.

(4) FET linked to the minimum standard of treatment of aliens under customary international law. Which have been concluded by many modern IIAs these days. See, Article 1105 of the North America Free Trade Agreement (NAFTA).

and (5) FET with link to other substantives protection (Ex. denial of justice, unreasonable/discriminatory measures, breach of other treaty obligations, or accounting for the level of development). The reason beyond this language of FET is to enhance the predictability and limited the scope of interpretation of international arbitral tribunal. For example, See, Article 11 of the ASEAN Comprehensive Investment Agreement of 2009.

more details on the FET standard is to overcome its critics of uncertainty and lack of uniformity[419], by enhancing certainty in the interpretation by the arbitral tribunals[420].

In broad understanding, the Fair and Equitable standard (FET) obliged the host state to treat foreign investors fairly in a non-discriminate manner. The notion has been developing from a number of arbitral proceedings giving the definition to this substantive protection. Although the concept is not yet defined, we could say that the FET standard has been expanded to include notions of non-discrimination, consistency, good faith, fair procedure, proportionality, transparency, and do not violate investors' legitimate expectations. It was at one stage agreed that the FET standard offers a higher standard than the international minimum standard[421], but the trends today show the opposite. More detail on the relevancy between the FET standard and the international minimum standard shall be discussed later in this section.

It is also important to note that the recent arbitral tribunal decision takes more account of balancing foreign investment protection and the host state's right to regulate. The balancing between them is always involved by the doctrine of the proportionality test, in order to determine whether foreign investment protection or the host state's right to regulate is greater[422]. However, the relevancy between the FET standard and the proportionality test is still vague since the development of the principle of proportionality as a sub-element of the FET standard is still in the early stage[423]; thus, it is not mandatory for the arbitral tribunal to apply proportionality test in every arbitral proceeding. However, some literatures points out to the benefit of including the proportionality test in the FET standard[424]. Today, there are many recent arbitral tribunals that

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419 SCHREUER, Christoph H., «Fair and Equitable Treatment in Arbitral Practice», *The Journal of Investment and Trade* Vol. 6 No.3 (2005), 357-386; See also, KALICKI, Jean &MEDEIROS, Suzana, «Fair, Equitable and Ambiguous: What Is Fair and Equitable Treatment in International Investment Law?», *ICSID Review* Vol. 22 Issue 1, 24-54;

420 There are critics toward FET standard, especially, with the sovereignty-related issues, which are; an expansive interpretation of the FET standard and a lack of predictability as to what kinds of actions will infringe upon it, the indeterminacy of the threshold of liability under the FET standard, and the striking of balance between the private and public interests by arbitral tribunal.

421 SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

422 There are many awards rendered by ICSID tribunals pursuant to Argentina's response to the crushing economic crisis of 2000-02. Those international arbitral tribunals were striking the balance between Argentina's right to regulate during the crisis and investor's right. For instance, See CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/18, award of May 12, 2005. See also, LG & E Energy Corp, LG & E Capital Corp and LG &E International Inc. vs. Argentina Republic, ICSID Case No. ARB/02/1, Decision on Liability Award of 3 October 2006.

423 Many arbitral tribunals criticize the vagueness of the term Fair and Equitable standard (FET), but they also not achieve the goal in unified the term FET standard. Therefore, it is still unknown for sure which specific conduct of host state shall breach FET standard. However, in the vast majority of those vague interpretation, there is no obvious arbitral awards really tie proportionality test to the FET standard. See, ISLAM, Rumana, «Proportionality as a Tool for Balancing Competing Interest in Investment Disputes: Fair and Equitable Treatment (FET) Standard in Context», *Jahangirnagar University Journal of Law* Vol. 1 (2013), 119-139;

424 Some scholars purpose that linking FET with proportionality can play an important role as a part of rule of law in many domestic legal systems. See, SCHILL, Stephan W., «Fair and Equitable Treatment under Investment Treaties

have linked the proportionality test to the FET standard, although those applications have been subjected to criticism regarding the lack of reasoning on how the proportionality test has been interpreted in the FET context[425].

It is not possible to cover all aspects of the FET standard in this thesis. Therefore, this part of our thesis shall explore the current trend of FET standards by making an analysis of the term investor's legitimate expectation, and then the term of FET and the minimum standard of customary international law.

The notion of an investor's legitimate expectation is the most important sub-principle of the FET standard that arbitral tribunals usually bring up to determine whether the action of the host state breaches the FET standard of protection or not[426]. The notion of legitimate expectation requires stable business environment conditions to be maintained; therefore, foreign investors could obtain profits through the lifetime of their investment[427]. The term stable investment climate refers to the specific situation when the representative from the state made a specific promise or incentives, and such specific promise or incentives has a huge influence on foreign investors to make their decision to invest in the host state[428]. For example, the representative of the state made a promise to a foreign investor to grant a license to operate its business. In *Walter Bau v. Thailand*, the arbitral tribunal ruled that Thailand had breached Claimant's legitimate expectation. The tribunal held that the claimant has a legitimate expectation since both parties signed a memorandum of association (MoA2 – passed by the Thai Cabinet approval on 11 June 1996), in which MoA2 grants many rights to the claimant, and then creates the legitimate expectation for the claimant to be able to expect for a certain amount of profits in the long run. Especially, the MoA2 included the ability to increase toll fees[429], but later the request from the claimant to increase the toll fees in accordance with the MoA2 was rejected by the Royal Thai government.

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as an Embodiment of the Rule of Law», Rainer HOFMANN &Christian J. TAMS (Eds.), *The International Convention for the Settlement of Investment Disputes (ICSID) – Taking Stock After 40 Years*, Nomos, Baden-Baden, 2007;

425 For example, See, LG&E Energy Corporation vs. Argentine Republic, ICSID Case No. ARB/02/01, award of 3 October 2006, para. 124. See also, S.D. Myers vs. Canada, UNCITRAL First Partial Award of 13 November 2000, para. 255. See, Técnicas Medioambientales, TECMED SA vs. Mexico, ICSID Case No. ARB(AF)/00/2, award of 29 May 2003, para. 122-133.

426 In arbitral tribunal of Walter Bau v. Thailand, award of 1 July 2009, para. 12.1 stated that "Legitimate expectations are definitely part of FET to the extent indicated by the authorities…".

427 CMS Gas Transmission Co v. Argentina, award of 12 May 2003, ICSID Case No. ARB/01/8, para. 274.

428 FIETTA, Steven, «Expropriation and the Fair and Equitable Standard: The Developing Role of Investors' Expectations in International Investment Arbitration», *Journal of International Investment Arbitration* Vol. 23 No. 5 (2006), 375-399;

429 Walter Bau v. Thailand, award of 1 July 2009, para. 12.13.

As we already note that the recent arbitral tribunal decisions took more account in balancing foreign investment protection and the host state's right to regulate. Therefore, investors' legitimate expectations are not always prevailed; however, the host state still has an obligation to maintain a reasonable and predictable regulation[430]. Therefore, in our view, we strongly agree that states are still responsible for breaching investors' legitimate expectation, if there is a solid promise given by the state's representative, but later that promise cannot be fulfilled.

It is important to remind the reader until this paragraph that we shall move to the second point of this part, which is the FET standard and the customary international law minimum standard of treatment. In the current trend, the FET standard of customary international law has no further protection than the minimum international standard of customary international law. The view has been gaining dominance that for a breach to be found, a state's conduct must be "egregious", "obvious error", "presenting high degree of fraud or a clear outrage" or "shocking" from an international perspective.

The term minimum standard of treatment of aliens under customary international law (MST) came into existence in 1926. The notion of MST appeared in one of the most cited cases of *L. F. H. Neer and Pauline E. Neer*. In this case, the U.S. claimed that Mexican authorities had committed the denial of justice, because (claimed by the US) Mexican authorities failed to exercise due diligence in finding and prosecuting the murderer of a United States national. In this decision, the Mexico-United States General Claims Commission disallowed the U.S.'s claim by giving the reason that the MST only provides minimum protection to a foreigner, in which it requires a government's action to be egregious or an obvious error[431]. This case, again, shows us that MST

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[430] Tribunal in EDF Case also gave a great definition of legitimate expectation. See also, EDF (Services) v. Romania, ICSID Case No. ARB/05/13 award of 8 October 2009, para. 217. "The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable."

See also, Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19 Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 7.77 stated that "While the investor is promised protection against unfair changes, it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment".

[431] Arbitral award of L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States on 15 October 1926, VOL. IV, pp. 60-66, para. 4; stated that "Without attempting to announce a precise formula, it is in the opinion of the Commission possible to […] hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from

only serves as the "floor" protection for the investor. The violation of the FET standard in the view of the Commission in this case, required a high standard for denial of justice to be established.

Nowadays, there are huge debates on FET and MST, which is one of the standards of protection under IIAs, using by the U.S., Canada, Australia, and New Zealand as the exporters of the concept[432]. It is appropriate to begin with the center of the debate, which is NAFTA. NAFTA Commission issued an interpretative note declaring that the fair and equitable standard under Article 1105(1) was no more than the international minimum standard of customary international law[433]. The interpretative note was issued to encounter the problem caused by *Pope &Talbot* Case[434], in which the tribunal decided that the MST offers a higher standard of protection than the *Neer* Case. The interpretative note should serve more certainty in arbitral proceedings, but on the contrary, the way that the arbitral tribunal in NAFTA interpreted the MST shows us otherwise.

There are attempts from the arbitral tribunal in the 20th Century to put a higher standard of protection to MST (At least, a higher standard than *Neer* Case). In *Mondev* Case, the tribunal concluded that it cannot be assumed that NAFTA is confined to the *Neer* standard of outrageous treatment. Thus, the arbitral tribunal in Mondev views that in order for a state's action to constitute as a breach of FET standard, it does not require those actions from the state to be egregious or an obvious error[435]. Similar words also appear in *Crystallex* Case which stated that "…the Tribunal is of the view that FET comprises, *inter alia*, protection of legitimate expectations, protection against arbitrary and discriminatory treatment, transparency and consistency. The Tribunal believes that state's conduct needs not to be outrageous or amount to bad faith to breach the fair and equitable treatment standard"[436].

However, the arbitral tribunal in *Glamis* Case does not share the same view as the two aforementioned cases in the previous paragraph. The arbitral tribunal in *Glamis* Case just ignored

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the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial".

[432] The letters attached to the Singapore–United States Free Trade Agreement also take the position that the phrase 'fair and equitable treatment' as used in the treaty should be taken to refer to the international minimum standard of treatment. The new model investment treaties of both the United States and Canada repeat this formula. See, SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

[433] North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions NAFTA Free Trade Commission of July 31, 2001. Available at, <http://www.sice.oas.org>.

[434] Pope & Talbot v. Canada, award in the Merits of Phrase 2 of 10 April 2001, para. 110.

[435] Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, award of 11 October 2002, para. 116. "….To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith".

[436] Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2) of 4 April 2016.

the relevant evolution of the MST by strictly to the *Neer* standard and embracing to NAFTA interpretative note. The tribunal believes that the MST serves only as a floor, which requires an action of the state to be egregious and shocking below the international standard to find its action in violation of FET[437]. However, the tribunal leaves an interesting view that the international community views as "outrageous" may change overtime, in which "outrageous" today is already beyond what we perceived in 1926 by *Neer* standard[438].

Finally, it is interesting to note that the approach of FET standard in IIAs that EU member states had concluded before the entry of the Lisbon treaty is different from the U.S. model[439]; the trend in modern EU IIAs under its exclusive competence seems to set a higher standard of FET. EU IIA model on the FET standard contains novel clauses that link to other substantive provisions[440], which make the FET term to be clearer with more precise language to avoid the unwelcomed discretion of the arbitral tribunal[441]. EU newly concluded IIAs indeed, enhance the predictability of interpretation of FET standard, because the more specific the clause, the clearer its scope and content. In the Comprehensive Economic and Trade Agreement CETA, a breach of FET standard links to other substantive provisions like a denial of justice, a fundamental breach of due process, manifest arbitrariness, and targeted discrimination on manifestly wrongful grounds (such as gender, race, or religious belief)[442]. Thus, the concept of "legitimate expectation" in CETA is also limited to situations where a specific promise or representation was made by the state[443].

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437 Glamis Gold, Ltd. v. The United States of America, UNCITRAL, award of 8 June 2009, para. 615.

438 Glamis Gold, Ltd. v. The United States of America, UNCITRAL, award of 8 June 2009, para. 612.

439 However, in the capital export countries like Germany or France contain autonomous fair and equitable treatment without linking to international law minimum standard of protection. For example, See, Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments of 2002.

440 The trend of linking FET standards with other substantive provisions also appears in others continent. For example, See, ASEAN Comprehensive Investment Agreement (2009) Article 11. The Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States Article 8.10.

441 DUMBERRY, Patrick, «Fair and Equitable Treatment», Makane Moïse MBENGUE &Stefanie SCHACHERER (Eds.), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)*, Springer, Cham, 1st Edition, 2018;

442 Comprehensive Economic and Trade Agreement (CETA) Article 8.10(2).

443 Comprehensive Economic and Trade Agreement (CETA) Article 8.10(4). See also, KRIEBAUM, Ursula, «FET and Expropriation (Invisible) EU Model BIT», *Journal of World Investment & Trade* Vol. 15 Issue 3-4 (2014), 454-483;

3.2.3.3 National Treatment & Most Favored Nation Treatment

National treatment and Most Favored Nation Treatment (MFN) are known by international lawyers as principles of the trading system under the WTO[444], which are based on non-discriminatory between foreign investors and local investors, and between foreign investors from one state and other states. In sum, these two standards of protection aim to guarantee the equality of competitive opportunities between investors, regardless of whether they are local or foreign. However, national treatment and MFN are facing many challenges; one of them which deserves a full analysis is whether there should be a legitimate discrimination (A positive discrimination) in some cases. One of the good examples is when international firms that possess more funds and experience, in these very circumstances, a differentiation between national and non-national firms may be necessary, in order to bring about a degree of operative equality. A deeper analysis of this issue shall be discussed later in Chapter 6 of the thesis.

National treatment standard of protection obligated state parties to give treatment to investors of national of other contracting parties accorded to its own investors. States are prohibited from giving different treatment between foreign investors and local investors who conduct similar businesses. For discrimination to be found in this context, there must always be a comparison made between two types of investments operating in the same sector and competing with each other. Such a comparison must be made between persons in like circumstances[445]. Modern IIAs, particularly, the United States and Canada model BITs have extended national treatment to include the pre-entry stage (Pre-establishment). The pre-establishment stage of national treatment ensures market access for foreign investors as equal to national investors[446]. In other words, the national treatment at the pre-entry stage also applies to prospective investors[447].

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444 National Treatment and MFN are one of the main pillars of the WTO multilateral trading system. They ensure non-discrimination between trading partners. National treatment standard of protection obligated WTO state parties to give treatment to investors (in similar business) of national of WTO member states accorded to its own investors. Meanwhile, MFN required WTO member who grant advantages to other WTO member, to give the same advantages to all WTO members. It could be regarded that WTO member is a club, in which one of the fundamental rules of the club, requiring member of the club to grant the same advantages that given to other countries to the member of the club. In general, the MFN ensure that anytime WTO members open up their market or lower their trade barrier, they have to do so in the same manner to all WTO members, regardless of whether economic sizes or development. In is interesting to note that MFN in WTO does require its member state to grant the same advantages to its member, even though such advantages are given to non-WTO countries. See, <www.wto.org>.

445 SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

446 United Nations Conference on Trade and Development (UNCTAD), National Treatment: UNCTAD Series on issues in international investment agreements, United Nations, New York and Geneva, 1999.

447 For instance, article 5 of the ASEAN Comprehensive Investment Agreement stated that

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

Thus, it is important to note that the national treatment standard, regardless of whether it does include the pre-entry stage or not, might contain negative or positive lists that are exempt from national treatment protection[448]. Those lists are normally exempt in certain strategic areas such as, those industries that could create an adverse financial impact on the state, or natural sectors. For example, the energy sector, healthcare, or agriculture[449].

In addition to the national treatment standard, there is a standard of Most Favored Nation (MFN) that is commonly included by IIAs. MFN ensures that a host country extends to the covered foreign investor and its investments, as applicable, the treatment that is no less favorable than that it accords to foreign investors of any third country[450]. However, the MFN standard of protection is not unlimited since treaties always leave some exceptional areas that are not covered by the MFN (Ex. MFN does not apply to economic integration, energy sector, or double taxation)[451]. MFN enables the nationals of the parties to profit from favorable treatment that may be given to nationals of third states by either contracting state[452]. In text, some modern IIAs tend

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2. Each Member State shall accord to investments of investors of any other Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments"

Other similar word on national treatment, for example, See, Agreement Between Canada and Mongolia for the Promotion and Protection of Investments of 2016.

448 Negative list refers to excepted industries and areas to which national treatment does not apply. Meanwhile, "positive list" refers to where no *a priori* general right to national treatment is granted and national treatment extends only to those industries and areas specifically included in the positive list.

449 For example, ASEAN Comprehensive Investment Agreement of 2009, Article 9 on reservation clause on national treatment and MFN.

450 United Nations Conference on Trade and Development (UNCTAD), Most-Favored Nation Treatment: UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2010.

451 Some of formulation regarding to exception on economic integration and double taxation. For example, See, France – Libya BIT of 2004 Article 4 stated that

"This treatment does not extend, however, to the privileges that one Contracting Party grants to the nationals or companies of a third State, by virtue of its participation in or association with a free trade area, customs union, common market or any other form of regional economic organization.

Treatment granted under this article is not applied to taxes and fiscal deductions and exemptions granted by one of the Contracting Parties to the investors of a third State under a double taxation or other tax related agreement."

See also, Agreement between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar for the Promotion and Protection of Investments of 2008, Article 4, which also provided the similar wording.

Thus, Some BITs specifically exclude certain sectors from the scope of MFN, namely "aviation, fisheries, maritime matters, including salvage." (Canada–Peru BIT 2006). Other BITs add specific exceptions, such as "any arrangements for facilitating small scale frontier trade in border area," (China–Benin BIT 2004) or "matters related to the acquisition of land property." (Japan–Kazakhstan BIT 2014).

452 The International Law Commission's (ILC) describe MFN clause as "A most-favoured-nation clause is a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations". See, UN, *The Yearbook of the International Law Commission*, 1978, vol. II, Part Two, Article 4.

to include National Treatment and MFN together, in which foreign investors could benefit from either standard of protection, whichever one is more favorable to the investor concerned[453].

As we already mentioned that MFN clause in IIAs was created to prevent discrimination between foreign investors and to ensure an equal footing between foreign investors operating a business in host countries. However, MFN cause concerns to the host state as it is a constraint to the host state's sovereignty on policy making, since MFN might extend to the protection that the host state does not intend to give to foreign investors in the first place. One particular issue that the MFN clause brings to the debates by scholars is its applicability, whether or not, to dispute settlement provision. Since some IIAs require foreign investors to exercise local remedies before the rights to submit their dispute to arbitration, nevertheless some IIAs do not require the exhaustion of local remedy but rather just give the right to foreign investors to submit their dispute directly to the international arbitral tribunal when they feel that state has failed to fulfill its obligation under the IIAs.

It was already established in the *Maffezini* case, where the tribunal held that it is possible for a foreign investor who is protected by an investment treaty with the MFN clause to use a better (More favorable to investor) dispute-settlement provision in a treaty made by the respondent. In the *Maffezini* case, Spain claimed that *Maffezini* must exercise exhaustion of local remedies before the Spanish court under article X of Argentina-Spain BIT before the right to submit their dispute to arbitration under the aforementioned BIT. However, the tribunal rejected Spain's claim by

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The example of MFN clause, Agreement between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments of 2016 Article 5 stated that

"1. Each Party shall accord to an investor of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its area.

2. Each Party shall accord to a covered investment treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its area" See, Article 5 (1) (2) of the Agreement between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments of 2016.

[453] For example, Portugal-Jordan BIT of 2009 stated that

"1. Neither Party shall accord in its territory to investments and returns of investors of the other arty a treatment less favourable than that which it accords to investments and returns of its own investors, or investments and returns of investors of any other third State, whichever is more favourable to the investors concerned.

2. Neither Party shall accord in its territory to the investors of the other Party, as regards, acquisition, expansion, operation, management, maintenance, enjoyment, use, sale or disposal of their investment, a treatment which is less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable to the investors concerned".

See, Article 4(1)(2) of the Agreement between the Government of the Portuguese Republic and the Government of the Hashemite Kingdom of Jordan on the Reciprocal Promotion and Protection of Investments of 2009.

concluded that MFN is broad, and then allowed a more favorable settlement of the dispute clause in Chile-Spain BIT, whereas there is no pre-condition to the arbitration clause[454]. The decision by the tribunal was subjected to criticisms of its uncertain scope of application. Later, there was more controversy when some arbitral tribunals followed the views of the *Maffezini* case[455]; meanwhile, others rejected it[456]. There are efforts by states to overcome this vagueness and uncertainty of interpretation of the clause by writing in their modern IIAs that MFN does not apply to the settlement of dispute clause[457]. Some scholars further suggested that the specification of how and in what circumstances an MFN clause will be applied will solve the aforementioned problems in any future arbitral tribunal's interpretation[458].

3.2.3.4 Other Standards of Protection

Apart from the aforementioned standards of protection under IIAs (Protection against unfair expropriation and nationalization, FET standard, national treatment standard, and MFN standard). There are also three other standards of protection under IIAs that we shall explore in this section, which are, "Full protection and security", "Free transfer of funds", and "Umbrella clause". However, we shall explore limited only to their general concepts, since it would be out of the scope of our thesis if we make a deep investigation into all of them.

The standard of "full protection and security" appears in the majority of the IIAs[459]; some IIAs might put the word "security" before the word "full protection". However, those variations

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454 Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 of 13 November 2000, para. 21.

455 Arbitral tribunal that following the *Maffezini* views', for example, See, Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1, para. 186. See also, National Grid plc v. The Argentine Republic, UNCITRAL, Decision on Jurisdiction of 20 June 2006, para. 93. See also, Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Jurisdiction 3 August 2006, para. 68. See also, Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004, para. 109.

456 Arbitral tribunal that rejecting Maffezini views', for example, See, Vladimir Berschader and Michael Berschader v. Russian Federation (SCC Case No. 080/2004) para. 206. See also, Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, decision on Jurisdiction of 9 November 2004, para. 119. See also, Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 219 &227. See also, Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award of 8 December 2008, para. 160-197.

457 For example, See, Agreement between the Portuguese Republic and the United Arab Emirates on the Reciprocal Promotion and Protection of Investments of 2011, Article 4(4). See also, Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia of 2010, Article III(2).

458 DOLZER, Rudolf &MYERS, Terry, «After Tecmed: Most-Favored-Nation Clauses in Investment Protection Agreements», *ICSID Review* Vol. 10 Issue 1 (2004), 49-60;

459 For example, See, Article 1105(1) of the North America Free Trade Agreement (NAFTA). See also, Article 10(1) of the Energy Charter Treaty (ECT). See also, Article 5(1) of the Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the Enforcement and Reciprocal

in language do not appear to carry any difference in substantive significance[460]. In general, the standards require the states to ensure the security that foreign investors can operate their businesses peacefully, and without adverse effects. It is accepted by arbitral tribunals that full protection and security refer to physical security[461]. States must prevent violence against the interests of foreign investors if such violence could be reasonably anticipated with the state's due diligence[462]. Among many arbitral awards, we could categorize that, states have to ensure security for foreign investors against a third person[463], and against states themselves[464]. In some cases, tribunals found that the standard protects not only foreign investors against physical violence, but also includes legal security by state[465]. However, the widening of its scope is calling for intention and criticisms from scholars[466].

The main objective of foreign investors who make an investment in a host state is to generate profits, and able to repatriate those profits from their successful business back to their home state. In many IIAs, there is a standard of protection called the standard of "free transfer of

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Protection of Investment. See also, Article 4(1) of the Agreement between the Government of the Kingdom of Thailand and the Government of the United Arab Emirates on the Promotion and Protection of Investments.

460 CORDERO-MOSS, Giuditta, «Full Protection and Security», August REINISCH (Ed.), *Standards of Investment Protection*, Oxford University Press, Oxford, 1st Edition, 2008;

461 Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, award of 29 July 2008, para. 668.

462 SCHREUER, Christoph H., «Full Protection and Security», *Journal of International Dispute Settlement* Vol. 1 Issue 2 (2010), 353–369;

463 Arbitral tribunals finds that the host State's only duty was to exercise due diligence in protecting the investors from forcible interference. For example, in ELSI case, the ICJ ruled that Italy already respond adequately to the ELSI's worker occupation of the plant. See, Elettronica Sicula S.P.A. (ELSI) (United States of America V Republic of Italy) Judgment of 20 July 1989, para. 108. However, in *Wena Hotels* Case, the tribunal ruled that Egypt violated full protection and security since its aware of intentions to seize the hotels and took no action to prevent it. Thus, the police and authority does not take an immediate action against them. See, Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, award of 8 December 2000, para. 80-117. Furthermore, in *Pantechniki* Case, the tribunal held that the extent of the State's duty under full protection and security depended to some extent on the resources available. In this case, the state was not able to stop the riot with it resources. Thus, the claimant failed to demonstrate how state fail to such duty. See, Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, award of 30 July 2009, para. 77-82.

464 Thus, it is beyond unreasonable doubt by the arbitral tribunal that the full protection and security not only require host state to prevent harm from third party to foreign investors, but also prevent itself from such action. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, award of 24 July 2008, para. 730. Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, final award of 27 June 1990, para. 78-86. See also, American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, award of 21 February 1997, part 3.

465 Trends of arbitral tribunals are supporting these views, among many, See, Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, award of 17 January 2007, para. 303. See also, Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, award of 14 July 2006, para. 406. See also, National Grid plc v. The Argentine Republic, UNCITRAL, award of 3 November 2008, para. 189.

466 There has been a tendency to expand the scope of the provision well beyond the minimum standard of treatment under the international law, to include a wider notion that the clause mandates the maintenance of conditions of stability for the investment. See, SORNARAJAH, Muthucumaraswamy, The International Law… *id.* See also, SCHREUER, Christoph H., «Full Protection… *id.*

funds" (Or repatriation of profits). Free transfer of funds is one of the core provisions in IIAs. The standard puts an obligation toward the host state to allow the free flow of protected investment related to transactions, guaranteeing the transfer, conversion, and liquidation of any form of capital, proceeds from liquidation, payments, profits, and others without restraint. However, some IIAs allow an exception in case of a host state's financial crisis, especially in the host state's balance-of-payment (BoP) crisis[467], but such restriction must be done in a temporary manner and on a non-discrimination basis[468].

Finally, many IIAs contain a clause ensuring that parties shall keep their commitments made to each other's nationals. This clause under IIAs is called the "Umbrella Clause". The clause ensures that each Party to the treaty will respect specific undertakings towards the nationals of the other Party[469]. Host states are obligated to observe any obligation they may have entered to[470]. It would be unnecessary to examine all the criticisms of the umbrella clause in the thesis; however, it is sufficient to note here that the umbrella clause is subjected to criticism mostly on its interpretation by arbitral tribunals. Even though similar facts have the interpretation in different

[467] For example, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Jamaica for the Promotion and Protection of Investments of 1987, Article 7.

[468] United Nations Conference on Trade and Development (UNCTAD), Transfer of Funds: UNCTAD Series on Issues in International Investment Agreements, United Nations, New York and Geneva, 2000; For example, See, Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investment of 2019, Article 7.

[469] Umbrella Clause for example, Article 10(2) of the Swiss Model BIT provides that "Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party". In addition, Article 8 of the German Model BIT (2008) states that "Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party/investments in its territory by investors of the other Contracting State". See also, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments of 1990, Article 2(2). "…Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party".

[470] Some IIAs cover only disputes relating to an "obligation under this agreement", i.e. only for claims of its violations. Others extend the jurisdiction to "any dispute relating to investments". Some others create an international law obligation that a host state shall, for example, "observe any obligation it may have entered to"; "constantly guarantee the observance of the commitments it has entered into"; "observe any obligation it has assumed", and other formulations, in respect to investments. See, YANNACA-SMALL, Katia., "Interpretation of the Umbrella Clause in Investment Agreements", OECD Working Papers on International Investment 2006/03, OECD Publishing.

ways of the term, this situation led to criticism of its unpredictability and inconsistency[471]. It leads to a current trend that states do not include umbrella clauses in their new IIAs model anymore[472].

3.2.4 Dispute Settlement Provisions

In a general sense of foreign investors, justifiably in many instances, do not have confidence in the impartiality of local tribunals nor from host state domestic courts to settle the dispute between them and the host state government[473]. Not to mention that the procedure in domestic court usually takes a longer period before coming to the finality compared to the international arbitration, and the benefits from worldwide enforcement of arbitral awards. In response to the issue, most of the IIAs contain the inter-state dispute settlements provision (ISDS)[474]. ISDS provision allows foreign investors from the home state to bring the dispute to a domestic court or to the international arbitral tribunal when foreign investments feel that the host state failed to perform its substantive obligations under the IIA[475]. Foreign investors could choose

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[471] The most two famous cases in the interpretation of the term "Umbrella Clause" are SCG v. Pakistan and SCG v. Paraguay. These two cases introduce two similar facts, which are the non-performance of contract by host state. In SCG v. Pakistan, the arbitral tribunal held that there is no need to elevate the contract claim into the treaty claim. See, SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13 decision of 6 August 2003, para. 165. Meanwhile, in SCG v. Pakistan, the arbitral tribunal ruled that the umbrella clause already encompassed the contractual obligation, supported by set of reasons and the interpretation of clause under Vienna Convention. See, SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case No. ARB/07/29 award of 10 February 2012, para. 93.

Thus, the interpretation of the clause is even more controversial, since many other arbitral tribunals made the interpretation in either way that we mentioned above. See, Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13. See also, Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12. See also, El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15. See also, Eureko B.V. v. Republic of Poland, partial award of 18 August 2005. See also, Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5.

[472] NAFTA and the ASEAN-Australia-New Zealand FTA did not contain umbrella clauses. The position against umbrella clauses was clear. Furthermore, the much-anticipated Trans-Pacific Partnership (TPP) and EU-Canada Comprehensive Economic and Trade Agreement (CETA) showed signs that they would not contain umbrella clauses, as well as other important jurisdictions in updating their model BITs, such as India and Norway. See, DE SOUZA, Fleury &PEREIRA, Raul, «Umbrella clauses: a trend towards its elimination», *Arbitration International* Vol. 31 Issue 4 (2015), 679–691;

Thus, when looking at BITs at the moment, around 75 percent of them are omitting the umbrella clause. See, TUERK, Elisabeth, BAUMGARTNER, Jorun &ATANASOVA Dafina, «Trends and… *id.*

[473] PARRA, Antonio R., «Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment», *ICSID Review - Foreign Investment Law Journal* Vol. 12 Issue 2 (1997), 287–364;

[474] In the recent study by Organization for Economic Co-operation and Development (OECD), there are 96 percent from 1,660 surveyed Bilateral Investment Treaties contain ISDS provision. See, POHL, Joachim, MASHIGO, Kekeletso &NOHEN, Alexis, «Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey», OECD Working Papers on International Investment 2012/02, OECD Publishing.

[475] Some IIAs just omit the term that foreign investor could choose to use domestic court, but rather to exclusively refer to international arbitration. We think this does not make any different whether to put the clause allowing foreign investors to use domestic court or not. Since any injured party have rights to seek the remedy through the local court anyway, even though it is explicit in the IIA or not. For example, Agreement on Encouragement and

only one venue to decide their dispute, whether by the domestic court or by international arbitration. This situation is called the "Fork-in-the road clause" in international arbitration[476].

Contract law, in general, requires consent from both parties to use arbitration as a method to resolve the current or future dispute. In the ISDS arbitration, consent from the host state was already given by the IIAs. This kind of consent usually refers to as an "Open offer" or "Standing offer" from the host state made to foreign investors from the home state. These standing offers get accepted on a case-to-case basis when a particular investor files an investment dispute to arbitration by their right in the IIA[477].

There are several types of clauses creating different obligations before the right to submit the dispute to arbitration. At the least requirement, the foreign investor can directly submit an investment dispute to an arbitral tribunal after a "cool-off" period as suggested by the treaty[478]. At a high level, certain conditions must be fulfilled before the right to submit the dispute to arbitration

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Reciprocal Protection of Investments between the Arab Republic of Egypt and the Kingdom of the Netherlands of 1996.

[476] In many investment treaties gave choices to foreign investors to bring the dispute to domestic court or to international arbitration. Fork-in-the-road doctrine come into play in this situation, allowing investor to choose either domestic court or international arbitration to solve its dispute. Same dispute could be submitted to only one venue, and it is irrevocable. For example, when domestic court already decided the matter related to default of payment in favor of state, the investor could not submit the dispute regarding to default payment to the international arbitration for better outcome, and Vice versa to the international arbitration. See, YANNACA-SMALL, Katia, «Improving the System of Investor-State Dispute Settlement», OECD Working Papers on International Investment, 2006/01 (2006), OECD Publishing.

[477] SACERDOTI, Giorgio, «Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards», *ICSID Review* Vol. 19 Issue 1 (2004), 1-48; See also, SINSOONGSUD, Katipote, *Non-contractual Regime of Arbitration Under Bilateral Investment Treaties, Study on General Concept from Some Bilateral Investment Treaties Between Thailand and Other Countries*, Faculty of Law, Thammasat University, 2013;

[478] For example, Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Finland for the Promotion and Protection of Investments of 2009, Article 10(1)(2) stated that

"(1) A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that three-month period, the dispute shall at the request of the investor concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify those Rules.

(2) Paragraph (1) of this Article shall not be construed so as to prevent investors of either Contracting Party from submitting the dispute to the competent courts of the Contracting Party in whose area the investment is made. In the event that an investor has submitted the dispute to a competent court within the area of the other Contracting Party, the same dispute shall not be submitted to arbitration referred to in paragraph (1) of this Article."

The length of the "cooling-off" period varies. Most often, it is set to 6 months, but many treaties set a shorter period of 3, 4 or 5 months. Other periods, such as 7, 12, and 18 months occur occasionally. The average required waiting time of treaties concluded in a given year has been stable as 6 months since the mid-1980s. See, POHL, Joachim, MASHIGO, Kekeletso &NOHEN, Alexis, «Dispute Settlement… *id.*

as suggested by the treaty[479]. Further details of the exhaustion of local remedies shall be discussed in Chapter 6 of the thesis.

It is common for IIAs to give "choice of forum" to foreign investors; even some IIAs might give only one choice of arbitration institution or arbitration rules to foreign investors. However, most of the IIAs give choices to foreign investors to choose the arbitration institution[480], for the purpose of using its services and rules on the dispute. There are arbitration institutions that are often referred to by the IIAs, which are the tribunals established under the International Centre for Settlement of Investment Disputes (ICSID), *ad hoc* tribunals established under UNCITRAL rules, and the International Chamber of Commerce (ICC)[481]. Furthermore, the local arbitration institute, for example, the Arbitration Institute of the Chamber of Commerce in Stockholm, is occasionally referred to by some IIAs[482]. It is also interesting to note that some states also promote their local arbitration institutions as one of the choices of forum for foreign investors[483].

3.3 Arbitration Institutions and Rules in relation to International Investment Arbitration

As already suggested in the previous part that there are many arbitration institutions offering rules and facilities for Inter-State dispute settlement (ISDS). However, there are only two

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[479] For example, Agreement between The Swiss Confederation and The Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments of 2010, Article 12 state that

"(1) Disputes between a Contracting Party and an investor of the other Contracting Party relating to an investment of the latter in the territory of the former, which concern an alleged breach of this Agreement (hereinafter referred to as "investment dispute") shall, without prejudice to Article 13 of this Agreement (Disputes between the Contracting Parties), to the extent possible, be settled through consultation, negotiation or mediation (hereinafter referred to "procedure of amicable settlement").

(2) Before submitting an investment dispute for settlement in accordance with paragraph (3), the investor shall in addition to paragraph (1) submit the dispute to the domestic administrative procedure of the Contracting Party in whose territory the investment has been made (hereinafter referred to as "disputing Party"). The investor may submit the investment dispute to the domestic administrative procedure in parallel or in conjunction with the procedure of amicable settlement referred to in the paragraph (l). The two procedures shall in no case exceed six months from the date of the written request for consultation, negotiation or mediation submitted by the investor."

[480] For example, See, Agreement between the Belgium-Luxembourg Economic Union, on the one hand, and the Sultanate of Oman the other hand, on the Promotion and the Reciprocal Protection of Investments of 2008, Article 12.

[481] The survey from 1660 IIAs have shown that there are three choices of forum that often mentioned by IIAs, which are, the tribunals established under the ICSID, *ad hoc* tribunals established under UNCITRAL rules, and the ICC. The survey also shown that most of IIAs tends to give between three to five choices to foreign investors. See, POHL, Joachim, MASHIGO, Kekeletso &NOHEN, Alexis, «Dispute Settlement… *id.*

[482] Mostly by international investment agreements which Sweden is a party.

[483] For instance, Egypt systematically includes the Cairo Regional Centre for International Commercial Arbitration (CRCICA) as a possible forum, and Egypt is also the only country to offer this forum. See, Agreement between The Swiss Confederation and The Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments of 1973. Likewise, Colombia is the only country that proposes in a treaty the Conciliation and Arbitration Centre of the Chamber of Commerce of Bogotá. See, Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia of 2010.

major institutions/rules that considering as usual places for foreign investors to pursue as a venue for ISDS[484]; which are, *ad hoc* arbitration under UNCITRAL rules, and ICSID arbitration. It would make no sense to explore all the arbitration institutions that govern ISDS, since they are too many in existence. Therefore, this part shall mainly explore two major institutions as follows.

3.3.1 Ad Hoc Arbitration under UNCITRAL Rules

Many IIAs either exclusively refer to or give a choice to foreign investors to use *ad hoc* arbitration governed by the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) to resolve their dispute with the host state[485]. The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect, and interpretation of the award[486]. Until today, there are three models of UNCITRAL Arbitration rules[487], in which different IIAs refer to different UNCITRAL model rules due to the time of conclusion of the IIAs.

Many states are using UNCITRAL Arbitration Rules as a model (Or at least, a guideline) to draft their domestic arbitration law[488]. The UNCITRAL Arbitration Rules were initially adopted in 1976. The Rules have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, ISDS Arbitration, State-to-State disputes, and commercial disputes administered by arbitral institutions.

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484 There are 630 known cases of international arbitration under the International Center for Settlement of Investment Disputes (ICSID). Meanwhile, there are 326 cases of international arbitration under UNCITRAL arbitration rules. There are also the uses of other institutions and rules, such as, International Chamber of Commerce (ICC) – 19 cases, London Court of International Arbitration (LCIA) – 5 cases, Permanent Court of Arbitration (PCA) – 166 cases, and Stockholm Chamber of Commerce (SCC) – 49 Cases. It is interesting to note that number of cases by ICSID and UNCITRAL arbitration rules are more than cases by all other institutions and rules in combined. See, United Nations Conference on Trade and Development (UNCTAD) Database, available online at <https://unctadstat.unctad.org/EN/>.

485 For example, See, Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment of 1998, Article VI(2). See also, Agreement between the Government of the Portuguese Republic and the Government of the State of Qatar on the Reciprocal Promotion and Protection of Investments of 2009, Article 11(3). See also, Agreement between the Government of the Republic of Singapore and the Government of the United Arab Emirates on the Promotion and Protection of Investments of 2001, Article 10(2)(c).

486 United Nations Commission on International Trade Law (UNCITRAL), at <uncitral.un.org>.

487 There are three models of UNCITRAL Arbitration rule, which are; (i) the 1976 version; (ii) the 2010 revised version; and (iii) the 2013 version. See, *Ibidem.*

488 For example, Law no. 63/2011 of 14th December Approves the Law on Voluntary Arbitration (Portugal). See also, Arbitration Guide by International Bar Association (Portugal), last updated February 2018. See also, Thai Arbitration Act, B.E.2545 (2002).

In 2010, there was a new version of the rules, to encounter with changes in arbitration practices in the past thirty years. Later in 2013, the latest version of the rules was an issue, in which it is the rules of the 2010 version combined with UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[489]. In other words, version 2013 is the latest version of UNCITRAL arbitration rules and remains unchanged from the 2010 revised version. However, the addition of rules on transparency is considered as a big change in the field of ISDS.

The UNCITRAL Rules on Transparency in treaty-based investor-state arbitration (Hereinafter, Rules on transparency) came into force on 1 April 2014. The rules on transparency comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-state arbitration. Rules on transparency apply to investor-state arbitration initiated under UNCITRAL arbitration rules under IIAs, which concluded on or after 1 April 2014[490]. Rules on transparency aimed to overcome the weaknesses of ISDS, especially the issue of lack of transparency by requiring arbitration proceedings to make available to the public (Ex. Notice of arbitration, the statement of defense, hearing, etc.). However, the transparency rules are subjected to certain exceptions within the discretion of arbitrators in certain circumstances[491].

It is also interesting to mention that there is another keystone development, which is the existence of the Mauritius Convention[492]. As mentioned earlier that the UNCITRAL Rules on Transparency only entered into force in 2014, but most of the existing investment treaties are dated much earlier, some for decades long. Therefore, the investment treaties that concluded before the effect of the UNCITRAL Rules on Transparency would not benefit from the rule. However, the Mauritius Convention filled the gap by allowing the application (in many ways) of the UNCITRAL Rules on Transparency retroactively to all investment treaties. The Mauritius Convention functions as a meta-treaty to modify the existing treaties regarding transparency provisions. If the Mauritius Convention is to be widely adopted, it will serve the purpose of enhancing the transparency and legitimacy of investment arbitration[493].

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[489] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014).

[490] However, investor-state arbitration initiated under UNCITRAL arbitration rules under IIAs which concluded before 1 April 2014 are possible to apply transparency rules, if agreed by both parties, or agreed by the respondent state. See, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, New York (2014) (The Mauritius Convention on Transparency), Article 1.

[491] Such exception to transparency, for example, the confidential business information, information that would impede law enforcement, or essential information regarding security interest. See, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, New York (2014) (The Mauritius Convention on Transparency), Article 7.

[492] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, New York (2014) (The Mauritius Convention on Transparency).

[493] JOHNSON, Lise, «The Mauritius Convention on Transparency: Comments on the Treaty and Its Role in Increasing Transparency of Investor-State Arbitration», Columbia Center on Sustainable Investment Policy Paper

3.3.2 International Centre for Settlement of Investment Disputes (ICSID)

As mentioned earlier in the historical perspective part, that there were efforts by many international organizations pointed out the importance of having an international independent system/instrument for settling the investment dispute rather than resolving investment by force (Gunboat policy)[494]. Though none of those proposals led to the establishment of the International Centre for Settlement of Investment Disputes (ICSID), yet those proposals played an important role in the discussion by drafting committees ICSID Convention during the early 1960s period[495], as they foresaw the need for the international instrument for every foreign investor (Regardless of whether they possess with big or small negotiating power) to be able to use arbitration as dispute settlement mechanism. The view of the drafting committee during the early 1960s also suggested their concern about whether foreign investors shall be treated fairly and equally by the host state's "local laws"[496].

Later, ICSID was established in 1965 under the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (ICSID Convention), which is a multilateral international treaty. Until today, there are 163 signatory states, with 154 contracting states already ratified to the convention[497]. ICSID is one among five agencies of the World Bank. It is a specialized institution created for the sole purpose of settling international investment disputes[498]. The governing body of ICSID is called "the ICSID Administrative Council", consists with one representative from each state in the administrative council[499]. However, the administrative council has no role in an individual case. Those individual cases are assisted by the ICSID Secretariat as a separate body from its administrative council. Disputes through arbitration

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(2014), available online at <http://ccsi.columbia.edu/files/2013/12/10.-Johnson-Mauritius-Convention-on-Transparency-Convention.pdf>. See also, <https://www.arnoldporter.com/en/perspectives/publications/2017/10/the-mauritius-convention-on-transparency>.

494 One of these schemes culminated in the Draft Convention on the Protection of Foreign Property (OECD document 23081 - Nov. 1967). Earlier the Economic and Employment Commission of ECOSOC had commenced a study of the need for such an "investment code" (UN document E/2546 (1947). Also, there were an urged of the needed for international investment agency from UNCTAD from time to time during 1960s. See, PARRA, Antonio R., *The History of ICSID*, 1st Edition, Oxford Scholarship online, Oxford, 2012;

495 For general historical perspective on drafting of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). See, International Centre for Settlement of Investment Disputes (ICSID), *History of the ICSID Convention*, Document Concerning the Origin and the on the Settlement of Investment Disputes between States and Nationals of Other States Formulation of the Convention, Analysis Document, Vol. 1, Washington D.C., 1970;

496 *Ibidem.*

497 ICSID's database, available at, <icsid.worldbank.org> (Data of April 2020).

498 SCHREUER, Christoph H., MALINTOPI, Loretta, REINISCH, August &SINCLAIR, Antony, *The ICSID Convention: A Commentary*, 2nd Edition, Cambridge University Press, Cambridge, 2009;

499 Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Article 4.

proceedings are decided by partial arbitrators, with ICSID Secretariat maintaining a panel of arbitrators and facilitating such arbitration proceedings[500].

International arbitration under the ICSID Convention is distinct and should not be confused with *ad hoc* arbitration or with the arbitration conducted by private arbitral institutions. As already mentioned above that ICSID operates on the basis of international conventions which consist of 163 signatory states (154 of them are contracting parties). Therefore, ICSID juridical status is an international institution, whereas other arbitral tribunals are either private bodies, creatures of single sovereigns or of the immediate parties to a dispute as in the case of *ad hoc* tribunals[501].

Apart from the fact that there are many criticisms of the ICSID system which lead to the situation that some states are existing from the ICSID system[502]. Still, statistics point out that ICSID arbitration is the most popular choice by foreign investors using as a forum to resolve the international investment dispute[503]. Many IIAs allow foreign investors to use ICSID arbitration as an institution and rules to govern disputes between them and the host state. Many IIAs allow foreign investors to submit investment disputes to ICSID (in case of both parties to IIA are contracting parties of the ICSID Convention)[504]. However, if there is just one party to the IIA is a

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500 Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Article 3. For the Secretariat compositions and functions, See, Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Section 3.

501 SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

502 Criticisms such as ICSID is being too friendly to foreign investors and put the constraint to host state's right to regulate. Many states exist from ICSID system and even terminate its IIAs with other states. In 2007, the Republic of Bolivia was the first state to denounce the ICSID Convention. Later, by the Republic of Ecuador in 2009 and, most recently, by the Bolivarian Republic of Venezuela in January 2012. Following their respective withdrawals from ICSID, Bolivia, Ecuador, and Venezuela have each terminated at least some of their existing BITs. See statistic in ICSID's website at <icsid.worldbank.org> (Data of April 2020). See also, REINISCH, August, «The Scope of Investor-State Dispute Settlement in International Investment Agreements», *Asia Pacific Law Review* Vol. 21 No. 1 (2013), 3-26; See also, SCHREUER, Christoph H., «Denunciation of the ICSID Convention and Consent to Arbitration», Christina BINDER, Ursula KRIEBAUM, August REINISCH, &Stephan WITTICH (Eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press, Oxford, 2009;

503 There are 630 known cases of international arbitration under the International Center for Settlement of Investment Disputes (ICSID). Meanwhile, there are 326 cases of international arbitration under UNCITRAL arbitration rules. There are also the uses of other institutions and rules, such as, International Chamber of Commerce (ICC) – 19 cases, London Court of International Arbitration (LCIA) – 5 cases, Permanent Court of Arbitration (PCA) – 166 cases, and Stockholm Chamber of Commerce (SCC) – 49 Cases. It is interesting to note that number of cases by ICSID and UNCITRAL arbitration rules are more than cases by all other institutions and rules in combined. See, United Nations Conference on Trade and Development (UNCTAD) Database.

504 For example, See, Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part of 2018, Article 3.6. See also, Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of the Investments of 2018, Article 23. See also, Agreement between the Government of the State of Qatar and the Government of the Republic of Singapore for the Reciprocal Promotion and Protection of the Investments of 2018, Article 10(2). See also, Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Article 26.

contracting party to the ICSID Convention, IIAs also give alternative choices for foreign investors to use the ICSID Convention in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID Additional Facility Rules)[505].

ICSID Convention and the ICSID Additional Facility provide the procedural framework for arbitration, conciliation, and fact-finding proceedings for its member states. This framework is supplemented by detailed Regulations and Rules. Thus, ICSID also handles arbitration cases under other rules such as UNCITRAL Arbitration rules or *ad hoc* basis.

In the scheme of international arbitration, the ICSID Convention and the ICSID Additional Facility Rules provide a procedural framework for ISDS arbitration[506]. The most important reason that makes ICSID arbitration become the most popular venue for foreign investors is because of the delocalized from domestic procedures, and the finality of awards rendered under ICSID rules. ICSID awards are final and, they are not subject to any appeal or other remedy except as provided for by the Convention itself[507]. The remedy of post-awards could only be made through ICSID appellate tribunal under limited circumstances, which are, the constituted of an arbitral tribunal, or its serious mistakes in the arbitral proceedings[508]. In ICSID Convention, all member states must recognize the awards as a final judgment from their domestic court[509]. Even though in some cases, domestic courts in some jurisdictions are challenging the finality of ICSID awards by setting aside or imposing their jurisdiction to review them[510], this

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505 The ICSID Additional Facility Rules.

506 Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Article 37-40 dealing with the constitution of tribunal, Article 41-47 indicate powers of the tribunals, Article 48-49 dealing with awards, Article 50-55 dealing with the recognition and enforcement of awards, Article 56-58 dealing with the replacement of arbitrators, Article 59-61 dealing with costs, and article 62-63 dealing with place of arbitration.

507 Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention), Article 53.

508 Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Section 5. See also, United Nations Conference on Trade and Development (UNCTAD), Dispute Settlement: International Center for Settlement of Investment Disputes, United Nations, New York and Geneva, 2003;

509 Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention), Article 54.

510 For example, the Argentine court share the view that even though the ICSID award is binding, however, the enforcement has to be made through a national court, and the Argentine court have power to ensure that such awards do not contrary to Argentine public policy. Even though the fact that later Argentina entered to the settlement with its creditors since it was forced by the U.S. threatened to put the sanction on them for not complying to those ICSID awards. See, message from the Obama's Administration of 26 March 2012 on the suspending on Generalized System of Benefits (GSP) to Argentina. See also, BORDACAHAR, Julian, «Argentina: First Court Ruling Regarding the Enforcement of ICSID Awards», available online at <globalarbitrationnews.com>.

Other example that non-compliance to ICSID awards is Zimbabwe, where its refuse to comply with ICSID award of Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co.

situation led to the criticisms that the finality of ICSID awards might be just a "scarecrow" in international arbitration[511].

Finally, the scheme of ICSID Additional Facility Rules, the rules allows the ICSID Secretariat to administer certain types of proceedings between states and foreign investors that fall outside the scope of the ICSID Convention. Generally, the proceeding of ICSID Additional Facility Rules is similar with ICSID Convention (Also, similar to UNCITRAL Arbitration Rule). However, there are some features in ICSID Additional Facility Rules that are different from ICSID Convention[512]. Especially, the awards from ICSID Additional Facility Rules shall not benefit from recognition and enforcement provisions in the Convention. Put it in another way, the awards from ICSID Additional Facility Rules shall not benefit from its finality and its autonomy under ICSID Convention[513].

(Private) Limited v. Republic of Zimbabwe (ICSID Case No. ARB/10/25). Zimbabwe has missed the deadline to pay the awards worth 240 million USD in August 2018. See, <iclg.com/alb/7593-multi-million-dollar-payment-hangs-over-zimbabwe>.

511 There are many articles express concern regarding to finality of ICSID award and attempt from many states, especially Argentina to assert its jurisdiction to ICSID awards. Among many, See, HIRSCH, Moshe, «Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach», *Journal of International Economic Law* Vol. 19 Issue 3 (2016), 681-706; See also, LIN, Tsai-Yu, «Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?», *Contemporary Asia Arbitration Journal* Vol. 5 No. 1 (2012), 1-22;

512 For example, the choice of forum in ICSID Additional Facility Rules are limit only to States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See, ICSID Additional Facility Rules (Schedule C) Article 19. Thus, The condition of approval by Secretary General also different. See, ICSID Additional Facility Rules Article 4.

513 SCHREUER, Christoph H., MALINTOPI, Loretta, REINISCH, August &SINCLAIR, Antony, The ICSID… *id.*

CHAPTER 4

ARBITRATION IN THAI ADMINISTRATIVE CONTRACT &INTER-STATE DISPUTE SETTLEMENT ON ADMINISTRATIVE CONTRACT

4.1 Background and General Idea of Arbitration

4.1.1 Historical Perspectives

Arbitration is one form of alternative dispute resolution (In short, "ADR") that has been practiced for a very long time. The fact that when and who was the first to use it could not be traced from any literature. Yet, it could be traced back that there were practices of an act common to arbitration in Greek and Roman Civilization as early as 500 B.C., for both civil dispute and territory dispute[514]. However, it is very common to say that commercial arbitration had its beginning of practices by Britain merchant guilds during the 12th and 13th Centuries. The merchant guilds played the role of maintaining and regulating their trade monopoly. The members were required to pay membership fees and abide by the guild's rules, in which those guilds also provided a set of rules on dispute settlement between its merchants by a middle person who has function like today's arbitrator (The rules of appointment of arbitrators are differs by guilds). The disputes of these traders were settled by "a fair law" which was in accord with the universal customs of merchants[515].

During modern Britain in the 17th Century, commercial arbitration was not so welcomed in their society. Judgments by British courts at that time demonstrated a high interference by courts, both in the arbitral proceeding and in the arbitral award. The arbitration law at the time did not encourage the use of commercial arbitration, because laws at the moment solely allowed arbitration for current disputes, but not for future disputes. In other words, parties could not conclude an arbitration agreement to resolve future disputes. Thus, the enforcement of arbitration

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514 It could trace back that there were settlements of disputes by chief and elders in the community. For example, in the middle of the sixth century B.C., Peisistratus, the Athenian tyrant, furthered his policy of keeping people out of the city by appointing justices to go on circuit throughout village communities. If parties in dispute failed to conclude a friendly settlement, justices were authorized to make binding arbitration decisions.

Furthermore, international arbitration also known in Greek and Roman civilization. it was used for settled the territory dispute between Athens and Megara during 600 B.C., in which five Spartan judges who, by arbitration, allotted the disputed territory to Athens. Also, the similar dispute between Corinth and Corcyra also settled down by arbitration in 480 B.C. Thus, a boundary line in dispute between the Genoese and Viturians was settled by arbitration in 117 B.C. See, EMERSON, Frank D., «History of Arbitration Practice and Law», *Cleveland State Law Review* Vol. 19 Issue 1 (1970), 155-164;

515 WOLAVER, Earl S., «The History Background of Commercial Arbitration», *University of Pennsylvania Law Review and American Law Register* Vol. 83 Issue 2 (1934), 132-146;

awards must be done by the courts with plenty of grounds to reject them, even for minor procedural errors could let to the cancelation of arbitral awards[516]. Thus, the party to the arbitration agreement could revoke the arbitration clause without prior consent from another party because arbitration at that time was deemed as the deprivation of the court's jurisdiction[517]. In the famous case of *Scott v. Avery*, Lord Campbell made a comment that demonstrated that British judges had a pessimistic view against arbitration because the judges at that time relied on the fees from cases, and without fixed salary. Therefore, the presence of arbitration was considered as a competitor to the court, which could affect to the lower income of judges[518]. However, the case of *Scott v. Avery* has set up a new standard, in which it confirmed that the dispute that contained an arbitration clause, should first be referred to arbitration, and then to the court. As Lord Campbell stated in the judgment that "…I can see not the slightest ill consequences that can flow from such an agreement, and I see great advantage that may arise from it… Public policy therefore seems to me to require that effect should be given to the contract". Later, the "condition precedent" that required the party with an arbitration clause to bring a dispute to arbitration before the court is referred to as "Scott v. Avery Clause".

Nowadays, England offers one of the friendliest atmospheres to arbitration. England is one of the most popular destinations for foreigners to choose as a seat of arbitration and the place to seek enforcement of the foreign arbitral award, due to the high chance of success of enforcing such awards[519]. One of the reasons is because lack of development of the administrative law sphere in England, and also the historical development of English arbitration that was made in an exclusively private mode of dispute resolution. The development of the English common law/ private law paradigm resulting the status of administrations on equal feet with private parties. Therefore, the enforcement is less constrained with the account of public interest, which makes it easier to enforce against administrations when compared to other countries in the EU such as France, Germany, or other countries outside the EU like Thailand, which developed a strong idea of administrative law and administrative contract[520].

Besides, it is interesting to note that many European Union member states (Ex. France, Germany, and Sweden) also shared a similar part of the historical development of arbitration law

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516 *Ibidem.*

517 Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746). See also, Thompson v Charnock (1799) 8 TR 139 [101 ER 1310].

518 WOLAVER, Earl S., «The History… *id.*

519 BREKOULAKIS, Stavros & DEVANEY, Margaret B., «Public-Private… *id.*

520 CRAIG, Paul, *UK, EU and Global Administrative Law: Foundations and Challenges*, 1st Edition, Cambridge University Press, Cambridge, 2015; See also, general idea of EU Administrative Law and Thailand Administrative Law in Chapter 2 of the thesis.

with England. In which during the 18th and 19th Centuries, arbitration was not fully accepted, easily to be revoked unilaterally, and faced high interference by courts at the time. These situations caused the effectiveness of arbitration in the past within those European countries[521]. However, in the present days, those European member states are open to the use of arbitration as England due to globalization and many international treaties supporting the existence and effectiveness of arbitration as a means of alternative dispute resolution.

Meanwhile, the modern U.S. also faced a similar situation with modern Britain, in which arbitration was not so welcome in the U.S. legal society. In 1920, there was a big step of arbitration law in the U.S. that took place in the State of New York, when New York arbitration law possessed the unusual features of looking forward instead of backward by enabled parties in dispute to control future disputes as well as to settle existing disputes[522]. Under the provisions of this new law, agreements to submit future disputes to arbitration were made legally valid, enforceable, and irrevocable. The new law led to the rapid development of the U.S. arbitration law. It led to the foundation of Arbitration Society of America. The Arbitration Society of America played an important role in promoting arbitration among the U.S. legal offices, corporations, and banks[523]. All circumstances led to the enactment of the U.S. Arbitration Act of 1925, followed by many revisions, including the one in 1970 which was implemented in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Until today, the practice of arbitration in the U.S. is widely accepted both for domestic and international disputes, regardless of whether it is a commercial dispute or administrative dispute. Many pieces of literature agree that the U.S. today offers a friendly environment for arbitration[524].

In Thailand, it is known that Thailand has used something similar to arbitration as an alternative dispute settlement method for a long time ago. However, there is no clear evidence as to when the arbitration first emerged in Thailand. The first arbitration text law was first found in "Three Seal Law" (Kod-mai-tra-sam-duang), dated back in 1805 during the reign of King Rama I. The law was a revision of earlier law that reflected Buddhism and Hinduism's ideas[525]. Three Seal

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521 For general discussion, See, VON MEHERN, Robert B., «From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law», *Brooklyn Journal of International Law* Vol. 12 Issue 3 (1986), 583-628;

522 POPKIN, Lionel S., «Judicial Construction of the New York Arbitration Law of 1920», *Cornell Law Quarterly* Vol. 11 Issue 3 (1926), 329-352;

523 At the time, Arbitration Society of America played an important role of promoting the use of arbitration in the U.S. The Society pushed arbitration into many newspapers 'headline and in Television, including promoting to monetary institution. Later in 1926, there are the merger of Arbitration society into American Arbitration Association (AAA) of today. See, <www.adr.org>.

524 ALFORD, Roger P., «The American Influence on International Arbitration», *Ohio State Law Journal on Dispute Resolution* Vol. 19 Issue 1 (2003), 69-88; See statistics at, <www.investmentpolicy.unctad.org>.

525 CHANTARA-OPAKORN, Anan, «Arbitration Law in Thailand», *TAI Journal* Vol. 2 Issue 1 (2017), 6-26;

Law allowed two or more people to use arbitration, with no right to appeal those arbitral decisions. Thus, the "Three Seal Law" also protected the arbitrator by did not permit any party to recourse against the arbitrator whenever they made any mistake[526].

Later, at the beginning of the 19th Century, Thai arbitration law shared a similar situation with modern Britain, in which Thailand at the time had a pessimistic view against arbitration. Thai law at the time allowed high interference from the court with arbitral proceedings at almost every stage. Especially, it was mandatory for the arbitrator/s to submit the arbitral award to the court for reviewing purposes, if the court found an error in the arbitral award, the court shall not enforce such award[527]. Thus, when the court enforced the arbitral awards, it was not subject to appeal, except for the sole ground that the enforcement by the court obviously contradicted to the arbitral award[528]. Afterward, Thailand developed arbitration law to meet up with the standard of the international community, alongside with a big push from Thailand's ratification of the New York Convention on December 1959[529]. Until today, Thailand offers a friendly environment for arbitration with its modern law up to date. The details of Thai arbitration law shall be discussed in part 4.2 of this Chapter.

4.1.2 General Idea of Arbitration

In general, arbitration possesses with seven characteristics, which are, (1) Arbitration could be deemed as a "Private Court", which parties to the dispute agree to use for solving their dispute. Unless agreed upon by both parties, arbitration proceedings are usually done in a private manner, and prohibit the public from participating in or observing such proceedings. (2) Even though arbitrators are appointed by the parties (Or sometimes by institutions or courts, whatever the case may be), but they must be independent and impartial. Otherwise, such an arbitral award they made could be set aside by the domestic court. (3) The use of arbitration requires mutual consent from both parties. The authority of arbitrators to decide the dispute is limited within the scope of an arbitration agreement of the parties. (4) The function of arbitrators is in the "Quasi-juridical ways", their action must respect the due process. Arbitrators must ensure that both parties to the dispute have an equal opportunity to present their case in the arbitral proceedings. (5) Arbitral proceeding is a result of a voluntary basis agreed by the parties to use arbitration as a mean to settle their

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526 Thai Three Seals Law of 1805 on the section of arbitration.

527 Thai Civil Procedure Code B.E. 2439 (1896) Article 120.

528 Thai Civil Procedure Code B.E. 2439 (1896) Article 121.

529 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

dispute. Therefore, parties are eligible to agree on many aspects, such as, the appointment of arbitrators, the procedural rules, and the scope of authority of arbitrators to decide the case. States could not intervene in those agreements between parties, unless the action to support the arbitral proceedings or the enforcement stage of arbitral awards, is limited to the request from parties. (6) The arbitral award is binding. If the losing party refuses to comply with the award, the winning party could seek judicial assistance for the enforcement from the local court, or from courts in other countries where they have an international commitment on the enforcement of the foreign arbitral awards[530]. (7) Courts only intervene in the arbitral proceedings solely, when necessary, upon request by the arbitral tribunal or the parties. Courts have a strong role in the recognition and enforcement, including the role of setting aside and the refusal to enforcement of the arbitral awards. However, there are limited grounds for courts to set aside or refuse to enforce the arbitral awards[531].

Arbitration offers many benefits, especially in commercial disputes for its confidentiality, flexibility, and less formality. Those benefits are considered as good for businesses because the parties could agree to settle their dispute in an amicable way for both parties' satisfaction outcome at any stage during the proceedings[532]. Both parties can choose *inter alia* the place of arbitration and language to the proceeding, which is more flexible, relaxing, and friendlier to the business than the courtroom. Thus, confidentiality and less formality could keep the reputation of the firms and keep the certain good relationship between parties since the outcome of arbitral proceedings did not come out to the public.

Arbitration is also considered as a tool of case management in the modern day because it could help reduce the caseloads from the court[533]. In addition, the enforcement of arbitral awards in foreign countries is easier than the enforcement of the decision of the local court in foreign countries. Since the enforcement of arbitral awards is widely accepted by courts on a global scale due to the emergence of international conventions, especially, the New York Convention which has 159 signatory parties up to date[534].

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530 Convention on the Execution of Foreign Arbitral Awards of 1927 (Geneva Convention). See also, *Ibidem.*

531 MOSES, Margaret L., *The Principles and Practice of International Commercial Arbitration*, 2nd Edition, Cambridge University Press, Cambridge, 2012;

532 BLACKABY, Nigel, PARTASIDES, Constantine, REDFERN, Alan &HUNTER, Martin, *Redfern and Hunter on International Arbitration*, 6th Edition, Oxford University Press, Oxford, 2015;

533 SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

534 It is not an overstatement to conclude that arbitration is globally accepted. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (So called "New York Convention") has 159 state parties to the convention, in which they are obligated to recognize an arbitral award as binding and enforce such foreign arbitral awards. See, New York Convention text at <http://www.newyorkconvention.org>.

Besides those obvious benefits of arbitration, parties are also able to choose arbitrators with particular subject matter expertise. Often, arbitrators do not possess with legal expertise but rather specific with specialize skills, as a result make them become the suitable person to decide complex commercial disputes that require particular/specific technical expertise (Ex. Some international joint venture disputes, cross-border disputes, disputes with multi-contracts, medical dispute, or complex construction dispute). Thus, arbitration is usually claimed for its advantages as being cheaper and faster than litigation. Since litigation has strict procedural rules that usually take a long time, and in many cases, along with high costs. The finality of the judgment in public court usually takes longer time than the arbitration because the finality of complicated cases with high-value stakes might require three tiers of court litigation that in a result, could take years of a series of expensive lawsuits. It does not need a lot of explanation that investors in multimillion-dollar disputes surely do not want to wait for such a long period of time for the final judgment.

Before ending this part, it is important to note that there are also many criticisms of arbitration both for commercial and administrative disputes[535]. However, this thesis shall limit our investigation solely to the criticisms of the use of arbitration in administrative disputes. In which, we shall discuss the downside of using arbitration in administrative disputes later in Chapter 6 of the thesis.

4.2 Arbitration Practice in Thailand

4.2.1 Type of Arbitrations

There are many Thai scholars gave a definition to the term "Thai arbitration". Professor Dr. Saowanee Asawaroth stated that "Arbitration refers to an action that parties appoint one or more middle person to decide the dispute between them"[536]. Professor Dr. Anan Chantara-opakorn referred to the term as "Arbitration is a form of alternative dispute resolution, in which the parties choose/appoint one or more people to serve as arbitrators. An arbitrator is a person who conducts the procedural and decides the case on who is right and who is wrong"[537]. Professor

[535] For example, the lack of discovery, the lack of right to be appeal, arbitrators have no coercive powers. See detail discussion in Chapter 6 of the thesis.

[536] ASAWAROTH, Saowanee, *Alternative Dispute Resolution by Commercial Arbitration*, 3rd Edition, Thammasat press, Bangkok, 2011;

[537] CHANTARA-OPAKORN, Anan, *Law on Out of Court Arbitration Procedure*, 1st Edition, Thammasat Press, Bangkok, 1993;

Dr. Phichaisak Hornyangkul referred to an arbitrator as "Arbitrator is a person who the parties permitted to decide their particular dispute"[538].

Thai arbitration law has implemented the standard of UNCITRAL Model Law on International Commercial Arbitration[539]. Thai law permits the use of arbitration for the existing dispute or any future disputes in respect of a defined legal relationship, whether contractual or not[540]. Thus, the Thai Civil Procedure Code also allows any case pending before the court of first instance, to be submitted to arbitration by the joint pending of the parties. If it appears to the court that such application to the arbitration is not contrary to the law, the judge shall grant the application[541]. Therefore, the majority of literature are pointing out in the same direction that Thai arbitration could be simply categorized into two types, which are, in court arbitration procedure, and out of court arbitration procedure[542].

4.2.1.1 In Court Arbitration Procedure

In court arbitration procedure is govern by Thai Civil Procedure Code B.E. 2477 (1934) Section 210 to 220, and section 222. It refers to a process in the court where the parties agree to refer issues in dispute before the court to arbitration[543]. In any case pending before a Court of First Instance, the parties may agree to file a joint application to the court, asking for their case to be decided by arbitration. If it appears to the court that such application to the arbitration is not contrary to the law, the judge shall grant such application[544]. Afterward, unless it is otherwise provided in the agreement, the parties shall appoint the arbitrator/s[545]. If there is a disagreement of arbitrator appointment between the parties, the court shall assist the parties in the appointment of them[546]. Thus, upon the request, the court also assist the arbitration procedure with *inter alia* the

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538 HORNYANGKUL, Pichaisak, *Alternative Dispute Resolution in Commercial Dispute*, 1st Edition, Chulalongkorn University Press, Bangkok, 2006;

539 UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006.

540 Thai Arbitration Act B.E. 2545 (2002) Section 11.

Thus, when investigate into Section 15 of the Act, it is clear that arbitration is not only arbitrable/ allow in commercial dispute but could also use in the contract between the administration and the private party, regardless of the type of contract whether it is administrative contract or not. See, Thai Arbitration Act B.E. 2545 (2002) Section 15.

541 Thai Civil Procedure Code B.E. 2477 (1934) Section 210-220, &222.

542 ASAWAROTH, Saowanee, Alternative Dispute Resolution… *id.*

543 Thai Arbitration Institute, *A book on Court Decisions and Laws regarding to Arbitration*, 1st Edition, Thai Arbitration Institute Press, Bangkok, 2019;

544 Thai Civil Procedure Code B.E. 2477 (1934) Section 210.

545 Thai Civil Procedure Code B.E. 2477 (1934) Section 210.

546 *Ibidem.*

appointment of the new arbitrator, giving documents to the case before them, summoning the witnesses, order of provisional measures, or administrative oat taking[547]. However, those actions by the court shall be in no way to intervene with the independency of the arbitrators, but rather for the purpose of assisting such arbitration.

After the arbitral tribunal reaches its decision, arbitrators shall file their award with the court; then, the court shall give a judgment in accordance with the arbitral award. However, the Court could refuse to enforce an arbitral award upon their own recognition in case when such award is contrary to the law. Yet, if such award could be made good, the court may require arbitrators to revise them, whichever case may be[548]. Lastly, even there are benefits of using in-court arbitration procedures, such as, assistance from the court or the enforcement. In practice, there are rare cases where the parties who already submitted their case to the court in the first place, then later agree to move from court litigation into in-court arbitration procedure. The reason behind this circumstance is rather obvious which it was the parties' intention in the first place to get their case solved by the court rather by arbitration[549].

4.2.1.2 Out of Court Arbitration Procedure

Out of court arbitration procedure is normal and most practices form of arbitration in Thailand. Parties could agree to use arbitration for all or certain disputes which have arisen, or which may arise in the future between them in respect of a defined legal relationship, whether contractual or not[550]. Similar to other countries, out of court arbitration procedure is the most popular choice in Thailand. Parties could either choose to have their arbitration either on an *ad hoc* basis or with assistance from the arbitration institutions. Out of court arbitration normally occurs by the contract of the parties. However, investment agreements sometimes also cause the occurrence of this type of arbitration too.

Out of court arbitration procedure in Thailand is governed by the Thai Arbitration Act B.E. 2545 (2002). It is important to note that the thesis shall solely focus on Thailand's out of court arbitration procedure, which is the most popular in practices in Thailand, and also similar to

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547 Thai Civil Procedure Code B.E. 2477 (1934) Section 213-216, and 219.

548 Thai Civil Procedure Code B.E. 2477 (1934) Section 218.

549 CHANTARA-OPAKORN, Anan, *Alternative Dispute Resolution: Negotiation, Conciliation, and Arbitration*, 1st Edition, Thammasat Press, Bangkok, 2015;

550 Thai Arbitration Act B.E. 2545 (2002) Section 11 para. 1.

practices of the majority of countries. The details of out of court arbitration procedure shall be discussed in part 4.2.3 (Some Features under Thai Arbitration Act B.E.2545) of the thesis.

4.2.2 Arbitration Institutes in Thailand

Thailand has many arbitration institutes, and similar to any other international arbitration institutes, arbitration institutes in Thailand do not decide cases, but rather assisting an arbitration procedure by providing arbitration rules, maintaining the list of arbitrators, and facilitating the arbitration proceedings. All disputes submitted to Thai arbitration institutes shall be decided by arbitrators. It is important to note that the Thai Arbitration Act B.E. 2545 (2002) allows individual or company to submit their dispute to any arbitration institutes[551].

Currently, there are two major arbitration institutes offering arbitration services for all kinds of disputes arbitrable in Thailand; those arbitration institutes are, the Thai Arbitration Institute (TAI) of the Office of the Judiciary, and Thailand Arbitration Center (THAC) of the Ministry of Justice. Apart from that, there are also some other specialized arbitration institutes, which are, the Office of the Insurance Commission for Insurance Cases, the Securities and Exchange Commission for disputes between investors and securities business firms, and the Department of Intellectual Property for disputes involving intellectual property, and Thai Rubber Arbitration Institute.

Among all arbitration institutes in Thailand, the most active and the most popular venue is the Thai Arbitration Institute (TAI) of the Office of the Judiciary[552]. TAI provides a set of supplement rules for arbitral proceedings in every stage of the arbitral proceedings, from the appointment of the arbitrator to the decision stage and the calculation of all fees[553]. In addition to those aforementioned rules, TAI also provides a Code of Ethic and Conduct for Arbitrators to ensure the impartiality and good practices of arbitrators[554].

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551 Thai Arbitration Act B.E. 2545 (2002) Section 6 &19.

552 There are 2,345 disputes filed to the Thai Arbitration Institute (TAI) of the Office of the Judiciary since 1990 to 2017. There are 2,059 finished disputes. In total, the amount of dispute up to year 2017 have the value of 25,694,580,454 USD. The reason of that high number is because of its reputations. Thus, TAI is funded by the government. It provides administrative services free of charge which means parties to an arbitral proceeding administered by the TAI pay no institutional fee. The parties are responsible for only the actual expenses in conducting arbitral proceedings such as expenses for delivering documents, production of media recording testimony. See, <www.tai.coj.go.th>.

553 LIMPARANGSRI, Sorawit, SEOW, Samuel &TAN, Paul, «Arbitration in Thailand: the Thai Arbitration Institute», *TAI Journal of Arbitration* Vol. 10 (2015), 1-18;

554 Code of Ethics and Conduct for Arbitrators by the Thai Arbitration Institute (TAI).

4.2.3 Some Features under Thai Arbitration Act B.E.2545

As mentioned, that arbitration in Thailand (except for In-Court Arbitration Procedure) is governed by the Thai Arbitration Act B.E.2545 (2002)[555]. The Act follows the UNCITRAL Model Law on International Commercial Arbitration (1985). In order to truly understand Thai arbitration, it is important to explore the Act. Therefore, this session shall explain an important feature under the Thai Arbitration Act B.E.2545 (2002).

4.2.3.1 Arbitration Agreement

Except for Inter-State Dispute Settlement arbitration (ISDS), parties could only submit their dispute to arbitration only when they have an arbitration agreement. Parties could agree to submit the existing dispute or any future disputes to arbitration[556]. The agreement could be made in several forms, except verbal. For example, the arbitration clause contained in the principal contract or a separate agreement or an agreement contained in the exchange of, letters, telegrams, facsimiles, telex, data interchange with electric signatures, or other means which provided a record of the agreement. It is also important to note that the capacity of the parties at the time of the conclusion of the arbitration agreement is crucial to its validity[557], since an act which does not comply with the requirements concerning the capacity of a person is voidable under Thai Civil and Commercial Code[558]. As the result, in the enforcement stage of the arbitral award, the incapacity of the parties at the time of conclusion of an arbitration clause is one of the grounds to set aside of arbitral award in Thai Arbitration Act B.E.2545 (2002)[559].

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[555] In practice, almost all of arbitration procedures in Thailand are Out of Court Arbitration Procedure, which is govern by the Thai Arbitration Act B.E.2545**.** See, ASAWAROTH, Saowanee, Alternative Dispute Resolution… *id.*

[556] Thai Arbitration Act B.E. 2545 (2002) Section 11.

[557] An act by some people is set to be voidable unless otherwise provided by Thai Civil and Commercial Code B.E.2535 (1992). Those acts also include the conclusion of arbitration clause. Those group of people are, a minor (Section 19-21), person of unsound mind (Section 30), a person adjudged incompetent (Section 29), A quasi incompetent person (Section 34).

Married person must have a consent from his/her spouse in order to conclude arbitration clause (Chapter IV). If either spouse has entered into any juristic act alone or without consent of the other, the latter may apply in Court for revoking such juristic act, unless it has been ratified by the other spouse, or the third person was at the time of entering into such juristic act, acting in good faith and make the counter-payment. See, Thai Civil and Commercial Code B.E.2535 (1992) Section 1480.

Also, a form of agency/representative must have a specific consent that he/she have a consent from the party to conclude the arbitration clause on the behalf of him/her. Those agency/representative is, agent (Section 801(6)), lawyer (Thai Civil Procedure Code B.E. 2477 (1934) Section 62), Manager of Disappearance person (Section 54), Liquidators (Section 1259), Bankrupted person (Bankruptcy Act B.E.2483 (1940) Section 145(5)).

[558] Thai Civil and Commercial Code B.E.2535 (1992) Section 153.

[559] Thai Arbitration Act B.E. 2545 (2002) Section 40(1)(a).

Regarding to arbitrability, even though the Thai Arbitration Act B.E.2545 (2002) does not regulate to what kind of dispute could be resolved by arbitration[560]. However, in practice, arbitration is allowed in commercial disputes and disputes in administrative contract, but not in criminal disputes in which jurisdiction is exclusively laid down to the court[561]. There are some commercial disputes that prevent parties from using arbitration, which is a dispute related to sole jurisdiction by the court[562]. Thus, a dispute which is contradicted to the public policy is not able to be arbitrated (Ex, gambling dispute, prostitution, murdering contract, or slavery contract[563]).

The validity of the arbitration agreement is not end, even if any party thereto is dead[564]. If one of the parties to the arbitration is dead, his/her heir is binding to arbitration agreement but not be liable in excess of the property devolving on him[565]. Thus, the arbitration clause is treated as an independent agreement from the main contract. Therefore, the invalidity of the main contract does not affect the validity of the arbitration clause[566].

The arbitration agreement made in accordance with the Arbitration Act is recognized. Therefore, in case where any party to the arbitration agreement commerce legal proceedings in Thai court against another party thereto in respect of any dispute which is covered by the arbitration agreement, the other party is eligible to file a motion requesting the court to issue to motion to strike the case[567]. If it appears to the court that the arbitration agreement does not void

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560 It is interesting to note that previous Thai arbitration law, which is Thai Arbitration Act B.E. 2530 (1987) Article 5 allow arbitration solely in the commercial dispute.

561 Even though some offense, for example, certain degree of defamation or certain degree of crime against liberty could be compromised under Thai law. See, Thai Criminal Procedure Act B.E. 2477 (1934) Section 39 (2). However, arbitration could not be used as a mean to resolve criminal dispute. The jurisdiction lay with the court because of two big reasons, which are; 1. The decision of criminal court set precedents to the future disputes, in which arbitration awards could not do that, and 2. Arbitration does not exercise the power of states. Therefore, arbitral awards could not give the criminal punishment to the parties.

It is interesting to note in the end that arbitration is allow in the case that possess with character of both commercial and criminal dispute related to tort law. See, Thai Civil and Commercial Code B.E.2535 (1992) Section 240. In which, the arbitral tribunal could decide the commercial dispute, meanwhile the court will decide the criminal dispute. See, CHANTARA-OPAKORN, Anan, Alternative Dispute Resolution… *id.*

562 There are certain disputes in Thai Civil and Commercial Code B.E.2535 (1992) which solely rely to jurisdiction of the court that could not be arbitrated. For example, ordered of disappeared person (Section 48), ordered domicile person to be disappeared person (Section 61), ordered divorce status (Section 1514), and ordered regarding to capacity of person (Title II).

563 ASAWAROTH, Saowanee, Alternative Dispute Resolution… *id.*

564 Thai Arbitration Act B.E. 2545 (2002) Section 12.

565 Thai Civil and Commercial Code B.E.2535 (1992) Section 1601.

566 JUNTAMA, Eakasit, «Principle of the Autonomy of Arbitration Agreement in Administrative Contracts: Studying the Case of the Klong Dan Wastewater Treatment Plant», *Naresuan University Journal* Vol. 9 Issue 2 (2016), 45-65; See also, Thai Arbitration Act B.E. 2545 (2002) Section 24 para. 1.

567 Thai Arbitration Act B.E. 2545 (2002) Section 14.

or unenforceable or impossible to perform, the court shall issue an order to strike the case without seeing the details of the case, so party could proceed their arbitral proceedings[568].

4.2.3.2 Arbitrators

Thai Arbitration Act B.E.2545 (2002) attempt to give parties the greatest possible degree of autonomy in arranging arbitration that suits their need. The Act allows parties to determine the number of the arbitrator by their agreement. Failure of agreement of the parties to the number of the arbitrator, the Act provides that a sole arbitrator shall be appointed in this case. It is important to note that the arbitral tribunal shall be composed with an uneven number of arbitrators (In practice, most cases are three arbitrator tribunal). If parties have agreed on an even number, the arbitrators must jointly appoint an additional arbitrator who shall act as the chairman of the arbitral tribunal[569]. Thus, if there are disagreements in the appointment of the chairman of the arbitral tribunal or the absent of appointment of arbitrator from any party, the court shall appoint them upon the request of either party[570].

Thai Arbitration Act B.E.2545 (2002) does not explicitly place any condition on the qualifications of persons to be appointed as arbitrators, regardless of nationality or educational background[571]. This is considered as one of the strong points of using arbitration since the parties could choose their own adjudicator with particular knowledge and expertise to decide technical complex matters, in which arbitrators might have a better view of the cases than national judges. The Act required that arbitrators must be impartial, independent and possess with the qualifications prescribed in the arbitration agreements, or according to qualifications prescribed by the parties or by arbitration institutes if the parties agreed to use the services from them[572]. The Act contained with mechanisms controlling the impartiality, independence, and qualifications

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568 Supreme Court Judgment no. 4288/2558 (2015). See also, Supreme Court Judgment no. 9686/2559 (2016).

569 Thai Arbitration Act B.E. 2545 (2002) Section 17.

570 Thai Arbitration Act B.E. 2545 (2002) Section 18.

571 Normally, the legal profession is a preserve for Thai national only. However, as Thailand is aiming to be hub of arbitration in the South-East Asia region. Thailand has passed the Royal Decree (No.3) of 2000 issued under the 1978 Working of Aliens Act, clearly provide that the serving as arbitrator shall be exempted from the List. Therefore, foreigner can be appointed as an arbitrator under Thai law. See, Government Gazette of 15 November 2000 Vol. 117, No. 105, 22-23A.

It is also interesting to note that in practice, the judges normally do not accept to be an arbitrator. Even though there are no binding instrument prohibiting judges to serve as an arbitrator, but there is wide criticisms in Thai legal society that there is a conflict of interest and a matter of appropriateness for judge to serve as an arbitrator, because judge is the person to enforce the arbitral awards. See, CHANTARA-OPAKORN, Anan, «Arbitration Law… *id.*

572 Thai Arbitration Act B.E. 2545 (2002) Section 19 para. 1.

regarding to arbitration agreement of the arbitrators in many ways, in which, arbitrators must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence[573], the right to challenge arbitrators by the parties[574], the liabilities of arbitrators in case of corruption or civil liability in case of gross negligent[575].

Apart from the obvious role of the arbitrator as a master of procedure to conduct the arbitral proceedings by giving the equal and full opportunity to the parties to present their case, and issue the arbitral award, arbitral tribunal also has competence on its own jurisdiction, because Thailand has adopted the doctrine of severability and competence-competence jurisdiction in order to follow the international standard of arbitral proceedings. Arbitral tribunals have the competence to rule on their own jurisdiction, including the existence or validity of the arbitration agreement, the validity of the appointment of the arbitral tribunal, and the issues of dispute falling within the scope of its authority. For this purpose, an arbitration clause which forms part of a contract, shall be treated as an agreement independent of the main contract. A decision by the arbitral tribunal that the contract is null, and void shall not affect the validity of the arbitration clause[576].

Lastly, it is interesting to note that foreigners could be appointed as arbitrators to conduct arbitral proceedings conducting in Thailand, as Thailand has put an exception for them to serve/work as arbitrators in the schedule of Alien Working Act B.E. 2543 (2000)[577]. Such exceptions also extended to foreign lawyers to work/serve as counsel in arbitral proceedings under limited circumstances[578].

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573 Thai Arbitration Act B.E. 2545 (2002) Section 19 para. 2.

574 The challenge shall be decided by the tribunal themselves. If the challenge is unsuccessful, the challenging party may request the competent court to decide on the challenge. See, Thai Arbitration Act B.E. 2545 (2002) Section 20. However, in the Thai Arbitrator's Ethic Code suggested that the arbitrator should withdraw themselves in the first occasion.

575 Thai Arbitration Act B.E. 2545 (2002) Section 23.

576 Thai Arbitration Act B.E. 2545 (2002) Section 24, para. 1. See Also, Supreme Administrative Court No. อ.487-488/ 2557 (2014) of 10 October 2014.

577 The act was repeal by Alien Working Act B.E. 2551 (2008). However, the exception in the schedule remains, in which foreigner still allowed to serve/work as an arbitrator in Thailand.

578 Foreign national's lawyers are able to perform their roles as counsel in the arbitral proceedings in Thailand, subjected to limited circumstances. Such limited circumstances, namely, (1) where the law governing the dispute is other than Thai law, or (2) where the award will not be enforced in Thailand.

In practice, foreign lawyers often serve in a "consultant" role in arbitral proceedings; advising Thai lawyers who are empowered to make submissions to the tribunal directly. The rationale behind it is to avoid complicates in the enforcement procedure.

4.2.3.3 Arbitration Procedure

Unlike Thai Civil Procedure Code B.E. 2439 (1896) which has strict procedural rules for civil cases, Thai Arbitration Act B.E.2545 (2002) only laid down general principles for the arbitral procedure. Therefore, arbitration is more flexible than litigation. The strongest advantage of arbitration is its informality. The informality of arbitration proceedings considers as one of the strong points of arbitration by allowing parties to keep a good business relationship. In practice, some arbitrators who conduct the complex commercial dispute do not possess any legal knowledge, but they have true knowledge and experience on the specific matter which related to the dispute (Ex. Medical dispute, chemical components, or complex construction dispute)[579]. There are important features of Thai arbitral procedures under the Thai Arbitration Act B.E.2545 (2002) as follows;

4.2.3.3.1 Doctrine of Equality in Thai Arbitration Procedure

Thai Arbitration Act B.E.2545 (2002) does not lay down specific procedural rules, but rather a set of general principles that every arbitration procedure must follow. The most important principle is that the arbitral tribunal must treat all parties in an equal manner, by providing them with a full opportunity of presenting their cases in accordance with the circumstances of the dispute[580]. The arbitration proceeding is so flexible that the parties could agree on the procedural framework. If the parties do not agree on a procedural framework, the arbitral tribunal shall have the power to conduct any proceedings in any manner, as it deems appropriate, including the power to determine the admissibility and weighting of the evidence. Thus, the parties could agree to keep the confidentiality of the arbitral proceedings, including the existence of arbitration, oral hearings, evidence provided in such proceedings, and arbitral awards[581].

The parties could also agree on how and in what form they wish to perform the oral hearing. If there is no such agreement, the arbitral tribunal as a master of the procedure, shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or

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[579] SUVANPANICH, Tawatchai, *Explanation of the Arbitration Act B.E. 2545*, 1st Edition, Nititham Publication, Bangkok, 2015;

[580] There is the observation by scholars and practices that the equal opportunity refers to the equal in the right to present their cases, but not the equal in quantity. For example, one party has one lawyer, but another party has two lawyers. It is not equal in the quantity, but it is equal for both parties to presenting their case. See, CHANTARA-OPAKORN, Anan, Alternative Dispute Resolution… *id.*

[581] The parties might conclude the clause of fine as a punishment in case of breaking the confidentiality. Since sometime, in the arbitral proceedings might related to their important factors of businesses, such as; trade secret, reputation of the parties, or scientific research. See, ASAWAROTH, Saowanee, Alternative Dispute Resolution… *id.*

whether the proceedings shall be conducted solely based on documents or other evidence, the hearing could be at any stage during the cause of proceedings[582]. However, the power of arbitrators to determine the oral hearing is not unlimited. In practice, the arbitral tribunal always consults with the parties in this regard, in order to bring the best proceedings for the parties and also the equal opportunity for them to present their case. In addition, unless otherwise agreed by the parties, the arbitral tribunal may appoint an expert on the specific issues if they deem it necessary[583].

4.2.3.3.2 Applicable law (Choice of Law)

Like international practice regarding to the doctrine of party autonomy[584], Thai law does not restrict parties' choice of law clause except when it is contrary to the public order of Thailand[585]. There are some cases that parties choose Thailand as a seat of arbitration, but rather to choose their law of preference over the local law. In the aforementioned circumstances, the arbitral tribunal shall apply the procedural and substantive law as agreed by the parties[586], without applying the procedural rules or conflict of law rules at the place of arbitration. If there is no choice of law clause, Thai law shall be applied to the case, but if there is a conflict of law, the latter shall prevail. Thus, the parties may agree to give the power to the arbitrators to decide a dispute in accordance with their sense of fairness and a good conscience (*ex aequo et bono*), instead of applying a particular law[587]. It is interesting to note that parties could and usually agreed on their arbitral proceeding, including the arbitral award, regardless of whether it is commercial or administrative arbitration, since there is no rule that requires transparency and openness of arbitration in Thailand.

It is fair to conclude that arbitration proceedings conducted in Thailand are not completely unconstrained from Thai law, even though parties have chosen their own applicable law. Since the parties may be limited in their choice of procedural rules of any arbitral institution (Of their choice) if those rules contradict to the mandatory provisions of Thai law[588]. In addition, there might be an uncomplying action from the parties which needed an exercise of power that belonged to the

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582 Thai Arbitration Act B.E. 2545 (2002) Section 30.

583 Thai Arbitration Act B.E. 2545 (2002) Section 32.

584 In the field of conflict of laws, private actors are generally granted the power to choose the law to govern their contracts. Most international commercial contracts contain a choice of law clause. The parties' freedom to choose the law applicable to their contract is so widely accepted in the global scale. See, COYLE, John F., «A Short History of the Choice-of-Law Clause», *University of Colorado Law Review* Vol. 91 Issue 4 (2020), 1147-1214;

585 Conflict of Laws Act B.E. 2481 (1938). See also, Supreme Court Judgement no.1538/2511.

586 Thai Arbitration Act B.E. 2545 (2002) Section 32.

587 Thai Arbitration Act B.E. 2545 (2002) Section 34 para. 3.

588 CHANTARA-OPAKORN, Anan, «Arbitration Law… *id.*

court. In which parties could seek for judicial assistance in Thailand, for example, in taking evidence, issuing a subpoena, or granting provisional measures to protect the party's interest during the arbitration. Those judicial assistances asked in Thailand, in considering whether to grant such assistance requested, the court shall apply the local law. Therefore, in these aforementioned circumstances, we can conclude that the Thai Arbitration Act B.E.2545 (2002) could not be completely disregarded even though parties have chosen foreign law to apply to their case.

4.2.3.3.3 Languages

Thai Arbitration Act B.E.2545 (2002) gives the parties autonomy to choose the language using in arbitral proceedings[589]. If there is no such agreement, the arbitral tribunal shall be the one to determine the language to be used in the proceedings. In addition, the arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into language or languages agreed upon by the parties or determined by the arbitral tribunal.

4.2.3.3.4 Venue

Venue or seat of arbitration refers to a formal legal domicile of the arbitration, which establishes the territorial link between the arbitral proceedings and the law of the jurisdiction where the arbitration takes place. Thai Arbitration Act B.E.2545 (2002) gives autonomy to the parties to agree on the place of arbitration. However, if the parties did not agree upon the place of arbitration, the arbitral tribunal shall determine them, taking an account of circumstances of the case and the convenience of the parties[590]. It is important to note that it is no need to have a factual or legal connection with Thailand in order to choose Thailand as a seat of arbitration. As Thai Arbitration Act B.E.2545 (2002) allows arbitral tribunal, unless agreed by the parties, to make an appointment for a meeting or hearing of witnesses outside Thailand as they deem convenient[591].

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[589] The agreement or determination, unless otherwise specified therein, shall apply to any statement of claim, statement of defense, any written statement by a party, any hearing, and any award, decision, or other communications by or to the arbitral tribunal. See, Thai Arbitration Act B.E. 2545 (2002) Section 28.

[590] Thai Arbitration Act B.E. 2545 (2002) Section 26.

[591] Thai Arbitration Act B.E. 2545 (2002) Section 26 para. 2.

4.2.3.4 Arbitral Awards

Thai Arbitration Act B.E.2545 (2002) requires the arbitral tribunal to decide the dispute between the parties in accordance with the applicable substantive laws, or according to the term provided in the contract[592]. The arbitral tribunal may decide the dispute in their sense of fairness and good conscience (*ex aequo et bono*) if the parties have expressly agreed to authorize the arbitral tribunal to do so[593]. It is important to note that the arbitral tribunal could not apply *ex aequo et bono* to an administrative law dispute since it is already set by the precedents from the Thai Supreme Administrative Court's decisions that such application is contrary to public policy[594].

The arbitral award shall be made by a majority of votes. If the majority of votes cannot be obtained, the chairman of the arbitral tribunal shall solely issue an award, an order or a ruling[595]. The award shall clearly state reasons for making such decisions. However, the power of the arbitral tribunal to decide the case will not go beyond the scope of the arbitration agreement. Noted that the parties can settle the dispute anytime during the proceedings as long as such settlement request by the parties is not contrary to the law, the arbitral tribunal shall render an award accordingly[596]. Such awards must be made in writing and signed by the members of the arbitral tribunal. If there is more than one arbitrator, the signature of the majority is sufficient, provided that the reason for the omission of signature is stated[597]. It is required by Thai law that the awards must be made in writing and signed by the arbitrator/s; therefore, if the parties choose Thailand as a seat of arbitration, the arbitral tribunal must follow these rules, which means the awards cannot be signed by the director of the executive officer of an arbitral institution *in lieu* of the arbitrators.[598]

The arbitral award shall be recognized as binding to the parties[599], and upon petition to the competent court, shall be enforced. There are slightly different between the recognition and enforcement between domestic and international arbitral awards. In which, we shall discuss this in detail in the next part (4.2.4 Role of Court in Arbitration).

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592 Thai Arbitration Act B.E. 2545 (2002) Section 34.

593 Thai Arbitration Act B.E. 2545 (2002) Section 34 para. 3.

594 Supreme Administrative Court Decision no. ๑. 1259/2559 (2016).

595 Thai Arbitration Act B.E. 2545 (2002) Section 35.

596 Thai Arbitration Act B.E. 2545 (2002) Section 36. It is important to note that the agreement to settlement by the parties could go beyond the arbitral clause. Thus, of parties agrees, the arbitral tribunal could issue the award outside the arbitral clause, since the settlement consider as the agreement between the parties.

597 Thai Arbitration Act B.E. 2545 (2002) Section 37.

598 The formality of article 37 allows a court at the enforcement stage to ascertain whether the members of arbitral tribunal were those who were actually appointed by the agreement of the parties. It is also confirming that the arbitrators are independent from each other. See, CHANTARA-OPAKORN, Anan, «Arbitration Law… *id.*

599 Supreme Court Judgement no. 11102/2551 (2008). See also, Supreme Administrative Court Order no. 1531/2557 (2014).

4.2.4 Role of Court in Arbitration

It is the autonomy of the parties to agree to submit their dispute to arbitration. Unless requested by the parties, Thai courts would not interfere with arbitral proceedings. However, it is not an overstatement to express that arbitration could not solely "stand on their own feet" without judicial assistance from the courts. Apart from the recognition and enforcement of the arbitral award by courts, they also have an important role in setting aside or refusing to enforce the awards when there is an error or illegal action in arbitral proceedings/awards. Thus, the court also plays an important role during arbitration proceedings by giving judicial assistance to the arbitral tribunal and parties.

4.2.4.1 Judicial Assistance during Arbitral Proceedings

It is known that arbitral proceedings are the dispute resolution conducted between private parties. However, some actions by the arbitral tribunal or the parties are hard to be achieved, especially, when they try to achieve something in the way of enforcement manner. Therefore, judicial assistance is necessary for the effectiveness of overall arbitration proceedings. In the practice of most states including Thailand, the court shall give judicial assistance to the arbitral proceedings upon request. Limited only to necessary circumstances, and within the request of the parties. In Thailand, the arbitral tribunal or the parties could seek for judicial assistance from the competent court[600]. There are four judicial assistances during the arbitral proceedings that we shall mention here, which are, the appointment of arbitrator, the challenge of arbitrator, the issue of a subpoena or an order for submission of any documents or materials, and an order imposing provisional measures to protect his interest before or during the arbitral proceedings.

Thai Arbitration Act B.E.2545 (2002) gives autonomy to the parties to agree on the number of arbitrators as long as the composition is an uneven number (In practice, there are usually one or three arbitrators). However, in an appointment of arbitrator/s, if the parties could not appoint the arbitrator/s, the competent court shall appoint them upon request. In case the parties agreed to the sole arbitrator and are later unable to agree on the arbitrator, either party may file a motion with the competent court asking for such appointment from them. In case the parties agreed to more than one arbitrator, if the parties fail to appoint the arbitrator within the period

[600] Thai Arbitration Act B.E. 2545 (2002) Section 9. The competent court, for example, The Intellectual Property and International Trade Court for an intellectual property and international trade matters, Administrative Court for administrative contract matters, and civil court for commercial matters. See, Supreme Administrative Court Order no. 510/2549 (2006).

prescribe by law, either party may file a motion with the competent court requesting an order appointing the arbitrator or the chairman of the arbitral tribunal[601].

The competent court also plays an important role in the challenging against arbitrators. If a party has a justifiable doubt on the impartiality, independence, or the qualification of arbitrator as agreed by the parties[602], he/she can file a statement stating the grounds of the challenge with the arbitral tribunal[603]. If the challenge by a party to the arbitral tribunal is unsuccessful, the challenging party may request the competent court to decide on the rejected challenge within the limitation of time as prescribe by law[604]. Unless the court orders otherwise, the arbitral tribunal could proceed with the proceedings while the parties' request to remove the arbitrator is still pending at the court[605].

An arbitrator or a party subjected to the consent of the majority of the arbitral tribunal may request the judicial assistance from the competent court to issue a subpoena or an order for the submission of any documents or materials. If the court is of the opinion that such proceedings could have been carried out by the court if a legal action were brought, it shall grant such request. In this connection, the provisions of the Civil Procedure Code in the part relating to such proceedings shall apply *mutatis mutandis*[606]. Such judicial assistance by the court is important to the arbitral proceedings, since the arbitral tribunal does not have the power to force the third person to come to testify or hand the documents in possession to the arbitral tribunal; the case proves to be harder when the third party is the government officials or the documents in possession of Thai administration. Thus, the Thai Arbitration Act B.E.2545 (2002) allows a party to ask for such judicial assistance from the court. However, with the limitation to the prior consent from the majority of the arbitral tribunal. The reason behind this is because if the parties could ask the

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601 Thai Arbitration Act B.E. 2545 (2002) Section 18.

602 Thai Arbitration Act B.E. 2545 (2002) Section 19.

603 Thai Arbitration Act B.E. 2545 (2002) Section 20, para. 1.

Normally, the arbitrator usually withdraws themselves as soon as there is a challenge from a party. As it appears on Thai Code of Ethic and Conduct for Arbitrators Section 20. However, such withdrawal does not mean that withdrew arbitrator accept the challenge ground by a party in any way.

604 The challenging party may request the competent court within thirty days after having received notice of the decision rejecting the challenge. See, Thai Arbitration Act B.E. 2545 (2002) Section 20, para. 2.

605 *Ibidem.*

606 Thai Arbitration Act B.E. 2545 (2002) Section 33.

It is important to note that the judicial assistance is only limited to what is stated in the Act. The court have no jurisdiction to grant anything further than the Act has authorized. See, Supreme Court decision of 719/2549 (2006) "The court have no jurisdiction to determine whether the appointment of arbitrator of ICC rules is unlawful, since there is no law authorize the court to do so. Thus, there is no law to empower the court to determine whether the fees of the ICC rules are too high as claimed by the claimant". See also, Supreme Court decision of 7546/2550 (2007) "Unless there are specify by law, the court have no power to intervene the arbitral proceedings. Therefore, the court could not intervene on the discretion of the arbitrators as requested by the claimant".

judicial assistance from the court without prior consent from the majority of the arbitral tribunal, the parties might use this channel to stall their cases[607].

A party to an arbitration agreement may file a motion requesting the competent court to issue an order imposing provisional measures to protect his/ her interest before or during arbitral proceedings. Similar to the issuance of subpoena or submission of documents, if the court views that had such proceedings been conducted in court, the court would have been able to issue such an order, the court may proceed as requested, and the provisions of the Civil Procedure Code in relation to it shall apply *mutatis mutandis*[608].

4.2.4.2 Role of Court in Recognition and Enforcement of Arbitral Awards

After the arbitral tribunal issue the arbitral award (Regardless of domestic awards or international awards), such award is considered binding to the parties, and upon the petition to the competent court[609], shall be enforced. The condition of recognition and enforcement of arbitral awards has no difference between domestic awards and international awards, since Thailand is the party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[610]. Thus, Thai Arbitration Act B.E.2545 (2002) follows the model of UNCITRAL Arbitration Rules in which there is no double standard for the enforcement of the domestic and international arbitral award in the model law.

The winning party shall file the petition to the court within three years from the day that the awards become enforceable[611], alongside with original or certified copy of the arbitral award and arbitral agreement, and the translation of them into Thai language by an authorized person as required by law[612]. After receipt of the application, the court shall promptly examine and give judgment accordingly[613].

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607 ASAWAROTH, Saowanee, Alternative Dispute Resolution… *id.*

608 Thai Arbitration Act B.E. 2545 (2002) Section 16. See also, Supreme Administrative Court Order no. 610/2546 (2003).

609 Thai Arbitration Act B.E. 2545 (2002) Section 9. The competent court, for example, The Intellectual Property and International Trade Court for an intellectual property and international trade matters, Administrative Court for administrative contract matters, and civil court for commercial matters. See, Supreme Administrative Court Order no. 510/2549 (2006).

610 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

611 In practice, the three years limitation start from the date that the parties legally received the arbitral awards, not the day that arbitral tribunal concluded such awards. See, Supreme Court Judgment no. 2598/2549 (2003). See also, Supreme Court Judgment no. 4549/2536 (1993).

612 Supreme Court Judgment no. 1916/2544 (2001).

613 Thai Arbitration Act B.E. 2545 (2002) Section 42.

4.2.5 Grounds to Set Aside or Refusal of Arbitral Award

Arbitral awards are considered as binding on the parties. However, the parties who are dissatisfied with the arbitral awards could challenge them under the Thai Arbitration Act B.E.2545 (2002). As we mentioned that the Act was enacted to give almost identical treatment between domestic arbitral awards and international arbitral awards, yet, in practice, there are controversial and criticisms on the challenge of those arbitral awards. In which this part shall clarify the difference of challenge of the arbitral award between domestic arbitral awards on the one hand (4.2.5.1 Ground to Set Aside of Domestic Arbitration), and the international arbitral awards on the other (4.2.5.2 Ground to Set Aside Investor-State Dispute Settlement).

4.2.5.1 Ground to Set Aside of Domestic Arbitration

As mentioned, arbitral awards are considered as binding on the parties, and in general, the parties must fulfill their obligation under the arbitral awards. However, if a party is dissatisfied with the arbitral award, he/she could file a motion to set aside of the award to the competent court[614], such motion must be filed within the timeframe limited by Thai Arbitration Act B.E.2545 (2002)[615]. The Act set seven grounds for the court to set aside the arbitral award. Those grounds have shared one similar characteristic, in which those grounds are in no way to interfere with the procedural and substantive discretion/judgment of the arbitral tribunal[616]. In other words, the court shall not consider that if the court decides the dispute by itself will give a different result of not. Thai Courts respect the autonomy of the parties to appoint a third person to decide their dispute. Therefore, the court only acts as the "guardian", to make sure that arbitral awards gave equal opportunity to the parties, and that those awards do not contrary to the public policy of Thailand.

There are seven grounds for setting aside arbitral awards in the Thai Arbitration Act B.E.2545 (2002); all are transposed from the UNCITRAL Model Law on International Commercial Arbitration. Those grounds could categorize into two types, considering from the burden of proof, which is 1. Burden of proof by the filing party, and 2. The Court own recognition.

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[614] Thai Arbitration Act B.E. 2545 (2002) Section 9. The competent court, for example, The Intellectual Property and International Trade Court for an intellectual property and international trade matters, Administrative Court for administrative contract matters, and civil court for commercial matters. See, Supreme Administrative Court Order no. 510/2549 (2006).

[615] Challenge of an arbitral award may be made a motion for setting aside to the competent court within ninety days after receipt of a copy of the award or after the correction or interpretation or the making of an additional award. See, Thai Arbitration Act B.E. 2545 (2002) Section 40.

[616] Supreme Court Judgement No. 4750-4751/2561 (2018). "The Court could not intervene arbitral proceedings by correcting the discretion of arbitral tribunal, changing, or destroy their judgement. Except clearly provided by law. Otherwise, such action would obstruct arbitration to achieve its goal according to the spirit of arbitration law".

Burden of proof by the filing party

According to Thai Arbitration Act B.E.2545 (2002) Section 40(1), there are five grounds that allow a party to file the motion for setting aside to the competent court, with his duty to furnish prove, which are.

- **The capacity of the parties**: If a party to the arbitration agreement was under some incapacity under the law applicable to that party, those arbitration agreements, and the appointment of the arbitrators are considered as unlawful. Therefore, those arbitral awards are unenforceable, and be able to set aside by Thai courts[617].
- **The arbitration agreement is not binding**: the competent court shall set aside arbitral awards if the party can prove that the arbitration agreement is not legally binding under the law of the country agreed to by the parties[618]. However, whether Thai Courts possess the power to set aside foreign arbitral awards is still controversial and subjected to substantial criticisms. In which we shall discuss the issue in detail in the next part (4.2.5.2 Ground to Set Aside Investor-State Dispute Settlement).
- **Lack of proper advance notice of the arbitration**: If the party could furnish proof to the competent court that the arbitral tribunal does not give him a proper advance notice of the appointment of the arbitral tribunal or of the arbitral proceedings, the court shall issue an order to set aside the arbitral award. The proper notice refers to the notice with a reasonable time in the circumstances that allow the party to appoint his arbitrator and attend the proceedings. Such notice must furnish with details, for example, the name of the parties, and the allegations

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[617] For Example, Company A nationality of Argentina has a rice purchase agreement in the amount of 10 tons in the contract with Mr. B who has the Thai nationality. In the contract, the parties agree to use arbitration under Thai Arbitration Institute (TAI) of the Office of the Judiciary. However, Mr. B was ordered by the court to be incapacity person under Thai law the day before the conclusion of the contract. Thus, the conclusion of the contract between Company A and Mr. B has no consent from Mr. B's Guardian. Therefore, if there is an arbitral award, the competent court shall set aside them if Mr. B's Guardian can prove the incapacity of Mr. B at the time of conclusion of the arbitration agreement. See, ASAWAROTH, Saowanee, Alternative Dispute Resolution… *id.* See also, Supreme Court Judgment no. 3913/2549 (2006).

[618] Supreme Court Judgment no. 377/2531 (1988), part of the judgment stated that "The sub-lease agreement without the consent from the owner neither verbal nor writing is not effective. Therefore, the arbitral awards by the tenant and sub-tenant are not binding". See also, Supreme Court Judgment no. 611/2535 (1992), part of the judgment stated that "Mr.S who is the shareholder of the company, who act without power conclude arbitration clause with the third party. Such arbitration agreement is not binding to the company".

See also, Supreme Court Judgment no. 520/2520 (1977), part of the judgment, the court view that all previous practice between plaintiff and defendant, they always sign a contract in order to purchase good. However, in the dispute presented to the court, the defendant does not sign the contract. Therefore, there is no arbitration clause since the contract has not yet legally binding upon the parties.

from a party[619]. Thus, if the party is unable to attend the arbitral proceedings due to the necessary circumstances such as, there is a civil war in the area of a party which causes him unable to attend the arbitral proceedings. The competent court might set aside the arbitral award on that ground too.

- **The award is outside the scope of an arbitration agreement**: This ground of refusal refers to either the award deal with the dispute is either not within the scope of the agreement or beyond the scope of the arbitration agreement. However, if the award both falls within the scope and goes beyond them. If the award is able to separate, and upon the discretion of the court, it may set aside only the part that is beyond the scope of an arbitration agreement.
- **The false composition of the arbitral tribunal, or the arbitral proceeding**: This refers to when the composition of the arbitral tribunal or the arbitral proceeding is not in accordance with the agreement of the parties. For example, the arbitral tribunal conduct the proceeding in secret behind one party, and that proceeding has weight in delivering the arbitral award[620].

Court own recognition

The competent court might set aside arbitral awards on its own discretion without a furnish proof from a party under two circumstances, which are, (1) The award is not capable of settlement by arbitration under the law, and (2) The recognition or enforcement of the award would be contrary to public policy[621].

Thai Arbitration Act B.E.2545 (2002) Section 40(2)(a) simply provide that the award deals with a dispute that is not capable of settlement by arbitration under the law could be set aside by the competent court. "The law" in this respect is strictly refers to Thai law. Even though Thai law does not specifically state which kind of dispute that cannot be settled by arbitration. However,

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[619] Supreme Court Judgment no. 1273/2543 (1998), part of the judgment stated that "The appointment of arbitrators, the proceedings, and a notice must be in accordance with arbitration agreement. In this case, the arbitral proceedings under the Rubber Association rules, which there is no proper notice regarding to information of arbitrators or the initiation of arbitration to the opposing party. Therefore, the parties do not have the proper notice according to the Act".

[620] The false composition of arbitral tribunal must be substantial to the arbitral proceedings. In Supreme Court Decision no. 639/2496 (1953), part of the judgment stated that "It is true that the parties agreed to 7 arbitrators in the arbitration agreement, but later in the proceedings, some proceedings have the absent of couple arbitrators. However, there is no sign that arbitrators are acting in fraud behavior, thus, all 7 arbitrators signed in the awards. Therefore, the opposing party could not claim that the composition of tribunal is not in accordance with their agreement".

[621] Thai Arbitration Act B.E. 2545 (2002) Section 40.

there are certain disputes in Thai law that are not capable of settlement by arbitration under the law, for example, criminal dispute[622], antitrust, family law, law related to the capacity of a person[623], or bankruptcy status. The reason that Thai law does not clearly specify a kind of dispute that could not be settled by arbitration is because Thai law aims to give the power to the competent court to interpret them to ensure consistency and assure that some areas could only intervene by the power of the courts.

The competent court is also able to set aside an arbitral award on its own recognition when the recognition or enforcement of the award would be contrary to public policy. This ground of refusal considers as the most popular litigation strategy for the losing party, especially for foreign arbitral awards. The public policy ground is subjected to many criticisms by Thai legal scholars, mostly to the controversy of interpretation of the term "public policy" in this connection[624]. Especially, the interpretation of the term by the judicial court and the Administrative Court, because these two courts have jurisdiction over different kinds of disputes and carry different laws. The difference of interpretation of the term public policy shall be discussed in detail later in this chapter.

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[622] Even though some offense, for example, certain degree of defamation or certain degree of crime against liberty could be compromised under Thai law. See, Thai Criminal Procedure Act B.E. 2477 (1934) Section 39 (2). However, arbitration could not be used as a mean to resolve criminal dispute. The jurisdiction lay with the court because of two big reasons, which are, 1. The decision of criminal court set precedents to the future disputes, in which arbitration awards could not achieve that result, and 2. Arbitration does not exercise the power of states. Therefore, arbitral awards could not give the criminal punishment to the parties.

It is interesting to note in the end that arbitration is allow in the case that possess with character of both commercial and criminal dispute related to tort law. See, Thai Civil and Commercial Code B.E.2535 (1992) Section 240. In which, the arbitral tribunal could decide the commercial dispute, meanwhile the court will decide the criminal dispute.

There are some commercial disputes that prevent parties from using arbitration, which are dispute related to solely jurisdiction by the court.

[623] An act by some people is set to be voidable unless otherwise provided by Thai Civil and Commercial Code B.E.2535 (1992). Those acts also include the conclusion of arbitration clause. Those group of people are, a minor (Section 19-21), person of unsound mind (Section 30), a person adjudged incompetent (Section 29), A quasi-incompetent person (Section 34).

Married person must have a consent from his/her spouse in order to conclude arbitration clause (Chapter IV). If either spouse has entered into any juristic act alone or without consent of the other, the latter may apply in Court for revoking such juristic act, unless it has been ratified by the other spouse, or the third person was at the time of entering into such juristic act, acting in good faith and make the counter-payment. See, Thai Civil and Commercial Code B.E.2535 (1992) Section 1480.

Also, a form of agency/representative must have a specific consent that he/she have a consent from the party to conclude the arbitration clause on the behalf of him/her. Those agency/representative is, agent (Section 801(6)), lawyer (Thai Civil Procedure Code B.E. 2477 (1934) Section 62), Manager of Disappearance person (Section 54), Liquidators (Section 1259), Bankrupted person (Bankruptcy Act B.E.2483 (1940) Section 145(5)).

[624] SAISOONTHORN, Jumphot, *Alternative Dispute Resolution by International Arbitration in International Investment Agreements*, 1st Edition, Thammasat University Press, Bangkok, 2010;

The term public policy in Thai Arbitration Act B.E.2545 (2002) refers to public policy under Thai law[625]. However, Thai law does not explicit the definition of the term "public policy". Therefore, the term has a wide sense of interpretation which is hard to be precisely defined. In practice, we could fairly say that the public policy ground shall bring up by the court when the enforcement of arbitral awards shall lead to the injustice, illegality, contradict to administrative policy, or it affects the morale of the public, or public order[626]. Arbitral awards that violate the public policy in Thai law, for example, There is evidence suggesting actual bias or prejudice on the part of an arbitrator, an arbitral agreement exacted by duress, An award obtained by fraud, there are the circumstances treating an arbitrator to be dishonest in which the level of dishonesty must be high until making impossible for him/her to act in impartiality manner, or an arbitrator willfully or gross negligently ignores the important pieces of evidence of the case[627]. In addition, the interpretation of the term public policy in arbitral awards which falls under the jurisdiction of the Administrative Court is in the development stage since the Thai Administrative Court is still in its early age. We are expecting to see more development and clarification of the term public policy in the arbitral award by the Thai Administrative Court, which will surely be different from the interpretation from the Judicial Court[628]. We shall discuss in detail regarding to the term public interest of the arbitral award in the scheme of administrative contract later in this chapter (4.3.6.1 Public Policy Grounds to Set Aside/ Refuse Arbitral Award).

Thai Arbitration Act B.E.2545 (2002) also opens for the possibility for the arbitral tribunal to resume the case or carry out any act as it deems fit to eliminate the grounds for setting aside, subjected to the party's request and the court considers it reasonably justify, then the court may adjourn the hearing of the case as it deems fit[629].

Lastly, when it comes to the question of whether Thai courts have the jurisdiction to set aside the foreign arbitral award or not, it is still subject to the controversy both in the text law itself and Supreme Court judgments which lack of consistency on it. We shall discuss this in detail later

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[625] As in practices of many countries that making a distinction between the arbitrability of domestic and of international disputes. A dispute to be found non-arbitrable under a country's domestic law is not preventing the recognition in that country of a foreign award dealing with the same subject matter. See, <https://unctad.org/en/Docs/edmmisc232add37_en.pdf>.

[626] SETHABUTH, Jit &THINGSAPHAT, Jitthi, *Principle of Commercial Law regarding Juristic Act and Obligation*, 4th Edition, Academic Committee of Thammasat University Press, Bangkok, 2009;

[627] ASAWAROTH, Saowanee, Alternative Dispute Resolution… *id.*

[628] The interpretation of the term public interest by the Thai Administrative Court is different from the Judicial Court. For example, in the dispute between The Prime Minister's Office v. ITV, where the Supreme Administrative Court set aside the arbitral award on the ground of arbitral tribunal competence and the exclusive rights of the state. See, Supreme Administrative Court Order No. 349/2549 (2006).

[629] Thai Arbitration Act B.E. 2545 (2002) Section 40.

in the next part (4.2.5.2 Ground to Set Aside Investor-State Dispute Settlement). Yet, it is sufficient to mention here that we strongly believe that the power to set aside arbitral awards solely belongs to the competent court of the seat of arbitration, or under the law of the country where the arbitral award was made[630].

4.2.5.2 Grounds to Refuse the Enforcement of Foreign Arbitral Award

As mentioned, Thailand has some international obligations regarding the recognition and enforcement of the international arbitral award[631], in which Thai courts are binding to recognize foreign arbitral award as it is made in Thailand. However, limited to an international convention, treaty, or agreement to which Thailand is a party[632]. Thus, there are only certain grounds that Thai courts could set aside or refuse to enforce the arbitral award; those grounds are similar to UNCITRAL Model Law on International Commercial Arbitration[633].

There is a controversial issue of whether Thai courts have the authority to set aside the foreign arbitral award or not, since Section 40 of the Thai Arbitration Act B.E.2545 (2002) does not give clarity as to what kind of arbitral award that shall fall within the jurisdiction of Thai court to set aside them. This situation creates controversy in the field of Thai arbitration, and we believe that the rationale behind this controversy is because the legislation does not want to give up this power in the drafting process, so they leave the gap for interpretation to the judicial branch. Nowadays, there are two sides of opinions; in which one side supports that the Thai court has the authority to set aside the foreign arbitral award according to the language of Section 40 of the Act; on the other hand, the opposition argues that the authority to set aside the arbitral award solely belongs to the competent court or under the law of the country where it was made. Thai Courts' decisions in the last decade regarding to setting aside the foreign arbitral award demonstrated us more controversial, because some court judgments have exercised their power by setting aside a foreign arbitral award under Section 40 of the Act[634]. Meanwhile, other decisions confirm that Thai

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630 The rationale behind it is because Thai Arbitration Act B.E.2545 (2002) have the influence *inter alia* from the New York Convention. See, The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Article 5(1)(e).

631 There are several major international agreements on the recognition and enforcement of the international arbitral awards which Thailand is a party, which are, Geneva Protocol on Arbitration Clauses of 1923, Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, and The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

632 Thai Arbitration Act B.E. 2545 (2002) Section 41, para. 2.

633 Thai Arbitration Act B.E. 2545 (2002) Section 40, Section 43 &Section 44.

634 Supreme Court Judgment no. 5511-5512/2552 (2009), part of the judgment state that "The awards made by arbitral tribunal under Grain and Feed Trade Association (GAFTA) which made in London, United Kingdom. The aforementioned award was set aside by our Intellectual Property and International Trade Court, in our consideration,

courts have no jurisdiction to set aside the foreign arbitral award[635]. In our view, we strongly believe that the authority to set aside an arbitral award belongs to the competent court or under the law of the seat of arbitration, since the UNCITRAL Model Law on International Commercial Arbitration and Thai Arbitration Act expresses that the competent court could refuse to enforce the arbitral award when such award was set aside by the court of seat of arbitration[636]. Therefore, the competent court in this context should strictly refer to the court of seat of arbitration or under the law of the country where the arbitral award was made.

Recently, we could see the current position of Thai courts starting to accept that they have no authority to set aside the foreign arbitral award. However, we need to see more upcoming judgments from the courts to see its true position whether it is really settled in Thailand that the court has the jurisdiction to set aside the foreign arbitral award or not[637].

In conclusion to the ground to set aside or refuse the foreign arbitral award by the Thai courts. Although it is still uncertain in Thailand whether the Thai court could set aside the foreign arbitral award or not, since we could not point out the true standing point of the Thai court in this matter. However, in our view, we believe that the upcoming court judgments shall confirm the Supreme Court Judgment no.9476/2558 (2015) and Supreme Court Judgment no. 8539/2560 (2017) that Thai Courts do not have jurisdiction to set aside foreign arbitral awards[638]. Therefore, Thai court could only refuse enforcement of the foreign arbitral award according to Section 43

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even though such award was made in a foreign country. However, Thai Court has a jurisdiction to set aside foreign arbitral award as stated in Arbitration Act B.E. 2545 (2002)".

See also, Intellectual Property and International Trade Court judgment no. 119/2557 (2014), part of the judgment state that "The Awards was made in the United Kingdom. In this case, the award was made in contrary to Section 25 of Arbitration Act (Equal opportunity for the parties to present their case). The court finds that the enforcement of such award would be contrary to public policy. Therefore, the Court decide to set aside the awards by the power of Arbitration Act B.E. 2545 (2002) Section 40(2)(b)".

635 Supreme Court Judgment no.9476/2558 (2015). See also, Supreme Court Judgment no. 8539/2560 (2017).

636 UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006) Article 36(a)(v).

637 SRIRATH, Kritin, «Court vs. Arbitration: The issue of set aside foreign arbitral awards», *TAI Journal* Vol. 2 Issue 2 (2018), 3;

638 Supreme Court Judgment no. 9476/2558 (2015), part of the judgment state that "In consideration of foreign arbitral award which was made in Germany. We affirm that the authority to set aside the arbitral award under Section 40 of the Arbitration Act B.E. 2545 (2002) solely belong to the court where is in place that arbitral proceedings were occur. Therefore, the oppose party could not ask the court to set aside the foreign arbitral award".

See also, Supreme Court Judgment no. 8539/2560 (2017), part of the judgment state that "In line with the Supreme Court Judgment no. 9476/2558 (2015), when considering texts either from Arbitration Act B.E. 2545 (2002)" or from The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), we could only conclude that Thai court has authority only for set aside domestic arbitral award. Thai Court does not have authority to set aside foreign arbitral award. Therefore, Intellectual Property and International Trade Court does not have authority to set aside the arbitral award from International Cotton Association (ICA), where it was made in Liverpool, United Kingdom.

and 44 of the Act[639]. In which those aforementioned sections set out similar refusal grounds as Section 40 of the Act, with a slightly different which Section 43 also added the ground that the court may refuse enforcement of the arbitral award when such award has been set aside by the competent court at place of arbitration[640].

4.3 Arbitration in Administrative Investment Disputes

As we already discussed mainly in Chapter 2 (Administrative Law and Administrative Contract) and also earlier in this Chapter, it led to one question that Chapter 4 and Chapter 5 tend to investigate, whether Thai administrations and the European Union could conclude an arbitration agreement with a private party or not? In relation to the aforementioned question, there are also many relevant issues shall be explored, which are, the issue of whether the administration could submit the dispute to arbitration, administrative subject matter that could be referred to arbitration (Administrative arbitrability), the role of courts (Especially, Administrative Court) on administrative arbitration, practices of administrative arbitration both from Thailand and the European Perspectives, practices, and obstacles. Every Chapter shall lead to Chapter 6, in which we shall make an analysis of legal problems concerning the use of arbitration in administrative investment contracts, including the reform options for all problems.

4.3.1 Alternative Dispute Resolutions in Thai Administrative Contract

As already discussed in Chapter 2, Thai administrations have important tasks to *inter alia* arrange public services for its citizen. One of the methods to arrange public service is by concluding a contract with private parties. A contract in which at least one of a party is an administrative agency/administration could be regarded as either private contract or an administrative contract. To determine which contract could be regarded as an administrative contract, two characteristics must be met. First, at least one of the parties of which is an administration or person acting on behalf of the State[641]. Second, such contract must exhibit the

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639 Thai Arbitration Act B.E. 2545 (2002) Section 43 &44. See also, Supreme Court Judgment no. 11102/2551 (2008).

640 Thai Arbitration Act B.E. 2545 (2002) Section 43 (6) stated that "The arbitral award has not yet become binding, or has been set aside or suspended by a competent court or under the law of the country where it was made. Save where the setting aside or suspension of the award is being sought from the competent court, the court may adjourn the hearing of this case as it thinks fit; and if requested by the party making the application, the court may order the party against whom enforcement is sought to provide appropriate security".

641 "Administration" refers to Ministry, a Sub-Ministry, a Department, a Government agency called by any other name and ascribed the status as a Department, a provincial administration, a local administration, a State enterprise

characteristic of a concession contract, a contract providing public services, or a contract for the provision of public utilities or for the exploitation of natural resources[642]. Apart from those two aforementioned characteristics, other circumstances must also take into consideration, in which the Thai Administrative Court is the most important institution to make the interpretation, reshape, determine, and lay down principles of Thai administrative contract[643]. Thai Administrative Contract has a unique character. When one contract is regarded as an administrative contract, administrations have special power over the contract in a manner that we could not find in private contract, among many, the Administration could alter the scope of contract, unilaterally terminate contract without prior consent from a private party, or setting fine for the omission of private party's performance[644].

When there is the dispute arising from administrative contract, parties always have right to submit their dispute to Administrative Court as a court of jurisdiction over Thai administrative contract. However, other means of alternative dispute resolutions are also available under Thai law. Above all other forms of alternative administrative dispute resolution, administrative appeal considers as the most important and popular method, due to the fact that it is mandatory in Thailand for the injured party to file an administrative appeal before the right to administrative trial[645]. In other words, the administrative appeal is a pre-condition before the right to administrative trial. In addition, the conciliation in certain administrative dispute (including dispute arising from an administrative contract) is the new alternative administrative dispute resolution that just came into action and gained more attention both from private party and administration[646]. Lastly, arbitration as one form of alternative administrative dispute resolution which had already been in action for decades[647], but has been subjected to substantial criticisms and controversies

established by an Act or a Royal Decree or any other State agency and shall include an agency entrusted to exercise the administrative power or carry out administrative acts"

"A person acting on behalf of state" refer to an "official" which are government official, an official, an employee, a group of persons or a person performing duties in an administrative agency. Thus, the term "A person acting on behalf of state" also referring to a quasi-judicial commission, a commission or a person empowered by law to issue any by-law, order or resolution affecting persons. See, Supreme Administrative Court Judgment no. 12/2545 (2002). See detail discussion in Chapter 2 of the thesis.

642 Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) Section 3 paragraph 9. See also, the Resolutions of the Supreme Administrative Judges of 6/2544 (2001).

643 PHOLLAKUL, Phokin, «Description of… *id.*

644 See more detail of Thai Administrative Law and Thai Administrative Contract on Chapter 2 of the Thesis.

645 Act on the Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999) Section 42.

646 WANNAPANICH, Boonanan, «Conciliation in Administrative Law Cases», *Administrative Court Journal* Vol. 33 No 2 (2021), 1-35;

647 See details in 4.1.1 (Historical Perspectives).

In the present, in case where any party to the arbitration agreement in administrative contract commences any legal proceedings in Administrative Court against the other party thereto in respect of any dispute which is the

due to the reason that arbitration is not so warmly welcome in Thai public law legal society. The detail of arbitration in administrative law and administrative contract shall be discussed later in this Chapter.

4.3.2 The Relationship of Arbitration and Administrative Contract

Thai Administrative Court was established by the virtue of the Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999). Since the first day of Administrative Court came into operation on 9 March 2001, it made the big influences on Thai legal society because it made *inter alia* Thai court system became the "Dual Court System", and there is finally a clear distinction between private law and public law in Thailand. In the scheme of contract, it makes private contract falls within the jurisdiction of the judicial Court; meanwhile, the administrative contract falls within the jurisdiction of the Administrative Court. In consequence, any dispute arising from an administrative contract, including the arbitration clause and all arbitration proceedings in accordance with an administrative contract fall within the jurisdiction of the Administrative Court.

After the establishment of the Administrative Court, there was a controversy regarding the possibility of settling the administrative dispute by arbitration because the language in the previous version of Arbitration Act B.E. 2530 (1987) solely allowed parties to submit a commercial dispute to arbitration[648]. However, the new Arbitration Act has clarified the issue by permitting government agencies and private enterprises to conclude an arbitration clause in an administrative contract, and such arbitration agreement shall bind the parties[649]. Therefore, it is clear that Thai law permits the use of arbitration as an alternative dispute resolution in an administrative contract[650].

Yet, neither the current Arbitration Act B.E. 2545 (2002) nor the Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) lay down any specific substantive or procedural rules for arbitration in an administrative contract

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subject of the arbitration agreement, subjected to certain limitations, if the Administrative Court found that there are no grounds for rendering the arbitration agreement void or unenforceable or impossible to perform, it shall issue an order striking the case. Therefore, parties could resolve their dispute by arbitration as they agreed in the first place. See, Thai Arbitration Act B.E. 2545 (2002) Section 14. See also, Supreme Administrative Court Order No. 209/2548 (2005).

[648] Thai Arbitration Act B.E. 2530 (1987) Section 5.

[649] Thai Arbitration Act B.E. 2545 (2002) Section 15.

[650] WANNAPANICH, Boonanan, «The principle of "non-paiement de l'indu": and its limitation to arbitration in administrative law dispute», *TAI Journal* Vol. 2 Issue 1 (2018), 103-112;

(Administrative arbitration). Therefore, Arbitration Act mainly applies to the dispute, alongside with Thailand Civil and Commercial Code and the Civil Procedure Code that shall apply *mutatis mutandis*. In other words, we could conclude that the administrative arbitration procedure in Thailand is almost identical to the arbitration procedure in private contract, in which both of them are subjected to the Thai Arbitration Act B.E. 2545 (2002).

4.3.3 Thai Cabinet Resolutions prohibited the use of Arbitration in Administrative Contract

The conclusion of an arbitration agreement in the contract between the Thai administration and a private party is not a new phenomenon in Thailand. In 1992, the Royal Thai Government enacted the Regulations of the Office of the Prime Minister on Procurement B.E.2535 (1992). The Regulations provided a set of procurement regulations. Along with the aforementioned Regulations, there were the attachments contained a "form of agreement between the administration and private party", in which the "form of agreement" contained an arbitration clause. The form of agreement in 1992 contained that if there is a dispute arising from the contract, parties could submit their dispute to the arbitral tribunal, and the decision from the arbitral tribunal is considered as final and binding. Although, the Royal Thai Government already issued a new version of the Regulations of the Office of the Prime Minister on Procurement B.E.2560 (2017) which did not provide an arbitration clause in form of an agreement in the manner of 1992 form of agreement anymore. Yet, from 1992 to 2017, Thai administrations concluded administrative contract by using the form of the agreement provided in the attachment from the Regulation of the Office of the Prime Minister on Procurement B.E.2535 (1992). In the result, many private parties who had an agreement with an administration under the old agreement form of the Regulations of the Office of the Prime Minister on Procurement B.E.2535 (1992) submitted their dispute to the arbitration, which in many cases, arbitral tribunal decided in favor of private party, in consequences, the Royal Thai Government has lost a substantial compensation and political popularity by the result of those arbitral awards[651].

In this connection, the Royal Thai Government foresaw that arbitration agreement in every contract between administrations and private parties presented problems *inter alia* the loss of substantial compensation from taxpayer's money and the ignorance of arbitral tribunals in

[651] For example, See, Supreme Court Judgment no. 1102/2511 (1968). See also, Supreme Administrative Court Judgment no. ๐.349/2549 (2006). See also, Administrative Court Judgment no. 1659/2555 (2012) and No. 1660/2555 (2012). See also, Administrative Court Judgment no. ๐.487-488/2557.

bypassing important core public law doctrines of Thai administrative contract. Meanwhile, the Royal Thai Government also aware that it is impossible to eliminate all arbitration agreements in every contract between administration and private party, since it would lower investors' confidence to invest in government projects; especially, to those foreign investors with high bargaining power. Owning to the fact that big infrastructure projects required billions of capital, and it was obvious that investors who had the capital to make an investment in such projects had sufficient funds to pursue their claim in an international level. It is understandable that those foreign investors did not want to resolve their disputes against Thai administrations in Thai Courts. To encounter the aforementioned issue, the Royal Thai Government declared Cabinet Resolutions suggested that the contract between the authority and private party (both domestic investors and foreign investors), regardless of whether it is a private contract or administrative contract, should not put an arbitration clause in it. However, if there is problem arose, necessities, or an unavoidable request from a private party, the authority shall request permission from the Cabinet to conclude the arbitration clause in their contract, on a case-by-case basis[652]. Following the declaration of these Cabinet Resolutions, the Thai Cabinet has allowed many administrations to conclude arbitration clause in the investment contract with high bargaining power investors, especially in the development in infrastructure projects[653].

It is interesting to note that there are criticisms on these Cabinet Resolutions; apart from criticisms that Resolutions are ruining the investment atmosphere in Thailand, there is also criticism regarding to the nature of these Resolutions by the executive branch in which it characterizes in a similar manner with legislative power. In other words, there is a criticism that these Resolutions have a very close status to the law, which the executive branch is prohibited from enact them since it is a power of the legislative branch[654]. However, no real debate has been carried on ever since the declaration of these aforementioned Cabinet Resolutions.

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[652] Thai Cabinet Resolution on 28 July 2009, and on 14 July 2015.

[653] For example, the permission to conclude arbitration agreement with private party in the constructing and supervising the Purple-line Subway. See, Thai Cabinet Resolution on 13 October 2009. See also, Thai Cabinet Resolution on 23 February 2010 on permitting Thai Airways to insert arbitration clause in the loan agreement to pay for 6 Airbus A330-300.

[654] However, there is classic judgment (Supreme Court Judgment number 559/2496 (1953)) ruled that "Government can exercise its power in anyway, but not relating to judicial and legislative power". The Royal Thai Government always take an account of this judgment when declare Resolutions. Thus, the language of Resolutions is well-drafted in order to avoid the collision between powers of executive branch and legislative branch. See the meeting report from the Thai Office of the Council of State at, <http://www.krisdika.go.th>.

In our opinion, this kind of order could not be passed by the parliament since it would ruin the investment atmosphere in Thailand, and we do not think that Thailand would pass such a law for the aforementioned reason.

In sum, Thai law permits the use of arbitration in the administrative contract. By the virtue of Arbitration Act B.E. 2545 (2002) Section 15, administration may agree to settle any dispute by arbitration and such arbitration agreement is considered binding to the parties[655]. However, in practice, administrations could not conclude arbitration agreements with private parties because there are Cabinet Resolutions prohibited them from doing so. Yet, there is an exception that the administration could request permission from the Cabinet on a case-by-case basis. The purpose of this exception is to maintain the possibility of concluding an arbitration clause with investors who have high bargaining powers (Mostly in strategic projects that require huge investments or technology). In other words, Thai law "allows" arbitration in the administrative contract; however, in practice, Thailand almost "prohibits" the conclusion of an arbitration clause with private parties by administrations. This led to the question of the suitability of Thai law that permits the use of arbitration in all administrative contract disputes. Thus, the status of Cabinet Resolutions needed to have further discussions in Thai legal society, including what would happen if the administration violated the Resolutions by concluding an arbitration agreement with the private party, whether it would affect to the validity of the arbitration agreement or not. Most importantly, the aforementioned Cabinet Resolutions reflect the situation that the country where embraces a strong idea of public law as Thailand finds an uneasy situation to fully accept arbitration as an alternative administrative dispute resolution.

4.3.4 Relationship between International Investment Agreements and Administrative Contract

Thailand has international obligations on the recognition and enforcement of international arbitral awards. Thailand is one of the first contracting Asian states entered to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), in which Thailand has been a signatory state since 1959[656]. Additionally, Thailand is also a party of predecessors of the New York Convention, which are the Geneva Protocol 1923 and the Geneva Convention 1927.

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[655] Thai Arbitration Act B.E. 2545 (2002) Section 15.

[656] It is interesting to mention that Thailand has not made any "reciprocity reservation" or indeed any reservations in its ascension to the New York Convention. See, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

Thailand has concluded BITs with its major trading partners[657]. In addition, Thailand also concluded Free Trade Agreement (FTA) and Regional Trade Agreement (RTA) as a member of the Association of Southeast Asian Nations (ASEAN)[658]. Most of those International Investment Agreements (IIAs) between Thailand and other states contain an Investor-State Dispute Settlement clause (ISDS), which allows foreign investors from IIA's counterparts to initiate an international arbitration proceeding against Thailand when foreign investors feel that Thailand fails to perform its substantive obligation provisions provided by the IIAs (Ex, FET, Unfair Expropriation, NT, or MFN)[659]. Such consent to international arbitration was given in advance by Thailand, and the mutual consent shall be met when foreign investors decide to initiate arbitration by their rights under the IIAs. It is also interesting to note that almost all IIAs concluded between Thailand and other states require Thailand and foreign investors to solve their dispute in an amicable way before the right to international arbitration as a pre-condition called "cool-off period clause"[660]. Moreover, some of IIAs even went further by requiring the exhaustion of local

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[657] Data of 3 March 2019, Thailand has concluded 44 BITs with other countries (39 BITs in force), and Thailand also concluded 27 treaties with investment provisions-TIPs (23 treaties in force). In addition, Thailand by Ministry of foreign Affairs does not seem to slow down on concluding international investment agreements with other countries. Only in 2019, it aims to conclude international investment agreements with at least 5 more countries. See information and texts on Ministry of Foreign Affairs of Thailand's website at, <www.mfa.go.th>.

[658] For example, Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations (2017), ASEAN Comprehensive Investment Agreement (2009), Free Trade Agreement between ASEAN and Japan (2008). See, *Ibidem.*

[659] See details in Chapter 3 Arbitration and International Investment Agreements.

[660] For example, Agreement between the Government of the Kingdom of Thailand and the Government of the United Arab Emirates on the Promotion and Protection of Investments of 2015, Article 10 stated that

"1, Disputes arising between a Contracting Party and an investor of the other Contracting Party in respect of an investment under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

2. If the dispute cannot be settled amicably within the period of three months, the parties to the dispute should pursue the following procedures:

a) the investor shall resort to a local competent authority, court or tribunal to settle the dispute, provided that such authority, court or tribunal has jurisdiction over such dispute under its law of the Contracting Party;

b) if the dispute cannot be settled according to the provisions of sub paragraph (a) of this Article within six months from the date of submission, such investor may submit the dispute to;

i. arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965 (hereinafter referred to as the "Centre"), if the Centre is available; or

ii. arbitration by the Additional Facility of the Centre, if only one of the Contracting Parties is a signatory to the Convention referred to in subparagraph (i) of this paragraph; or

iii. an ad hoc arbitration tribunal is to be established under the Arbitration Rules of the United Nation Commission on International Trade Law (UNCITRAL),; or

iv. any other arbitral] tribunal or institution as agreed by the parties to the dispute."

See similar terms in, Article 11 of the Agreement between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar for the Promotion and Protection of Investments of 2008. See also, Article 10 of the Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments of 2002. See also, Article 11 of the Agreement between

administrative or judicial remedies as a pre-condition of Thailand's consent to the arbitration[661]. However, some of the IIAs concluded by Thailand and other states did not require the exhaustion of local administrative or judicial remedies as a pre-condition; in these cases, Thailand usually negotiates with foreign investors to put that requirement into the investment contract.

As the result ISDS clause provided in the IIAs between Thailand and other countries, although there is no arbitration clause in investment contracts, Thailand must be bound to international arbitration by the virtue of those IIAs[662]. Accordingly, when foreign investors choose to refer investment dispute to institutional arbitration or *ad hoc* arbitration by their rights under the IIA, Thailand will have no other choice but to submit to the same jurisdiction that foreign investors have asserted their right into, regardless of whether there is the existence of arbitration in investment contract or not, since it is the dispute regarding to substantive provisions under the IIAs[663]. In this regard, we could see that Ministerial Cabinet Resolutions restricting Thai agencies to conclude the arbitration clause with a private party (See details in 4.3.3 Thai Cabinet Resolutions prohibited the use of Arbitration in Administrative Contract) shall have no effect in the area of investment protection by the IIAs. As already appear in several international arbitrations against Thailand, which are *Walter Bau v. Thailand* (Dispute in concession contract, Walter Bau initiated international arbitration against Thailand under German-Thailand BIT 2002)[664], and *Kingsgate v. Thailand* (Dispute in the exploitation of natural resources, Kingsgate initiate international arbitration against Thailand under Australia-Thailand FTA 2004)[665]. The details of these two cases shall be discussed in part 4.3.7 (Case Study regarding to Investor-State Dispute Settlement on Administrative Contract Dispute: Case study of Walter Bau v. Thailand/ Kingsgate v. Thailand).

4.3.5 Role of Administrative Court in Arbitration in Administrative Contract during Arbitral Proceedings

As already discussed in 4.2.4 (Role of Court in Arbitration), there is no different set of rules between arbitration in a private contract and arbitration in an administrative contract. In this

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the Government of the Kingdom of Thailand and the BELGO-LUXEMBURG Economic Union on the reciprocal Promotion and Protection of Investments of 2002.

661 *Ibidem.*

662 CHANTARA-OPAKORN, Anan, «Investment Arbitration: Remarks for Thailand», *TAI Journal* Vol. 5 Issue 1 (2010), 1-18;

663 See Details in Chapter 3 of the thesis.

664 Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag v. The Kingdom of Thailand (formerly Walter Bau AG (in liquidation) v. The Kingdom of Thailand), award on 1 July 2009.

665 Kingsgate Consolidated Ltd v. The Kingdom of Thailand (Case Pending, Data of 3 September 2020)

connection, Thai Arbitration Act B.E.2545 equally applies to both private contract and administrative contract. In a similar manner to arbitration in private contract, parties could agree on *inter alia* procedural frameworks, arbitrator (Without the requirement of public law knowledge), applicable law (Without any requirement that the arbitrator must apply administrative law in administrative contract arbitration), Venue, etc. in administrative contract arbitration[666].

If the Administrative Court is the court of competent[667], in case any party to the arbitration agreement commences any legal proceedings against another party in the Administrative Court regards to the arbitration agreement, upon certain grounds, the Administrative Court shall order striking the case so the parties could refer their dispute first to the arbitration[668]. Thus, if the parties could not appoint the arbitrator/s in any circumstances, the competent Administrative Court shall appoint them upon request[669]. Furthermore, arbitrators or any party could seek judicial assistance from a competent Administrative Court whenever they need (Ex. Issue Subpoena, Submit of documents by administrations/party, or provisional measures), if the Administrative Court views that had such proceedings been conducted in court, the Administrative Court would have been able to issue such order, the Administrative Court may proceed as requested, and the provisions of Thai laws in relation shall apply *mutatis mutandis*[670]. In addition, international arbitration could also seek for judicial assistance from the Administrative Court when the Thai Administrative Court is the court of competent to their dispute.

These aforementioned situations created concerns and debates among Thai scholar in which many of them are already have negative views on arbitration in the administrative contract. Many of Thai scholars argue that arbitration in the administrative contract is an unfit and question the properness of using arbitration as a dispute resolution method in the administrative contract; especially, the situation that there is no requirement for arbitrators to be specialized in public law, or an obligation (Except parties already agreed to such applicable law) to apply public law to the

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666 See detail in Chapter 4 of the thesis.

667 Thai Arbitration Act B.E. 2545 (2002) Section 9. The competent court, for example, The Intellectual Property and International Trade Court for an intellectual property and international trade matters, Administrative Court for administrative contract matters, and civil court for commercial matters. See, Supreme Administrative Court Order no. 510/2549 (2006).

668 Thai Arbitration Act B.E. 2545 (2002) Section 14. See also, Supreme Administrative Court Order no. 42/2552(2009).

669 Supreme Administrative Court Order no. 985/2550 (2007). In the part of the Order stated that "…Therefore, the claimant could ask the competent court, which is the Administrative Court in this case, because the dispute is in regards of Broadcasting Agreement under U.H.F. system that characterized as "Administrative Contract" under the Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) Section 3 para. 9. Thus, the Act also indicated that the dispute is in the jurisdiction of the Administrative Court under Section 9 para. 1 (6). In conjunction with Thai Arbitration Act B.E. 2545 (2002) Section 9".

670 Thai Arbitration Act B.E. 2545 (2002) Section 16. See also, Supreme Administrative Court Order no. 610/2546 (2003).

dispute. In many administrative arbitration cases, arbitrators mostly apply private law, which puts the administration on the same level with the private party and disregards public law doctrine in the proceedings[671]. The main reason that many of Thai scholars stand against arbitration in the administrative contract is because they believe that private parties mainly pursue the benefits for themself, but the Thai administration pursues different objectives, which are *inter alia* arrangement of public services and protection of public interest. Therefore, the issue of disregarding to apply the public law in arbitration proceeding on administrative contract resulting criticisms by Thai legal scholars[672]. Many pieces of the literature suggest that Thai law should not permit the use of arbitration in administrative contract[673]. However, in our view, those views by Thai scholars to prohibit the use of arbitration in the administrative contract are not realistic, taking the fact that the analysis of those pieces of literature only looks arbitration in the administrative contract only from the public law practitioner's view, but lack of weighing other factors, especially, they do not take account of economic development perspective, the rule of law development, and international obligations of the Royal Thai Government to the international community.

4.3.6 Role of Administrative Court in Arbitration in Administrative Contract After Issuance of Arbitral Award

Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) section 3 gives the definition of the term "Administrative Contract"[674], in which arbitration proceedings, also the execution or refusal of arbitral awards regarding to administrative contract dispute fell within the jurisdiction of the Thai Administrative Court as the court of

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671 Supreme Administrative Court Judgment no. ๑.349/2549 (2006).

672 RATTANALEAM, Rapeeporn &ASAWAROTH, Saowanee, «Arbitration in Construction Administrative Contract», *The Journal of Industrial Technology* Vo. 15 No. 2 (2019), 17-32;

673 *Ibidem.*

674 Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) Section 3 para. 9 stated that "administrative contract includes a contract at least one of the parties of which is an administration or a person acting on behalf of the state, and which exhibits the characteristic of a concession contract, a contract providing public services or a contract for the provision of public utilities or for the exploitation of natural resources".

See also, the Resolutions of the Supreme Administrative Judges of 6/2544 (2001) stated that "Administrative Contract must possess with two characteristics. First, at least one of the parties of which is an administration or person acting on behalf of the State. Second, such contract must exhibit the characteristic of a concession contract, a contract providing public services, or a contract for the provision of public utilities or for the exploitation of natural resources. If the contract aimed to create the equal status of parties, thus in case such contracts do not possess those two characteristics, such contracts are regarding as private contracts. This is for the purpose of execution of administrative powers and arrange the public services".

competent as referred by the Thai Arbitration Act[675]. Thai Administrative Court acts as the guardian to control and to ensure that the arbitral awards are done legally and do not contrary to public policy. However, the control of the arbitral awards by the Thai Administrative Court shall only be done after the issuance of the arbitral award because the Thai Administrative Court respects the autonomy of the parties and aware that both parties are voluntarily agreed to use arbitration as an effective dispute resolution mechanism[676]. Therefore, the Thai Administrative Court would not intervene in the arbitral proceeding, except to give judicial assistance during the proceedings, upon the request of the party or the arbitral tribunal, whatever the case may be[677].

There is neither a different set of rules regarding setting aside nor refusal of arbitral awards between the Administrative Court and the Judicial Court. Similar to the Judicial Courts, the power of the Administrative Court to set aside or refusal of arbitral awards is empowered by the Thai Arbitration Act B.E. 2545 (2002)[678], in which such powers of judicial review by the Administrative Court limited to the grounds presented by the parties (Ex. Incapacity of party, invalid applicable law, or awards outside the scope of the arbitration agreement)[679], and the grounds that Administrative Court found that the dispute is not capable of settlement by arbitration or the arbitration award is contrary to the public policy (Public Policy ground). It is important to emphasize that the Thai Administrative Court respects the autonomy of the parties to get their dispute to be resolved by arbitration. Thus, there are limitations by the Thai Arbitration Act limits the role of administrative judicial review by the Administrative Court[680]. In this connection, the Thai Administrative Court could not intervene or review the correctness of details decided by the arbitral tribunal because the Thai Administrative Court could only choose either to enforce or set aside or refuse to enforce arbitral awards. It is important to note that there are limited grounds to set aside or refuse the arbitral awards, in which those grounds are in accordance with the UNCITRAL Model Law on International Commercial Arbitration[681].

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675 Thai Arbitration Act B.E. 2545 (2002) Section 9 &Section 15. See also, Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) Section 9 (4) &(6). See also, Supreme Administrative Order no. 89/2551(2008).

676 Supreme Administrative Court Order no. 108/2553(2010).

677 See details of judicial assistances during arbitration proceedings on 4.2.4.1 (Judicial Assistance during Arbitral Proceedings) and on 4.3.5 (Role of Administrative Court on Arbitration in Administrative Contract during Arbitral Proceedings).

678 Thai Arbitration Act B.E. 2545 (2002) Section 40 (Setting Aside of the Arbitral Awards), Section 43 &44 (Refusal Enforcement of Arbitral Awards).

679 See details in (4.2.5.1 Ground to Set Aside of Domestic Arbitration).

680 Thai Arbitration Act B.E. 2545 (2002) Section 40 (Setting Aside of the Arbitral Awards), Section 43 &44 (Refusal Enforcement of Arbitral Awards).

681 Thai Arbitration Act B.E. 2545 (2002) Section 40 (Setting Aside of the Arbitral Awards), Section 43 &44 (Refusal Enforcement of Arbitral Awards).

The Court could not change the decision of the arbitral tribunal because the limitation of the law limited only certain grounds for the competent courts to refuse or set aside the arbitral award. Although the use of discretion of arbitral tribunal was done in the lack of specialties in the field, the case of impartiality or bias of the arbitrators (since it is so hard for the Court in practice to prove such allegation)[682], or even arbitral proceedings and the awards were done in the manner of disregard the application of administrative laws in the dispute that falls within the scope of public law dispute. It is important to emphasize that Thai Courts could only choose either to enforce or set aside or refuse to enforce arbitral awards, but not to change details or correct those arbitral awards.

There are even more limited grounds to appeal against the order or judgment of the court regarding to its order or judgment to enforce, set aside, or refuse the enforcement of the arbitral award. In the view of the court[683], the appeal shall be granted only in rare situations where such an award is contrary to public policy[684]. This is the view of the Administrative Court to respect *inter alia* the finality and the effectiveness of arbitral award according to the purpose/intention of the Thai Arbitration Act B.E. 2545 (2002)[685].

The aforementioned situations and cases decided by the Administrative Court present problems and controversies regarding to the use of arbitration in the administrative contract dispute. In many cases, Thai administrations lost in arbitral proceedings, and then could not force

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[682] Administrative Court Judgment (Decided Case) no. ค.6/2551 (2008) and (Undecided Case) no. 6/2551 (2008). The part of the order, the Administrative Court view that in order to determine the impartiality of the arbitrator. There must be an obvious indication indicated the close relationship between party and the alleged arbitrator. In this case, the arbitrator does not have any indication on his relationship and the party. Thus, there is no law prohibited party to appoint the prosecutor to be an arbitrator. In addition, the Regulation of the Office of the Attorney General provided set of rules regarding to the appointment of prosecutor to be the arbitrator. In the light of aforementioned circumstances, such appointment is not contrary to public policy. However, Supreme Administrative Court Order no. 2/2552 (2009) revised the decision of the Administrative Court that rejected the appeal of the party on the impartiality of the arbitrator.

[683] Thai Arbitration Act B.E. 2545 (2002) Section 45 stated that

"No appeals shall lie against the order or judgment of the court under this Act unless:

(1) The recognition or enforcement of the award is contrary to public policy;

(2) The order or judgment is contrary to the provisions of law concerning public policy;

(3) The order or judgment is not in accordance with the arbitral award;

(4) The judge who sat in the case gave a dissenting opinion; or

(5) The order is an order concerning provisional order measures for protection under Section 16.

The appeal against the court's order or judgment under this Act shall be filed with the Supreme Court or the Supreme Administrative Court, as the case may be".

[684] Supreme Administrative Court Order no. 108/2553 (2010). See also, Administrative Court Order (Decided Case) no. ค.6/2551 (2008) and (Undecided Case) no. ค.6/2551 (2008).

[685] *Ibidem.*

private parties to perform their duties in the administrative contract[686]. There are many academic debates seeking for the development of administrative arbitration. Many suggestions have been purposing yet have not been moving on in practice or any major reform, at least in the past two decades. Those suggestions, among others, (1) To put a more well-drafted arbitration agreement because Thailand does not have any law governing the conclusion of the administrative arbitration clause (Ex. applicable law and arbitrator's qualifications), (2) Introduce new laws putting minimum requirement on the arbitrator's qualification in administrative law disputes, (3) Enact the new set of laws to differentiate between administrative arbitration and commercial arbitration, (4) Enhance the transparency in administrative arbitration since the public interest is highly relevant to such proceedings/result[687]. The details of them shall be discussed in Chapter 6 (Analysis on Legal Problems Concerning Arbitration in Administrative Investment Contract).

4.3.6.1 Public Policy Grounds to Set Aside/ Refuse Arbitral Award

Public policy ground is the most frequent ground using to set aside or refuse arbitral award by Administrative Court's own recognition or upon the request from the party[688], it considers as one of the most popular litigation strategies for the losing party in the arbitration who wishes to get such award to be refused or set aside by the competent court. At the moment, there is no law giving the definition to the term "public policy", but we could say in general that the term public policy in the arbitral award refers to the situation that the competent court shall set aside/refuse the arbitral award when such award is contradicted to fairness or create the high negative sense to the public if such award shall, to be enforced (Ex. The party was not given an equal chance in the arbitral proceedings)[689]. The development and interpretation of the term have been made by Thai Courts over time. One of the good explanations for the lack of such a definition is because the law aimed to empower the competent court to interpret them in order to respond to the dynamic nature of the term public policy. All the pieces of literature agreed that the term public policy in Thai administrative arbitration refers to public policy under Thai law.

Since there is no definition of the term public policy in Thai administrative arbitration, examples from Administrative Court's decisions on administrative arbitrations would help the reader to have a better understanding of the term. In this regard, the classic *ITV* case which

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[686] Supreme Administrative Court Order no. อ.437/2560 (2017). See also, Supreme Administrative Court Order no. อ.761/2552 (2009).

[687] RATTANALEAM, Rapeeporn &ASAWAROTH, Saowanee, «Arbitration in… *id.*

[688] Thai Arbitration Act B.E. 2545 (2002) Section 40 &Section 44.

[689] ASAWAROTH, Saowanee, Alternative Dispute Resolution… *id.*

demonstrated the interpretation of the term public policy by the Supreme Administrative Court in administrative arbitration is worth mentioning here. In the aforementioned case, the ITV Company submitted the dispute to arbitration according to the arbitration clause in the broadcasting agreement (administrative contract)[690], alleged that the Office of the Permanent Secretary (Prime Minister Office) breached an agreement, and then required the Office of the Permanent Secretary (Prime Minister Office) to compensate them in accordance with the contract. In January 2004, the arbitral tribunal constituted under the rule of the Arbitration Institute of the Ministry of Justice delivered an award[691], found that the Office of the Permanent Secretary (Prime Minister Office) breached the contract by creating substantial damages to ITV's financial status and ordered them to pay compensation. Thus, the arbitral tribunal also ordered the change of programs of ITV broadcasting, in which the arbitral tribunal ordered to modify the agreement between the ITV and the Office of the Permanent Secretary (Prime Minister Office), in which from the first place, ITV must broadcast news and academic documentary with no less than 70 percent of its broadcasting time into 50 percent of its broadcasting time, as ordered by the arbitral tribunal.

On December 2006, the Supreme Administrative Court set aside the arbitral award of the *ITV* case, ordered that the award was contrary to public policy[692]. The reason that Supreme Administrative Court set aside the award is based on two grounds, which are, (1) the illegality which created the ineffective of an additional clause in the main agreement, and (2) the lack of power of the arbitral tribunal in changing details of public service[693]. On the first ground, the Supreme Administrative Court found that the additional clause in the main contract that allowed compensation cost and additional measures whenever the Office of the Permanent Secretary (Prime Minister Office) created substantial damages to ITV's financial status is invalid, and in the consequences, do not bind the parties because the agreement with the value exceeds 1 Billion Thai Bath must have an approval from the Cabinet whenever the party wishes to modify the contract[694]. However, the additional clause in this case does not obtain approval from the Cabinet. Therefore, the arbitral tribunal could not use the additional clause that does not receive approval from the

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690 In Thailand, the National Frequency is the telecommunication resources which belong to the State. The Government gave the concession to the private party and collect fees from them. The arrangement of Television Frequency is considered as public service that must be serve to the people. See, Administrative Court Order no. 258/2562 (2019). See also, Supreme Administrative Court Order no. 16/2550 (2007). See also, Supreme Administrative Court Order no. 397/2553 (2010).

691 ITV v. Office of the Permanent Secretary (Prime Minister Office), award of 30 January 2003 (No. 29/2545 (2002) and No. 4/2547 (2004)).

692 Thai Arbitration Act B.E. 2545 (2002) Section 40.

693 Supreme Administrative Court Order no. 349/2549 (2006).

694 Private Investment in State Undertaking Act, B.E.2535 (1992) Section 21.

Cabinet to decide the case. Regardless that parties do not argue/ pick up about this point in the arbitration proceeding; however, this is a matter of contrary to public policy under the Arbitration Act B.E. 2545 (2002), in which the Court could consider on its own recognition. The court, therefore, set aside an arbitral award in this case. Meanwhile, on the second ground, the Supreme Administrative Court ruled that the order from the arbitral tribunal to modify the quota broadcasting time of news and academic documentary from no less than 70 percent to 50 percent is contrary to public policy. The court noted that the authority to adjust the broadcasting agreement is the exclusive power and responsibility of the state, not to the arbitrators, who consider as a private party who decide a specific dispute in accordance with the contract.

The *ITV* case is only one example the Administrative Court has set aside an arbitral award on the ground of contrary to the public policy under the Arbitration Act. There are more others Administrative Court judgments that refuse the enforcement or set aside the arbitral award in administrative arbitration on the public policy ground, for example, *Ultra Vires*[695], Corruption[696], Over Fine[697], the award is outside the scope of the arbitration agreement, or the ignorance of arbitrators to apply the equal opportunity to both parties to present their case[698]. Yet, it is important to emphasize once again before ending this part that although there is no definition to the term "contrary to public policy" in Thai administrative arbitration, but the threshold for the Administrative Court to declare arbitral awards to be contrary to public policy is considerably high[699], and seems to be even higher since the *ITV* case. One of the reasons is because of the limitation of laws and international practices. The Administrative Court could not declare every arbitral award as contrary to public policy, neither just because the award was made in a dispute

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[695] Supreme Administrative Court Judgment no. 7277/2549 (2006).

[696] *Ibidem.*

[697] Supreme Administrative Court Order No. 108/2553 (2010). In the Order, Supreme Administrative Court reversed the order from Administrative Court of First Instance, order that they must accept the appeal on the ground of the fine over than ten percent of value of the contract accordance to the Regulations of the Office of the Prime Minister on Procurement B.E.2535 (1992) Section 138. In which the Regulation is enacted for purpose of protection of public interest, to prevent Thai Agency to charge over fine to the private party.

However, it is also important to mention that the threshold is high, if the fine do not contrary to the public policy, the Administrative Court shall not intervene with the consideration of the arbitral tribunal. See, Supreme Administrative Court Order no. 1824/2556 (2013).

[698] Supreme Administrative Court Order no. 380/2560 (2017).

[699] Supreme Administrative Court Order no. 37-38/2560 (2017). See also, Supreme Administrative Court Order no. 349/2549 (2006). See also, Supreme Administrative Court Order no. 603-604/2556 (2013). See also, Supreme Administrative Court Order no. 1195-1196/2560 (2017). See also, Supreme Administrative Court Order no. 320/2561 (2018). See also, Supreme Administrative Court Order no. 221-223/2562 (2019).

related to the administrative contract, nor the payment of such compensation shall be made by taxpayer's money[700].

4.3.7 Case Study regarding to Investor-State Dispute Settlement on Administrative Contract Dispute (Case study of Walter Bau v. Thailand/ Kingsgate v. Thailand).

As already mentioned in 4.3.3 (Relationship between International Investment Agreements and Administrative Contract), Thailand has concluded a little over 40 international investment agreements, in which almost all of them contained ISDS clause giving the right to protected foreign investors from home state to initiate international arbitration against Thailand when foreign investors feel that Thailand failed to perform its substantive protections under international investment agreements[701]. One of the prime examples of administrative arbitration under the investment agreement could be found in the case of *Walter Bau v. Thailand*. In *Walter Bau* Case[702], the arbitral tribunal found Thailand breached the Fair and Equitable Treatment Standard (FET), then awarded Walter Bau roughly 31 million euros. After the issuance of the arbitral award, Thailand refused to comply with the arbitral award. Therefore, the investor requested German Court to recognize and enforce the arbitral award by seizing the Boeing 747 Royal Plane owned by the Crown Prince (At the time) of Thailand[703]. The main reason that German Court allowed such seizure was because both Germany and Thailand are the party to the New York Convention. Although it was in dispute whether the royal plane is subjected to seizure since the plane itself was the personal property of the prince, but the Government. However, this strategy by Walter Bau proved to be successful, since the Royal Thai Government gave the letter of guarantee by a state-run bank to the German Court on the very next day of the royal plane was seized[704].

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[700] Supreme Administrative Court Order no. 48/2555 (2012). See also, Supreme Administrative Court Order no. 603-604/2556 (2013).

[701] See details regarding to substantive protections under the international investment agreements in Chapter 3 of the thesis.

[702] The arbitral tribunal constitute under Germany - Thailand BIT (2002). See, Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag v. The Kingdom of Thailand (formerly Walter Bau AG (in liquidation) v. The Kingdom of Thailand), UNCITRAL, Award of 1 July 2009.

[703] It is interesting to note that the Royal Plane in dispute worth only roughly 5 million in the resale price instead of the value of 31 million Euros of the arbitral awards. However, due to the important of the Thai Monarchy to Thailand, the Royal Thai Government decided to honor the award at the German Court in order to get the Royal Plane to be released as soon as possible. This strategy by Walter Bau seems to be effective in this occasion.

[704] Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag v. The Kingdom of Thailand (formerly Walter Bau AG (in liquidation) v. The Kingdom of Thailand), UNCITRAL, Award of 1 July 2009. See also, <https://www.nytimes.com/2011/07/14/business/global/thai-princes-plane-impounded-in-germany.html>. See also, <https://www.thairath.co.th/content/188030>.

After the incident of the Royal plane seized in Germany, the Royal Thai Government by the Ministry of Transport and the Department of Highways filed a petition to Administrative Court, asking for the Administrative Court to set aside the arbitral award on the ground of contrary to the public policy according to the Arbitration Act[705]. In October 2013, the Supreme Administrative Court issued order number 883/2556 (2013), rejected the claim, and disposed of the case by the reason that the dispute did not fall within the jurisdiction of the Administrative Court. The Supreme Administrative Court gave the reasoning that the dispute and the right to submit the dispute to arbitration in this case have arisen from the international investment agreement between Thailand and Germany, not the concession contract between the Thai agency and Don Mueng Public Company. As the result, there is no law giving jurisdiction to the Administrative Court to decide the case, neither Act on the Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) nor Arbitration Act B.E. 2545 (2002)[706].

Although Thailand has many international investment agreements and many foreign direct investments, however, the Supreme Administrative Court Order number 883/2556 (2013) is so far, the only Supreme Administrative Court Order regarding the enforcement or setting aside the

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[705] The Plaintiff led by the Royal Thai Government alleged that the defendant is not eligible to the protection under Thai-German BIT because the plaintiff only owns 9.8 percent share of the company. In addition, the plaintiff argues that the jurisdiction to decide the dispute is solely belong to the Administrative Court. See, Supreme Administrative Court Order no. 883/2556 (2013).

[706] Act on the Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) Section 9 stated that "The Administrative Courts have the competence to try and adjudicate, or give orders over the following matters:

(1) cases involving a dispute in relation to an unlawful act by an administrative agency or a State official, whether in connection with the issuance of a by-law or order, or in connection with other acts, by reason of acting without or beyond the scope of powers and duties, or in a manner inconsistent with the law or the form, process, or procedure which is the material requirement for such act, or in bad faith, or in a manner indicating unfair discrimination, or causing unnecessary process, or excessive burden to the public, or amounting to undue exercise of discretion;

(2) cases involving a dispute in relation to an administrative agency or a State official neglecting official duties required by the law to be performed or performing such duties with unreasonable delay;

(3) cases involving a dispute in relation to a wrongful act or other liability of an administrative agency or a State official arising from the exercise of power under the law, or from a by-law, an administrative order, or any other order, or from the neglect of official duties required by the law to be performed or the performance of such duties with unreasonable delay;

(4) cases involving a dispute in relation to an administrative contract;

(5) cases prescribed by the law to be submitted to the Court by an administrative agency or a State official for mandating a person to do a particular act or refrain therefrom;

(6) cases involving a matter prescribed by the law to be under the jurisdiction of the Administrative Courts.

The following matters are not within the jurisdiction of the Administrative Courts:

(1) actions concerning military disciplines;

(2) actions of the Judicial Commission under the law on judicial service;

(3) cases within the jurisdiction of the Juvenile and Family Court, Labor Court, Tax Court, Intellectual Property and International Trade Court, Bankruptcy Court, or other specialized courts."

See also, Thai Arbitration Act B.E. 2545 (2002) Section 9.

international arbitration award made under the international investment agreement. The rationale behind that is because the Royal Thai Government can negotiate an amicable solution with foreign investors almost all the time, despite the fact that there are frequent cases that foreign investors threaten to initiate arbitration proceeding under the international investment treaties, or sometimes the international arbitrations are already initiated by foreign investors but the Royal Thai Government could agree to the amicable solution with foreign investors before the arbitral awards were to be an issue. Yet, the Supreme Administrative Court Order number 883/2556 (2013) has shown us the position of the Administrative Court on the ISDS arbitration award, in which the order showed us that the Administrative Court was denied its jurisdiction over the ISDS arbitration award. We disagree with the position of the Administrative Court because we believe that the Administrative Court should have jurisdiction over the investment arbitration award in the concession contract, although investors in dispute are only carry a certain sum of shares and initiate the arbitration proceeding under their rights under the investment agreement, not the concession contract. The Administrative Court should assert its jurisdiction because it is clearly the dispute arising from an administrative contract and the liability of an administrative agency from the exercise of its power, which are fall within the jurisdiction of the Administrative Court in accordance with the Act on the Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999)[707]. In addition, if the Administrative Court is still holding this position, it would represent the situation as a "close door" for Thai agencies and foreign investors in similar circumstances to the *Walter Bau* case who wish to get their investment arbitral award to be enforced, set aside, or refuse enforcement by the Administrative Court. Without any changes, international arbitral awards from investment agreements could not find effective enforcement in Thailand, and it could result that Thailand does not respect the international obligations regarding the enforcement and finality of the foreign arbitral awards.

It is important to see more Supreme Administrative Court Orders/Decisions to see its position on the recognition and enforcement of administrative investment arbitral awards in various circumstances. There are some investment administrative arbitration cases are on pending at the moment[708], yet we could not know how soon the next case shall come to the consideration of the Thai Administrative Court once again, since the government shall try in every way to prevent the tension both in the political and budgetary scheme[709]. It is also interesting that the *Walter Bau*

[707] Act on the Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999) Section 9 (3) &(4). See also, the Resolutions of the Supreme Administrative Judges of 6/2544 (2001).

[708] Kingsgate Consolidated Ltd v. The Kingdom of Thailand (Pending), UNCITRAL Rule.

[709] CHANTARA-OPAKORN, Anan, «Arbitration Law… *id.*

case has awakened both the Thai government and legislation to develop Thai law and practices of Thai agencies. For example, Thailand is seeking a better system to control the conclusion and the execution of the public contract[710], the qualification of arbitrators (To possess public law knowledge)[711], or develop arbitration laws to attract more investors to choose Thailand as a seat of arbitration[712].

4.4 Conclusion Remark

It is far more than obvious that Thailand is open to arbitration, both for commercial arbitration and arbitration in administrative law disputes[713]. Thai Arbitration Act B.E. 2545 (2002) which is the main law governing arbitration practices in Thailand has followed the UNCITRAL Model Law on International Commercial Arbitration, the New York Convention and other international treaties regarding to recognition and enforcement of foreign arbitral awards[714]. Thai law respects the autonomy of parties who agree to use arbitration as a dispute settlement mechanism and embraces the flexibility of the system. Thai competent courts shall not break the spirit of the Arbitration Act B.E.2545 (2002) by setting aside or refusing to enforce arbitral awards, except for certain grounds provided by the Arbitration Act, taking into account that the exercise of such power to set aside or refuse the arbitral awards are subjected to the high threshold. In addition, many actions by policy maker are in no doubt, encouraging more use of arbitration and pushing Thailand to be the center of the arbitration institute of the ASEAN region[715].

Although there are benefits from using of arbitration, yet there is no different set of arbitration laws between commercial arbitration and arbitration in administrative contract disputes. Therefore, Thai Arbitration Act B.E. 2545 (2002) is equally applied to both commercial and administrative disputes, despite the fact that there is a unique nature of administrative law and there is no requirement for arbitrators to take public law doctrine into account when deciding the dispute in the administrative contract. Thus, the interpretation of the term public policy as one of the important grounds to refuse or set aside arbitral awards by the Judicial Court and

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[710] The letter from the Secretariat of the Cabinet no. 0503/ ว 162 of 9 September 2010.

[711] *Ibidem.*

[712] Recommendations from Thai Arbitration Institute (TAI), available at <tai.coj.go.th>.

[713] Academic Bureau of the Administrative Court of Thailand, «Arbitration and Thai Administrative Laws», *Administrative Court Journal* Vol. 3 (2003), 109-128;

[714] Geneva Protocol on Arbitration Clauses of 1923. See also, Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

[715] Interview from Secretary – General of the Office Executive of the Judiciary in Thai Arbitration Institute (TAI) News Vol. 2 Issue 2 (2017), 7;

Administrative Court are different. This situation led to criticisms in Thai legal society regarding the properness of using arbitration in administrative contract, since they foresee the weaknesses of lack of a different set of arbitration rules between commercial arbitration and administrative arbitration (Ex. Arbitrators qualification, the applicable law, the transparency, etc.). The details of them and those concerns shall be discussed in detail in Chapter 6 (Analysis on Legal Problems Concerning Arbitration on Administrative Investment Contract).

In order to counter those issues, many measures are in debating and purposing by Thai legal scholars, for example, a more well-drafted arbitration clause in a public contract, the set of rules or guidelines for administrations in performing and cancellations of the public contract, a new law that put a minimum requirement on arbitrator's qualification in an administrative contract dispute, a new set of law that allow differentiate between commercial arbitration and administrative arbitration, and enhance transparency in arbitral proceedings and in arbitral awards. In addition, some protective measures are already implemented; for example, the declaration of Cabinet Resolutions prohibited Thai agencies from concluding arbitration clauses in the public contract (Although those Resolutions have no place in administrative investment arbitration).

Lastly, in the scheme of administrative international investment arbitration, although Thailand has concluded many international investment agreements and there are frequent claims under international investment agreements by foreign investors, yet the Supreme Administrative Court Order number 883/2556 (2013) is the sole Supreme Administrative Court Order regarding the recognition and enforcement of the administrative investment arbitration, in which the Supreme Administrative Court has denied its jurisdiction over Inter-State Dispute Settlement (ISDS) in the administrative contract. The aforementioned situation seems to be controversial at the moment; therefore, we have to see more Supreme Administrative Court orders/decisions to see a clearer standing point of Thailand and the Supreme Administrative Court regarding ISDS arbitration in the administrative contract.

CHAPTER 5

THE EUROPEAN UNION ARBITRATION IN ADMINISTRATIVE INVESTMENT CONTRACT

5.1 The European Union Exclusive Competence in the Area of International Investment Law after the entry of the Lisbon Treaty

The European Union is a supranational legal entity[716], in which it sits somewhere along the *continuum* between an international organization and a state, and it has been moving closer to a state than an international organization[717]. The European Union is based on the rule of law. Thus, the European Union has its own legal orders[718], in which there are separate from international law and form an integral part of the member states' legal system[719], with the Commission acting as a guardian of the treaty monitoring that all European Union countries properly apply EU law to their national laws[720]. The European member States consist with 28 sovereign nationals (Currently

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716 The term Supranational was originated from Article 9 of the Treaty establishing the European Coal and Steel Community to describe the character of the duties of the members of the High Authority, the later Commission. Nowadays, the term is characterized by the possibility of decisions that are taken by a majority of the member states and are nevertheless binding on all member states, including the direct effect of Union Law on individual in member states, and the primacy or precedence of Union law over the law of the member states. See, Treaty on European Union (TEU), Article 16. See Also, Treaty on the Functioning of the European Union (TFEU), Article 288. See also, Judgment of the Court of 5 February 1963 on NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration - Case 26-62, para. 13.

717 MACCORMICK, John, Understanding the European… *id.* See also, CRAIG, Paul &DE BÚRCA, Grảinne, EU Law:… *id.* See also, SCHÜTZE, Robert, European Union… *id.*

718 The European Union legal order based on their own source of law, which are, Primary Legislation, international agreements, and also various types of secondary legislation. See the general idea in Chapter 2 of the thesis.

719 Judgment of the Court of 5 February 1963 on NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration - Case 26-62, para. 12. See also, Judgment of the Court of 15 July 1964 on Flaminio Costa v E.N.E.L. – Case 6-64. See also, Judgment of the Court of 13 February 1969 on Walt Wilhelm and others v Bundeskartellamt, Case. 14-68, para 6.

720 Treaty on the Functioning of the European Union (TFEU) Article 258 (ex Article 226 TEC). The infringement procedure under article 258 authorized the Commission to deliver a reasoned opinion to the Member States when the Commission seen that the member state failed to fulfill its obligation under the Treaties. Thus, if the State concerned does not comply with such reasoned opinion, the Commission may bring the dispute to the CJEU. This article made the Commission to be so called; "The guardian of the Union". See, ECJ Judgment of the Court (Fifth Chamber) of 1 February 2001 on the Commission of the European Communities v French Republic - Case C-333/99, para. 23. Moreover, the Commission has a certain margin of discretion on whether it should take action on a specific infringement, however the Commission are obligate to initiate an infringement procedure (Even the breach was minor) when it appears that the Member State failed to be obligated to their duties under the Treaties. See, Order of the Court of First Instance (Second Chamber) of 12 November 1996 on Syndicat Départemental de Défense du Droit des Agriculteurs (SDDDA) v Commission of the European Communities - T 47/96, para. 2. See also, Judgment of the Court (Sixth Chamber) of 17 July 1997 on Commission of the European Communities v Italian Republic - Case C-43/97, para. 8.

Thus, the Member States themselves also bound to monitor the compliance of others Member States to the EU's Treaties, if one or more member states foreseen that other member states failed to fulfill their obligations under the Treaties, they may bring the dispute to the CJEU under Article 259 of the TFEU. In addition, for the purpose of EU's laws supremacy, Member States are not allowed to submit cases in the boundary of the EU's

become 27 states after Brexit), altogether decided to give up an important part of their sovereign power to the European Institutions in order to achieve the same goals and values as underpinned by the Treaties[721].

The European Union is subjected to the principles of conferral, of subsidiarity, and of proportionality[722]. The principle of conferral governs the limits of Union competences in relation to the Member States and restricts the Union to the competences conferred upon it by the Member States in the Treaties. The principle of subsidiarity and proportionality play a role in the area which do not fall within the European Union's exclusive competences; it limited that the Union shall act only insofar as the objectives of an action cannot be sufficiently achieved by the Member States and that the Union's actions in general do not exceed what is necessary to achieve the objectives of the Treaties. Therefore, as a result of the principle of conferral, all competences that do not conferred upon the Union in the Treaties remain with the Member States[723].

The entry of the Lisbon Treaty created a huge change in the relation between the European Union and foreign direct investment (FDI). Under Article 3(1)(e) of the Treaty on the Functioning of the European Union (TFEU), the common commercial policy (CCP) fell into the exclusive competence of the Union[724]. In which Article 207(1) of the TFEU refers to CCP as *inter alia* the conclusion of tariff and trade agreements relating to foreign direct investment[725]. Member states were pre-empted from taking any action in the areas covered by the CCP, even regarding those with which the EU had not yet taken any legislative action[726]. In the context of the European Union investment competences after the entry into force of the Lisbon Treaty, it is commonly accepted by the majority of literature that the European Union has exclusive competence to conclude international agreements on foreign direct investment[727]. Nowadays, the negotiation of

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jurisdictions to other international or national court or tribunal. See, Judgment of the Court (Grand Chamber) of 30 May 2006 on Commission of the European Communities v Ireland - Case C-459/03, para. 132.

721 JACKSON, John H., «Sovereignty: Outdated Concept… *id.*

722 Treaty on the European Union (TEU) Article 5 (Ex article 5 TEC).

723 MACCORMICK, John, Understanding the European… *id.* See also, CHAMON, Merjin, EU Agencies:… *id.*

724 Article 3(1)(e) of the TFEU stated that the common commercial policy (CCP) fell within the exclusive competence of the European Union. Meanwhile, Article 207 of the TFEU elaborate that CCP refer to many areas, including foreign direct investment (FDI). See, Treaty on the Functioning of the European Union (TFEU) Article 3(1)(e). See also, Treaty on the Functioning of the European Union (TFEU) Article 207(1) (Ex Article 133 TEC).

725 The exclusive competence in the field of CCP made the authority to conclude investment agreement fall to the European Union. See, *Ibidem.*

726 Opinion of the Court of 11 November 1975, no. 1/75. See also, part 2.2.3.3 of the thesis (Principle of Sincere Cooperation).

727 The European Union may conclude the international agreement where there is *inter alia* provided by the Treaties. See, HINDELANG, Steffen &MAYDELL, Niklas, «The EU's… *id.* See also, DIMOPOULOS, Angelos, EU Foreign… *id.*

The language of Article 3(2) and Article 216(1) of the Treaty on the Functioning of the European Union (TFEU) are similar. It could explain that Art. 216 (1) TFEU gives the EU external competence without defining its

international investment agreements (IIAs) is conducted by the European Commission, subjected to authorization from the Council, alongside with a certain extent assistance from the European Parliament as a co-decision body[728].

There are two issues regarding to this new competence worth mentioning here, which are, the scope of foreign direct investment under article 207(1) of the TFEU, and the future of EU's IIAs on the investor-state dispute settlement clause (ISDS).

For the first issue, the scope of the term "direct investment" is not defined. Yet, EU law meaning of the notion of "direct investment" may rather be found indirectly in secondary law[729], or the interpretation by international organizations[730]. Both EU secondary law and interpretation by international organizations have pointed in the same direction that the term "direct investment" does not include portfolio investment. Therefore, if the EU wants to conclude an international agreement that alters the scope of foreign direct investment (For example, broadening the term to include the protection to portfolio investment), it will have to conclude mixed agreements since the power to enter into agreements concerning portfolio investment is evidently not conferred to the EU[731].

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nature and only becomes exclusive when the requirements of Art. 3 (2) TFEU are fulfilled. Also, Article 216(1) also play an important role in exercise EU external role in the shared competence. See, Treaty on the Functioning of the European Union (TFEU) Article 3(2). See also, Treaty on the Functioning of the European Union (TFEU) Article 216(1).

728 Treaty on the Functioning of the European Union (TFEU) Article 218 (Ex Article 300 TEC). See also, BUNGENBERG, Marc, «The Division of Competences Between the EU and Its member states in the Area of Investment Politics», Marc BUNGENBERG, Jorn GRIEBEL &Steffen HINDELANG (Eds.), *International Investment Law and EU Law*, Springer, Heidelberg, 2011;

729 For instance, Annex I of the Capital Liberalization Directive 88/361/EEC refers to "direct investments" and defines this term as "investments of all kinds [...] which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity".

730 For example, the OECD refer to the term direct investment as "Direct investment is a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor. The motivation of the direct investor is a strategic long-term relationship with the direct investment enterprise to ensure a significant degree of influence by the direct investor in the management of the direct investment enterprise. The 'lasting interest' is evidenced when the direct investor owns at least 10% of the voting power of the direct investment enterprise. Direct investment may also allow the direct investor to gain access to the economy of the direct investment enterprise which it might otherwise be unable to do. The objectives of direct investment are different from those of portfolio investment whereby investors do not generally expect to influence the management of the enterprise".)" See, OECD Benchmark Definition of Foreign Direct Investment, 4th edition, 2008, para. 11, available at <http://www.oecd.org>.

Thus, International Monetary Fund (IMF) also refer to the term "direct investment" as in terms of a 10% minimum ownership requirement or voting power. See, International Monetary Fund, Balance of Payments Manual, 5th edition, 1993, para. 362, available at <http://www.imf.org/external/np/sta/bop/BOPman.pdf>.

See Chapter 3 of this thesis for the general idea of the term "direct investment".

731 REINISCH, August, «The Division… *id.*

For the second issue, it is already settled that the new exclusive competence power shall encompass both market access and post-establishment rules. Therefore, it is agreed by many pieces of literature and as already appeared in modern IIAs at the European Union level (Ex. CETA and EU-Vietnam Agreement) that it is also possible for the EU to conclude IIAs with substantive standards of treatment, alongside with not only interstate dispute settlement (Rarely used in practice), but also investor-state dispute settlement (ISDS)[732]. In sum, the entry of the Lisbon Treaty gave full power to the Union to act over the FDI issue, especially the EU's exclusive competence to conclude international investment agreements that contain both substantive protections and dispute settlement clauses. With its new competence, there is no doubt that the European Union will become an even more important actor in the field of international investment policy and law.

5.2 Arbitration Practice in the European Union

As we already affirmed in 5.1 (The European Union Exclusive Competence in the Area of International Investment Law after the entry of the Lisbon Treaty), that the competence over foreign direct investment (FDI) belongs to the Union according to the TFEU[733]. However, in the area of arbitration rules, the European Union does not have an authoritative catalog or unified code of arbitration rules. As a result of the principle of conferral, all competences that do not conferred upon the Union in the Treaties remain with the Member States. This situation makes the competence to enact internal arbitration rules belong to the Member States.

Nonetheless, the arbitration rules in the Member States are not entirely different, but rather share a lot of similarities due to the UNCITRAL Model Law on International Commercial Arbitration in which its aim is to serve as the benchmark for the harmonization of arbitration laws and statutes in the worldwide scale[734]. UNCITRAL Model Law on International Commercial Arbitration plays a strong role in the foundation of Member States' arbitration rules[735]. Moreover,

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[732] Many international arbitral tribunals indicate that access to dispute settlement may be regarded as a crucial element of investment protection. For example, in Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, para. 102 stated that "Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause". This point out that access to dispute settlement may be regarded as a crucial element of investment protection.

[733] See, 5.1 (The European Union Exclusive Competence in the Area of International Investment Law after the entry of Lisbon Treaty).

[734] UNCITRAL Model Law on International Commercial Arbitration by United Nations Commission on International Trade Law.

[735] Directorate General for Internal Policies: Policy Department C: Citizen's Right and Constitutional Affairs, Legal Instruments… *id.*

Member States' national laws in relation to the enforcement of foreign arbitral awards are abided by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), because all of EU Member States are the contracting states to the Convention. As a result, the subject matter/arbitral award which is not arbitrable under national law or contradicts to public policy could be the grounds leading to the denial of enforcement by the Member State's competent court set out by the New York Convention.

It is important to remind the reader until this point once again that the competence of internal arbitration rules belongs to the Members States. Therefore, there is no consistent set of a procedure or authoritative catalog of arbitrations rules across the European Union. Nowadays, the arbitration rules are different among Member States. Those levels of difference might be from tiny to huge. It is not appropriate to explore all internal arbitration rules in each Member State since it would be too wide. However, some examples of the different of arbitration laws and practices among Member States are worth to mention here in order to give general ideas of the European arbitration and the different arbitration laws and practice of Member States. There are examples as follows,

- **Scope of Application (International v. Domestic):** The majority of Member States do not distinguish in any way between domestic and international arbitration[736]. Therefore, the arbitration proceedings shall be subject to similar national rules irrespective of domestic or international arbitration. On the contrary, some Member States draw a distinction between them[737].
- **Arbitrability:** The EU Member States' legal systems allow subject matters that are almost universal considered arbitrable, such as, monetary, or commercial disputes. In comparison, regarding other areas of law as inarbitrable, such as, criminal disputes or disputes that solely fall within the jurisdiction of its national court. However, there are some areas which considered as the "gray areas", which leave to their national court to determine whether such disputes could be settled by arbitration or not.
- **Form of Agreement:** As the UNCITRAL Model Law on International Commercial Arbitration set up that the arbitration agreement shall be in writing in the various forms of communication[738]. The majority of Member States follow the UNCITRAL Model Law by

[736] The example of Member States that do not distinguish between domestic and international arbitration: Austria, Belgium, Czech Republic, Denmark, England and Wales, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Scotland, Slovakia, Slovenia, Spain and Sweden. See, *Ibidem.*

[737] The example of Member States that distinguish between domestic and international arbitration: Bulgaria, Cyprus, France, Greece, Malta, Romania and Switzerland. See, *Ibidem.*

[738] UNCITRAL Model Law on International Commercial Arbitration, Article 7.

requiring the arbitration agreement must be in writing form[739]. Meanwhile, England, Wales and Northern Ireland take a broader view by accepting any agreement the terms of which are "evidenced" in writing[740]. Moreover, some other Member States also accept an agreement in an oral form, as long as there is adequate evidence of the parties' intention[741].

- **Arbitrator's qualifications:** As arbitration is the private mode of dispute resolution between parties. Therefore, national law tends to give high autonomy to the parties to choose their own adjudicator. Also in the European Union, the majority of Member States gave free choice to parties to choose their own arbitrator[742]. Meanwhile, some Member States are putting some minimum qualification requirements on arbitrators[743].
- **Competence-Competence:** Under the doctrine of Competence-Competence, the arbitral tribunal has competent to rule on its own jurisdiction, the validity of the arbitration agreement, and other relevant issues regarding to it. However, the details of implementing of the doctrine are diverse by Member States. In the positive effect of the doctrine of competence-competence, the arbitral tribunal could rule on their own competence; however, such power does not prevent a national court from determining such a question at the request of a party[744]. On the contrary, some Member States have developed the "negative effect" of the doctrine, in which the arbitral tribunal could rule on their jurisdiction in the first instance. The court could only intervene with the arbitral tribunal's jurisdiction only in "manifestly void or manifestly not applicable", yet, subject to a very

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[739] For example, in Spain. See, Act 60/2003 of 23 December on Arbitration Article 9(3). See also, German Civil Procedure Reform Act of 27 July. 2001 and the Law of Contracts Reform Act of 26 November 2001 Section 1031(1).

[740] Arbitration Act 1996 (of England), Chapter 23, Section 5(2)(c).

[741] For example, in Denmark, there are no formal or legal requirements for entering into agreements; both an oral and written agreement is binding, and this also applies to arbitration agreements. According to the Danish Arbitration Act, Section 7, parties can agree to arbitration for disputes already arisen, or for future disputes in a certain legal relationship. See, Danish Arbitration Act 2005, Act no. 553 of 24 June 2005 on Arbitration. See also, ROSTOCK-JENSEN, Jens &POULSEN, Sebastian Barrios, *Arbitration Guide by International Bar Association on Denmark*, September 2014, Copenhagen, Denmark.

[742] The majority of Member States give the full autonomy to parties to choose their own arbitrators without any legal requirement of minimum qualification, those Member States for example, Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, England and Wales, Finland, France, Germany, Greece, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia and Switzerland. See, Directorate General for Internal Policies: Policy Department C: Citizen's Right and Constitutional Affairs, Legal Instruments… *id.*

[743] For example, in Latvia, it is required by law that the arbitrator must have an impeccable reputation, with academic education and the qualification of a lawyer, thus, with 3 years of experiences. See, Latvia Arbitration Law of 2014 Section 14. Meanwhile, in Hungary, those who serve as an arbitrator must not under 24 years old, thus, have not been barred from public affairs by a non-appealable court judgment. See, Act LXXI of 1994 on Arbitration Section 12.

[744] For example, See, The Swedish Arbitration Act (SFS 1999:116) Section 2 para. 1.

high threshold. In the scheme of "negative effect", the court could only review the arbitral tribunal's jurisdiction after they rendered the arbitral award[745].

- **Provisional Measures:** Arbitral proceedings require time; the duration of time depends on many factors but mainly the level of complication of cases. During the proceedings, the parties might need a provisional measure in order to ensure that their substantive rights are not frustrated during the wait for the final decision. Most of European States leave a free choice to the parties to decide whether to apply the provisional measure to the competent court or the arbitral tribunal[746]. Meanwhile, some Member States strictly allow the power to grant the provisional measures to the competent court[747].

Before ending this part, it is noteworthy that the arbitration practices in the European Union are facing problems and particular issues regarding to the nature of the European Union. Among many others which shall be discussed later in this Chapter and also in Chapter 6 of the thesis, the arbitral proceedings in the EU are facing the issue that the arbitral tribunal cannot make a preliminary reference to the Court of Justice of the European Union when they are uncertain on the interpretation of the EU law. Article 267 of the TFEU gave the opportunity to any court or tribunal of a Member State to address the question of the interpretation of the Treaty to the CJEU, and then the CJEU shall give the preliminary ruling[748]. The mechanism under article 267 aims to ensure a uniform interpretation and application of EU law in all Member States. However, as it already set in the precedents, the term "Tribunal of a Member State" does not include to the arbitral tribunal[749]. Again, this simply means that the arbitral tribunal could not ask for a preliminary

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[745] POPOVA, Ina C., TAYLOR, Patrick &ZAMOUR, Romain, «The European Arbitration Review 2020: France», 2019, available online at <www.globalarbitrationreview.com>.

[746] For example, in Portugal, arbitrators also have the power to grant ex parte preliminary orders. Interim measures ordered by arbitral tribunals can be enforced upon application before the competent State court. See, Portuguese Voluntary Arbitration Law Article 22, 23 &27. See also, Directorate General for Internal Policies: Policy Department C: Citizen's Right and Constitutional Affairs, Legal Instruments… *id.*

[747] For example, in Italy, arbitrators cannot grant interim measures. Therefore, even if parties have concluded an arbitration agreement, they must apply for provisional measures before the Italian National Court which would have been competent on the merits in the absence of the agreement. Czech Republic also follow the similar practices. See, Italian Code of Civil Procedure Article 818 stated that "The arbitrators may not grant attachment or other interim measures of protection". See also, KUDRNA, Jaroslav, *Arbitration Guide by International Bar Association on Czech Republic*, January 2018, Prague, Czech Republic.

[748] Treaty on the Functioning of the European Union (TFEU) Article 267 (Ex Article 234 TEC).

[749] Judgment of the Court of 23 March 1982 on Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse – Case 102/81, para. 10. See also, Judgment of the Court of 17 September 1997 on Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH – Case C-54/96, para. 3.

However, there are some arbitral tribunals of some EU Member States that constitute by the legislation are recognized as "court" or "tribunal" of the Member States by the European Court of Justice. For example, the European Court of Justice decided that Portuguese Tribunal Arbitral necessário meets all of the requirements to be considered a court or tribunal. Its jurisdiction stems not from the will of the parties, but from Portuguese legislation. Thus, there are other reasons *inter alia* the special requirement of arbitrators, the applicable law, and the fact that the judgment of this case shall be consider as judgment from the Portuguese Court. See, Order of the Court (Eighth

ruling from the CJEU[750]. Therefore, when the question of EU law is raising in the arbitral proceedings, there is an inherent risk that tribunals might interpret or apply them wrong or contrary to with the view of the CJEU, which could lead to the rejection of those awards by the Member States' national court or by the CJEU. Yet, it is important to mention that the trend has been moving as it is demonstrated in *Ascendi v. Autoridade Tributária e Aduaneira*, where the CJEU ruled that the arbitral tribunal constituted under the Portuguese law is equivalent to the EU member states court. Therefore, CJEU allowed the arbitral tribunal in *Ascendi v. Autoridade Tributária e Aduaneira* to refer EU law in question for the preliminary ruling by the CJEU under Article 267 of the Treaty on the Functioning of the European Union (TFEU)[751].

5.3 The Situation of EU's BITs After the entry of the Lisbon Treaty

The first BIT was concluded between West Germany and Pakistan in 1959[752]. Since then, the European Member States have concluded over 1,300 BITs with other countries outside Europe (Extra-EU BITs). In addition, the European Member States also concluded nearly 200 BITs among themselves. In other words, one Member State also concluded BIT with one or more other Member States (intra-EU BITs)[753]. All intra-EU BITs were concluded before the entry of the Lisbon Treaty. As we already clarified in part 5.1 (The European Union Exclusive Competence in the Area of International Investment Law after the entry of the Lisbon Treaty), the reason that there is no further conclusion of BITs by any European Member States, neither extra-EU BITs nor intra-EU BITs is because the power to conclude BITs exclusively belongs to the European Union after the entry of the Treaty of Lisbon[754]. It is interesting to mention that prior to the Treaty

Chamber) of 13 February 2014 on Merck Canada Inc. v Accord Healthcare Ltd and Others, Request for a preliminary ruling from the Tribunal Arbitral necessário, Case C-555/13. See also, Court of Justice of the European Union press release No. 21/14, Luxembourg, 20 February 2014.

750 Opinion of the Court (Full Court) of 30 April 2019 on EU-Canada CETA Agreement, Opinion 1/17.

In addition, the legal service of the European Commission pointed out in the context of a Member State investment treaty that "The arbitral tribunal is not a court or tribunal of an EU Member State but a parallel dispute settlement mechanism entirely outside the institutional and judicial framework of the European Union. Such mechanism deprives courts of the Member States of their powers in relation to the interpretation and application of EU rules imposing obligations on EU Member States, which are presumably relevant in the arbitral proceeding". See, EURAM (n 54).

751 Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira, Judgment of the Court (Second Chamber) of 12 June 2014, Case C-377/13.

752 Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments of 1959.

753 See statistic at <https://investmentpolicy.unctad.org>.

754 Treaty on the Functioning of the European Union (TFEU) Article 3(1)(e). See also, Treaty on the Functioning of the European Union (TFEU) Article 207(1) (Ex Article 133 TEC).

of Lisbon, the European Union was a party to just one agreement providing for investment protection, which is the Energy Charter Treaty (ECT).

This part shall investigate the details of extra-EU BITs on the one hand, and the details of intra-EU BITs on the other. The reason that we must analyze them separately is because the different types of EU BITs have different natures. Thus, different kinds of BITs are presenting their unique set of problems and concerns. The most important reason is because of the competence of the European Union toward each kind of BITs, in which the European Union has full authority toward intra-EU BITs since there were concluded between Member States; therefore, the matter falls within the scope of the Lisbon Treaty. Meanwhile, the European Union has a limitation of its competence toward extra-EU BITs, considering the fact that the European Union does not have jurisdiction over third states.

5.3.1 The Situation of Extra-EU BITs

The Extra-EU BITs refer to BITs that the European Union Member States have concluded with other third countries before the entry of the Lisbon Treaty (For example, France-Malaysia BIT[755], Egypt-Germany BIT[756], Bahrain-Italy BIT[757], etc.). Currently, there are roughly 1,300 extra-EU BITs in force[758]. The situation of extra-EU BIT presented its unique problem as the EU does not have competent over the third states in the field of FDI. For instance, the European Union could not force China to comply with the doctrine of free capital movement as it could easily do so toward its Member States[759]. It is also interesting to mention that it is already confirmed by the CJEU that EU law cannot form part of the law interpreted and applied by the arbitration tribunals established under the extra-EU BITs[760].

It must be recalled that, although the EU is not a party to the extra-EU BITs, the measure challenged by the foreign investors under extra-EU BITs may be relevant to the EU measures

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[755] Agreement between the Government of the French Republic and the Government of Malaysia on Investment Guarantees of 1975.

[756] Agreement between the Arab Republic of Egypt and the Federal Republic of Germany concerning Encouragement and Reciprocal Protections of Investments of 2005.

[757] Agreement between the Government of the Italian Republic and the Government of the Kingdom of Bahrain on the Promotion and Protection of Investments of 2006.

[758] See statistic at <www.investmentpolicy.unctad.org>.

[759] There are many mechanisms under the Treaties for the European Union to enforce its Member States to comply with the doctrines under the Treaties. See details in Chapter 2 of the thesis.

[760] Opinion of the Court (Full Court) of 30 April 2019 on EU-Canada CETA Agreement, Opinion 1/17.

and/or measures taken by the EU Member States in order to implement EU law[761]. Therefore, as it was a long concern of the European Commission, especially regarding to those issues of the implementation of EU law, accountability of international arbitrators, lack of transparency in arbitral proceedings, and the legal certainty of arbitration awards. Many steps by the European Union led by the Commission have been implemented in order to encounter with these issues presented by extra-EU BITs. One of the most successful actions by the European Union is the replacement of extra-EU BITs with the agreement at the EU level. As the Treaty of Lisbon conferred upon the EU exclusive competence with regard to foreign direct investment by including it within the EU's common commercial policy (CCP), in which the EU has started to undertake replacing the Member States' extra-EU BITs progressively with agreements at EU level (For example, The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States, and also many agreements that are still on an ongoing discussion between the EU and third states) [762]. The international agreements at the EU level contain the more innovative foreign investment dispute settlement clause, along with wider opportunities for states to regulate in order to preserve the state's policy space. As a result, those newly concluded international agreements at the EU level are the solution, tackling the problems created by outdated Extra-EU BITs that the European Member States have concluded with the third state before their entry into the European Union.

Thus, The Extra-EU BITs also present one particular problem from the fact that Member States have to fulfill their obligations under investment agreements that they concluded before the entry of the Treaty of Lisbon. Meanwhile, they also have an obligation to the EU law and its supremacy. According to Article 351 of the TFEU, the rights and obligations arising from pre-

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761 This situation was illustrated by the pending case to the ICSID arbitration by 35 Mexican physical persons and 11 Mexican entities organized under the laws of Mexico against Spain under Spain-Mexico BIT of 2006. The disputes were in regard to the measures taken by Spain in order to implement the resolution of Banco Popular pursuant to the Single Resolution Mechanism Regulation: Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1). The claimants alleged that Spain had failed its obligation of *inter alia* FET, National Treatment and Most-Favored Nation Treatment, and guarantee against unfair expropriation under the aforementioned BIT. The claimant alleged that Spain was stood by and watched, opting to let a solvent bank fail in order to engineer the bank's sale to Santander or another large bank via the EU's newly implemented resolution framework. See, Elías Abadi Cherem, Jaime Abadi Cherem, Abraham Abadi Tawil and others v. Kingdom of Spain, ICSID Case No. ARB/18/33, Request for arbitration of 23 August 2018.

762 The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States was the first bilateral agreement signed by the EU that included provisions on investment protection. On October 2018, the EU and the Member States signed a self-standing investment protection agreement (IPA) with Singapore. In addition, the Commission has negotiated an IPA with Vietnam and an association agreement that includes investment protection with Mexico. Furthermore, it is conducting bilateral negotiations on investment protection with, *inter alia*, Japan, Malaysia, Philippines, Thailand, China, and Myanmar. See, <www.europarl.europa.eu>.

accession agreements concluded between EU member states and third states are not affected by the provisions of the EU treaties; however, member states must take all appropriate steps to eliminate any established incompatibility between such agreements and the treaties in the sincere manner among member states[763]. As it appears in the language of Article 351 of the TFEU, the EU member states are still bound by extra-EU BITs. In this connection, the Commission as a "Guardian of the Treaties" foresaw the incompatibility between extra-EU BITs and the EU law for a long time[764].

In this connection, an additional measure is also being taken within the EU. As after the entry of the Treaty of Lisbon, it is clearer that extra-EU BITs impinge on the EU's exclusive competence with regard to foreign direct investment. In July 2010, the Commission took a further step by proposing a draft Regulation, aimed at establishing transitional arrangements for Extra-EU BITs[765]. Later, the Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 came into play in order to manage the transitional arrangements of Extra-EU BITs[766]. This regulation also commonly referred to as the "Grandfathering Regulation", it has empowered the Member States to maintain their existing extra-EU BITs. In addition, the Commission may authorize the Member States to amend their existing extra-EU BITs or to conclude new ones. As a condition of being authorized, Member States must ensure that their agreements are compatible with both EU law and investment policy. In other words, the

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763 Treaty on the Functioning of the European Union (TFEU) 351 (ex Article 307 TEC). See also, TERHECHTE, Jorg Philipp, «Art. 351 TFEU: the Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties», Marc BUNGENBERG, Jorn GRIEBEL &Steffen HINDELANG (Eds.), *International Investment Law and EU Law*, Springer, Heidelberg, 2011;

764 For example, in 2003, the Commission negotiated a Memorandum of Understanding with the United States aimed to set an international obligation, bringing them to come in line with the European Union's mandatory provision of law. See, Understanding Concerning Certain U.S. Bilateral Investment Treaties, signed by the U.S., the European Commission, and acceding and candidate countries for accession to the European Union (September 22, 2003), available online at <http://www.state.gov/s/l/2003/44366.htm>.

Also, during 2004, the Commission also took a view concerning the provision of "free transfer of fund" that Austria, Sweden and Finland concluded with other countries before their accession to the EU (EC at the time). Later the Court found that those aforementioned Member States fail their obligation to eliminate the provision that might infringe to the authority of the European Union Institutions. See, Judgment of the Court (Grand Chamber) of 3 March 2009 on Commission of the European Communities v Republic of Austria, Case C-205/06. See also, Judgment of the Court (Grand Chamber) of 3 March 2009 on Commission of the European Communities v Kingdom of Sweden, Case C-249/06. See also, Judgment of the Court (Second Chamber) of 19 November 2009 on Commission of the European Communities v Republic of Finland, Case C-118/07.

765 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a comprehensive European international investment policy, Brussels, 7 July 2010.

766 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012: establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

Commission could have simply asked Member States to renegotiate or terminate their BITs where in conflict with EU law or with the possibility of future negotiations of new agreements[767].

In sum, we could say that the Commission had foreseen the problem of extra-EU BITs as it is impinging on the EU's competence. However, as it is stated in Article 351 of the TFEU that EU Member States are still obligated to international agreements, they concluded before the entry of the Lisbon Treaty. Therefore, the Commission has been taking steps to maintain the power to suggest the Member States to amend their existing extra-EU BITs or to conclude new ones when those agreements are likely to impinge the EU's competence. In addition, the Commission is also taking further actions toward extra-EU BITs by replaced and continuing to replace them with an agreement at the EU level in order to ensure legal certainty and the supremacy of the EU law without breaking international commitments[768].

5.3.2 The future of Intra-EU BITs (after *Achmea*)

As already mentioned, that the European Member States have concluded over 1,300 BITs with third states before their entry into the European Union; those BITs are so-called "Extra-EU BITs". In addition, there are nearly 200 BITs concluded among European Member States themselves, so-called "Intra-EU BITs" (For example, Germany-Portugal BIT, Croatia-France BIT, and so on). Until today, there are almost 200 intra-EU BITs in force.

The intra-EU BITs are presenting their particular issue. As European Member States are already accepted the EU competences, in this connection the primacy of EU law prevails over Member States' national law[769]. In a particular case, when two or more EU Member States have a dispute regarding to the EU laws, those EU laws in question could only be interpreted by the European Court of Justice (CJEU) as member states already abided not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than

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[767] MERSCH, Yves et. All, «The new challenges raised by investment arbitration for the EU legal order», Legal Working Paper Series No. 19, European Central Bank, (October 2019).

[768] The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States was the first bilateral agreement signed by the EU that included provisions on investment protection. On October 2018, the EU and the Member States signed a self-standing investment protection agreement (IPA) with Singapore. In addition, the Commission has negotiated an IPA with Vietnam and an association agreement that includes investment protection with Mexico. Furthermore, it is conducting bilateral negotiations on investment protection with *inter alia* Japan, Malaysia, Philippines, Thailand, China, and Myanmar.

[769] Judgment of the Court of 15 July 1964 on Flaminio Costa v E.N.E.L. – Case 6-64. See also, Judgment of the Court of 8 April 1976 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, Case 43-75. See also, Judgment of the Court of 5 February 1963 on NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration - Case 26-62.

those provided in the Treaties[770]. As it is also settled in the CJEU cases that neither Member States' national courts nor the international arbitral tribunal under investment agreements could interpret EU law[771]. From the European Union's perspective, the interpretation of EU law by CJEU is the only way to ensure the coherence, uniform interpretation, application, and supremacy of EU law by the Member States[772]. In consequence, the European Commission has a long-standing pessimistic point of view against arbitral tribunals constituted under those intra-EU BITs to solve the dispute of EU law.

Before getting to the point of the future of Intra-EU BITs after *Achmea*, the brief historical perspectives are noteworthy for a better understanding of the overall situation. As we already mentioned earlier, the European Commission is the key player ensuring the uniform of Member States' practices and policies in the area of foreign direct investment[773]. We could say that the European Commission has a long stand unpleasant view against intra-EU BITs. We could fairly state that the European Commission's negative view against intra-EU BITs dated back at least on November 2006, when it recommended member states to terminate intra-EU bilateral investment treaties (BITs)[774]. In the Commission's view at the moment, it considered that the content of intra-EU BITs had been superseded by European Community law. Therefore, the Commission saw no

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770 Treaty on the Functioning of the European Union (TFEU) Article 344 (ex Article 292 TEC).

771 The arbitral tribunal presented even more complicate problem in this area since it was already established in the precedents that arbitral tribunal is not consider as a Member States court. Therefore, the arbitral tribunal has in no way to address the question of EU law to the CJEU. See, Judgment of the Court of 23 March 1982 on Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse – Case 102/81, para. 10. See also, Judgment of the Court of 17 September 1997 on Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH – Case C-54/96, para. 3.

772 There is also a view from the ECJ that the use of intra-EU BITs arbitral tribunal is undermine the system of EU legal remedies and jeopardize the autonomy, effectiveness, primacy, and direct effect of the EU law. See, Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), award of 7 December 2012.

773 The European Commission is usually referred to as "Guardian of the Treaties". See details in Chapter 2 of the thesis.

774 EC Note of November 2006 on the Free Movement of Capital. A part of aforementioned note by the Commission stated that:

"There are still around 150 BITs between Member States in force (Annex IV). There appears to be no need for agreements of this kind in the single market and their legal character after accession is not entirely clear. It would appear that most of their content is superseded by Community law upon accession of the respective Member State. However, the risk remains that arbitration instances, possibly located outside the EU, proceed with investor-to-state dispute settlement procedures without taking into account that most of the provisions of such BITs have been replaced by provisions of Community law. Investors could try to practice "forum shopping" by submitting claims to BIT arbitration instead of - or additionally to - national courts. This could lead to arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States as a possible outcome.

In order to avoid such legal uncertainties and unnecessary risks for Member States, it is strongly recommended that Member States exchange notes to the effect that such BITs are no longer applicable, and also formally rescind such agreements. The Committee is invited to endorse this approach and Member States are asked to communicate to the Commission by 30 June 2007 which actions have been taken in that regard and which of their intra-EU investment agreements still remain to be terminated."

need for BITs in the EU single market[775]. However, most of European Member States are opposed to the view of the Commission at the moment. Thus, the arbitral tribunal in *Eastern Sugar v Czech Republic* also rejected those views by stating the reason that the recommendation by the Commission was neither clear nor binding on the arbitral tribunal[776].

Following the arbitral award in *Eastern Sugar v. Czech Republic*, there were infringement procedures initiated by the Commission proposed to the European Court of Justice (ECJ) against Austria, Sweden, and Finland. In which those judgments by the ECJ upheld that the substantive protection under BITs concluded by the aforementioned Member States (Guarantee the free transfer of funds) might infringe the authority of the European Union institutions[777].

The tension regarding the validity of intra-EU BITs has broken in the case of *Micula v Romania*, where the Micula brothers suffered a loss as a result of Romania's withdrawal of a tax incentive scheme four years before the schedule of the expiration date of such incentive[778]. The Romanian's tax incentive withdrawal was caused by their accession plan to the European Union[779]. Later, the arbitral tribunal constituted under the Romania-Sweden BIT and ICSID Convention ruled in favor of the Micula brothers. The arbitral tribunal has pointed out that Romania's actions were in violation of the fair and equitable treatment standard (FET), respect the claimants' legitimate expectations and act transparently. Afterward, Romania complied with the arbitral award and later had made a partial payment during 2014, but the European Commission issued a suspension injunction[780], calling Romania to suspend the remaining payment due under the arbitral award by the reason that paying out the award would violate EU law since it would constitute incompatible State aid by Romania[781]. The injunction by the European Commission has elevated the tension and created debates in the international arbitration community regarding to the validity and enforcement (within the EU) of intra-EU BITs, since the payment of arbitral award might

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[775] *Ibidem.*

[776] Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case No. 088/2004, partial award, on 27 March 2007, para. 125-127. See also, BURGSTALLER, Markus, «The Future of Bilateral Investment Treaties of EU Member States», Marc BUNGENBERG, Jorn GRIEBEL &Steffen HINDELANG (Eds.), *International Investment Law and EU Law*, Springer, Heidelberg, 2011;

[777] Judgment of the Court (Grand Chamber) of 3 March 2009 on Commission of the European Communities v Republic of Austria, Case C-205/06. See also, Judgment of the Court (Grand Chamber) of 3 March 2009 on Commission of the European Communities v Kingdom of Sweden, Case C-249/06. See also, Judgment of the Court (Second Chamber) of 19 November 2009 on Commission of the European Communities v Republic of Finland, Case C-118/07.

[778] For Romania tax incentive ordinance, See, Emergency Government Ordinance 24/1998 (EGO 24). For the cancellation of dispute's tax incentives, See, Emergency Government Ordinance 75/2000 (EGO 75).

[779] The Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part, on 1 February 1995. Article 64(1)(iii).

[780] The European Commission letter to Romania on State Aid Investigation of 1 October 2014.

[781] *Ibidem.*

equal to the violation of EU principle. However, the aforementioned decision from the Commission was already annulled by the ECJ, for the reason that the revocation of the incentive was done before Romania's accession date to the European Union; therefore, the action could not constitute the illegal state aid under the EU law[782]. It is interesting that the ECJ also distinguished the difference between *Micula* Case and *Achmea* Case by briefly stating that "In that regard, it must be pointed out that, in the present case, the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it, unlike the situation in the case which gave rise to the judgment of 6 March 2018, Achmea…"[783].

The validity of intra-EU BITs was clearly established in the case of *Achmea v. Slovakia*. In *Achmea*, the original dispute is originated from when Slovakia reformation of its health system in 2004 and opened its market for private medical insurance services. As a result, Achmea, the Dutch company that established a subsidiary in Slovakia began selling such services. However, in 2006 Slovakia partially reversed its 2004 reforms and prohibited the distribution of profits generated by the sale of these services[784]. Achmea later submitted the dispute to arbitration under the 1991 Netherlands-Slovakia BIT[785], and the arbitral tribunal ruled that Slovakia's policy of liberalization of its health insurance market was violated Slovakia's obligation under the said BIT and ordered Slovakia to pay around 22.1 million Euros of damage to Achmea[786]. However, Slovakia did not comply with the award and then challenged them to the German Court, in which the German Federal Court of Justice later referred the questions on the compatibility with EU law of the BIT's arbitration clause[787] to the Court of Justice of the European Union (ECJ) for a preliminary ruling[788].

On 6 March 2018, the ECJ delivered a judgment, and decided on the compatibility of the dispute settlement provision contained in Article 8 of the Netherlands-Slovakia BIT with EU

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782 Judgment of the General Court (Second Chamber, Extended Composition) on 18 June 2019, In Cases T-624/15, T-694/15 and T-704/15.

783 Judgment of the General Court (Second Chamber, Extended Composition) on 18 June 2019, In Cases T-624/15, T-694/15 and T-704/15, para. 87.

784 However, in 2011, Slovakia's Constitutional Court ruled that this prohibition was contrary to the Slovak Constitution, and the distribution of profits was once again allowed. Yet, the Achmea has already initiate the arbitral proceedings under Netherland-Slovakia BIT beforehand. See, <https://www.asil.org/insights/volume/22/issue/8/slovak-republic-v-achmea-bv-death-knell-intra-eu-bits>.

785 Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 1991.

786 Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), award of 7 December 2012, para. 333.

787 Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic Article 8.

788 Preliminary Decision of the German Federal Supreme Court (Bundesgerichtshof) on 19 September 2013. Available online at <https://www.italaw.com/cases>.

law[789]. In the CJEU's view, the dispute resolution under the BIT may require an arbitral tribunal to interpret or apply EU law, and this is inconsistent with Article 267 TFEU, because unlike a Member State court, an arbitral tribunal cannot refer EU law questions (preliminary ruling) to the ECJ[790]. Therefore, the mechanisms of dispute resolution between Member States themselves by investment arbitration under intra-EU BITs could prevent those disputes from being resolved in a manner that could ensure the full effectiveness and coherence of EU law[791]. Thus, EJC also foresaw that intra-EU BITs arbitration is also contradicted to article 344 of the TFEU, in which it prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than provided by the Treaties[792]. Consequently, the ECJ ruled that the ISDS arbitration clauses laid down in intra-EU BITs undermine the system of legal remedies provided for in the EU Treaties and thus jeopardize the autonomy, effectiveness, primacy and direct effect of Union law, and the principle of mutual trust between the EU member states. Furthermore, ECJ also ruled that the investor-state arbitration clauses laid down in intra-EU BITs are incompatible with the principle of sincere cooperation. As a result, the dispute settlement provision of intra-EU BITs is inapplicable[793]. By reaching this conclusion, the CJEU decided not to follow the Opinion of Advocate General Wathelet of 19 September 2017, in which the Advocate General view that the intra-EU ISDS is not precluded by EU law[794]. After the judgment, the view of ECJ was supported by the Commission (Who always has consistently express it's viewed that intra-EU BITs and ISDS provisions are incompatible with EU Law), as it reaffirmed the ECJ ruling that there is no place for investor-state arbitration in the single market, those views by the Commission also extended to the dispute resolution between Member States under Energy Charter Treaty (ECT)[795].

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789 Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), award of 7 December 2012.

790 As it is already set in precedents, the term "Tribunal of a Member State" is not including to the arbitral tribunal. See, Judgment of the Court of 23 March 1982 on Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse – Case 102/81, para. 10. See also, Judgment of the Court of 17 September 1997 on Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH – Case C-54/96, para. 3.

791 Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), award of 7 December 2012, para. 56.

792 Treaty on the Functioning of the European Union (TFEU) 344 (ex Article 292 TEC).

793 Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), award of 7 December 2012, para. 56-60.

794 Opinion of Advocate General Wathelet, delivered on 19 September 2017 in Slowakische Republik v Achmea BV (Case C-284/16).

795 Commission Guidance on Protection of Cross-Border EU Investments, Brussels, 19 July 2018.

The consequences from the *Achmea* judgment led to a joint political declaration by most of the European Member States on January 2019[796], in which the Member States are aware that they are bound to necessary consequences from the *Achmea* judgment. In the 2019 political declaration, Member States declared that they would *inter alia* terminate intra-EU bilateral investment treaties (BITs)[797]. Afterward, on May 2020, in which 23 EU Member States have signed the agreement *inter alia* to terminate intra-EU BITs including the sunset clause provided by those intra-EU BITs[798]. In addition, the agreement to terminate intra-EU BITs also provides the option for negotiation between investors and Member States for the pending arbitration[799].

Even though in practice, the investors might still be able to initiate the ISDS arbitral proceedings due to the reason that intra-EU BITs are still in existence. Thus, some arbitral tribunals might try to challenge the decision of the *Achmea* case for various reasons, such as, the ECJ judgment on *Achmea* is not binding to other arbitral tribunals, the arbitral proceeding is initiated by the different agreements/institutions, or some arbitral tribunal might challenge that the right to submit the dispute to arbitration under the intra-EU BITs shall terminate only if such BIT really comes to an end by the termination from both Member States (In this case, the arbitration which initiate prior 29 August 2020 or later for some EU Member States, when there is the entry force of agreement to terminate intra-EU BITs[800]). However, seeing from the long-standing point/opinions from the Commission against intra-EU BITs, the *Achmea* judgment, along with the agreement to terminate intra-EU BITs by the Member States; in our view, we are certain

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796 Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection.

The Declaration of the representatives of the governments of the Member States of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union was signed by 22 Member States. On 16 January 2019, the remaining Member States made two separate declarations (one signed by Finland, Luxemburg, Malta, Slovenia and Sweden, and the other by Hungary alone). Both separate declarations, nevertheless, include the commitments with regard to the extra-EU BITs mentioned above and differ mainly as regards the position of the signatory Member States with regard to the ECT.

797 Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, page 5.

798 The agreement signed (subjected to ratification) by 23 Member States, which are; the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxemburg, Hungary, the Republic of Malta, the Kingdom of Netherlands, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, and the Slovak Republic. Upon the ratification, the treaty shall come into force for all 23 member states, the entry will terminate 123 "intra-EU BITs". Beside agreed to terminate the intra-EU BITs, Member States also agreed on the procedural and legal issues relevant to them. See, Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union of 5 May 2020 (SN/4656/2019/INIT).

799 *Ibidem.*

800 See the status of date of entry into force for each Member States including their reservation, available online at, <https://www.consilium.europa.eu/>

that it is already an end of the intra-EU BITs. If there is a request for enforcement of intra-EU BITs in the future, there is a high possibility that the Member State court shall refuse such a request based on the standard of *Achmea*.

Lastly, although it is not within the scope of our thesis, yet it is interesting to mention at the end here regarding to the investment arbitration under the Energy Charter (ECT). We agree with the view of the Commission that the ruling of *Achmea* also extended to the dispute settlement clause under the Energy Charter Treaty (ECT)[801]; if there is a request for an enforcement of arbitral award between Member States and investor from other Member States, such award would be incompatible with the Treaties and thus would have to be rejected[802]. The main reason is that the fact that the EU is also a party to the Energy Charter has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States themselves[803].

5.4 Multilateral Investment Court (MIS)

As already stated in Chapter 3, the European Union is the biggest player in the field of FDI, both in value of inward/outflow of them. Thus, the European Union also concluded substantial numbers of IIAs globally (around 1,300 IIAs from almost 3,000 IIAs globally). The European Union by the initiation of the Commission recognized the problems of using the investor-state dispute settlement (ISDS). They aimed to create more consistency, coherence, predictability, and at the same time, with no less importantly, preserve the supremacy of the EU law across the entire investment treaty regime. In this connection, further institutionalization seems to be called for.

In this connection, the European Union led by the Commission has been pursuing modern reform approaches to investment dispute resolution. One of the major reform approaches is by moving out from an outdated concept of the ISDS system into the permanent court or standing mechanism for the settlement of international investment disputes. The idea to overcome the old fashion of ISDS started in 2014, when the European Commission President pledged such a

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[801] The Energy Charter Treaty (ECT) Article 26.

[802] Communication "Protection of Intra-EU Investment" adopted by the Commission on 19 July 2018 (COM(2018)547 final), pages 3-4.

[803] *Ibidem.*

replacement[804]. Since then, those progresses such as, the process of public consultation[805], the indication of multilateral investment court in their upcoming EU level treaties (Ex. EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the EU-Vietnam trade agreement) [806], and the intergovernmental talks under the Working Group III of the UNCITRAL[807], have been carrying on.

In the Working Group III, the European Union and its Member States gave authorization to the Commission to represent them[808]. The Commission has been presenting its view supporting the establishment of the permanent multilateral investment court (MIC) to overcome the weaknesses of ISDS arbitration *inter alia* system's reliance on arbitrators, lack of transparency, issues over the predictability and consistency of their decisions, and the excessive costs involved[809]. Although the work of the UNCITRAL talks is not concluded at the moment since there is still an ongoing discussion[810], however, we could foresee a general idea of the multilateral investment court purposed by the Commission, especially, when we look at the Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes adopted by the Council on March 2018[811]. The overall objective of the directive is to create a multilateral investment court (MIC) as a permanent body to settle the international investment dispute, in which the negotiation by the Commission shall negotiate with EU's trading partners in the framework of the United Nations Commission on International Trade Law (UNCITRAL).

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804 <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-(mic)>.

EU Commissioner Malmström mentioned the "Multilateral Court" for the first time on 18 March 2015 in the Committee on International Trade (INTA Committee) and at an informal meeting of the Council (Foreign Affairs) on 25 March 2015. See, European Commission (2015): Concept paper – investment in TTIP and beyond – the path for reform, May 2015, available online at <www.trade.ec.europa.eu>.

805 Consultation Strategy Impact Assessment on the Establishment of a Multilateral Investment Court for investment dispute resolution on 30 September 2016.

806 Concept Paper of 5 May 2015 on Investment in TTIP and beyond – the path for reform. See, <https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>. In the paper, the Commission indicated that work should start on setting up a multilateral system for resolving international investment disputes. This work would be carried out in parallel to the reform process undertaken in bilateral EU negotiations.

807 The intergovernmental talks under the Working Group III of the UNCITRAL started on 27 November 2017, and there are still going discussions for ISDS reforms.

808 Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes of 20 March 2018 adopted by the Council (12981/17 ADD 1 RESTREINT UE/EU RESTRICTED).

809 The concern of system's reliance on arbitrators, given its lack of transparency, issues over the predictability and consistency of their decisions, and the excessive costs involved also appeared in discussion of Working Group III: Investor-State Dispute Settlement Reform. See, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019) See also, <https://uncitral.un.org/en/working_groups/3/investor-state>.

810 *Ibidem.*

811 Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes of 20 March 2018 adopted by the Council (12981/17 ADD 1 RESTREINT UE/EU RESTRICTED).

Although we do not know the exact feature of the MIC yet since it depends on future negotiations, however, we could say that the idea of MIC in the view of the European Union is to overcome weaknesses of the ISDS system, in which the concept of MIC should be consisted of, *inter alia*; be a permanent institution, transparent procedural, independent qualified judges appointed by contracting States to the Convention (With a regional balance and gender representation), review mechanisms with two-tiers courts, effective international enforcement, and reasonable length and cost of the procedure[812]. The further analysis of the MIC shall be made in the Chapter 6 of the thesis.

5.5 Complementary Actions from the Commission regarding to the International Investment Agreements and Foreign Direct Investment

There are long calls for the reformation of the ISDS system[813]. Many ideas such as setting up the multilateral investment court[814], or even a proposal from the opposition site for a total cancelation of the ISDS system in order to return all disputes to the domestic court has been proposed and are even implemented at this very moment[815]. As many weaknesses of the ISDS system have been exposed, in particular, the lack of consistency, coherence, transparency, and predictability. The current ISDS system also fails to produce satisfactory outcomes to host state or foreign investors or sometimes, even both of them. Therefore, a function of dispute settlement mechanisms other than arbitration such as a dispute-avoidance system or dispute prevention and mitigation system has been in the light in these past years[816].

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812 *Ibidem.*

813 HINDELANG, Steffen &KRAJEWSKI, Marcus, «Towards a more Comprehensive Approach in International Investment Law», Steffen HINDELANG &Marcus KRAJEWSKI (Eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, Oxford University Press, Oxford, 2016; See also, LESTER, Simon, «Rethinking the International Investment Law System», *Journal of World Trade* Vol. 49 Issue 2 (2015), 211-222;

814 See detail in 5.4 (Multilateral Investment Court (MIS)).

Along with the idea of multilateral investment court (MIS) purposed by the European Union. Other ideas such as Multilateral Institution for Dispute Settlement on Investment (MIDSI) is also being purposed. MIDSI is the institution that do not force state to enter arbitration proceeding with foreign investors, but only upon the consent from the state. Along with flexible procedural that allow parties to agree to the best outcome. See, SCHILL, Stephan W. &VIDIGAL, Geraldo, «Designing Investment Dispute Settlement À La Carte: Insights from Comparative Institutional Design Analysis», *The Law & Practice of International Courts and Tribunals* Vol. 18 Issue 3 (2020), 314-344;

815 VOON, Tania, ANDREW, Mitchell &JAMES, Munro, «Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights», *ICSID Review* Vol. 29 No. 2 (2014), 451–473; See also, A project purposed to International Economic Law Clinic by KOLTUNOVA, Anastasiia, REAGAN, Etale &TRUNK-FEDOROVA, Marina, «Termination of Bilateral Investment Treaties: Alternatives for Least Developed Countries», available online at <https://www.bilaterals.org/IMG/pdf/termination_of_bits_memorandum_13.10.2018_final.pdf>. See also, <https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf>.

816 BRAUN, Tillmann Rudolf, «Investor-State Mediation: Is there a Future?», Arthur W. ROVINE (Ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010,* Martinus Nijhoff Publishers, Leiden, Vol. 1, 2010; See also, <https://uncitral.un.org/en/working_groups/3/investor-state>. See also,

In response to those aforementioned critiques, states and commentators have proposed a range of institutional reforms that are being discussed at this very moment[817]. In particular, discussions for the need for an alternative answer for dispute resolutions/preventions for international investment disputes. The European Union led by the Commission has been implementing and seeking for both adjudicatory options and non-adjudicatory mechanisms, in order to seek for new (better) tools to resolve international investment disputes.

For the purpose of finding/developing alternative dispute resolutions to investment treaty arbitration, the European Union has been taking two different approaches following the international guidelines[818], in which it could divide into 2 kinds, which are; 1. Methods of alternative dispute resolution (ADR) that seek to resolve existing disputes through negotiation or amicable settlement such as international conciliation or mediation, and 2. Dispute prevention policies (DPPs) attempt to prevent conflicts between investors and states from emerging and/or escalating into formal investment disputes[819]. In connection with these two approaches, the European Union is implementing The EU Regulation on screening of foreign direct investments into the Union as the DDPs approach (This point shall be elaborated in 5.5.1). Thus, for alternative dispute resolutions, the European Union is looking for the development of a method of mediation (This point shall be elaborated in 5.5.2).

5.5.1 The European Union Regulation ((EU) 2019/452) on screening of foreign direct investments into the Union

After tensions for some time regarding to the need of EU-wide legal framework for screening inward FDI on the grounds of security or public order[820], in March 2019, the European

SALACUSE, Jeswald W., «Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution», *Fordham International Law Journal* Vol. 31 Issue 1 (2007), 138-185;

817 For detail discussion, See, 5.5.2 (Mediation).

818 UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD Series on International Investment Policies for Development, New York and Geneva, 2010;

The advantages of these alternative approaches are the flexibility offered by these approaches, including the possibility to find amicable grounds for settlement between investors and States, permitting the parties to continue a working relationship. The settlement process is also faster and less costly. ADR can be without prejudice to the right of the parties to resort to other forms of dispute resolution. Finally, alternative approaches can improve good governance and other regulatory practices of States.

Nevertheless, there are also challenges to the use of alternative approaches. As they are non-binding to the parties, and parties often lack familiarity and experience with the techniques involved. Alternative approaches could also be considered as a waste of time and funds if they are not conducted successfully, and they may not be suitable for all investment disputes. Thus, the DPPs could potentially generate inter-institutional conflicts.

819 *Ibidem.*

820 Before the entry of Regulation on FDI screening, some EU Member States were already tightened their FDI screening mechanisms in recent years, or at least, discussing such changes. For example, Germany has enacted the

Parliament and the Council passed the Regulation establishing a framework for the screening of FDI[821]. The Regulation established a framework for the screening of FDI into the Union on the grounds of security or public order. The Regulation also establishes a mechanism for cooperation between Member States, and between Member States and the Commission in order to pull out the full potential of the Regulation.

The scope of the FDI Screening Regulation covered FDI from third countries as defined by article 2 of the Regulation[822]. In this regard, investments that do not constitute FDI (For example, portfolio investments) do not fall within the scope of the Regulation. However, investments that are not constituted as FDI might be able to be screened by the Member States in compliance with the Treaty provisions on the free movement of capital.

The "screening" allows Member States to *inter alia* investigate, authorize, condition, or prohibit FDI. As a result, the screening might lead to the screening mechanisms, in which the screening mechanisms refer to an enactment of the instrument by the Member States, such as a law for the purpose of *inter alia* to investigate, authorize, condition, or prohibit FDI on the ground of security or public order[823]. The FDI Screening Regulation has demonstrated strategic sectors that might be constituted as security or public order, for example, critical infrastructures (energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, and sensitive facilities. Thus, lands to facilitate those purposes), critical technologies, important supplies, access to sensitive information, and the freedom and pluralism of the media[824]. In addition, in determining whether the FDI is likely to affect security

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set of regulation to control FDI in 2017, A central element of the reform was the introduction of a catalogue of industry sectors for the first time, defining critical infrastructure and security-related technologies, where the acquisition of at least 25 percent of the voting rights of a German company by a non-EU/EFTA foreigner is, by law, considered to be a potential threat to public security or public order and must be notified to the Federal Ministry for Economic Affairs (BMWi). In which, BMWi shall decide in a case-by-case basis whether such action is a threat to public security of public order or not.

Afterward, Germany still put a negative view against FDI in crucial areas, such as electricity by group of Chinese investors. In 2018, German government prevented two attempts by the Chinese electricity giant SGCC to acquire a 20-percent stake in 50Hertz, one of Germany's four electricity transmission system operators. See, BICKENBACH, Frank &LIU, Wan-Hsin, «Chinese Direct Investment in Europe – Challenges for EU FDI Policy», *CESifo Forum, ifo Institut – LeibnizInstitut für Wirtschaftsforschung an der Universität München* Vol. 19 Issue 4 (2018), 15-22; See also, HANEMANN, Thilo, HUOTARI, Mikko, &KRATZ, Agatha, *Chinese FDI in Europe: 2018 Trends and Impact of new Screening Policies*, A report by Rhodium Group (RHG) and the Mercator Institute for China Studies (MERICS), March 2019, 1-23;

821 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

822 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, Article 2.

823 *Ibidem.*

824 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union Article 4(1)(a-e).

or public order or not, the Regulation also gives an instrument that member states could also determine and evaluate from the origin of those FDI[825].

The screening could be either initiated by the Member States themselves[826], from the observation of other Member States[827], or by the Commission[828]. Such initiation must be done on the basis of non-discrimination between third countries[829].

It is obvious that the FDI Screening Regulation is resulting in the restriction on capital movements between the Member States and third countries. Consequently, it might appear that the Regulation itself put a restriction on the free capital movement, in which such restriction is prohibited by Article 63 of the TFEU[830]. However, there is a justification and limitation for the exercise of FDI Screening Regulation[831], which is the restriction must be done as suitable, necessary, and proportionate to attain legitimate public policy objectives[832]. Such an objective should not be solely achieved for economic purposes as already set out by the CJEU[833]. Thus, the

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825 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union Article 4(1)(a-c).

826 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union Article 3 & Article 6.

827 When other Member States foresee that the FDI in other member States might affect the security of public order. Those Member State may provide comments to that other Member State. The Member State providing comments shall send those comments to the Commission simultaneously. See, Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union Article 6(2), Article 7(1), & Article 8.

828 The Commission, where it considers that a foreign direct investment planned or completed in a Member State which is not undergoing screening in that Member State is likely to affect security or public order in more than one Member State, it may issue the opinion to Member State for such circumstances. See, Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union Article 6(3), Article 7(2), & Article 8.

829 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union Article 3(2).

830 Treaty on the Functioning of the European Union (TFEU) Article 63 (ex Article 56 TEC).

831 It is generally accepted that discrimination between categories of persons, where the categorization is not based on race, is permissible. States also distinguish between their own nationals when it comes to requirements of formation of joint ventures, and mandate that joint ventures be formed in accordance with certain preferential guidelines as to quotas also considered permissible. See, SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

832 As already settled by ECJ, there are many circumstances that could justify the screening measure in order to prevent the violation of security or public order, for example, Restrictive measures may also be taken to address threats to financial stability. See, Statement on behalf of the European Commission by Jonathan Hill on the capital controls imposed by the Greek authorities on 29 June 2015. In addition, the public health reason has been recognized by the Court of Justice of the European Union as an overriding reason in the general interest which can justify restrictions on the freedoms of movement guaranteed by the Treaty. See, Judgment of the Court (Grand Chamber) of 19 May 2009 on Commission of the European Communities v Italian Republic, Case C-531/06, para. 51.

833 Judgment of the Court (Second Chamber) of 27 February 2019 on Associação Peço a Palavra and Others v Conselho de Ministros, Case C-563/17, para. 70. See also, Judgment of the Court (Grand Chamber) of 21 December 2016 on Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis, Case C-201/15, para. 72.

exercise of power under these regulations could only be done against limiting certain strategic sectors as defined by the regulations themselves[834].

In this connection, even though it does not specify in the FDI Screening Regulation, however, in our opinion, the threshold of FDI to be constitute as a threat to Member States and/or the European Union's security or public order is supposed to be high. Especially when taking into consideration that the precedents from the ECJ regarding to restriction measures from Member States on security or public order grounds set a very high threshold in order to declare that one's business could constitute a threat to the Union's security or public order[835]. Besides the limitation of non-discrimination between the third countries basis and the setting out the circumstances triggering the screening as stated in the Regulation[836], the EU law and its principles (Ex. Proportionality or necessity) could not be totally disregarded in the process of execution of the regulations on the screening of the FDI.

Recently, the importance of the FDI Screening Regulation was brought up by the Commission in its communication on 26 March 2020[837]. The Commission was urging Member States to be vigilant and use all tools available at Union and national levels to avoid the loss of critical assets and technology due to the pandemic of COVID-19 situation. It is also interesting to mention that although the communication from the Commission for the use of Regulation regards to the pandemic situation, yet the use of Regulation to prevent the loss of strategic investments is not solely limited to the healthcare businesses. In other words, the Commission is concerned that some strategic sectors might sell their business to third countries in order to survive from COVID-19's impact on their finances. Those cheap sales might lead to disadvantages of the European Union in the future, in which the screening mechanisms are considered as important tools that could be used to prevent such circumstances. Yet, at this point, the FDI Screening Regulation is still in an early phase. Currently, there are only 15 Member States implementing the Regulation, and the list of businesses on the screening list at this moment is still considered short[838]. Therefore,

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834 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union Article 4(1)(a-e).

835 Judgment of the Court (Second Chamber) of 27 February 2019 on Associação Peço a Palavra and Others v Conselho de Ministros, Case C-563/17, para. 70. See also, Judgment of the Court (Grand Chamber) of 21 December 2016 on Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis, Case C-201/15, para. 72.

836 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union Article 3(2).

837 Communication from the Commission: Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) on 26 March 2020.

838 At the moment, there are 15 Member States implementing screening mechanisms (Data of 28 July 2020). See the details available at <https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf>.

we need to see more cases from the result of the FDI Screening Regulation, in order to see the threshold to constitute a violation of Member States and/or the European Union's security or public order. Thus, to extend that how far could the Regulation defends Europe's interest.

5.5.2 Mediation

Taking into consideration of weaknesses of international arbitration under investment agreements, other functions of dispute settlement mechanisms other than arbitration, especially mediation, have been in academic discussion in these decades[839]. The concept of finding an "amicable solution" through negotiation/ mediation is not a new thing since we can usually find these concepts in many IIAs[840]. The amicable solutions in IIAs are usually referred to as the "amicable settlement period" or "cooling off period", the main objective of those provisions is to allow the foreign investor and host state to find possibilities to settle their dispute before entering the international arbitration proceedings. Some treaties even require a mandatory formal conciliation as a precondition before the right of foreign investors to submit their dispute to the arbitration according to investment agreement[841].

At the moment of writing this thesis, there are very few parties had chosen mediation as a first means of dispute settlement mechanism[842]. To us, the aforementioned situation is

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[839] CONSTAIN, Silvia, «Mediation in investor-state dispute settlement: government policy and the changing landscape», *ICSID Review* Vol. 29 No. 1 (2014), 24-40; See also, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017).

[840] The United States-Peru Free Trade Agreement (PTPA) Article 10.15. See also, The United States-Panama Trade Promotion Agreement (TPA) Article 10.15. See also, Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain Article IX.

[841] Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments (New Delhi, 26 February 1999) Article 12 (1)-(3) stated that

"1. Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the Parties to the dispute.

2. Any such dispute which has not been amicably settled may, if both Parties agree, be submitted; (a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial or administrative bodies; or (b) to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

3. Should the Parties fail to agree on a dispute settlement procedure provided under paragraph 2 of this article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows…".

Many other BITs also provided the similar language. See also, Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investment of 2019 Article 9.

[842] Conciliation has been overlooks as it so far has only 12 Conciliations cases settled by in ICSID from 1966-2019 (10 Cases under ICSID Convention Conciliation Cases, and 2 Cases under ICSID Additional Facility Conciliation Cases). See, The ICSID Caseload – Statistics (Issue 2019-2), available online at <www.icsid.worldbank.org>.

comprehensible since the mediation did not have the enforcement tools in akin of the New York Convention[843]. For the foreign investors' stance, they are sure reluctant to enter to the mediation since it would distract them from the arbitration, which in a result could cause them with more time and expenses[844]. From the States perspective, it is very hard to find someone who could make a decision for any settlement, especially, those states which have complicated bureaucracy and political difficulties[845]. Not to consider the fact that the reliance on negotiation and mediation should be less likely to promote the broader rule of law practices within domestic governance institutions[846]. Thus, the issue of lack of specialties and true understanding of relevant parties seems to be adding more difficulties to investor-state mediation[847]. Yet it is interesting to note that there are many cases in which the parties who already initiated their dispute to the arbitration under investment agreements, could later find their way to settle the dispute by negotiation/conciliation during the arbitral proceedings[848].

It is also worth to mention that the home state of the investor could also be an important player in the mediation by assisting in enabling and encouraging. Although there are some restrictions against home states asserting their influent during arbitral proceedings (Ex. Diplomatic Protection)[849], yet those restrictions are not restricted states from assisting for the sole purpose of facilitating the negotiation for settlement between the host state and investors from the home state (Ex. Host state could act as observing party)[850].

In much of searching for an alternative way to resolve international investment dispute other than arbitration, there has been discussions and many proposals by leading institutions

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843 See detail of New York Convention in Chapter 3 of the thesis.

844 STEVENS, Margrete &LOVE, Ben, «Investor-State Mediation: Observation on the Role of Institutions», Arthur W. ROVINE (Ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010*, Martinus Nijhoff Publishers, Leiden, Vol. 1, 2010;

845 *Ibidem.*

846 PUIG, Sergio, «Imperfect Alternatives: Institutional Choice and the Reform of Investment Law», *The American Journal of International Law* Vol. 112 Issue 3 (2018), 361-409; See also, UNCTAD, Investor–State Disputes… *id.*

847 FRANCK, Susan D., «Using Investor–State Mediation Rules to Promote Conflict Management: An Introductory Guide», *ICSID Review - Foreign Investment Law Journal* Vol. 29 Issue 1 (2014), 66–89;

848 Western NIS Enterprise Fund v. Ukraine (ICSID Case No. ARB/04/2), Order taking note of the discontinuance issued by the Tribunal dated 16 March 2006, Pursuant to Arbitration Rule 43(1).

The Case is interesting to mention here because the arbitral tribunal ask the party to use the benefit of cooling off period. Afterward, the parties could really find the amicable solution in the period given by the tribunal.

849 Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Article 27 para. 1.

850 Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Article 27 para. 2. See also, SCHREUER, Christoph H., MALINTOPI, Loretta, REINISCH, August &SINCLAIR, Antony, The ICSID… *id.*

urging the undermining of using mediation as a tool to resolve international investment dispute[851]. As well as the European Union who is an active player in the field of FDI, also has the objective of exploiting the full potential of amicable dispute resolution methods[852]; in particular, the European Union also putting their interest in mediation for the international investment dispute in order to overcome weaknesses of ISDS system. Thus, the European Union could also foster the area for foreign direct investment law and policy without prejudicing/compromising the superiority of the EU laws. Currently, in the UNCITRAL Working Group III: Investor-State Dispute Settlement Reform[853], the European Union has been supporting the idea of dispute prevention and mitigation by strengthening the use of investor-state mediation[854]. However, we could neither see nor predict any model of investor-state mediation from the UNCITRAL Working Group III at the moment since it is still an ongoing discussion. Yet, the result from it should create a huge impact on the reform of investor-state mediation. At least, there should be more use of investor-state mediation in the future since the European Union shall also be a part of the upcoming model. More detail of investor-state mediation shall be discussed in Chapter 6 of the thesis.

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851 In general, See, IBA Rules for Investor-State Mediation Adopted by a resolution of The IBA Council 4 October 2012. See also, JOUBIN-BRET, Anna &LEGUM, Barton, «A Set of Rules Dedicated to Investor–State Mediation: The IBA Investor–State Mediation Rules», *ICSID Review - Foreign Investment Law Journal* Vol. 29 Issue 1 (2014), 17–24; See also, UNCTAD, Investor–State Disputes… *id.* See also, ICSID Rules of Procedure for Conciliation Proceedings (Conciliation Rules). See also, OECD's public Consultation of 16 May - 9 July 2012 on the topic of "Investor-State Dispute Settlement". See also, a Guide on Investment Arbitration approved by Energy Charter Conference of 19 July 2016, available online at <www.energycharter.org>.

852 For the General ideas. See, PUIG, Sergio, «Imperfect Alternatives… *id.* See also, the European Union's public consultation on the prevention and amicable resolution of disputes between investors and public authorities within the single market, available online at <www. ec.europa.eu>. See also, the European Union's approach to investment dispute settlement on the 3rd Vienna Investment Arbitration Debate (22 June 2018), available online at <www.trade.ec.europa.eu>.

853 See the current work, available online at, <www.uncitral.un.org>.

854 Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union and its Member States (A/CN.9/WG.III/WP.159/Add.1).

It is also interesting to mention that many states that also participating in UNCITRAL Working Group III also supporting the idea of strengthening investor-state mediation. See, UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156); UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, Submission from the Government of Morocco (A/CN.9/WG.III/WP.161); UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, Submissions from the Government of Thailand (A/CN.9/WG.III/WP.162); UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, Submission from the Governments of Chile, Israel and Japan (A/CN.9/WG.III/WP.163); UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, Submission from the Government of South Africa (A/CN.9/WG.III/WP.176,); UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, Submission from the Government of China (A/CN.9/WG.III/WP.177); UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, Submission from the Government of Mali (A/CN.9/WG.III/WP.181); UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182).

5.6 Conclusion Remark

As we already presented in this Chapter, which covered; the European Union exclusive competence over FDI, the overall picture of arbitration in the European Union, the situation of EU BITs (Especially, the end of intra-EU BITs after *Achmea*), the purpose of Multilateral Investment Court (MIC), and the European Union's complementary actions on foreign direct investment (FDI screening Regulation, and the investor-state mediation reform). All of them are significantly relevant, in which they have shown that the European Union as the biggest importer/exporter of the FDI, is stepping in to have fully competent over the FDI area at the EU level. As the European Union has been recognizing the issues of using the inter-state dispute settlement system (ISDS), consequently, the European Union is on its way to reforming and modernizing the ISDS system, aiming to overcome the weaknesses of the ISDS system *inter alia* the inconsistency, the incoherence, transparency, issue on arbitrator selection, and cost-effective. One of the most important reasons for such reform and modernization that was done and continues to be done is to ensure the supremacy of EU law without jeopardizing the international commitments, of which the European Member States have made with third countries before their entry into the European Union.

For internal reform, it is clear that the European Union has the exclusive competence over the FDI after the Treaty of Lisbon. In the scheme of intra-EU BITs, the *Achmea* judgment already put an end to intra-EU BITs for the reason of *inter alia* to preserve the supremacy of EU law and the fact that there are already adequate legal instruments within the EU for the European member states to resolve any dispute (Including international investment dispute)[855]. For external reform, the European Union retains the authority to order Member States to terminate or renegotiate the Extra-EU BITs when such BITs seem to be a threat to the supremacy of EU law[856]. Thus, the European Union is on its way to replacing the old fashion BITs with international agreements at the EU level (Ex. CETA, EU-Vietnam Agreement), in which those newly concluded agreements contain more innovative and improvement to the dispute resolution clause.

The European Union is also taking complementary actions to preserve the supremacy of EU laws by reforming the ISDS system. The European Union is proposing the idea of a Multilateral Investment Court (MIC) to overcome the weaknesses of the current ISDS system.

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[855] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a comprehensive European international investment policy, Brussels, 7 July 2010.

[856] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012: establishing transitional arrangements for bilateral investment.

The idea of MIC has shown the determination of the European Union to be a leading institution in the development of international dispute resolution not only inside the EU, but also on the global scale[857]. In addition to the MIC, the European Union is also looking for an alternative measure as, 1. Exploring the benefit of using investor-state mediation since this method has been overlooked, and 2. Dispute prevention policies (DPPs) in order to mitigate the dispute that could elevate into international arbitration by introducing the mechanism of FDI screening regulation to Member States. This Regulation not only avoids the loss in the strategic business to investors from third countries but is also considered as the mechanism to prevent such disputes from emerging from the beginning since those strategic sectors usually consider as an active areas of investment disputes[858].

[857] Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes of 20 March 2018 adopted by the Council (12981/17 ADD 1 RESTREINT UE/EU RESTRICTED), para. 14.

[858] Empirical data show that investment disputes are more likely to arise in the context of certain types of contracts or activities and in certain economic sectors, including those strategic areas expressed by the FDI Screening Regulations. See, UNCTAD Investment Dispute Settlement Navigator by economic sector, available online at <https://investmentpolicy.unctad.org/>. See also, Possible reform of investor-State dispute settlement (ISDS): Dispute prevention and mitigation - Means of alternative dispute resolution, Note by the Secretariat of 15 January 2020, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-ninth session (A/CN.9/WG.III/WP.190).

CHAPTER 6

ANALYSIS OF LEGAL PROBLEMS CONCERNING ARBITRATION IN ADMINISTRATIVE INVESTMENT CONTRACTS

This Chapter shall analyze legal problems arising from arbitration in administrative investment contracts. The analysis shall encompass the subject matter of all Chapters beforehand. Taking all Chapters beforehand into our consideration, this Chapter shall be divided into three parts, which are, Part I: Analysis of the Compatibility of Arbitration and Administrative Law, Part II: Analysis of the Legal Problems of Inter-States Arbitration under the Investment Agreements, and Part II: Alternative Dispute Resolutions and Dispute Prevention Measures other than Arbitration and Domestic Court.

6.1 Analysis on the Compatibility of Arbitration and Administrative Law

6.1.1 Introduction: The Clash of Administrative Law and Arbitration

States have duties and obligations towards their people; one of the most important tasks of a state is to provide public services to their people (For example, transportation, health, education, security, etc.). In addition, states are considered as the guardian of natural resources within their sovereignty, in which states might explore those resources by themselves, or allow private parties to explore such natural resources in which states will issue licenses for such activities and collect fees from private parties (Ex. Mining Contract or Petroleum Contract). States shall ensure that the benefits from the exploration of those natural resources shall come back to its people in the form of allocation of benefits from such exploration to the people.

In order to arrange such public service or the exploration of such natural resources, states normally manage it through "contract" with private parties. The conclusion of a contract in which one of the parties is the state, many times such contract does not consider as a one-time buyer as a contract among private. Some public buying could deem as the smart way to regulate, tools to achieve secondary objectives, and distribution of wealth for the target zone (For example, a public contract that requires counterparts to hire locals)[859]. Therefore, such buying by states also considers them as a developer, a regulator of policies, and also a manager of public funds[860]. In recent trends,

[859] PROSSER, Tony, *The Economic Constitution*, 1st Edition, Oxford University Press, Oxford, 2014;
[860] TAVARES DA SILVA, Suzana & VICENTE, Marta, «Arbitragem dos negócios internacionais e integridade: Reflexos na arbitragem de investimento em energia», *Revista Internacional de Arbitragem e Conciliação* Ano XIV (2020), 9-34;

the society of public procurement regulators also encourages states to use public procurement as a vehicle to achieve secondary objectives[861].

It is important to note that in many jurisdictions, such contacts between public and private parties are usually referred to as "administrative contract" or "public contract". Such contact holds one of the most important characteristics in which the states conclude such contract for the interest of the public. Since those contracts hold public interest implications, many jurisdictions tend to differentiate such contact from the private contract. In those jurisdictions where the differentiate of the contacts are strong (For example, France, Germany, Portugal, and Thailand), states or administrations possess the special functions or powers which we could not see in the private contract, such as; the power of administration to terminate public contract where such contract is no longer serve public interest purpose, the sole power of administration to modify the contract under the principle of adaptability in order to respond to the alteration of public needs, the special branch of organs or administrative courts to particularly deal with administrative disputes, and etc.[862]. In this connection, as administrative law as the branch of law governing "administrative contract" or "public contract", many administrative law principles/components (Ex. Principle of Legality, Proportionality, Public interest, Equality, Administrative judicial review, etc.[863]) have been developed in order to govern transactions of those contract from the moment of formation of contract till the stage where the dispute has arisen from them.

It is safe to say that it is common in the majority of legal systems, that the idea of public interest in the public contract exists. Although there is someone challenge that the idea of the administrative contract was particularly French and could not be constituted as a general principle

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[861] Questions of particular constitutional salience are raised by the use of contracts as a means of regulation, the role of non-market 'secondary' objectives (notably industrial policy, equality, and sustainability) in procurement, transparency in procurement, and value for money. See, PROSSER, Tony, The Economic… *id.*

For the general idea of public procurement and secondary objective. See, ARROWSMITH, Sue, *The Law of Public and Utilities Procurement*, 2nd Edition, Sweet & Maxwell, London, 2005; See also, ARROWSMITH, Sue, «The Revised Agreement on Government Procurement: Changes to the procedural rules and other transparency provisions», Sue ARROWSMITH &Robert D. ANDERSON (Eds.), *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge University Press, Cambridge, 2011; See also, ARROWSMITH, Sue, «The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies», *Cambridge Yearbook of European Legal Studies* Vol. 14 (2011), 1-48; See also, CARANA, Roberto, «Public Procurement and award criteria», Christopher BOVIS (Ed.), *Research Handbook on EU Public Procurement Law*, Edward Elgar Publishing Limited, Cheltenham, 2016; See also, OECD, «Strategic public procurement», *Government at a Glance 2015*, OECD Publishing, Paris, 2015; See also, SANCHEZ-GRAELLS, Albert, «Rejection of Abnormally Low and Non-Compliant Tenders in EU Public Procurement: A Comparative View on Selected Jurisdictions, Award of Contracts in EU Procurements», Mario COMBA &Steen TREUMER (Eds.), *European Procurement Law Series*, DJOF Publishing, Copenhagen, 2013;

[862] See details in Chapter 2 of the Thesis.

[863] See details in Chapter 2 of the Thesis.

of international law[864], yet there are also counterarguments to this point of view[865]. Whatever selective argument that any side made, it is unarguable that there is the development of administrative contract (public contract) and administrative law principles in most legal systems[866], in which the different treatment of administrative contracts is range from little to huge in different jurisdictions. As it is already discussed in detail in Chapter 2, Thailand (and also many countries in Asia), have developed a strong idea of administrative law in these couple of decades. On the other hand, there is acceptance of the concept of administrative law throughout Europe. The European Member States' national legal systems are familiar with either specialized administrative court systems or special procedural rules on administrative law disputes between citizens and administrative authorities[867]. For example, France has a corpus of administrative law relating to government contracts. At the European Union level, although there is lacking codification rules of administrative procedural principles at the moment. Yet, we could see that the EU administrative law principles have mostly been developing in the sector-specific procedure (Ex. In the area of Competition or State Aid)[868].

On the other hand, arbitration in which we refer to as a "Private Court" between the parties, seems not to be so warmly welcomed, especially in those jurisdictions where the development of public law is so strong. Some believe that administrative law needs special tools or specialized institutions to resolve an administrative dispute related to public life[869]. Although there are many benefits from arbitration, such as, speedy results, confidentiality, flexibility, less formality, parties could choose specific expertise arbitrators, and the chance for parties to keep a good business relationship. Thus, at the international level, arbitration could be used for fulfilling

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[864] Arbitrator Dupuy, a distinguished French professor of international law, suggested that "the theory of administrative contracts is somewhat typically French" and that it should not be accepted as forming part of international law. See, Texaco v. Libya (1977) 53 ILR 389, para. 57.

[865] Professor Bernard Audit of the University of Paris has rejected the view that the idea is particularly French. He observed that "These arguments make the form unduly prevail over substance. Comparative law indicates that everywhere contracts concluded by public authority are not altogether governed by the same regime as purely civil contracts". See, SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

[866] SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

[867] CRAIG, Paul, EU Administrative… *id.* See also, DRAGOS, Dacian C. &MARRANI, David, «Administrative Appeals… *id.*

[868] See details in Chapter 2 of the Thesis.

[869] "In most French law scholars' mind, ADR is first associated with (international) private law and especially private contracts. And yet, as we have seen before, in France, it is commonly believed that administrative law needs its special tools to resolve its special disputes related to special areas of public life. Therefore, adopting ADR that mainly comes from private law is not always warmly welcomed. Also, ADR by arbitration, while not impossible, is still rare in French administrative law". See, BOUSTA, Rhita &SAGAR, Arun, «Alternative Dispute… *id.*

Thus, it is considered rarely to see arbitration as a mean to resolve administrative dispute, though the law do not prohibit such actions. See, STELKENS, Ulrich, «Administrative Appeals in Germany», Dacian C. DRAGOS &Bogdana NEAMTU (Eds.), *Alternative Dispute Resolution in European Administrative Law*, Springer, Berlin, 2014;

the gaps between legal systems avoiding problems in foreign decisions of foreign courts, along with worldwide recognition of foreign arbitral awards as the consequences of the New York Convention. To some, arbitration also has been seen as a modern method to help reduce caseloads from the courts. In addition, some see arbitration as a perfect tool for alternative dispute resolution that secures fair access to justice. Thus, the supporter also pointed out that arbitration is more suitable than administrative court litigation to resolve some complexity of administrative investment disputes[870]. Yet, we object to that view, since there are also many cases where national courts share a better view of protection thoroughly than the arbitral tribunal[871].

To many people, those benefits from arbitration do not seem to go well with administrative law disputes[872]. It is common for scholars in jurisdictions where the public law idea is strong to have a pessimistic view regarding to the use of arbitration on administrative law disputes. Needless for the explanation that arbitration was viewed, and some might currently view it as a dispute resolution that is only suitable for commercial disputes (Only in private mode, not public). Arbitration usually being criticized as a private mode of dispute resolution that has been developed in a private law framework. It is commonly believed among contestants that arbitration is solely associated with (international) private law and especially private contracts[873]. In addition, the relevancies of arbitration and administrative law are not designed to be used together in the first place. For example, Thailand where arbitration text law has been used since the beginning of the 18th Century, while administrative law and administrative court were just established in the past couple of decades ago[874]. Nonetheless, Thai law (Also in many other countries) opens to the possibility of the existence of arbitration in administrative contract (public contract) disputes. Although with some restrictions and barriers were built up by the executive branches[875]. In this connection, the two areas of law that are not designed to be used together in the first place become very relevant these days.

Nowadays, there is more use of arbitration as a mean to resolve administrative contract disputes (public contract). Those skyrocketing numbers are the result of globalization and the rapid growth of cross-border trade. The source of the right to arbitration is either from the conclusion

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870 See detailed discussion of the use of arbitration in administrative law dispute in Chapter 4 and Chapter 5 of the thesis.

871 VIÑUALES, Jorge E., «International Investment… *id.*

872 VAN HARTEN, Gus, Investment Treaty Arbitration… *id.*

873 BOUSTA, Rhita &SAGAR, Arun, «Alternative Dispute… *id.* See also, STELKENS, Ulrich, «Administrative Appeals… *id.*

874 See general idea of administrative law and administrative contract in Chapter 2 of the thesis.

875 See detail in 4.3.3 (Thai Cabinet Resolutions prohibited the use of Arbitration in Administrative Contract).

of the agreement between states and private parties, or the asserting right to arbitration by foreign investors under the investment agreement that their home state had concluded with the host state[876]. All of the aforementioned situations and concerns led to one of the most important questions that we aim to make an analysis in this part, which is "Whether the use of arbitration is really compatible with administrative law? In particular, to the administrative contract, and to what extent should we allow arbitration in administrative contract? Thus, what are the current legal problems of using arbitration in administrative contract?".

6.1.2 The Issue on Procedure of Arbitrator Selection and Impartiality of Arbitrator

The selection criteria of arbitrators are generally based on the autonomy of the parties to choose their own adjudicator, taking into consideration that there are consensual of both or all parties to arbitration in the first place. In most jurisdictions, there is no specific rule requiring that arbitrators must possess legal knowledge[877]. Most jurisdictions usually require arbitrators to be impartial and independent, as we usually see from the statutory law or even through the soft law (Ex. Guidelines or customs)[878]. Arbitrators also have a duty of disclosure to the parties where there might lead to the doubt about their impartiality and independence. Lack of arbitrator impartiality and independency always led to the ground to get the arbitral awards rendered by them to be set aside or refuse to enforce by domestic courts. The big influence of the principle in which arbitrators must be impartial and also independent came from the UNCITRAL Model of Law on International Commercial Arbitration. The great autonomy of the parties to be able to choose their own adjudicator could be seen as one of the benefits of arbitration, since the parties could choose the arbitrators who possess the specific knowledge or expertise to the dispute; for example, the arbitrators with the chemical expertise who could decide on the specific scientific formula without asking help from expert's testimony, or the arbitrators with the knowledge of engineering who could see the better view of a complex construction dispute than a judge. Arbitrators are usually seen as more attentive to the case since they got appointed by the parties. In many institutional arbitrations, there are usually forms by the arbitration institutions require the arbitrators to sign in

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[876] See detail of international investment agreement in Chapter 3 of the thesis.

[877] There are few jurisdictions that place a minimum requirement for the arbitrator qualification. For example, Latvia require that arbitrator must have a qualification of lawyer with 3 years of experiences. See, Latvia Arbitration Law of 2014 Section 14.

[878] For example, Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement purposed by United Nations Commission on International Trade Law, IBA Guidelines on Conflicts of Interest in International Arbitration Adopted by resolution of the IBA Council on Thursday 23 October 2014, Code of Ethics and Conduct for Arbitrators, The Thai Arbitration Institute (TAI), Guidelines for Arbitrators by Stockholm Chamber of Commerce (Revised 2020).

order to confirm their availability and to assure that they can finish the arbitration proceeding within the timeframe given by the rules of the institutions or by the timeframe as agreed by the parties, whichever case maybe. For all aforementioned reasons, the supportive side usually sees arbitrators as a "perfect fit" or a "perfect adjudicator" more than a domestic court.

On the other hand, when we consider the loose regulations regarding the minimum requirement of arbitrator's qualification, it presents more negative outcomes than benefits that could earn from such a wide range of autonomy of the parties to choose their own adjudicator. Especially, in the administrative contract dispute where the public interests and the issues of the state's actions or its regulatory actions are at stake. As mentioned in the previous paragraph that there is no requirement in most of the jurisdictions that arbitrators must possess legal knowledge. The lack of minimum requirements for adjudicators' qualifications concerns us. To us, arbitrators who shall decide in public-private arbitration which is a complicated matter where the public interest or the interpretation of state's conduct, should at least possess the ability to determine facts, identify and interpret the law, and apply the law to the facts (Public Law in this case). This led to our first concern because in the administrative law dispute, it is important (At least, from the state's perspective) that the arbitrators must acquire public law knowledge. Therefore, the public law principles shall be adequately applied in the arbitral proceedings. This first observation led to doubt about whether arbitrators are the right person to determine the dispute in public-private arbitration proceedings. Thus, whether the public interest was adequately protected by them (The detail shall be discussed later in Principle of Legality in Arbitration Proceedings).

The current system gives a wide range of power to arbitrators, by allowing them to decide on critical issues of public law (Ex. Legal issues, de facto, the issue on adjustment of administrative contract clause, and the determination of compensation), with no legal responsibility[879]. The current system also allows them to make a wide legal interpretation without the possibility of judicial review to correct errors of law[880]. As decisions that may ultimately affect public interests are at stake, it is undesirable that wrong decisions taken by arbitral tribunals cannot be appealed. In this connection, the authorities of arbitrators to resolve the core question of public law dispute (For example, expropriation, public contract, or the legislation that has an issue on discrimination) are also questionable for its accountability. The problem is not that these issues are resolved by international adjudication, but the issue is those decisions by arbitrators are made without adequate

[879] See online article by KONTTINEN, Jussi &TEIVAINEN, Alexsi, «Finland's legislative power may be in jeopardy», available online at <www.helsinkitimes.fi>.

[880] The international arbitral tribunals have wide range of power. For example, in CMS v. Argentina, the arbitral tribunal even referred and interpreted the Argentine constitution. See, CMS Gas Transmission Company v. The Republic of Argentina, award of 12 May 2005, ICSID Case No. ARB/01/8, para. 119-121.

supervision by public judges. In addition, those decisions might not adequately take into account of administrative law principles.

The judicial accountability and independence of arbitrators are also in question. In our view, this issue is less serious in commercial arbitration. Yet, this issue concerns us in the event of public-private arbitration. Unlike judges, who have their salary paid on a monthly basis, the amount of salary paid to the judges is usually paid in more than a fair amount in order to ensure their independence without influences from any third party. Also, national judges do not have to worry about the performance of each of their decision whether it will displease the states or the private parties or not, since it will not affect the well-being of the national judges in any way due to the principle of judicial independence. The main focus of the national judges is the quality of their judgment (Which is open to the public scrutiny), since the quality and correctness of the judgments by national judges is the only thing to ensure the legitimacy of the judicial branch. These consider as a "good thing" of litigation. On the contrary, arbitrators earn their payments on a case-by-case basis, and upon the appointment by private parties (Or by institutions, whatever case may be). This provides a basis for reasonable suspicious of bias of arbitrators who serve as an adjudicator for the parties[881]. It has a reasonable degree of suspicious that arbitrators, if they wish to win future appointments to tribunals, they will do things to safeguard their reputation among those who appoint them (Foreign investors or States). There is convincing evidence regarding this issue, since the same face of arbitrators keeps getting repeatedly appointed by the parties[882], while there are very few newly appointed arbitrators (These issues shall be discussed later in the very last part). Thus, unlike courts, where parties have no right to choose their own judge. In addition, the courts usually have a high standard to prevent the conflict of interest between judges and private parties.

In investment arbitration, needless of explanation that foreign investors do not feel comfortable with judges who possess the nationality of the state that they are in dispute with to decide the dispute. We do not conclude that the domestic court is perfectly independent, since domestic judges are also normal humans after all. There might be some influences from the other judges, family members, or media. Yet, the judiciary is considered the closet to the modern constitutional democracy that frees from control from the government or the big businesses.

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881 VAN HARTEN, Gus, Investment Treaty Arbitration… *id.*

882 OECD, Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview, Consultation Paper of March 2018, available online at <oecd.org>. See also, GIRALDO-CARRILLO, Natalia, «The 'Repeat Arbitrators' Issue: A Subjective Concept», *International Law: Revista Colombiana de Derecho Internacional* Vol. 19 (2011), 75-106; See also, KUO, Houchi, «The Issue of Repeat Arbitrators: Is it a Problem and How Should the Arbitration Institutions Respond?», *Contemporary Asia Arbitration Journal* Vol. 4 No. 2 (2011), 247-271.

On the issue of the uncomfortable feeling of private parties or foreign investors against national judges, it is highly doubtful to us whether arbitrators could really fill up this gap, or even worst, if they only fill the gap in favor of foreign investors rather than properly balancing between investment protection and protection of public interest. This situation only took the jurisdiction of interpretation of public laws notion from states into the group of arbitrators. In addition, as mentioned that arbitrators got appointed on a case-by-case basis; it is obvious that foreign investors tend to choose an arbitrator who has a strong idea of private law and international obligation, rather than chooses an arbitrator who has a strong background in public law that might have more sentimental to the host state more than the investor[883]. Meanwhile, from our own experiences, states also tend to find an arbitrator who shares sympathy with perspectives from the state and takes adequate public interest factors into account in every arbitral proceeding beforehand. Some literature also observes that arbitrators make their living from disputes they arbitrate; they have an interest in creating standards that increase the chances of legal disputes[884]. As a result, they might create vague and ambiguous legal rules that can give rise to many future disputes.

The study showed that there is a lack of diversity of arbitrators in ISDS arbitration. The same arbitrators always keep secure the big cases[885]. For example, of the twenty-five most influential arbitrators, there are only two women. Thus, of the twenty-five most influential arbitrators, twenty-two of them are either from Europe or North America[886]; some literatures refer to this situation as the "White man club" or "An (Old) white boys' club"[887]. This does not consider

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883 SOBOTA, Luke A., «Repeat Arbitrator Appointments in International Investment Disputes», Chiara GIORGETTI (Ed.), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*, Brill, Leiden, 2015;

884 DOTHAN, Shai &LAM, Joanna, «A Paradigm Shift? Arbitration and Court-Like Mechanisms in Investors' Disputes», Güneş ÜNÜVAR, Joanna LAM &Shai DOTHAN (Eds.), *European Yearbook of International Economic Law: Permanent Investment Courts: The European Experiment*, Springer, Cham, 2nd Edition, 2020;

885 The problem also enshrines in the commercial arbitration. The statistic survey by JURI Committee suggested that "Diversity remains a significant problem within arbitration. Only 19.25% of arbitration practitioners who responded to the Survey were female. This number declines to 15.88% among those individuals who have served as an arbitrator within the past five years. Diversity issues become even more pronounced when ethnicity is considered, with 97.95% of practitioner respondents describing themselves as White, and this number increasing to 98.76% among individuals who have served as an arbitrator in the past five years". See, Directorate General for Internal Policies: Policy Department C: Citizen's Right and Constitutional Affairs, Legal Instruments… *id.*

886 BJORKLUND, Andrea K. et al., «The Diversity Deficit in International Investment Arbitration», *The Journal of World Investment & Trade* Vol. 21 Issue 2-3 (2020), 410-440; See also, CHATTERJEE, Payel &DESAL, Vyapak, «Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern?», Kluwer Arbitration Blog (2020), available online at <http://arbitrationblog.kluwerarbitration.com>.

887 VANINA Sucharitkul, «ICSID and UNCITRAL Draft Code of Conduct: Potential Ban on Multiple Roles Could Negatively Impact Gender and Regional Diversity, as well as Generational Renewal», Kluwer Arbitration Blog (2020), available at <http://arbitrationblog.kluwerarbitration.com>. See also, KARTON, Joshua &POLONSKAYA, Ksenia, «True Diversity is Intersectional: Escaping the one Dimensional Disclosure on Arbitrator Diversity», Kluwer Arbitration Blog (2018), available online at <http://arbitrationblog.kluwerarbitration.com>.

the fact that most of the ISDS disputes usually have at least one party, which are developing countries in the region like South America, Asia, or Africa[888]. Although there might be some defense claims that repeated arbitrator is not an issue as long as they are dependent[889]. However, we strongly believe that the same group of appointed arbitrators, rather than being seen as fair, just, and devoid of bias, decisions are sometimes suspected of the judgment quality of adjudicators who share a particular worldview and may be producing a predictable result for the selective side[890].

Therefore, for all the above reasons, we believe the arbitrator is not the most suitable person to adjudicate the administrative law dispute, in particular, for international arbitration in relation to an administrative contract. As a matter of principle, states themselves should be the ones that address this kind of problem for all investors, regardless of domestic or foreign, and indeed for all citizens.

6.1.3 Issue on Confidentiality and Transparency

Arbitration, as it is seen by many observers as a private mode of dispute resolution between parties[891], allows confidentiality. The confidentiality of arbitration could play its role in all proceedings. It could start from the oral hearing, evidence taking, testimony, and the stage of arbitral awards which normally do not open to the public. The confidentiality might include until the existence of such arbitral proceedings. Confidentiality could be seen as a benefit of using arbitration as a mean to resolve the dispute between parties since the parties could secure the important area of their business, such as, trade secret, secret formulas, or their scientific research. Arbitration does not prohibit parties from agreeing on the civil punishment in case of any parties break the confidentiality rules that they set it up prior to the arbitration proceedings. This also benefits the parties to be able to keep their good business relationship after their dispute resolutions.

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888 See Statistics at, <www.investmentpolicy.unctad.org>.

889 Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator of 23 December 2010, para. 60.

890 UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), «Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session» (New York, 23–27 April 2018) UN Doc AQ/CN.9/935, para. 70. See also, KIDANE, Won, «True Diversity is Intersectional: Escaping the one Dimensional Disclosure on Arbitrator Diversity», Kluwer Arbitration Blog (2017), available online at <http://arbitrationblog.kluwerarbitration.com>.

891 CRAWFORD, James, «Treaty and Contract in Investment Arbitration», *Arbitration International* Vol. 24 Issue 3 (2008), 351-374; See also, RICHARD Frankel, «The Arbitration Clause as Super Contract», *Washington University Law Review* Vol. 91 Issue 3 (2014), 531-588;

Currently, the issue of transparency in arbitration is seen from two different points of view. There are two sides of arguments proposing either there should be completely transparent of arbitration to the same extent as public court, or there is no need to adjust any transparency because it would undermine arbitration's essential functioning. From our point of view, it is very unconvincing that the function of confidentiality in arbitration could go well with public-private arbitration. The issue of confidentiality and lack of transparency is one of the weaknesses of public-private or ISDS arbitration. The issue of transparency in public-private arbitration is highly relevant to public law and public interest. Considering the fact that whenever states lose in arbitral proceedings, it almost inevitably leads to damages awards against a State, which have a direct impact on the State's budget. Apart from the expense that the state might need to pay for arbitral awards, there are other hiding expenses that occur during the arbitral proceedings, such as, the countless hours of work by the government officials from the respondent state. It is also important to leave our observation here that whenever we hear those states win in public-private arbitration, we do not agree with such a phrase because states do not really win anything. They just did not lose in public-private arbitration.

The confidentiality function under arbitration creates a potential set of conflicts with public law norms[892]. In the scheme of public law, transparency and openness are one of the core governing principles of the public law system. Transparency in administrative litigation is subjected to possible exceptions in limiting certain circumstances along with the opinion from the court, such as, interest of morals, national security reasons, and also to the public interest itself[893]. In particular, in administrative law, an open hearing is an important process to ensure transparency. In court procedure, generally, there are rules that require that oral proceedings and judgment be held in an open court, with limited circumstances that combine with the opinion of the court to omit such actions in the open court. Judgments from the administrative court are usually made by the bench of administrative judges in an uneven number, with a possibility of appeal to the court of higher hierarchy to ensure the consistency of judgments delivered. Important judgments usually publish to the public. Thus, the public could obtain copies of the judgments at their own initiative; many jurisdictions are also open to such possibility through online requests[894], as in principles, the public is entitled to the right to access to the document. In administrative litigation, many

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892 ASTERITI, Alessandra &TAMS, Christian J., «Transparency and Representation of the Public Interest in Investment Treaty Arbitration», Stephan W. SCHILL (Ed.), *International Investment Law and Comparative Public Law*, Oxford University Press, 1st Edition, Oxford, 2010; See also, Public Law Project, «Third Party Interventions in Judicial Review: an action research study», Public Law Project, London, 2001;

893 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 6.

894 For example, Thai Administrative Court provide the online platform for public to request access to the court decision (Full decisions). See, <www.admincourt.go.th>.

jurisdictions also offer a special system like a rapporteur judge or *amicus curiae*[895]; in order to ensure correctness and transparency in administrative litigation[896]. Transparency in administrative litigation is an important tool to ensure legitimacy, correctness, development, and it also enhances accountability, consistency, and coherence of judgments by domestic courts.

Arbitration, especially investment arbitration, is often being criticizes for its lack of transparency[897]. The confidentiality of arbitration seems to be a problem, especially, when the subject matter of the disputes is in regard of regulatory disputes. Many kinds of investment disputes might relate to important subject matters, such as, water dispute[898], corruption[899], or the preservation of natural resources[900]. Many times, those disputes attracted intention on a global scale. These situations indicate that the dispute does not affect only the foreign investors and the states involved but also implicates global interests. As investment treaty arbitration becomes subject to greater scrutiny, the system shall require greater transparency[901]. In response, the policymakers and arbitral institutions who are also aware of such critics proposing and implementing tools aim to enhance the transparency of international arbitration. In the investment arbitration, for example, ICSID encourages parties not to oppose the full publication of the judgment[902]. If parties agree to open their hearing to the public, ICSID shall assist by posting an advance notice of hearings open to the public and details about access to such hearings. Yet, it is

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[895] The term *amicus curiae* refer to "a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter". See, GARNER, Bryan A., *Black's Law Dictionary*, 10th Edition, Thomson West, Minnesota, 2014;

[896] In the international investment arbitration. It is also agree that transparency includes; "[T]he substantive issues to be considered in respect of the possible content of a legal standard on transparency would be as follows: publicity regarding the initiation of arbitral proceedings; documents to be published (such as pleadings, procedural orders, supporting evidence); submission by third parties ("amicus curiae") in proceedings; public hearings; publication of arbitral awards; possible exceptions to the transparency rules; and repository of published information" See, United Nations Commission on International Trade Law (UNCITRAL), REPORT: Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration, Working Group II (Arbitration and Conciliation) of the work of its fifty-third session (Vienna, 4–8 October 2010), A/CN9/712, 20 October 2010, para. 31.

[897] RUSCALLA, Gabriele, «Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?», *Groningen Journal of International Law* Vol. 3 Issue 1 (2015), 1-26;

[898] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, award of 24 July 2008. See also, Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction of 21 October 2005.

[899] World Duty Free Company v Republic of Kenya, ICSID Case No. ARB/00/7, award of 4 October 2006.

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

[901] SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

[902] ZOELLNER, Carl-Sebastian, «Third-Party Participation (NGOs and Private Persons) and Transparency in ICSID Proceedings», Rainer HOFMANN &Christian J. TAMS (Eds.), *The International Convention for the Settlement of Investment Disputes (ICSID) – Taking Stock After 40 Years*, Nomos, Baden-Baden, 2007; See also, MISTELIS, Loukas A., «Confidentiality and Third Party Participation in Investment Arbitration», *Arbitration International* Vol. 21 Issue 2 (2005), 221-232;

not absolute, since parties have a wide range of autonomy to agree on the confidentiality or transparency of their arbitration proceedings. ICSID shall not publish the award without consent from the parties[903]. On the other side, the European Union is also moving toward more transparency in international arbitration which is reflected in their newly concluded BITs and FTAs[904]. Meanwhile, another initiation like UNCITRAL takes a step further, in the UNCITRAL Rules on transparency in treaty-based investor-state arbitration (Rules on Transparency) provides rules for transparency and accessibility to the public of treaty-based investor-state arbitration. However, the rules on transparency are subject to certain exceptions[905]. At the national level, some jurisdictions also push legislative actions to improve the transparency of public-private arbitration, in which those jurisdictions regulate arbitral proceedings and arbitral awards to have transparency at the same or almost the same level as the domestic court proceedings[906].

However, those reforms both at the international level and domestic level are still in an early phase, and also not universal. We must see in the long run how far the transparency in public-private arbitration could reach. At this point, we see that the confidentiality of arbitral proceedings undermines and overlooks a core principle of transparency in administrative law. The disputes in public-private arbitration could involve public contract disputes, the interpretation of regulations and the state's policy, and therefore directly connected to the public interest. Whenever the state is on the losing side in arbitral proceedings, it is inevitable that the payment of compensation shall come directly from the state's budget. The confidentiality in arbitration could leave the public in question whether the administrative law principles were adequately taken into account in the arbitral proceedings. Thus, such confidentiality could cause a certain degree of difficulty for the

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[903] Yet, during the 2006 reform of the Arbitration Rules, Article 48(4) was reinforced, stating in the indicative that the Centre will "promptly include in its publications excerpts of the legal reasoning of the Tribunal." See, Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Article 48(4).

[904] European Commission, Investment Protection and Investor-to-State Dispute Settlement in EU agreements. Executive Summary: A New Start of Investment and Investment Protection, November 2013, available online at <trade.ec.europa.eu>.

See the detail of European and its current trend of concluding international investment agreements in Chapter 3 and Chapter 5 of the thesis.

[905] See detail discussion of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration in Chapter 3 of the thesis.

[906] For example, See, Portuguese Ordinance (Portaria) n. º 165/2020 of 7 July 2020. The Ordinance require transparency in Administrative Law dispute. The Ordinance require that all arbitral awards related to disputes involving matters of administrative law (whether or not administrated by arbitral institutions) or tax law (administered by the only authorized arbitral institution) are now subject to a custody deposit and to publication in a web-based platform. With a sufficient information to the public. This new ordinance enacted to reduce the tension of public scrutiny of using arbitration in administrative law dispute.

In addition, in the recent amendment of the French arbitration law in 2011, the principle of confidentiality of arbitration proceedings, which is normally applicable by default to domestic arbitrations, was not extended to international arbitrations. See, Decree No. 2011-48 of 13 January 2011.

state to litigate against a state agency or some investors for a liability from causing a dispute in arbitration. In sum, confidentiality in public-private arbitration deters the legitimacy, coherence, predictability, legal stability, and accountability of public-private arbitration. It is highly questionable that confidentiality in arbitration could really go well with the administrative law dispute.

6.1.4 The Issue of Inconsistency and Lack of Appellate Mechanism

Arbitration is being criticized for its lack of coherence and consistency of the rules and its application with other rules. In broad understanding, the same *de facto* and legal grounds that apply to the case could result in different outcomes in the arbitral award. Consistency of arbitral awards has a strong connection with the transparency issue that has already been discussed earlier as transparency of awards is a necessity in order to know what reasoning the tribunal used in their decision. In fact, if the award does not make public, it is impossible to know the reasoning of the tribunal as in other awards. As a consequence, when the arbitral decisions do not make publicly available, precedents cannot develop[907]. Legal precedents have been used by judges in most national legal systems to ensure a more predictable, certain, and foreseeable legal order[908]. The problem is when some awards regarding a certain question are published, and some are not published; therefore, it is not possible to have coherent case law and control due to the obstacle of confidentiality.

Coherence may be defined as the capability of an adjudicative system to resolve inconsistencies that arise from different decisions, and to ensure that the law is interpreted in a uniform and relatively predictable manner to allow those affected by the rules to plan their conduct. Coherent case law is a good way to ensure predictability[909], in which predictability is one of the core principles of administrative litigation, also in state's practices to ensure good governance by them. Apart from the issue of confidentiality in arbitration, there is one more important concern regarding to the coherence of arbitral awards, since arbitral tribunals are not binding by the precedents. Although in arbitration, particularly investment arbitration, arbitral tribunals usually refer to previous arbitral awards for their reasoning given in their own judgment,

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[907] In arbitration, the confidentiality considering as suppressing the rise of a precedent doctrine. Since it is not mandatory for the arbitral tribunal to make a publicity of their award. Thus, arbitral tribunals are not binding to the previous decisions.

[908] GUILLAUME, Gilbert, «The Use of Precedents by International Judges and Arbitrators», *Journal of International Dispute Settlement* Vol. 2 Issue 1 (2011), 5-23;

[909] DOLZER, Rudolf &SCHREUER, Christoph H., *Principles of International Investment Law*, 2nd Edition, Oxford University Press, Oxford, 2012;

the level of using those arbitral precedents could be from slim to substantial[910]. Yet, it is agreed in practices and in arbitral awards that neither previous arbitral reasoning nor awards are constituted as binding precedents[911], although with two disputes with almost identical backgrounds or disputes arising from the same investment agreement. Thus, there are no rules that force arbitral tribunals to follow the precedents, although famous precedents might have a greater impact on future

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[910] There are certain degrees of viewing precedents by arbitral tribunals. At the top, many arbitral tribunals express their views that there is no existence of binding precedents in the international arbitration, therefore; they are not binding by them. For example, Arbitral tribunal in *Methanex Corporation v United States of America* stated that "…For each arbitration, the decision must be made by its tribunals in the particular circumstances of that arbitration only." See, Methanex Corporation v. United States of America, UNCITRAL, Decision of the Tribunal on Petitioners from Third Persons to Intervene as "Amici Curiae" of 15 January 2001, para. 51. In *Enron Creditors Recovery Corporation and Ponderosa Assets, LP v Argentine Republic*, the tribunal expressed that "The Tribunal will accordingly discuss with particular attention the situation of these claims under the Bilateral Investment Treaty in view of the existence of facts that are specific to this particular case.". See, Enron Creditors Recovery Corporation and Ponderosa Assets, LP v Argentine Republic, Decision on Jurisdiction of 14 January 2004, ICSID Case No ARB/01/3, para. 40.

Other arbitral tribunals might regard precedents as a factual information to apply to their case, yet not to binding by the previous precedents. For example, the arbitral tribunal in *Fireman's Fund Insurance Company v. The United Mexican States* has expressed that "…It is true that arbitral awards do not constitute binding precedent. It is also true that number of cases are fact driven and that the findings in those cases cannot be transposed in and of themselves to other cases. It is further true that a number of cases are based on treaties that differ from the NAFTA in certain respects. However, cautious reliance on certain principles developed in a number of those cases, as persuasive authority, to the extent that they cover the same matters as the NAFTA, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States." See, Fireman's Fund Insurance Company v United Mexican States, ICSID Case No ARB(AF)/02/01, award of 17 July 2006, para. 172. Meanwhile, arbitral tribunal in *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador* expressed their view as "…It is in any event clear that the decisions of other tribunals are not binding on this Tribunal… However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they shed any useful light on the issues that arise for decision in this case" See, Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Partial Award on Merits of 30 March 2010, para. 163-165.

Some other tribunals seem to give an important to the precedents and the coherent of the international arbitration and use the similar reasoning to the previous decisions and conclude the similar outcome with them. Yet, expressed their views that the previous awards could not constituted any precedents. For example, arbitral tribunal in *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* stated that "While the Tribunal considers that it is not bound by previous decisions, it is of the opinion that it must pay due consideration to earlier decisions made by other international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to consider the solutions consistently established in prior similar cases. Subject to the specifics of a given treaty and of the circumstances of the case under review, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards establishing certainty in the rule of law". See, Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, award of 18 August 2008, para. 117. Meanwhile, the arbitral tribunal in *Saipem S.p.A. v. The People's Republic of Bangladesh* also expressed the similar view as "The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law". See, Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, award of 30 June 2009, para. 90.

Although all aforementioned views by arbitral tribunals express the different views of precedents. However, all of them sharing the same view on one ground, in which arbitral tribunals are not binding to the previous decisions by the other arbitral tribunals. Therefore, the previous decision does not constitute precedents in the international arbitration.

[911] *Ibidem.*

decisions than non-famous ones. Arbitral tribunals are bound to make their decisions based on the respective treaty and on a case-by-case basis, from the broad terms of substantive protections of almost 3,000 investment agreements globally[912], with limited possibilities for a substantive review[913]. This situation led to many criticisms regarding the coherence of the arbitral decisions.

The doctrine of precedents is strongly developed in common law legal systems; especially, in England, where there has been a long development of the common law system. A precedent or authority is a decision establishing a principle or a rule that courts will follow when deciding subsequent cases with analogs issues. Generally, in the common law sense, it is unable to provide justice if two similar facts shall have different results in the court judgments. Meanwhile, in administrative law, although they give less importance to precedents than the English system, because administrative law is highly developed in civil law jurisdictions that give more importance to the code law. Yet, precedents also play a crucial role in administrative dispute litigation as one of the weighing factors for national judges in order to decide their cases. Precedents also help enhance the predictability and coherence of administrative litigation. At the same time, it could also reduce the cost and frequency of dispute settlement. It may seem incontestable that a reasonable degree of consistency and coherence could maintain the legitimacy and creditability of the dispute settlement system.

Arbitration is also being criticized for the lack of an appellate mechanism[914]. The criticism of the lack of an appellate mechanism is closely linked to the criticism of the lack of consistency and predictability of arbitration awards, and in particular investment arbitration. At a national level, national courts could not correct the legal reasoning or *de facto* consideration of the arbitral tribunal,

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912 See FDI statistics and international investment agreements' text, available online at <https://investmentpolicy.unctad.org/>.

913 One of the core concerns with present-day ISDS identified in the current UNCITRAL process relates to the lack of consistency, coherence, predictability, and correctness of arbitral rulings. This concern stems not only from the existence of more than 3,000 differently worded bilateral, sectorial, and regional investment agreements and investment chapters in free trade agreements, but also above all a reflection of the institutional structure of ISDS, where disputes are settled by arbitral tribunals on a one-off basis under a variety of institutional rules with only limited possibilities for substantive review. As a result, many inconsistent and incoherent decisions by different arbitral tribunals have come about on issues of jurisdiction, admissibility, and as regards the interpretation and application of similar, or even identical substantive standards of treatment. See, SCHILL, Stephan W., The Multilateralization… *id.* See also, GARCIA, Frank J. et al., «Reforming the International Investment Regime: Lessons from International Trade Law», *Journal of International Economic Law* Vol. 18 Issue 4 (2015), 861–892;

In addition, the interpretation of each substantive standards under the investment agreements also being criticize with inconsistently, the specific contents and implications of their broad wording. See, MAYER, Pierre, «Conflicting Decisions in International Commercial Arbitration», *Journal of International Dispute Settlement* Vol. 4 Issue 2 (2013), 407–419;

914 SORNARAJAH, Muthucumaraswamy , «A Coming Crisis… *id.*

due to the limited grounds for the national court to set aside or refuse the arbitral award[915]. Moreover, the appellate rules by international organizations (For example, ICSID arbitration) are not considered sufficient to correct poor awards[916], since the grounds for appeal and the grounds for annulment are still very narrow[917].

On the other hand, domestic courts or national administrative appeal systems consider of having adequate tools to ensure the consistency and predictability of administrative dispute decisions. In administrative litigation, where precedents are adequately and reasonably taken into account by the judges, there is also an assurance from the court of higher hierarchy (Supreme Administrative Court for example) to reassure that the precedents are adequately and correctly applied in the judgment from the lower court. The role of the court of higher hierarchy is to harness the coherence and predictability of administrative justice. On the contrary, arbitration does not have a higher hierarchy to correct or harness neither coherence nor predictability of arbitral decisions. This situation concerns us, especially, when many arbitral tribunals interpret legal questions in different ways, and/or the arbitral tribunals produce inconsistency in outcomes in separate cases involving essentially the same dispute. In those aforementioned concerns, there will be no higher hierarchy to ensure the consistency and predictability of those awards like the national court system. In this connection, when the parties choose the arbitrator to decide their cases, the parties tend to choose the arbitrator who has the legal point of view in favor of their side in the dispute. These aforementioned situations are weaknesses exposed by the use of arbitration in administrative law disputes.

6.1.5 Principle of Legality in Arbitration Proceedings

As we already discussed mainly in Chapter 4 and Chapter 5, arbitration gives great autonomy to the parties to choose the applicable law (Choice of law clause) to their dispute; the parties are also eligible to agree to empower the arbitrators to decide their dispute in accordance with their sense of fairness and good conscience (*ex aequo et bono*)[918]. Generally, if the parties fail to

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[915] Grounds of set aside or refuse to enforce the arbitral award have a high influent from UNCITRAL Model Law on International Commercial Arbitration. See the general idea of arbitral enforcement regime of Thailand and the European Union in Chapter 4 and Chapter 5 of the thesis.

[916] GAUKRODGER, David &GORDON, Kathryn, «Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community», OECD Working Papers on International Investment 2012/03, OECD Publishing, available at <http://dx.doi.org/10.1787/5k46b1r85j6f-en>.

[917] See the general discussion of grounds to appeal/annulment of arbitral awards in Chapter 3 of the thesis.

[918] Yet, in those jurisdictions where the administrative laws are so strong. The public-private arbitration could not solely decide on *ex aequo et bono* since it would be "contrary to public policy" if not apply the law to the administrative

agree on applicable law, the arbitrators shall apply the most appropriate law to the dispute. Thus, the procedure rules on arbitration proceedings shall depend on the agreement by the parties or the arbitrators if the parties fail to agree upon. Those procedural rules are not subject to the same degree as the administrative litigation system. For instance, arbitration does not require arbitrators to conduct an inquisitorial system as the core procedural system of administrative litigation, where specialized judges play their roles in the administrative litigation system in order to balance the protection of private rights and ensure the protection of public interest at the same time. The procedural rules of public-private arbitration might come from an accusatorial system which evades the chance of arbitrator reaching their hands to the same extent as administrative judges (Also, there is doubt whether all arbitrators possess the same public law knowledge as administrative judges). In addition, laws, and rules applicable to the arbitration are so flexible, the parties do not require to have their arbitration proceedings conducted in the seat of arbitration. Although it seems to be a rare case where arbitration proceedings are conducted totally outside the seat of arbitration since the proceedings themselves might need support from the court from time to time (For example, to issue the subpoena, order for submission of documents, the issuance of provisional measures, or the appointment of the arbitrator when the parties could not agree upon).

Although there are some restrictions of using arbitration in administrative law disputes varies between jurisdictions, it is safe to conclude that administrative law disputes are arbitrable both in Thailand and in the European Union Member States[919]. This situation concerns us since arbitrators are neither binding to apply administrative laws nor to apply their doctrines to the dispute, although the dispute might arise from a public-private contract that contains public interest implications. Thus, the parties seem to select the seat of arbitration and the governing law which are in favor of them. Therefore, an outcome of public-private arbitration might come from an exclusively private law framework. It raised important questions, notably whether the public interest is adequately accounted for, and indeed protected, in public-private arbitrations[920]. In those jurisdictions where the development of public laws is strong, administrative contracts or public contracts are considered as tools to achieve public interest. Those contracts give a privilege or special power to the administration *inter alia* to terminate a contract when those contracts are no longer serve the public interest, alter the scope of the contract for the public interest, or adjust

law dispute. Yet, needless of explanation that in administrative litigation, the administrative court would never apply *ex aequo et bono* to the dispute.

[919] See general idea of administrative law in Chapter 2 of the thesis.

[920] BREKOULAKIS, Stavros &DEVANEY, Margaret B., «Public-Private… *id.*

fines to private parties when they could not perform the contract. Administrative contracts or public contracts aim to preserve the continuity of the performance of the contract in order to ensure that the public will always have access to use public services. Administrative contracts are different from a private contract which is based on the doctrine of freedom of contract and *pacta sunt servanda*. In our view, arbitration takes away of court jurisdiction, and also get rids of a chance of administration to fully exploit the benefits of the administrative contract. As a result, arbitration deprives a chance for the court to carefully applying administrative law components to the dispute.

Some jurisdictions have already imposed the restriction on public-private arbitration, requiring that arbitrators must apply laws but not *ex aequo et bono* to administrative law disputes[921]. This situation raises another important question, whether if arbitration is limited by the principle of legality is considered sufficient in the view of administrative law. In our view, it is insufficient even though public-private arbitration is limited to the principle of legality since arbitration could never serve at the same level and extend to the court where the court of hierarchy could ensure consistency in their reasoning and judgments. In arbitration, although limited within the principle of legality, it is no way that we could ensure the consistency of arbitral award or the same level of application of administrative law or its doctrines to its decisions. Considering the fact that there is also no respect for the precedents in the arbitral proceedings. The different ways of legal interpretations and the answer to *de facto* questions cause the lack of consistency in making arbitral awards. It doubts us whether justice could be served in public-private arbitration. To us, justice should come from laws, and courts under the constitutions. Justice could not be from the wide range of interpretations by the group of people (Arbitrators).

On the other hand, in investment arbitration, international arbitral tribunals decide whether states have broken their substantive obligations under the investment treaties or not. Those substantive obligations are varied depending on each investment treaty concluded (Developing in BIT by BIT manner[922]); for example, unfair expropriation, fair and equitable treatment (FET), national treatment, and most-favored nation treatment (MFN). The interpretations of those substantive protections by an international arbitral tribunal could not

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[921] For example, See, Portuguese Voluntary Arbitration Law 2011 (In force since 14 March 2012) Chapter X On the recognition and enforcement of foreign arbitral awards.

In addition, Thai Administrative Court ruled that arbitral tribunal could not apply the sense of fairness (*ex aequo et bono*) to the administrative law/ administrative contract dispute, since it would contrary to Thailand's public policy, which is one ground to set aside/ refuse to enforce such award. See, ASAWAROTH, Saowanee, Alternative Dispute Resolution… *id.*

[922] SALACUSE, JESWALD W., «BIT by BIT:… *id.* The literature explain that the development of investment agreements has been developing separately. As each states conclusion different investment agreement on their own model.

expect consistency and coherence, because of the different arbitral tribunals that got appointed on a case-by-case basis. Thus, the interpretation of those substantive protections by arbitrators could not assure coherent since those interpretations could potentially come from over 3,000 different investment agreements. Therefore, this might bring a reasonable suspicious that the interpretation of those terms is different among different arbitral tribunals.

Arbitral tribunals established under investment treaties have comprehensive jurisdiction over a broad class of potential disputes; for example, the implementation of state regulations and measures (Regardless of whether such measures are done in the emergency or crisis), administrative contracts, and expropriation. Investment arbitration removed the potential of a domestic court to determine the administrative law dispute. It is unavoidable that investment arbitrations, most of the time engage with a question of public law dispute. As already settled in the international arbitration precedents that investment arbitral tribunals recognize the state's right to regulate, but those rights are also subjected to international obligation[923]. Since arbitral tribunals in investment arbitrations must rely on the standard of protections from investment agreements, it raises our concern that the view of international arbitral tribunals solely relies on the substantive standards under the investment agreements, but not the public law doctrine. Although, the disputes are in dispute is entirely administrative law dispute in which the respondent states are states that embrace a strong idea of administrative law. This situation concerns to us that there is a substantial amount of disregarding of administrative law components in investment arbitration.

6.1.6 Issue on Judicial Review and the Interpretation of the Term "Public Policy" as the Ground to Set Aside the Arbitral Awards

In principle, arbitral awards consider as final and binding. Thus, arbitral awards are enforceable worldwide due to the influent from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which obligated every signatory party to recognize the foreign arbitral awards as it was made in its own country[924]. Theoretically, if the losing party to the arbitral proceedings complies with the arbitral award, then the awards are fully complied with and need no further recourse with a competent court. Yet, in practice, the losing party does not usually comply with the arbitral award. Then, the parties must ask the competent domestic court to enforce, set aside, or refuse enforcement of the arbitral award,

[923] CMS Gas Transmission Company v. The Argentine Republic (ICSID Case No. ARB/01/8), award of 12 May 2005, para. 108.

[924] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Article III. Until now, there are 159 signatories to the Convention.

whatever case maybe[925]. This kind of problem shall never arise in domestic court, where the court judgments are automatically enforced and final, if not subject to appeal to the court of higher hierarchy.

This situation led to another problem, which is the capability of the court to review awards from public-private arbitrations. The court has limited grounds to set aside or to refuse to enforce the arbitral awards, which are, the grounds that the subject matter of the dispute is not capable of settlement by arbitration, or such enforcement would be contrary to public policy[926]. These narrow grounds to set aside or refuse to enforce the arbitral awards have a consequence from the UNCITRAL Model Law on Commercial Arbitration. These narrow grounds prohibited courts from revising the decisions or correcting legal opinions from the arbitral tribunals. National courts act solely as the guardian to ensure that arbitration procedures are in accordance with the law and do not violate public policy. Consequently, national courts could only decide either to enforce, set aside, or refuse to enforce the arbitral awards. However, the national courts could neither change the decision, nor correct legal views from the arbitral tribunals. On the contrary, the appeal court could always change or correct decisions from the lower court in order to ensure the correctness of the judgments. In arbitration, national courts hardly control the consistency of arbitral awards since they cannot correct the legal opinion or the decision of *de facto* question by the arbitral tribunals, but rather decide whether to enforce such arbitral awards in question or not on the limited grounds not to do so.

Moreover, the term "public policy" seems to create problems and confusion in practices. Public policy is one such ground provided in the New York Convention as well as in the UNCITRAL Model Law which is one of the most popular grounds commonly used by parties to international arbitration to resist enforcement of arbitral awards[927]. The term is not easy to define[928]. The term public policy is complex, ambiguous, and controversial because the term does

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[925] National courts have a prominent relationship to the arbitration, since arbitral award, although final and binding in principle. Yet, if the party do not comply with the award. The enforcement must be done by the national court. National courts possess coercive powers which could assist a strong foundation of the arbitration. See, SATTAR, Sameer, «Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?», *Transnational Dispute Management Journal* Issue 5, available online at <https://www.ela.law.com>.

[926] UNCITRAL Model Law on International Commercial Arbitration (1985). With amendments as adopted in 2006, Article 36 (b).

[927] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Article V(2)(b). See also, UNCITRAL Model Law on International Commercial Arbitration (1985). With amendments as adopted in 2006, Article 34(b)(ii) &Article 36(b)(ii).

[928] In part of the classic judgment of *Richardson v. Mellish*, the court ruled that "public policy…it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail." See, Richardson v. Mellish, in the court of common pleas, and other courts of 2 July 1824, para. 252.

not interpret unanimously among jurisdictions. In other words, there is a lack of a common worldwide definition of public policy or practice on its application.

Although there is unanimously accepted that some areas clearly contradicted to the public policy; for example, genocide, enslaving in general, or maritime piracy. Yet there is still a "grey area" which have to wait for the court's interpretation that shall be developing over time. In arbitration, the use of public policy as the ground to refuse the enforcement of the arbitral award is being criticized because the use of it is seen as subjectivity and selectivity at the hand of the national courts in terms of interpretation of the concept (Sometime, the interpretation of the term public policy is making in a wide sense). National courts may interpret public policy entirely on their own discretion; it is more likely that the interpretation shall depend on the attitude of the national court and the particular judge at the time. We have reasonably expected that in some national judge's opinion, they might see the public policy ground as a weapon in the hands of the national court which allows it to refuse enforcement of an arbitral award that is otherwise valid.

In addition, some jurisdictions (Mostly, developed countries) tend to differentiate the term "international public policy" from "national public policy" when dealing with the foreign arbitral award, while some other jurisdictions do not make such a distinction (For example, Thailand)[929], then just apply national public policy as the ground to refuse or set aside arbitral awards, both to national and international arbitration. Thus, there are also different ways to interpret the notion of public policy in private law disputes and administrative law disputes between jurisdictions. This situation also led to another criticism, which pointed out that the use of public policy grounds to set aside/refuse arbitral awards caused unpredictability in the enforcement of arbitral awards in different jurisdictions[930]. It led to the possibility that courts might use idiosyncratic local rules to undermine the broad enforcement goals of arbitration and international conventions that support such broad enforcement. In our opinion, the unpredictability of the term public policy as one of the grounds to refuse/set aside the arbitral awards is weakening the legitimacy, effectiveness, and efficiency of investment arbitration.

[929] See detail of the term "Thai public policy" in Chapter 4 of the thesis.

[930] MOSES, Margaret, «Public Policy: National, International and Transnational», Kluwer Arbitration Blog (2018), available online at <http://arbitrationblog.kluwerarbitration.com>.

6.1.7 Risk Sharing Doctrine between Administration and Private Party (Doctrine of Risk-Sharing &Risk-Taking Contract)

Risk sharing between administrations and a private party in the public contract is something that lacks of consideration in arbitration proceedings. Every public contract inherits risks and uncertainty. In principle, states have to allocate risks in public contract to the best one who can manage them (with minimum cost). For the private party side, there are risks, such as, commercial risk when there is lower expected demand for services produced by the project, or an operating risk when inefficiency in operation leads to higher operating cost, or any unexpected risks (Ex. inflation rates, exchange rates). For states (Also risks for a private party in many instances), there are risks; for example, regulations or legal risks when states have to implement/adjust regulations to serve the public interest. Those circumstances: for example, there are risks like natural disasters, environmental problems, civil war, terrorism, transnational crimes, political instability, or economic crisis; those risks have forced the state's hand to react, change policy measures, and enact regulations responding to those disasters. Such changes/responses sometimes affect the business of the private party.

As we already elaborated mostly in Chapter 2 of the thesis, in the administrative contract (Public contract), states hold special functions that could not be found in private contracts; those special functions were justified in the eye of administrative law because those special functions were done for the purpose of public interest. In the administrative contract, the administration could terminate the contract unilaterally, alter/ modify the scope of the contract, or to put a penalty fine when the private party could not perform the tasks properly. Administrations buy products or services from private parties in order to serve a public interest (Ex. infrastructure projects, public transport, or licensing private parties to explore national resources). Mostly, administrations buy those products or services from private parties when they do not possess the capacity, knowledge, or know-how to execute those products or services by themselves. Many times, administrations do not really know what they must buy to serve public needs. In this connection, contracts need to be able to modify or terminated in the long run by the administrations, since those services from private parties might no longer serve the public interest properly.

The main issue that we are concern about is the area of risk sharing between the administrations and private parties. In jurisdictions where they embrace the idea of administrative law, the courts have wide powers to supervise the execution of public contracts. We do not totally against the use of arbitration in administrative disputes since we cannot totally reject the idea of arbitration. It would not be rational to simply denied arbitration since it has plenty of benefits

including the development of the economy when talking about international investment disputes. Thus, sometime arbitration could answer *de facto* question better than the court[931]. Yet, unlike arbitration, national courts are the best organs to decide to what extent risks should be shared in public-private arbitration. National courts shall consider all positions, both from the administration's side on the one hand, and also from the private parties on the other. The courts will take all circumstances into account, then strike a balance between the public interest, private interest, and liabilities of the parties. Therefore, fairness in public-private contract disputes could be achieved and balanced by them. On the contrary, it is not legally binding that arbitration must strike a balance between public interest and private interest, although most of the arbitration proceedings also analyze the issue of public-private interest. Yet, it does not seem to be sufficient for us[932]. Thus, the courts could not intervene with consideration or the answer to *de facto* questions of the arbitral tribunal because such interventions are limited by law.

This problem also enshrines in investment arbitration in the broader context. Apart from the issue that arbitral tribunals do not bind to strike a balance between public interest, private interest, and liability of both parties. The arbitral tribunal in investment arbitrations mainly focuses on considering whether host states did break the substantive protections under the investment agreements or not. For example, in *CMS v. Argentina*, Argentina claimed that emergency measures were taken in order to prevent economic collapse and social crisis. Thus, Argentina also argued that foreign investors could not ignore the public law of Argentina and all risks involved in investing in that country[933]. The arbitral tribunal in *CMS v. Argentina* did recognize the right of Argentina to regulate, yet the international obligation under Argentina-USA BIT (1991) had

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[931] In addition, the court could assist arbitration in many ways, including the interpretation of legal question, the preliminary order, or in the enforcement regime. See detail regarding role of Courts to arbitration in Chapter 4 and Chapter 5 of the thesis.

Thus, many might have seen that arbitration could serve as one of a good alternative dispute resolutions in administrative contract dispute. In other words, some might see that arbitration could work with administrative contract flawlessly. For example, in Portuguese public contract, private parties must accept the power of administrations in case it needed to terminate or modify public contract under public interest reason.

[932] In many international arbitral proceedings, the arbitral tribunal recognized that states have right to regulate in the exceptional circumstances in order to preserve the stability of the state itself, or to provide better public services to its people. Yet, they decided to award to the foreign investors since the substantive protections in the investment agreements have outweighed the public interest as claimed by the states. For example, See, Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, award of 22 May 2007. See also, Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, award of 27 September 2007. See also, Walter Bau AG (in liquidation) v. Kingdom of Thailand, UNCITRAL, award of 1 July 2009.

[933] CMS v. Argentina, the arbitral tribunal even referred and interpreted the Argentine constitution. See, CMS Gas Transmission Company v. The Republic of Argentina, award of 12 May 2005, ICSID Case No. ARB/01/8, para. 95.

outweighed in this case[934]. Therefore, Argentina's obligations under the investment treaty must be honored in the view of the arbitral tribunal.

As critics argue that there is only one-sided protection for investors and ask for very little obligations from them[935]. Investment arbitration limited the sovereignty of host states (Especially, developing countries that are the recipient of foreign direct investments). Thus, limited right to regulate of host states, although many times such regulations were enacted for the purpose of environmental concerns, economic development, human rights concerns, or public health[936]. Although it is no doubt that states have entered into investment agreements on their own will in order to attract foreign investments[937]. However, it is unarguable that those incentives came with the price that states must give up a huge amount of their sovereignty and chance to have the investment dispute to be determined properly in their domestic courts. In our view, the contribution from foreign investors to the host state's development is important. The investment arbitrations could potentially challenge those views in favor of investment protections under the substantive standards of investment agreements[938]. To us, the state should not be the sole responsible party for non-commercial risks caused by external factors beyond the control of the host state. Such risks should be properly shared, and the one who could best determine and balance those risks in the public-private contract is the national court.

In fact, foreign investors need to take responsibility for their business decisions. It does not persuade us why some foreign investors should have better protection than domestic individuals[939], considering the fact that those foreign investors have huge capital, knowledge, and

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934 CMS v. Argentina, the arbitral tribunal even referred and interpreted the Argentine constitution. See, CMS Gas Transmission Company v. The Republic of Argentina, award of 12 May 2005, ICSID Case No. ARB/01/8, para. 320.

935 BROWER, Charles N. &SCHILL, Stephan W., «Is Arbitration a… *id.*

936 SORNARAJAH, Muthucumaraswamy, The International Law… *id.* See also, SHEFFER, Megan Wells, «Bilateral Investment Treaties: A Friend or Foe to Human Rights», *Denver Journal of International Law &Policy* Vol. 39 No. 3 (2020), 483-521;

937 MYBURGH, Andrew &PANIAGUA, Jordi, «Does international commercial arbitration promote Foreign direct investment?», *The Journal of Law and Economic* Vol. 59 Issue 3 (2016), 597-627;

938 VIÑUALES, Jorge E., *Foreign Investment and the Environment in International Law*, 1st Edition, Cambridge University Press, Cambridge, 2012;

939 As Henry Strong expressed his opinion "…A citizen or subject of one nation who, in the pursuit of commercial enterprise, carries on trade within the territory and under the protection of the sovereignty of a nation other than his own, is to be considered as having cast in his lot with the subjects or citizens of the state in which he resides and carries on business. Whilst on the one hand he enjoys the protection of that state, so far as the police regulations and other advantages are concerned, on the other hand he becomes liable to the political vicissitudes of the country in which he thus has a commercial domicile in the same manner as the subjects or the citizens of that state are liable to the same…" See, Rosa Gelbtrunk and the "Salvador Commercial Company", et al. of 2 &8 May 1902, Opinion of Henry Strong;

The statement is simply that, once the alien voluntarily takes the risk of investing in a host state, he must bear the risk of potential injury to his investment and must be satisfied with the same standard of compensation as is given to the nationals of the state who suffer the same fate as he does. It is interesting to mention that the CALVO

experience. We believe that there are risks in every investment; there are more risks when investing in some countries than others. Thus, investing in developing countries might give more business advantages to foreign investors than investing in developed countries (For example, cheaper labor, abundant resources, and more favored regulations). Foreign investors should have the responsibility to know, and to plan for those risks. In fact, it is not so hard for the company to do so; especially, for the large multilateral firms that have long-time business experiences and resources. They could even buy insurance against non-commercial risks, where there are many companies that offer such a particular policy for it[940]. In addition, many foreign investors could also ask the government to put an arbitration clause in their investment contract. This is much easier for many big companies since the host state would be more than pleased to assert an arbitration clause in a high-value foreign contract. It would be more sensible and acceptable both to foreign investors and the state when entering arbitration by arbitration clause under the investment contract rather than the arbitration by the investment agreements.

doctrine also expressed a similar idea. See general discussions in 6.2 (Analysis on the Legal Problems on Inter-States Arbitration under the Investment Agreements).

[940] Those insurances policies are provided by several companies such as Lloyd of London in the United Kingdom; or American Insurance Group, Chubb & Sons, Insurance Companies of North America, and Sweet & Crawford in the United States.

6.2 Analysis of the Legal Problems in the Inter-States Arbitration under the Investment Agreements

6.2.1 Introduction: Foreign Direct Investment (FDI) and the Legitimacy Crisis of Investment Arbitration

Economic globalization brings more inter-connected to the world economy and cross-border businesses. Globalization increases economic independence between countries due to the dynamic of volume and variety of trade in goods and services, capital flow, and technology transfers[941]. Foreign Direct Investment (FDI) is one of the important engines to drive globalization[942]. FDI brings mutual benefits both to foreign investors and the countries that are the recipients of foreign direct investment. Foreign investors foresee business opportunities in foreign countries that might possess an abundance of resources, cheaper labor costs, lower rates of taxes, and lesser regulations than their home state. On the other side, the host state could expect benefits from job creation, technology transfer, and more revenue creation from those foreign direct investment activities[943]. FDI helps economic growth on a global scale, simply because more trade results in more prosperity. FDI also can provide financial stability, promote economic development, and enhance the well-being of societies[944]. The details of the benefits of FDI shall not be repeatedly analyzed here since we already did that throughout the thesis. Yet, we could leave a note here that it is generally accepted that FDI is considered as a "good thing".

Despite all the benefits that could be achieved from the FDI, there are also many disadvantages from it. FDI is of interest to all countries, whether developed, developing or in transition. Many developing countries seem to "Race-to-the-Bottom" by loosening their

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941 The European Commission defines economic globalization as a process by which markets and production in different countries become highly interdependent, due to the dynamics of trade in goods and services, capital flows and technology. See, EUROSTAT, *Globalisation patterns*… *id.*

Meanwhile, The International Monetary Fund (IMF) defines economic globalization as a historical process, the result of human innovation and technological progress. This refers to increasing economic interdependence between countries, as a result of increasing volume and variety of cross-border transactions of goods and services, the growth of international capital flows and the growing diffusion of technologies. See, <www.imf.org>.

942 UNCTAD reports concluded that FDI have become an important engine of economic growth because they grew faster than gross domestic product (GDP) and international trade and international corporate sales exceeded by far global exports. Also, FDI flows are higher in comparison to technological flows, expressed through license fees, royalties etc. See, United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2006: FDI from Developing and Transition Economies: Implications for Development, United Nations, available online at <www.unctad.org>.

943 There are also many side-benefits from foreign direct investment for host state. For example, the new-born restaurants beside the factory, laundry services, more facilities for foreigners which mean more spending, or the more need of private health care system. See, POHL, Joachim, «Societal benefits… *id.* See also, OECD, «Foreign Direct Investment… *id.*

944 OECD, *OECD Benchmark Definition of Foreign Direct Investment*, 4th Edition, OECD Publications, Available online at <www.oecd.ord/publishing>.

regulations and providing more incentive measures (For example, taxes incentive) in order to attract more foreign direct investment[945]; these situations are even tenser when many developing countries that heavily rely on FDI are located in the same area[946]. The presence of huge foreign firms might dominate the economy of the host state countries (Especially, in developing countries). Their presence, many times is criticized for the direct relevancy to the loss of the host state's economic sovereignty and the host state's rights to regulate[947]. Multilateral companies might drive out almost all the local competitors, in which the host state could be highly dependent on the multinational companies. In some cases, the decision by some multinational companies might affect severe damage to the host state's economy. There are concerns that the host state might have to respond to the need of multinational companies rather than its citizen[948].

Apart from criticism regarding to state's right to regulate, FDI is also being criticized for many other things. For example, FDI is being criticized for culture disruption. The fast-growing foreign investment might cause a disruption to the sensitive archaeological sites. For instance, the build of 5 stars hotel near the Giza Plateau in Egypt, in which the matter has brought to the International Centre for Settlement of Investment Disputes (ICSID Arbitration)[949], then the arbitral tribunal in this case made an award in favor of the foreign investor[950]. FDI is also being criticized for causing the growing of corruption[951], as corruption is also one of the frequent

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945 For example, Thailand offers tax holiday to foreign investors who shall invest in Eastern Economic Corridor. See, Eastern Special Development Zone Act B.E. 2561 (2018). See also, <https://www.eeco.or.th/en/incentives-schemes>.

946 SCHULTZ, Thomas &DUPONT, Cédric, «Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study», *The European Journal of International Law* Vol. 25 No. 4 (2014), 1147–1168. See also, SORNARAJAH, Muthucumaraswamy, «Developing Countries in the investment treaty system: A Law for Need or a Law for Need», Stephan W. SCHILL, Christian J. TAMS &Rainer HOFMANN (Eds.), *International Investment Law and Development: Bridging the Gap*, Edward Elgar, Cheltenham, 2015;

947 MISTURA, Fernando &ROULET, Caroline, «The determinants of Foreign Direct Investment: Do statutory restrictions matter?», OECD Working Papers on International Investment *2019/01* (2019), Available online at <www.oecd.org>.

948 COLLINS, David, An Introduction… *id.*

949 Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3 (20 May 1992).

950 *Ibidem.*

951 There are many investment arbitrations that corruption is one of the main defenses in the dispute. In the classic case of ICC Case No. 1110, Judge Gunnar Lagergren, the sole arbitrator of this case expressed that "…Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations." At the end, he declined his jurisdictions over the matter. See, ICC Award No. 1110 of 1963 by Gunnar Lagergren, YCA 1996, at 47 et seq.

Thus, there are also many other arbitral tribunals dealt with the question of corruption defences. For example, See, Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, award of 8 December 2000. See also, World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, award of 4 October 2006, para. 179 &188. It is interesting to mention that in World Duty Free Company v. Kenya, the arbitral tribunal ruled that bribery is constituted as a gross violation of good moral and international public policy, and then it results for a basis in declining to consider contractual claims based on corruption. See also, Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, award of 4 October 2013.

grounds that respondent state uses as a defense of public policy when foreign investors practice bribery to secure the public contract[952]. Foreign investors may have the incentive to bribe officials for the benefit of their business; meanwhile, those poorly paid officials may be tempted by the large sum of money paid by multinational companies. In addition, FDI has been criticized for the violation of human rights and labor rights. These criticisms observe that foreign investors tend to gain as much as possible from the host state with less care to share[953]. However, there are counter arguments from the supportive sites claiming that foreign investors tend to give a higher standard of protection to human rights and labor rights (also wages) than local investors[954]. Also, FDI is sometimes alleged to cause environmental damage to the host state. Since foreign investors do not care to put their best efforts into preventing environmental damages, but rather just do "enough" with the minimum cost to justify the legal standard required by the host state (Many times, those legal standards in developing countries are lower than the developed countries)[955]. Moreover, some economists criticized that FDI is slowing the growth of the host state's economy rather than contributing to its development, as foreign firms normally hire only low-skills labors. This claim is supported by the evidence that outflow by way of repatriation of profits by foreign firms is greater than the inflow. In some cases, we could see the repatriation twice as much as the initial inflow[956]. Thus, there is criticism that the presences of foreign firms decrease opportunities for locals to start a new business, since it is hard for locals to compete against foreign firms who have abundant capital[957].

The direct consequences of FDI lead to the creation of international investment agreements[958]. Those investment agreements concluded between the home state and host state have demonstrated a big problem; especially, the function of access to international arbitration by foreign investors whenever they feel that the host state break substantive protections in the

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952 HEPBURN, Jarrod, «In Accordance with Which Host State Laws? Restoring the 'Defense' of Investor Illegality in Investment Arbitration», *Journal of International Dispute Settlement* Vol. 5 Issue 3 (2014), 531–559; See also, HABAZIN, Margareta, «Investor Corruption as a Defence Strategy of Host States in International Investment Arbitration: Investors Corrupt Acts 'Give an Unfair Advantage to Host States in Investment Arbitration», *Cardozo Journal of Conflict Resolution* Vol. 18 Issue 3 (2017), 805-828; See also, *Ibidem.*

953 The prominent example is the collapse of Rana Plaza factory (Garment factory) building near Dhaka, Bangladesh. The factory was partially foreign-own. The collapse brought 1,021 death tolls. Later, there are alleged that the collapse was occurred by the negligence of the owners that try to cut their cost. See, <https://www.business-humanrights.org/en/the-rana-plaza-building-collapse-in-bangladesh-one-year-on>.

954 BROWN, Drusilla K., DEARDORFF, ALAN V. &STERN, Robert M., «The Effects of Multinational Production on Wages and Working Conditions in Developing Countries», National Bureau of Economic Research, NBER Working Paper Series No. 9669 (May 2003).

955 VIÑUALES, Jorge E., «International Investment… *id.*

956 SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

957 BEUGELSDIJK, Sjoerd, *International Economics and Business*, 2nd Edition, Cambridge University Press, Cambridge, 2013;

958 See details of international investment agreement on Chapter 3 of the thesis.

investment treaty in which the host state has concluded with their home state. Although, there is no concrete evidence to suggest that investment treaties shall lead to greater flows of foreign investment into states making them[959]. Yet, many developing countries have concluded and still concluding such agreements in order to give assurance to foreign investors and to attract their investments into the host state. Nowadays, there are around 3,000 investment agreements concluded worldwide[960].

Investment agreement: in particular, investment arbitration has a amount of literatures intimating that investment law may be in a veritable "legitimacy crisis"[961]. One of the most important reasons is that many bilateral or multilateral investment treaties confer upon arbitral tribunals the capacity to deem a state's regulatory action as inconsistent with the standards of treatment set out in the relevant treaty. In our opinion, investment arbitration also overlooked many core principles of administrative law since those international arbitral tribunals review the state's action in accordance with the special standards of protection under those investment agreements, but not in accordance with administrative law. Those substantive standards under investment agreements also consider vague and broad. The duty to interpret those substantive standards left with the international arbitral tribunals that constituted on a case-by-case basis, in which those diverse interpretations were criticized for their unpredictability and inconsistency. Those unpredictability and uncertainty of investment arbitration have led to the situation that many states are pulling out of the ICSID system[962], and many states are also threatening to

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959 Some studies pointed out that many countries, such as Ecuador, Bolivia, South Africa, Indonesia, and India, who are currently pulled out from investment agreements and investment arbitration. Despite the fact that it should create to less growing in volume of foreign direct investment, studies showed that the volume of foreign direct investments are rather growing up after the termination of investment treaties. In addition, the country like Brazil who never ratified ICSID, or any BITs is the biggest FDI import country in South America.

Thus, there are strong evidence that domestic institutional quality and other elements of the domestic investment climate have a significant independent positive impact on inward FDI. Some foreign investors seem to outweigh business opportunities rather than consider whether their home state had concluded investment agreement with home state or not. See, SORNARAJAH, Muthucumaraswamy, Resistance and Change… *id.* See also, HALLWARD-DRIEMEIER, Mary, «Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit... and They Could Bite», Karl P. SAUVANT &Lisa E. SACHS (Eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, Oxford University Press, Oxford, 2009; See also, BONNITCHA, Jonathan, «Assessing the Impacts of Investment Treaties: Overview of the evidence», IIS Report, International Institute for Sustainable Development, 2017.

960 See statistic, available online at <www.investmentpolicy.unctad.org/>.

961 BROWER, Charles N. &SCHILL, Stephan W., «Is Arbitration a… *id.*

962 According to the ICSID Convention, state party could withdraw from it. The denunciation shall take effect six months after receipt of notification. See, Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Section 71.

Bolivia is the first country in the history to withdraw from ICSID Convention, in which the denunciation notified in May 2007 and effective November 2007. Following Bolivia withdrawal, Ecuador and Venezuela soon followed (Ecuador denunciation notified in July 2009, effective January 2010. Meanwhile, Venezuela officially announced its withdrawal in late January 2012 which became effective in July 2012). See, VINCENTELLI, Ignacio A., «The Uncertain Future of ICSID in Latin America», *Law and Business Review of the Americas* Vol. 16 Issue 3 (2010),

terminate investment agreements, thus; some states are currently on their way to terminating those investment agreements[963]. Many other states are taking a different approach by concluding or replacing those investment agreements that fix the weaknesses of the old investment agreement's model and seek the balance between investment protection and the host state's right to regulate (For example, the EU investment treaty model, Canada treaty model, US treaty Model, ASEAN treaty model, or Thailand treaty model)[964].

In order to truly understand those problems, this part shall analyze the particular issues that arise from the investor-state dispute settlement clause by investment agreements.

6.2.2 Issue on the Limitation of Host State Policy Space

One of the central issues raised by investor-state dispute settlement (ISDS) under the investment agreements is that those ISDS provisions interfere and undermine the host state's right to regulate[965]. The term "right to regulate" refer to the power of the sovereign state to adopt and maintain government measures or policy through its legislative, administrative, and judicial bodies,

409-456; See also, online article by BOEGLIN, Nicolas on the topic of "ICSID and Latin America: Criticisms, withdrawals and regional alternatives", available online at <www.bilaterals.org>. See also, RIVERA, José Carlos Bernal &AZUGA, Mauricio Viscarra, «Life after ICSID: 10th anniversary of Bolivia's withdrawal from ICSID», Kluwer Arbitration Blog (2017), available online at <http://arbitrationblog.kluwerarbitration.com/>.

963 For example, the European Union already agreed to terminate intra-EU BITs. See, Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union of 5 May 2020, SN/4656/2019/INIT. On the other hand, the European Union also replace an old model of investment agreements by conclude new investment agreements at the EU level in order to overcome weaknesses of the old model of investment agreements. See, The Comprehensive Economic and Trade Agreement (CETA).

Many other countries also terminated their investment agreements. For example, Ecuador started to terminate BIT since 2008. Until now, Ecuador is the fifth country who terminate all of BITs. Also, South Africa started to terminate all of their BITs since 2010. Thus, Indonesia announced plans to terminate all 67 of its bilateral investment treaties in 2014. Interestingly, foreign investment inflows in those countries are either stable or increase after the termination of those BITs. See, <www.investmentpolicy.unctad.org>. See the statistics at <unctadstat.unctad.org>. See also, Public Citizen Research Brief, «Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows», available online at <www.citizen.org>.

All of views from representative from abovementioned states share the same view that BITs are not reflect any increasing of foreign direct investment. Thus, the use of the investor-state investment dispute resolution under the BITs create threat to public interest since a group of private arbitrators might not well-balance the commercial interest and public interest. See, CARIM, Xavier, «International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa», *Investment Policy Brief* No.4 (2015), available online at <www.southcentre.int>. See also, OLIVET, Cecilia, «Why did Ecuador Terminate all its Bilateral Investment Treaties?», available online at <tni.org>.

964 See detail in Chapter 4 and Chapter 5 of the thesis.

965 GWYNN, Maria A., «Balancing the State's Right to Regulate with Foreign Investment Protection: A Perspective Considering Investment Disputes in the South American Region», *Groningen Journal of International Law* Vol. 6 Issue 1, 110-127; See also, OECD, «"Indirect Expropriation"… *id.*

for the purpose of public welfare[966]. The ability of a state to regulate within its own borders is a core feature of the sovereign state. Normally, states are entitled to control the use of property in accordance with the general interest[967]. In general, any interference by a public authority with the peaceful enjoyment of possessions must respect the principle of lawfulness[968]. Those interferences must be done in accordance with a legitimate aim in the public interest[969]. Most importantly, a fair balance must be achieved in that interference, in which the state's wide margin of appreciation must not be disproportionate by exceeding the individual's burden that it has to bear[970]. States are free to adopt, maintain, and enforce the measures necessary for the advancement of their public policy goals for various purposes, such as, economic stability, public health, environment protection, national security, preservation of cultural heritage, etc.

The presence and the broad term of substantive protections under investment agreements create an uncomfortable situation for the state to exercise its police power by issuing laws, executive orders, policies, court interpretations, or regulations, for the purpose of achieving public

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966 GAUKRODGER, David, *The balance between investor protection and the right to regulate in investment treaties: A scoping paper*, OECD Working Papers on International Investment 2017/02, OECD Publishing, available online at <www.oecd-ilibrary.org>.

967 Broniowski v. Poland, European Court of Human Rights, Grand Chamber Judgement of 22 June 2004 (Application No.31443/96), para. 134. See also, Sargsyan v. Azerbaijan, European Court of Human Rights, Grand Chamber Judgement of 16 June 2015 (Application No. 40167/ 06), para. 217.

The concept of "possession" has an autonomous meaning which is not limited to the ownership of material goods and is independent from the formal classification in domestic law. Apart from material goods, any other rights and interest could constitute as the "property right". See, Parrillo v. Italy, European Court of Human Rights, Grand Chamber Judgement of 27 August 2015 (Application No. 46470/11), para. 211.

968 The principle of lawfulness is an important requirement for state to interfere with the individual's property. Such interference must subject to the conditions provided for by law. It is important that those laws must have certain quality *per se* follow the ideal of "rule of law" as one of the fundamental principles of a democratic society, since the existence of a legal basis in domestic law is not sufficient. Those laws in relation to expropriation must possess with *inter alia* adequate level of certainty, sufficiently accessible, precise, foreseeable, non-arbitrariness, and non-discriminate basis. See, The Former King of Greece and others v. Greece, European Court of Human Rights, Grand Chamber Judgement of 23 November 2000 (Application No. 25701/94), para. 79. See also, Vistiņš and Perepjolkins v. Latvia, European Court of Human Rights, Grand Chamber Judgement of 25 October 2012 (Application No. 71243/01), para. 96. See also, Molla sali v. Greece, European Court of Human Rights, Grand Chamber Judgement of 19 December 2018 (Application No. 20452/14), para. 153. See also, Beyeler v. Italy, European Court of Human Rights, Grand Chamber Judgement of 5 January 2000 (Application No. 33202/96), para. 109. See also, Centro Europa 7 S.R.L. and Di Stefano v. Italy, European Court of Human Rights, Grand Chamber Judgement of 7 June 2012 (Application No. 38433/09), para. 141 &142.

969 The interference of property right must be done for the purpose of public interest. In the system where the international institution has jurisdiction to rule over national courts; normally, the international institutions recognize the wide margin of appreciation of the domestic authorities, since they have a better, if not best angle of view. The decision on what is "public interest" mostly laid down with the national authorities. Unless such judgment is manifestly without reasonable foundation. See, The Former King of Greece and others v. Greece, European Court of Human Rights, Grand Chamber Judgement of 23 November 2000 (Application No. 25701/94), para. 87. See also, Lekić v. Slovenia, European Court of Human Rights, Grand Chamber Judgement of 11 December 2018 (Application No. 36480/07), para. 105.

970 Béláné Nagy v. Hungary, European Court of Human Rights, Grand Chamber Judgement of 13 December 2016 (Application No. 53080/13), para. 126. See also, Kjartan Ásmundsson v. Iceland, European Court of Human Rights, Judgement of 12 October 2004 (Application No. 60669/00), para. 43.

policy objectives. There are many big ISDS cases that represent the tension between the investment agreement and the host state's right to regulate. Among others, there is a case like Australia and Uruguay, where Uruguay must fight against a big company such as Philip Morris International, Inc. on plain-packaging legislation which was enacted for the purpose of protection of public health[971], or there is a case like Argentina who has faced many international arbitral proceedings for its measure to overcome the economic crisis in early 2000, which led to a substantial damages claim by foreign investors[972]. Various authors have expressed their concern that the presence of the ISDS regime might lead to the situation of regulatory chill[973], in which it refers to a situation where governments are reluctant to enact or enforce the legitimate regulatory measure due to concerns regarding to potential liability against themselves from ISDS arbitration. Besides, although in some cases, the state's actions seem to justify the criteria for interfering with the peaceful enjoyment of possession, yet some of the arbitral tribunals still ruled states liable due to a unique interpretation of the substantive standards of protection under investment agreements.

There are two sides of opinions among scholars; either criticize the existence of ISDS provisions, or supporters who favor such existence. The critic claim that investment arbitration creates a huge impact on to host state's right to regulate. As ISDS regime allows foreign investors to challenge and interfere with the state's ability to regulate for the benefit of the public at large[974].

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971 Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, award on Jurisdiction and Admissibility of 17 December 2015. See also, Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), award of 8 July 2016.

972 There are waves of arbitration proceeding under investment agreements by foreign investors against Argentina during early 2000. Those claims came from Argentina's measures to survive its financial crisis. The damage claimed by foreign investors is substantial in the amount equal to Argentina's annual budget. There are many substantial arbitral awards against Argentina *inter alia* in CMS Gas Transmission Company v. The Argentine Republic (ICSID Case No. ARB/01/8), arbitral tribunal issued an arbitral award in the amount of 133.2 million USD against Argentina. In Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), arbitral tribunal issued an arbitral award in the amount of 128 million USD against Argentina. In BG Group Plc v. The Republic of Argentina (UNCITRAL Arbitration Rules), in which arbitral tribunal issued an arbitral award in the amount of 185.2 million USD against Argentina. All of those awards are without the calculation of legal costs and interests. See, SALACUSE, Jeswald W., *The Law of Investment Treaties*, 2nd Edition, Oxford University Press, Oxford, 2015. See also, DI ROSA, Paolo, «The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues», *The University of Miami Inter-American Law Review* Vol. 36 No. 1 (2004), 41-74; See the statistics and full arbitral awards at <www.investmentpolicy.unctad.org>.

973 GWYNN, Maria A., «Balancing the State's… *id.* See also, OECD, «"Indirect Expropriation"… *id.*

974 VAN HARTEN, Gus &LOUGHLIN, Martin, «Investment Treaty Arbitration as a Species of Global Administrative Law», *The European Journal of International Law* Vol. 17 No.1 (2006), 121-150;

There are tensions between ISDS regime and state right to regulate among legal scholars. Robert S. French expressed that "the significance of ISDS arbitral processes is global. They have general implications for national sovereignty, democratic governance and the rule of law within domestic legal systems. Their long-term consequences for national judiciaries cannot be stated with confidence". See, Chief Justice FRENCH, Robert S.'s speech at the Supreme and Federal Courts Judges' Conference on 9 July 2014, on the topic of "Investor-State Dispute Settlement— A Cut Above the Courts?", available online at <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf >. Chief Justice Robert also expressed a similar view in his dissenting opinion on BG Group Plc. v. The Republic of Argentina, UNCITRAL, Dissenting opinion of Chief Justice Roberts and

Some criticize that the ISDS regime transfers the power from public authorities to an arbitration body, where the private arbitrators are able to rule whether a country can enact laws or not, how those laws should be interpreted, or even how government should govern or issue the order. The wide range of power of private arbitrators comes with a lack of transparency, consistency, and overall legitimacy in the ISDS process, where private arbitrators are called upon to decide multi-million dollar claims against sovereign states on their regulatory power[975]. Others also pointed out that the ISDS process has already transformed from its original purpose of protecting property rights into a weapon to fight regulation[976]. In other words, the IIAs usually describe as one-sided. They offer rights and remedies to foreign investors but not to the host state. States pay a heavy price since IIAs only impose a duty to the host state but not to foreign investors[977]. As a result, many countries are either walked away from the ISDS system, revised their investment policy, or improved their investment treaty model because they are aware that investment arbitration poses unacceptably high risks to the government's right to regulate in the public interest[978].

We also doubt that, to what extent foreign investors should contribute to the host state's development. The term "economic development" is usually stated in investment agreements as its main objective[979]; states surrender part of their sovereignty for the investment inflow in order to get economic development[980]. The issue of foreign investors' share responsibility to host states' development has been in discussions for a while[981]. To us, investment arbitration seems to overlook host state economic development and asks for very little responsible from foreign investors. One of the best examples is Argentina's government actions/regulations in order to survive from its economic crisis in early 2000; most of the arbitral tribunals solely focus on the

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Justice Kennedy on 5 March 2014 stated that "Substantively, by acquiescing to arbitration, a state permits private adjudicators to review its public policies and effectively annul the authoritative acts of its legislature, executive, and judiciary".

975 *Ibidem.*

976 <https://www.project-syndicate.org/commentary/us-secret-corporate-takeover-by-joseph-e--stiglitz-2015-05?barrier=accesspaylog>

977 SCHREUER, Christoph H., «Investment Protection: Original Purpose and Features», Crina BALTAG &Ana STANIČ (Eds.), *The Future of Investment Treaty Arbitration in the Eu: Substance*, Process and Policy, Kluwer Law International B.V., Alphen Aan Den Rijn, 1st Edition, 2020;

978 CARIM, Xavier, «International Investment… *id.*

979 For example, See, Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments of 1994. See also, The Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part and the Republic of Armenia, of the other part of 2017.

980 DOLZER, Rudolf, «The Impact of International Investment Treaties on Domestic Administrative Law», *New York University Journal of International Law and Politics* Vol. 37 Issue 4 (2005), 953-972;

981 Doha WTO Ministerial 2001: Ministerial Declaration (WT/MIN(01)/DEC/1), adopted on 14 November 2001, para. 22. See also, BROWER, Charles N. &SCHILL, Stephan W., «Is Arbitration a… *id.* See also, VAN HARTEN, Gus, Investment Treaty Arbitration… *id.*

fact that Argentina's regulatory actions have breached the investment treaties; however, those arbitral tribunals failed to take into account situations of massive economic downturn. This situation might have a different outcome in administrative litigation, where the court shall properly strike a balance and consider risk sharing between a foreign investor and public interest.

On the contrary, the supporter defends that the government's right to regulate is not actually at risk under the current regime. They pointed out that the ISDS function protected eligible investors from the host state government's misrule or discriminate regulations; thus, ISDS could affect a positive impact on the quality of regulation and the rule of law[982]. Supporters claimed that the critics are rather exaggerated and the reforms are risk destroying for all states the availability of a credible commitment to neutral dispute resolution by permitting states to interfere politically with the arbitration process[983]. Business groups also propose that existing treaties already achieve the proper balance between the right of States to regulate and the rights of investors to protection under international law. Looking from another angle, states also voluntarily to enter those investment agreements, since they want to attract foreign direct investments. Some claim that the ability to submit a claim directly to investor-state arbitration under an investment treaty remains an important factor for private investors seeking to invest abroad[984]. Above all, the strongest defense from the supporter side is that the state's regulatory autonomy is not affected by investment agreements at all. The right to regulate is still remains with the state. Those rights have never been taken away since the government still be able to regulate subjecting to the duty to pay to the awards made by arbitrators. Arbitrators could only decide the dispute before them, but not override policy decisions (In dispute) from the government[985].

Either critics or supporters of the existence of investment arbitration, without any doubt, there are sensitive issues of sovereignty here. Regulatory disputes represent a major challenge for ISDS. In our view, the existence of the current ISDS regime undermines the state's right to regulate for the public interest. Investment agreements have been used in ways that were not intended by the host state when they concluded such agreements[986]. In particular, in the way that those treaties restricted a state's freedom to regulate. Take the plain packaging dispute that we mentioned earlier

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982 BROWER, Charles N. &BLANCHARD, Sadie, «What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States», *Columbia Journal of Transnational Law* Vol. 52 Issue 3 (2014), 689-777;

983 *Ibidem.*

984 BROMUND, Ted, ROBERTS, James M. &DASGUPTA, Riddhi, «The Proposed Investor-State Dispute Settlement (ISDS) Mechanism: U.S. Should Oppose EU Demand to Abandon It», available online at <www.heritage.org>.

985 BROWER, Charles N. &BLANCHARD, Sadie, «What's in… *id.*

986 GWYNN, Maria A., «Balancing the State's… *id.*

for example; Uruguay was regulating on the health warning in every pack of cigarettes. However, because Uruguay has concluded BIT with Switzerland where it is the home state of the foreign investor. Uruguay has faced arbitration claims for protecting the health of its citizens[987], while the home state as Switzerland also introduced a similar health warning on tobacco products in order to protect the health of its citizen in the same way as Uruguay[988]. Apart from the plain packaging case, there are also many cases in the same manner, where states were sued regarding regulatory change for public welfare purposes[989]. In addition to our observation that investment agreements are not being used for their original purpose as the instrument to protect property right into the tools to fight regulation, investment agreements do not seem to serve another of their original purpose, which is to attract foreign investments. As the supporter claim that investment agreements are an important tool to promote investment abroad, we totally object to this view because the statistics have shown that all countries who terminate their BITs tend to attract more foreign direct investment[990]. Thus, a country like Brazil which never ratified ICSID, or BITs is the country that received the most value of foreign direct investment inflows in the South America region[991]. The fact that many states terminated their investment agreements and resulted in more value of FDI inflows than the time that they still have investment agreements suggest that investors tend to pay attention to business opportunity rather than considering whether the host state has concluded BIT with their home state or not. We believe that foreign investors are willing to overlook the weaknesses of the rule of law in the host state, if the business opportunities are greater.

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987 Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), award of 8 July 2016.

988 Ordinance of the FDHA on Combined Warnings on Tobacco Products of 10 December 2007.

989 For example, See, Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12. See also Kingsgate Consolidated Ltd v. The Kingdom of Thailand, UNCITRAL. See also, Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, award of 5 October 2012. See also, Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, award on Jurisdiction and Admissibility of 17 December 2015. See also, Jin Hae Seo v. Republic of Korea, HKIAC Case No. HKIAC/18117, Final Award of 27 September 2019.

990 Some studies pointed out that many countries, such as Ecuador, Bolivia, South Africa, Indonesia, and India, who's currently pulled out from investment agreements and investment arbitration. Despite the fact that it should create to less growing in volume of foreign direct investment, studies showed that the volume of foreign direct investments are rather growing up after the termination of investment treaties. In addition, the country like Brazil who never ratified ICSID, or any BITs is the biggest FDI import country in South America.

Thus, there are strong evidence that domestic institutional quality and other elements of the domestic investment climate have a significant independent positive impact on inward FDI. Some foreign investors seem to outweigh business opportunities rather than consider whether their home state had concluded investment agreement with home state or not. See, SORNARAJAH, Muthucumaraswamy, Resistance and Change… *id.* See also, HALLWARD-DRIEMEIER, Mary, «Do Bilateral Investment… *id.* See also, BONNITCHA, Jonathan, «Assessing the Impacts… *id.*

991 See statistics available online at, <www.investmentpolicy.unctad.org>.

Although many arbitral tribunals acknowledge a high level of deference to the state's right to regulate[992], yet state's right to regulate without compensation is far from absolute in investment arbitration. For example, in CMS v Argentina, the arbitral tribunal also expressed that it recognized Argentina's right to regulate in order to survive its financial crisis. However, the arbitral tribunal in CMS ruled that Argentina's international obligation must be respected, then award the damage to the foreign investor. It is clear to us that the ISDS regime undermines the state's right to regulate. Thus, the defense that states still can regulate, but they have to pay the compensation if they lose in international arbitration is very unconvincing. The big problem here is not just the state to pay the compensation, but the problem is states have to pay for the legitimate law or policy in order to protect public welfare. There is no requirement that the arbitral tribunal must take the consideration about foreign investors' responsibility and risk-sharing with the host state. ISDS system only imposes substantive obligations on the host state, without matching the investor's rights to the investor's obligation. Furthermore, the important doctrine of administrative law as the principle of proportionality is also overlooked in the current regime. Although the concept of proportionality is widely used both in the domestic law system and at the EU level[993], the concept

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992 Mesa Power Grp., LLC v. Government of Canada, NAFTA (UNCITRAL Rules), PCA Case No. 2012-17, Award of 24 March 2016. See also, S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award of 13 November 2000.

993 Proportionality analysis is a method of legal interpretation and decision-making when they are collisions or conflicts between parties, laws, or even government execution of policy. The characteristic of concept is to allow "more or less" basis, rather than "all or nothing fashion". In a domestic law context, principle of proportionality is one of the important methods that define the relationship p between the state and its citizens or other legal persons. It is considered as one of the tools to limit regulatory freedom of governments. As the measure must be suitable, necessity, and proportion to achieve the public welfare objective. See, DWORKIN, Ronald, *Taking Rights Seriously: With a New Appendix, a Response to Critics*, 5th Edition, Harvard University Press, Harvard, 1978;

Proportionality balancing is a concept stemming from German administrative and constitutional law. The German Constitutional Court (Bundesverfassungsgericht) apply the doctrine for the first time in *Apothekenurteil* case, where the court weight two conflict interests between free choice of a profession and public interest. See, BVerfG 7, 377 Apotheken, decision of 11 June 1958. See also, <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=657>.

Thailand also embraces the principle of proportionality both in a method of function of government or as a weighing factor for the Thai Administrative Court. See, the Constitution of the Kingdom of Thailand B.E. 2560 (2017) Section 26 &Section 77. See also, SINGHANETI, Bunjerd, *Principles of Rights and Human Dignity*, 3rd Edition, Winyuchon Publishing, Bangkok, 2009; See also, Supreme Administrative Court Judgment no. 162/2555 (2012). See also, Supreme Administrative Court Judgment no. 478/2555 (2012).

At the European Union level, the proportionality doctrine is frequently used to balance the Community's fundamental freedoms, such as, the free movement of goods, services, labour, and capital on one hand, and the legitimate interest of the Member States on the other. For example, See, Judgment of the Court of 20 February 1979 on Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, Reference for a preliminary ruling: Hessisches Finanzgericht - Germany. - Measures heaving an effect equivalent to quantitative restrictions. - Case 120/78. See also, Judgment of the Court of First Instance (Third Chamber) of 11 September 2002 on Pfizer Animal Health SA v Council of the European Union - Case T-13/99.

The concept of proportionality plays a similar role in resolving conflicts in the relations between equal sovereigns. For example, in case of Case Concerning the Dispute Regarding Navigational Rights between Costa Rica and Nicaragua, where the court use principle of proportionality to balance Nicaragua's right to regulate and right to free navigation granted by the treaty. See, Case Concerning the Dispute Regarding Navigational Rights (Costa Rica v Nicaragua) Judgment, 13 July 2009, para. 87;

is inadequately applied in investment arbitration and also in the interpretation of substantive protection under investment agreements[994], where the interests of foreign investors are in conflict with the state's regulatory activity. We are strongly agreeing that bringing proportionality doctrine to the ISDS regime would enhance its legitimacy, predictability, and coherence of the system[995].

Most investment agreements, especially the old versions between 1990 to the beginning of 2000, do not explicitly list conditions under which situations/areas that the host state can restrict investor's rights[996]. The concept of public interest is relatively new to investment agreements[997]. Scholars have noted that earlier investor protection treaties and other legal instruments did not contain references to the public interest.

Many states and international organizations realize the weaknesses of lacking such an exception list. In consequence, they sought to improve the model of investment agreements that aim to balance investment protection and preserve the state's regulatory power[998]. Many states are increasingly incorporating into their newly concluded investment agreements' text refer to the right to regulate to achieve legitimate policy objectives, as a rationale for various exceptions and exclusions. For example, the EU-Canada Comprehensive Economic Trade Agreement (CETA) has explicitly established the state's right to regulate in the areas of public health, safety, the environment, public morals, social or consumer protection, or the promotion and protection of

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994 KINGBURY, Benedict &SCHILL, Stephan W., «Public Law Concept to Balance Investor's right with State Regulatory Actions in the Public Interest-The Concept of Proportionality», Stephan W. SCHILL (Ed.), *International Investment Law and Comparative Public Law*, 1st Edition, Oxford University Press, Oxford, 2010;

995 *Ibidem.*

996 Restrictions and exceptions for protection under the treaties usually found in international agreements. For example, Article 20 of the Universal Declaration of Human Rights (UDHR) stated that

"(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.".

However, in the investment agreements which mostly concluded before the 2010 do not have such exception for protection in certain areas of investments or government regulatory activity area. For example, Agreement between the Portuguese Republic and the Republic of the Philippine on the Promotion and Protection of Investments (2003). See also, Agreement between the Swiss Confederation and the Republic of Mozambique on the Promotion and Reciprocal Protection of Investments (2002). See also, Agreement between the Thailand Trade and Economic Office in Taipei and the Taipei Economic and Trade Office in Thailand for the Promotion and Protection of Investments (1996).

997 The concept of public interest is relatively new for IIAs. Scholars have noted that earlier investor protection treaties and other legal instruments did not contain references to the public interest. See, DONALDSON, Megan & KINGSBURY, Benedict, «Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation», *Chicago Journal of International Law* Vol. 14 No. 1 (2013), 1-51, Available online at <www.chicagounbound.uchicago.edu>.

998 In general, See, KORZUN, Vera, «The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs», *Vanderbilt Journal of Transnational Law* Vol. 50 Issue 2 (2017), 355-414;

cultural diversity[999]. CETA further concluded that the expropriation or non-discriminatory measure for legitimate purposes excluded foreign investors from investment protection[1000]. The new trend of newly concluded investment agreements usually refers to and preserves the state's right to regulate at a certain level[1001]. These innovative provisions give an arbitral tribunal a legal avenue to consider and weigh a state's regulatory interests against the rights of foreign investors.

However, those innovative clauses are at risk of getting evaded by multilateral companies. Since those big companies might set up branches in capital export countries (Ex. Germany, the UK, the Netherlands, or the USA), which usually have a "gold standard" of investment protection because they have more bargaining power toward developing countries, those multilateral companies could be able to shop from varies of BITs that they have in hand (Treaty shopping), and then choose the treaty that weight to investment protection more than state right to regulate. Sometimes, those "mailbox" company had engaged fewer businesses in the developed country than the business in the developing country where the mother company is operating. Yet, those multilateral companies are eligible to use the better agreement against developing countries and secure a better chance of winning in international arbitration[1002].

In sum, we strongly believe that the current ISDS regime undermines the state's right to regulate. The ISDS transfers power from public authorities to the arbitrators, who have vast power to rule whether how the state should regulate. It concerns us when the decision by the group of arbitrators could condemn a decision from the national government, judicial branch, or elected government. Thus, such power comes with a lack of transparency, consistency, and overall legitimacy in the process. Many states and international organizations are also aware of such problems and encounter the problem by concluding more innovative agreements which tend to balance investor protection and the state's right to regulate. Those narrower definitions of the right to regulate and clearer substantive protections would strengthen the ISDS system. Yet, such

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[999] Comprehensive Economic and Trade Agreement (CETA) Article 8.9(1).

[1000] Comprehensive Economic and Trade Agreement (CETA) Annex 8-A.

[1001] For example, the Trans-Pacific Partnership Agreement (TPP) Article 9.16 stated that "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives". See also, EU-Vietnam Free Trade Agreement (EVFTA).

In addition, these same exclusion protection on the right to regulate also recommended to be included in the investment chapter of the Transatlantic Trade and Investment Partnership (TTIP) under negotiation between the US and the EU. Although, the negotiation of the agreement between EU and the USA was ended without any conclusion. See, <ec.europa.eu>. See also, A Council Decision no.6052/19 of 15 April 2019.

[1002] For general discussion, See, DE SWART, Fai, «The Use of Mailbox Companies in International Investment Protection», *European Company Law* Vol. 12 Issue. 1 (2015), 19-25; See also, VAN OS, Roos &KNOTTNERUS, Roeline, «The Netherlands: A Gateway to 'Treaty Shopping' for Investment Protection», SOMO Publishing, electronic copy available online at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974431>.

responses are still in an early phase; thus, the majority of investment agreements are still in the old model, where they focus on the protection of foreign investment more than balancing public interest and such protection[1003]. We also concern that the administrative law doctrine is not sufficiently recognized in the current ISDS regime. Although it is a matter of foreign investment; yet, the enforcement stage usually requires the jurisdiction of a domestic administrative court, and the payment of such award always come directly from the state's budget. Bringing administrative law doctrine into the ISDS regime would relieve situations where both states and investors are unclear about the outcome of a dispute. It will enhance the predictability, consistency, transparency, and overall legitimacy of the system. We are sure that the recipient states would come to the perspective that they are more comfortable and give more compliance with the ISDS system and the awards from international arbitrators. To a great extent, a long debate has to be struck on whether investment arbitration promotes and protect foreign investment as supporter claim. Or do they just give a special right to foreign investors and undermine the state's right to regulate as critics claim. To us, it appeared to be the latter than the former.

6.2.3 Issue on Broad Interpretation of Substantive Protections under Investment Agreements

One of the central issues which are close to the issue of the state's right to regulate is the broad and uncertain interpretation of substantive standards under the investment agreements. Investment agreements offer a broad scope of investment protections[1004]. In practice, arbitrators make the decision based on the substantive standards in the treaties, in which those standards by the investment treaties are independent from national legal order and they are not limited to restricting bad faith conduct of host states[1005]. The state could be found liable if they break substantive protections under investment agreements, although such actions from the state were done for the purpose of public interest (For example, to protect environmental, social unrest, or protect economic stability). The wording of investment protection clauses is minimalist, vague, and mostly broadly drafted[1006]. They lack specific meaning and are left to the expansive interpretation of arbitral tribunal. There is no binding interpretation tool, or any respect of the precedents of previous arbitral decisions before them. The interpretations of those protections by

[1003] SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

[1004] REINISCH, August, «The Division… *id.*

[1005] BROWER, Charles N. &SCHILL, Stephan W., «Is Arbitration… *id.*

[1006] United Nations Conference on Trade and Development (UNCTAD), Fair and Equitable… *id.*

the arbitral tribunal are being made on a one-case-of basis or on each arbitral tribunal's standing point of view.

We are not going to examine the issue of the broad interpretation of every substantive protection under the investment agreements since it would need the whole new Chapter to do so. Among many other standards of protection under the investment agreements that are also being criticized for their broad interpretation[1007], fair and equitable treatment (FET) is the standard of protection that is being criticized the most for its broad interpretation[1008]. Therefore, we would like to examine the broad interpretation, specifically of the FET standard.

The term fair and equitable treatment (FET) merely expresses that States shall accord fair and equitable treatment, then leaving the specific implications of such treatment for arbitral tribunals to interpret[1009]. The term is vague, uncertain, and broadly drafted. There are different formulations of the FET standard in different investment agreements[1010]. Thus, there are many

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[1007] Many standards of protections apart of fair and equitable treatment (FET) are also being criticized for its broad interpretation by arbitral tribunal. Those protection, such as, protection against indirect expropriation, National Treatment (NT), Most Favored Nation Treatment (MFN). There is example like the case of MFN clause, in which it allows foreign investors to benefit from other treaties that the host state concluded with another state, other than their home state. These situations constrain the host's state policy space, since it might have to give protection to the foreign investors, in which it is kind of protection that state does not want to give them in the first place. The central of debate is whether the MFN clause is extended to better dispute settlement provision in the other investment treaties that host state concluded with other state or not. Some arbitral tribunals are already confirmed that MFN is extended to dispute settlement provision. This creates the situation called "Forum shopping" or "Free ride", in which the MFN provision allow foreign investors to reorganize and establish in a jurisdiction with a more beneficial investor protection regime. Then, create potential difficulties for state's right to regulate for legitimate purposes. See detail discussion in Chapter 3 of the thesis. See also, Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 of 13 November 2000. See also, National Grid plc v. The Argentine Republic, UNCITRAL Decision on Jurisdiction of 20 June 2006.

[1008] For the general idea of fair and equitable treatment, see chapter 3 of the thesis.

[1009] TUDOR, Ioana, *The Fair and Equitable Treatment Standard in International Foreign Investment Law*, 1st Edition, Oxford University Press, Oxford, 2008;

[1010] According to the United Nations Conference on Trade and Development (UNCTAD), there are 5 main approach of FET standards, which are;

(1) There might be no FET standard in IIAs at all.

(2) FET standard standalone without any reference to international law. Mostly appear in old model of the BITs. This simply mean that states are obliged to FET standard. For example, See, Article 3 of the Belgium-Luxembourg Economic Union-Tajikistan Bilateral Investment Treaty of 2009.

(3) FET link to the international law. In which it will ensure that arbitral tribunal shall interpret FET standard according to principles of international law, including, but not limited to, customary international law. For example, See, Article 2(3) of Bahrain - United States of America Bilateral Investment Treaty of 1999. See also, Article 3(2) of the Agreement between the Government of the Republic of Croatia and the Government of the Sultanate of Oman on the Promotion and Reciprocal Protection of Investments.

(4) FET linked to the minimum standard of treatment of aliens under customary international law. Which have been concluded by many modern IIAs these days. See, Article 1105 of the North America Free Trade Agreement (NAFTA).

(5) FET with link to other substantives protection (Ex. denial of justice, unreasonable/discriminatory measures, breach of other treaty obligations, or accounting for the level of development). The reason beyond this language of FET is to enhance the predictability of the interpretation by arbitral tribunal. For example, See, Article 11 of the

ways that arbitral tribunals interpret the FET standard[1011]. Those wide ranges of interpretations lead to controversy in the ISDS regime[1012]. This situation concerns us, in particular that the application of the standard could potentially overreach its application. In addition, those uncertainties also affect the host state's right to regulate for legitimate purposes. The problem could even more controversial for those developing countries that have concluded many versions of FET formulations/languages; as a result, states could never know to what extent that their legitimate regulatory actions might be breached the substantive standards under investment agreements.

In a similar manner to every other substantive provision, there is neither a binding guideline nor a system of precedent to help interpret the FET standard. The vague and broad draft of the term results in inconsistent decisions, even for disputes on a similar background[1013]. The term FET is quite an autonomy in itself. In addition, the duty to interpret the term only depends on each arbitral tribunal that constitutes on a case-by-case basis[1014]. Among other varieties of specific requirements under FET obligation[1015], the sub-principle of FET so called "investor's legitimate expectation", seems to have a high impact on the state's right to regulate, and then create uncertainty regarding the interpretation of the term[1016]. The legitimate expectation is the most sub-principle of FET that arbitral tribunals usually bring up in order to determine whether the host state breaches the FET protection or not. Investment tribunals have applied various versions of a

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ASEAN Comprehensive Investment Agreement of 2009. See also, Comprehensive Economic and Trade Agreement (CETA) Article 8.10(2).

[1011] For example, some arbitral tribunal see that fair and equitable treatment standard only serve as floor, in which it serves only minimum standard of treatment under customary international law. See, L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States on 15 October 1926, VOL. IV. See also, Glamis Gold, Ltd. v. The United States of America, UNCITRAL, award of 8 June 2009.

Meanwhile, other arbitral tribunals seem to challenge those view by setting the standard to be higher. See, Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, award of 11 October 2002.

Indeed, some tribunals have disregarded the sources of the FET standard and concentrated purely on the content of the standard based on case-by-case readings of what is fair or equitable in light of the specific facts. This has been the case particularly when tribunals have been applying an unqualified FET clause, that led itself to the point of seeing whether the case before them is fair or not.

[1012] KLAGER, Roland, *'Fair and Equitable Treatment' in International Investment Law*, 1st Edition, Cambridge University Press, Cambridge, 2011;

[1013] See, <https://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/6634538>.

[1014] SCHILL, Stephan W., «Fair and Equitable… *id.*

[1015] FET standard has been expanded to include notions of non-discrimination, unambiguity, consistency, good faith, fair procedure, reasonably, arbitrariness, ensure of the due process, proportionality, transparency, and investor's legitimate expectations. See detail of FET standard in Chapter 3.

[1016] The notion of legitimate expectation requires stable conditions to be maintained, so that the foreign investor could obtain profits through the life of the investment. See, CMS Gas Transmission Co v. Argentina, award of 12 May 2003 (Case No. ARB/01/8), para. 274.

doctrine of legitimate expectations to find whether states are liable for treaty breaches on FET protection. At the broadest interpretation, the doctrine allows foreign investors to compensation from the increased cost due to the state's legitimacy regulatory action[1017].

In this regard, we would like to conclude that substantive protections under investment agreements are being used with a wide interpretation. Those wide interpretations by a one-time-appointed ISDS arbitrator pose a number of uncertainties and risks. These situations put high tolls, both on states and foreign investors who are in a situation where they do not know whether the state's action has entitled the breach of those concepts or not. The wide interpretation of substantive protection also poses a threat to the state's right to regulate for legitimate purposes. Those interpretations could affect to all administrative, government actions, and regulatory actions of the state. It is undeniable that ISDS limits host state sovereignty and the right to regulate. We strongly support that such limitation should be done with a clear term, in a substantial degree of predictability and consistency manner, but not with a vague term that waits for a broad interpretation by a group of international arbitrators, who have left on their own devices that could potentially rule over the legislative power of the state. The current way of interpreting of substantive provision poses a risk leading to the creation of unbalanced results in the determination of what is contrary to good governance. We highly suggest that the clear rule and binding interpretative tools that struck the right balance of investment protection and the state's right to regulate would enhance the legitimacy of the system.

6.2.4 Issue of Inequality between Foreign and Domestic Investors

The principle of equality before the law requires everyone to be treated equally under the law. Although there are some critics of procedural inequality between states and foreign investors in investment arbitration[1018]; however, the issue of inequality in investment arbitration procedure is not a major concern, since all arbitration rules or institutions require that arbitrators must give an equal opportunity to the parties to present their case. Otherwise, the award might be subject to the risk of being set aside or refused by the national courts. Meanwhile, at the constitutional level,

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[1017] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, award of 29 May 2003. See also, CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, award of 12 May 2005. See also, Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand, UNCITRAL (formerly Walter Bau AG (in liquidation) v. Kingdom of Thailand), award of 1 July 2009.

[1018] BANAI, Ayelet, «Is Investor-State Arbitration Unfair? A Freedom-Based Perspective», *Global Justice: Theory Practice Rhetoric* Vol. 10 No. 1 (2017), 57-78; See also, KRYVOI, Yarik, «Three Dimensions of Inequality in International Investment Law», *British Institute of International and Comparative Law* (2020), 1-18, available online at <www.biicl.org>.

there has been increasing controversy over whether arbitration is in fact the most appropriate forum for the resolution of investment disputes. As there are many initiatives from countries or international institutions proposing new specialized forums such as the multilateral investment court (MIC), to deal with the issue. The detail of the specialized international investment dispute forum shall be discussed later in Part III of this chapter.

Apart from the issues mentioned above, we are noticing that the current investor-state dispute settlement (ISDS) regime also creates inequality between foreign and domestic investors. The investment agreements originally create on the belief that host states may treat domestic investors better than foreign investors. Therefore, the capital-exporting countries made their move by concluding investment treaties with capital-importing countries, hoping that the additional protections under the investment agreements shall protect their investors from misruling or discriminatory measures from the capital-importing countries with weak judiciaries and corrupt regulators. Yet, we could not overlook the reality that ISDS only granted eligible foreign investors to the access to international arbitration against the state, but not to the individual from the host country, or the other foreign investors whose home state did not conclude an investment agreement with the country they have put their capitals in. This situation creates inequality between them. To us, it is highly doubtful why foreign investors should have better protection than other humans as an individual[1019]. As a matter of fact, those higher protections (purely from investment agreements, but not domestic law) came at the expense of the state's right to regulate for legitimate welfare and public interest (For example, human rights protection and environmental protection).

Many states acknowledge these privileged positions of foreign investors. They are increasingly concerned about the lower position of their domestic investors when compared to foreign investors, both on procedural and substantive levels. The European Union has seen that *inter alia* inequality between EU investors in investment arbitration could potentially distort the EU single market[1020], then enact many countermeasures, including the termination of intra-EU BITs and replace the old model of BITs with the agreements at the EU level[1021]. In North America, the inequality between foreign and domestic investors is one of the reasons for the more restrictive version of the ISDS provision in the Canada-USA-Mexico Agreement (CUSMA) than the old text

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[1019] VIÑUALES, Jorge E., «International Investment… *id.*

[1020] WOOLCOCK, Stephen, «The EU Approach to International Investment Policy after the Lisbon Treaty», Policy Department DG External Policies (2010), EXPO/B/INTA/FWC/2009-01/Lot7/07-08-09, available online at <www.europarl.europa.eu>.

[1021] See general discussion in Chapter 5 of the thesis.

in the former North American Free Trade Agreement (NAFTA)[1022]. In South America, which is the birthplace of the CALVO doctrine[1023], some states took action to follow the idea of the doctrine by terminating BITs and walking out of the ICSID system.

In sum, we foresee that the current ISDS system creates inequality between foreign and domestic investors. Since those domestic investors do not have access to international arbitration to challenge the government's actions. The issue of inequality seems to be presented here when one particular group of people (Foreign investors) have better protections than other individuals (Domestic investors or foreign investors whose home state does not conclude investment agreements with the host state). Thus, those additional protections might come at the expense of the people in the host country, in the circumstance that the local government could not properly execute an order to protect the public interest because of the regulatory chill effect.

6.2.5 Issue on Amicable Solutions & the overlook of Exhaustion of Domestic Remedy

The mandatory amicable solutions in investment agreements are also known as the "Cool-off period" or "Waiting period". The term amicable solutions might include negotiation, conciliation, and mediation, but do not extend to the local administrative or judicial remedies (Because they are considered as local remedies, the details of local remedies shall be discussed later here)[1024]. A cool-off period is a feature of investment agreements that puts foreign investors in a status of "on hold" for a certain period before their right to initiate the international arbitration against the host state[1025], and also requires foreign investors to try to settle the dispute with host

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[1022] Article by PHILIPS, Nicholas in the topic of «Making NAFTA Nationalist», available online at <https://www.nationalreview.com/2019/03/usmca-investor-state-dispute-settlement-corporate-welfare/>.

[1023] CALVO Doctrine named after Carlos Calvo, an Argentine diplomat and legal scholar who is the founder of the concept. CALVO doctrine is a foreign policy doctrine which based on the idea that jurisdiction of international investment dispute stays with the judicial branch of a country where such investment was made. The CALVO doctrine prohibit the seeking of diplomatic intervention from the home state; then, further prohibited nations to use armed force to collect debts owed them by other nations.

Later, the CALVO doctrine was narrow down by the DRAGO doctrine, which named after Luis María Drago, Argentinian minister of foreign affairs during the beginning of 1900. Although the essences of DRAGO doctrine are based on the CALVO, but the DRAGO goes further by rejecting the right of intervention and specifying that economic claims give no legal right to intervene militarily in another country. It stated that even the nations are legally binding to pay its debt, it could not be forced to do so. See, SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

[1024] UNCTAD, Investor–State Disputes… *id.*

[1025] GAUKRODGER, David &GORDON, Kathryn, «Investor-State… *id.*

The majority of investment treaties refer to the cool-off period. For example, See, Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirate for the Promotion and Reciprocal Protection of Investments Article 8 (1)-(2). See also, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Article 9.18 &

state in an amicably way. In this way, the doctrine also gives an opportunity for the state to avoid international arbitration if it can reach an amicable solution with foreign investors. Around 90 percent of investment agreements contain such a clause[1026]. Although the cool-off period is common in investment agreements; yet the duration is different depending on the treaties[1027]. The most common period is six months before the investor's right to initiate the international arbitration. A cool-off period is considered a "good mechanism" in investment agreements since it helps enhance efficiency, avoid expenses, delays, maintain a good relationship between foreign investors and host state, and avoidance of formal arbitral proceedings.

The cool-off period enshrines the problem regarding to its wide interpretation and inconsistency, since there are diverse interpretations among investment tribunals. Currently, there are three ways that arbitral tribunals interpret the term cool-off period, which are, (1) Arbitral tribunals that see the cool-off period only as one way to resort the investment dispute, but not the obligation of foreign investors to resort to it before the right to arbitration. Therefore, non-compliance with the clause is not amounting to a condition precedent and does not deprive the jurisdiction of the arbitral tribunal[1028]. (2) Other tribunals see the cool-off period as a "condition precedent" to arbitration. Non-compliance to the condition would result in the lack of the arbitral tribunal's jurisdiction to hear the dispute[1029]. (3) There are literatures that suggest a combination of

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Article 9.19. See also, The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 8.19.

[1026] POHL, Joachim, MASHIGO, Kekeletso &NOHEN, Alexis, «Dispute Settlement… *id.*

[1027] Although 6 months is common for the cool-off period; however, we could also find the range from as long as the dispute cannot be settled amicably to 3 months, until 24 months varies from different investment agreements. See, Agreement for the Promotion and Protection of Investment between the Government of the Republic of Austria and the Government of the Kyrgyz Republic Article 14 (1). See also, United Kingdom Model BIT 2008 Article 8 (1). See also, Agreement between the Government of the Republic of Austria and the Government of the Republic of India for the Promotion and Protection of Investments Article 9 (2). See also, Agreement between the Republic of Indonesia and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments Article 10 (2).

In practical, the cool-off period starts from the moment that state receive a "trigger letter" from foreign investor. The trigger letter should contain with sufficient details of the dispute, including name of the parties and amount of claim. Some investment agreements also express the condition of such letter. See, Western NIS Enterprise Fund v. Ukraine, ICSID Case No. ARB/04/2, order of 16 March 2006, para. 5 stated that "Proper notice is an important element of the State's consent to arbitration, as it allows the State, acting through its competent organs, to examine and possibly resolve the dispute by negotiations". See also, Ronald S. Lauder v. The Czech Republic, UNCITRAL, award of 3 September 2001, para. 185.

[1028] The arbitral tribunals that follow the view; for example, See, SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003. See also, Ethyl Corporation v. The Government of Canada, UNCITRAL, Award on Jurisdiction of 24 June 1998, para. 85. See also, Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), Decision on Jurisdiction and Admissibility of 4 August 2011, para. 564.

[1029] The other arbitral tribunals view that they will have jurisdiction over dispute only when the condition of cool-off period has been fulfilled. They see it as a formality and essential mechanism enshrined in most of the investment agreements, which it compels parties to make a genuine effort to engage in good faith negotiations before resorting to arbitration. See, Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5

those two aforementioned approaches. In this approach, the cool-off period is regarded as a contractual obligation; failing to comply would constitute damages but not result in any lack of jurisdiction or inadmissibility[1030].

Apart from the issue of the cool-off period, investment arbitration is also being criticized for overlooking the exhaustion of local remedy (Some literatures refer to the term as "Exhaustion of domestic remedy"). The term exhaustion of local remedy (ELR) should not be confused with the term "cool-off" period because there are two totally different functions in investment agreements. The concept of ELR requires foreign nationals allegedly harmed by a state to first seek to redress the alleged harm before the administrative or judicial system of that state (Or both), before their right to international claim[1031]. ELR plays an important role in order to safeguard state sovereignty by giving them an opportunity to correct their action by their own domestic legal system before their international responsibility can be called into question (And answered by an international tribunal).

Some of the investment agreements have asserted the ELR clause which requires foreign investors to pursue a local remedy for a certain period, ranging from three months to five years[1032], before their right to get their dispute resort by investment arbitration. The term ELR in investment agreement is different from customary international law, since the former only limit the investor's right to arbitration either for a certain timeframe, or when the domestic authority gives a final decision[1033]. Foreign investors do not always need to wait for the finality of the domestic decision

(formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)), Decision on Jurisdiction of 2 June 2010, para. 336-340. See also, Murphy Exploration and Production Company International v. Republic of Ecuador, ICSID Case No. ARB/08/4, award on Jurisdiction of 15 December 2010, para. 132.

1030 However, the third way is only the recommendation from scholars. This approach never appears in the ISDS system, but only in the commercial arbitration. See, GANESH, Aravind, «Cooling off Period (Investment Arbitration)», MPILux Working Paper 7 (2017), available online at <www.mpi.lu>.

1031 TRINDADE, A.A. Cançado (Org.), *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights*, 1st Edition, Cambridge University Press, Cambridge, 1983; See also, AMERASINGHE, Chittharanjan Felix, *Local Remedies in International Law*, 2nd Edition, Cambridge University Press, Cambridge, 2004;

1032 For example, See, Treaty between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments of 1991, Article 10 (2) &(3). See also, Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments of 1991, Article 10 (2) &(3). See also, Agreement between The Swiss Confederation and The Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments of 1973, Article 12 (2). Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments of 1990, Article 8 (1) &(2). See also, Model Text for the Indian Bilateral Investment Treaty of 2015, Article 15.1 &15.2.

1033 As it is constituted in n Siemens A.G. v. The Argentine Republic, the exhaustion of local remedy does not require a prior final decision of the courts, nor even a prior decision of a court at any level. It simply requires the passing of time or the persistence of the dispute after a decision by a court. See, Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004, para. 104. See also, Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction of 24 October 2011, para. 48.

before their right to initiate arbitration as is the case in the customary international law context[1034]. It is generally accepted in the international community that states have the right to assert the ELR clause as a condition of consent to treaty arbitration[1035]. It is interesting to note that there are also exceptions to the rule of ELR in investment arbitration, both by the language in the treaties itself[1036], and the interpretation by arbitral tribunals mostly on the ground of futility exception[1037].

Similar to the cool-off period, the concept of ELR is also being criticized for its wide interpretations by different tribunals, mostly whether the concept is considered as a jurisdictional condition of the host state's consent to international arbitration or in a procedural condition of admissibility of an investor's claim. Yet, those differences do not lead to significantly different outcomes[1038]. The biggest problem of the interpretation was demonstrating when ELR was

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[1034] *Ibidem.*

[1035] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Article 26.

[1036] In the customary international law standard, there are exceptional circumstances that foreign investors do not need to exhaust local remedies. As the Draft Article on Diplomatic Protection (Rep. of the Int'l Law Comm'n, 58th Sess., 2006, U.N. Doc. A/61/10), Article 15 stated that

"Local remedies do not need to be exhausted where:

(a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

(b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(d) the injured person is manifestly precluded from pursuing local remedies; or

(e) the State alleged to be responsible has waived the requirement that local remedies be exhausted".

However, the investment agreement has created the special rules of international law, excluding or departing substantially from the rules on diplomatic protection. Therefore, the draft article on diplomatic protection or customary international law regarding to ELR rule does not apply to the ELR rule under investment agreement. See, Draft Article on Diplomatic Protection of 2006 Article 17. See also, Model Text for the Indian Bilateral Investment Treaty of 2015, Article 15.1.

[1037] There are some investment agreements express the exception to the exhaustion of local remedy rule. For example, the model BIT adopted by the Southern African Development Community (SADC) includes elaborate language requiring exhaustion of local administrative remedies and pursuit of local remedies for a reasonable period of time. It also lists exceptions as local remedies do not need to be pursued in the absence of "reasonably available" remedies capable of "providing effective relief" in a "reasonable period of time". See, SADC Model Bilateral Investment Treaty of 2012, Article 29.4. See also, Agreement between the Government of the People's Republic of China and the Government of the Republic of Cote D'Ivoire on the Promotion and Protection of Investments of 2002, Article 9 (3).

In addition, there are some arbitral tribunals allow exception to bypass the ELR rule. See, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Decision on Jurisdiction of 19 December 2012, para. 202. See also, Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility of 17 November 2014, para. 317. See also, TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, award of 19 December 2008, para. 108–112.

[1038] The tribunal in *Abaclat* Case gave a famous definition and differences between the jurisdiction and admissibility in international arbitration claim. As it said "Although a lack of jurisdiction or admissibility may both lead to the same result of a tribunal having to refuse to hear the case, such refusal is of a fundamentally different nature and therefore carries different consequences:

interpreting along with other substantive protection; in particular, the Most-Favored-Nation treatment (MFN). As illustrated in the *Maffezini* case, where the arbitral tribunal allowed Maffezini to bypass the local remedies rule before the Spanish court set forth under article X of Argentina-Spain BIT for a more favorable settlement of the dispute clause in Chile-Spain BIT, whereas there is no ELR clause[1039]. Although there are some arbitral tribunals that objected to the view of the arbitral tribunal in the *Maffezini* case[1040], it is undeniable that such wide interpretations create a controversy over the term ELR, and then add one more weakness to the ISDS system. Such bypass gets rid of the opportunity for state and foreign investors to resort to their dispute in more efficient ways; thus, such ways could safeguard the state's sovereignty and increase the legitimacy of the ISDS system. In sum, such bypass as demonstrated in *Maffezini* is undermining the importance and overlooking the benefits that could obtain from the ELR.

Finally, in our view, we strongly support the existence of the ELR rule in the ISDS system. The concept of ELR is something very close to the concept of administrative appeal in administrative law, in which it produces many benefits *inter alia* allowing administrations to correct their wrongful actions and reduce caseload from the domestic court. In the context of investment arbitration, ELR also enhances efficiency by reducing the pressure on developing countries to resort to assistance from extremely expensive foreign law firms[1041], avoid the formal arbitral

(i) While a lack of jurisdiction *stricto sensu* means that the claim cannot at all be brought in front of the body called upon, a lack of admissibility means that the claim was neither fit nor mature for judicial treatment;

(ii) (ii) Whereby a decision refusing a case based on a lack of arbitral jurisdiction is usually subject to review by another body, a decision refusing a case based on a lack of admissibility can usually not be subject to review by another body;

(iii) (iii) Whereby a final refusal based on a lack of jurisdiction will prevent the parties from successfully re-submitting the same claim to the same body, a refusal based on admissibility will, in principle, not prevent the claimant from resubmitting its claim, provided it cures the previous flaw causing the inadmissibility".

See, Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), Decision on Jurisdiction and Admissibility of 4 August 2011, para. 247.

1039 Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 of 13 November 2000, para. 21. For detail discussions, See, Chapter 3 of the thesis (3.2.3.3 National Treatment & Most Favored Nation Treatment).

1040 For example, See, Vladimir Berschader and Michael Berschader v. Russian Federation (SCC Case No. 080/2004) para. 206. See also, Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 9 November 2004, para. 119. See also, Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 219 &227.

1041 Some literature suggested that the average cost of ISDS arbitration is around eight million dollars. See, PORTERFIELD, Matthew C., «Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time has Come?», *The Yale Journal of International Law* Vol. 41 (2015), 1-12;

Some developing states also claimed that they are lacking experience and awareness of ISDS mechanism and in-house specialize government officials on the ISDS. Most of developing countries are rely on services from expensive foreign law firms. In which those foreign law firms are not familiar with developing countries work culture and mind-set. As a result, those foreign law firms might not be able to represent developing countries in full potential as it should be. Thus, agencies in developing countries are not familiar with ISDS system and lack of effectively

proceedings; and most importantly, it is safeguarding state sovereignty. It is unfortunate that most of the investment agreements are silent on whether the investor must exhaust local remedies in the host state before initiating international arbitration against it. In other words, very few agreements in the universe of roughly over 3,000 investment agreements have expressly required exhaustion of local remedy[1042]. It is widely accepted that, unless it is expressly required by the investment agreements, the ELR requirement shall not imply to a dispute[1043]. Therefore, in the majority of investment disputes, many foreign investors might choose to overlook the chance to get local remedy and direct their dispute to international arbitration in order to save time, cost, and also be able to put more pressure on the host governments, since many of them might not want to put their name on the international attentions to ruin their reputation and investment environment. We suggest that if future investment agreements could include a reasonable ELR clause with a consistent interpretation, it would surely help to enhance the legitimacy of the ISDS system.

6.2.6 Issue on the Recognition and Enforcement of Arbitral Awards

One of the original purposes of arbitration is to reach a binding decision by the arbitral tribunal alongside with worldwide enforcement. In the ISDS system, if the state is the losing party, the foreign investors mostly have to seek enforcement from the host state's domestic court or seek enforcement from a domestic court in the third country where they have concluded the convention(s) regarding to recognition and enforcement of the foreign arbitral award[1044]. Any aforementioned situations present an uphill legal battle for foreign investors when fighting against a sovereign entity, since such enforcement through the state's domestic court might face with state action in order to prevent or delay the payment of compensation. In addition, foreign investors

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administering the disputes with international companies. See, Possible reform of Investor-State dispute settlement (ISDS): Comments by the Government of Thailand, A/CN.9/WG.III/WP.147, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-fifth session New York, 23–27 April 2018.

1042 BRAUCH, Martin Dietrich, «Exhaustion of Local Remedies in International Investment Law», *IISD Best Practices Series* (2017), available online at <www.iisd.org>.

1043 Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection concerning the Previous Proceedings of 26 June 2002, para. 30. See also, Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award of 31 March 2003, para. 40 &41.

In addition, Sornarajah also observed that "ICSID tribunals have consistently held that, unless expressly required, the ELR requirement cannot be implied in international investment law…" See, SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

1044 For example, Geneva Protocol on Arbitration Clauses of 1923, Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, and The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

possess the risk that their winning award might be set aside by the domestic court on the public policy ground. On the other hand, enforcement in the third states also have a number of difficulties; the most obvious one is that there is limited state property that could be seized; in most of the case, the property seized was worth far less than the value of the award[1045]. In addition, although many states have waived their jurisdictional immunity by agreeing to investment arbitration, yet courts have largely concluded that a state still retains immunity over its sovereign assets[1046].

In spite of the fact that there is a number of international conventions that tried to fill this gap by assuring the finality of the arbitral award, the most prominent are the New York Convention and the ICSID Convention[1047]. However, many states are reluctant to comply with international investment awards. As we already demonstrated throughout the thesis in which the details shall not be repeated here, there are many events in that states refused to comply with the international arbitral awards; for example, the EU issued a suspension injunction for Romania to stop paying the arbitral award[1048], following by the famous lawsuit of *Achmea*, where the Court of Justice of the European Union (ECJ) ruled that the intra-EU is incompatible with the EU law[1049]. Both aforementioned cases have roots in the purpose of uniform Member State's practices and policies in the area of foreign direct investment. In South America, Argentina refused to comply with the arbitral damage during the year 2010. Although in general, the ICSID awards should be final and domestic courts should enforce them without re-examining the substance of the dispute. Yet, in addition to ICSID annulment attempts[1050], Argentina further challenged the finality of the

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1045 KUIPERS, Jacob A., «Too Big to Nail: How Investor-State Arbitration Lacks an Appropriate Execution Mechanism for the Largest Awards», *Boston College International and Comparative Law Review* Vol. 39 Issue 2 (2016), 417-451;

There are difficulties, especially, when the award is in the massive amount, it is hard to seize any assets of sovereign entity to be equivalent to the amount of those award. For example, the award in Yokos v. Russia, where arbitral tribunal awarded in the value of 50 billion against Russia. See, Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227, final award of 18 July 2014. See also, BASARAN, Halil Rahman, «What make of the Yukos v Russia dispute?», *Gonzaga Journal of International Law* Vol. 22 Issue 1 (2019), 41-[viii]; See also, online article by SIMKIN, Shona, «The Yukos Settlement: An Insider's View into the Largest Arbitration Award in History», available online at <today.law.harvard.edu>.

1046 *Ibidem.*

1047 Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Article 54. See also, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) Article V.

1048 The European Commission letter to Romania on State Aid Investigation of 1 October 2014.

1049 Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), award of 7 December 2012, para. 56-60.

The consequence from *Achmea* Judgment has led to the actions of EU Member States to terminate all of their intra-EU BITs. See, Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union of 5 May 2020, SN/4656/2019/INIT.

1050 CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic of 25 September 2007.

ICSID Convention by setting their internal law stating that even the ICSID award must be revised by the local court before the enforcement[1051]. This view by Argentina at that time cause some foreign investors to lose their faith in Argentina's willingness to honor ICSID awards[1052]. In Russia, there was a case where a foreign investor could only get a partial of their award payback after eight years through international pursuit[1053]. In Thailand, many times the government lack of true understanding of the ISDS regime, then has expressed the view of incompliance with foreign arbitral awards. The award in the Hopewell project case has not been honored since 2008 until now. Regardless of the interest rates that are counting every day, many governments still seek a way to re-open the case with the Thai Supreme Administrative Court, in which they were all failed attempts[1054]. It is also interesting to note that recently, the Thai Supreme Court just denied its jurisdiction over Inter-State Dispute Settlement (ISDS)[1055], despite the prevailing circumstances that the origin of the dispute has arisen from an administrative contract. This situation is controversial and makes it even harder for foreign investors to seek their ISDS award to be enforced in Thailand.

In sum, there are cracks in the current system of voluntary enforcement and compliance with the international investment award[1056]. We do not say that states always refuse to comply with the awards since many of them complied with it, due to the fact that refusing to do so will hurt their future investment endeavors[1057]. Yet, many times, when states are on the losing side, they usually pull their game by delaying their payment and fighting in their domestic regime in order to not to comply with those international investment awards[1058]. This situation lowers the

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See also, Argentine Civil and Commercial Code (CCC) section 1656.

[1051] Argentina put attempted not to comply with international arbitral awards. Despite the clear wording requiring automatic enforcement, representatives of the Argentine government and several local academics consider that ICSID awards should be subject to judicial scrutiny in Argentina. In the "Rosatti Doctrine", Dr. Horacio Rosatti claimed that ICSID favors foreign investors and therefore discriminates against local investors/ that this situation violates the Argentine Constitution's principle of equality before the law, he contends that courts should review ICSID awards. See, GÓMEZ, Katia Fach, «Latin America and ICSID: David versus Goliath?», *Law and Business Review of the Americas* Vol. 17 Issue 2 (2011), 195-230;

[1052] CIBID, Pablo Letelier, «Enforcement of Arbitration Awards in Latin America: The Current Progress and Setbacks», *Law and Business Review of the Americas* Vol. 22 No. 2 (2016), 93-114;

[1053] Mr. Franz Sedelmayer v. The Russian Federation, SCC, arbitral award of 7 July 1998. See also, online article on the wall street journal on the topic of «Businessman vs. Kremlin: War of Attrition», available online at <www.wsj.com>.

[1054] Supreme Administrative Court Order no. 241-243/2563 (2020).

[1055] Supreme Administrative Court Order no. 883/2556 (2013).

[1056] TUCK, Andrew P., «Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules», *Law and Business Review of the Americas* Vol. 13 No. 4 (2007), 885-922;

[1057] SCHREUER, Christoph H., MALINTOPI, Loretta, REINISCH, August &SINCLAIR, Antony, The ICSID… *id.*

[1058] The study has showed that 81% of claimants have experienced difficulties enforcing an investment-arbitration award against a state. See, MISTELIS, Loukas A. &BALTAG, Crina, «Recognition and Enforcement of Arbitral

effectiveness of the current system since after both foreign investors and states spend millions of dollars in international arbitral proceedings but do not really get the final award in the end. Unlike domestic litigation, those international arbitral awards are usually not final. This by far, even lower the legitimacy of the ISDS regime.

6.2.7 Question of Lack of Diversity of Arbitrators

The lack of diversity of arbitrators is one of many issues of the ISDS regime. The study has shown that most international arbitrators are men from a particular ethnicity, mostly from Europe or the United States; in which many times; some literatures refer to this situation as "A white men club" or "An (Old) white boys' club"[1059]. The same group of people who get repeatedly appointed led to many reasonable suspicious[1060]; including, the quality of arbitrators, the arbitrator's true understanding of diverse cultures of different states, the quality of the award, and corruption. To us, the more diversity of arbitrators would enhance the legitimacy of ISDS arbitration. Diversity of arbitrators could avoid cognitive biases and group-thinking in decision-making (Currently based on the western world thinking). We should bear in mind that the ISDS disputes usually come from developing regionals like South America, South Africa, and some parts of Asia. Yet, there are slim, if any, number of arbitrators from the aforementioned regions. It led us to the suspicion that lack of cultural knowledge and knowledge of the working culture of developing countries might result in the western arbitrator's lack of understanding of the dispute in context. As a result, they might not be able to generate the best possible outcome both for states and foreign investors.

Awards and Settlement in International Arbitration: Corporate Attitudes and Practices», *The American Review of International Arbitration* Vol. 19 Issue 3-4 (2009), 319-376;

[1059] BJORKLUND, Andrea K. et all, «The Diversity Deficit… *id.* See also, MEYER, Kathryn, «Arbitration: An (Old) white boys' club», available online at <www.sites.psu.edu>.

There is also an issue of equality between ethnic and gender equality in this regard. Survey covering arbitrators in ICSID as well as non-ICSID cases found that 11% of arbitrators were female. Yet two women arbitrators (Kaufmann-Kohler and Stern) have acquired account for 57% of all appointments given to female arbitrators. See, ISDS Academic Forum Working Group 7 Paper, «Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?», available online at <https://www.cids.ch/images/Documents/Academic-Forum/7_Empirical_perspectives_-_WG7.pdf>. See also, SUCHARITKUL, Vanina, «ICSID and UNCITRAL… *id.*

[1060] Recent descriptive statistics taken from the Pluri Courts Investment Treaty Arbitration Database (PITAD) show that of the 716 arbitrators who have sat in at least one investment arbitration case, 377 arbitrators have received only one appointment. Thus, out of the 3,519 appointments known to have been made, single-appointment arbitrators represent approximately 10% of all appointments. This is in stark contrast to the 50 arbitrators who have received the most appointments in investment arbitration cases. This group of 50 arbitrators accounts for 1,710 appointments, which is nearly 50% of all the appointments on offer to date. See, <www.pitad.org>.

In connection to the issue of lack of diversity, the expertise of the arbitrator is also in question. As we already elaborated in Chapter 4 & Chapter 5, the majority of jurisdictions and the ISDS system give high autonomy to the parties to choose their own arbitrator. Most of the time, the parties could choose anyone to serve as an arbitrator. This concern us, especially when the same faces of arbitrators in ISDS repeatedly get appointed[1061]. Meanwhile, there is a variety of disputes in ISDS, for example, agriculture, fisheries, mining, water, mega-project construction, contract dispute, and regulatory dispute. It is very persuasive to us that the specific kind of dispute needs particular expertise to decide the case (For example, an environmental dispute should be decided by environmental experts).

6.2.8 The Issue of the Survival Clause under the Investment Agreements

In 2017, there was a greater number of effective terminations of investment agreements than the number of newly concluded investment agreements[1062]. The trend that many states are starting to walk away from the current ISDS system brings many issues to be considered *inter alia* the survival clause in investment agreements. The survival clause (Also known as the "Sunset Clause" or "Zombie Clause") is a unique feature in investment agreements that allow a treaty to continue to be effective for a certain period from the date of the termination, in which the foreign investment made before the termination of the agreement shall benefit from the clause. In other words, foreign investors can use terminated investment agreements to initiate international arbitration against the host state during the survival period. However, the foreign investments before the date treaty came into force; or especially, the foreign investment that was established in the host country after the termination could not benefit from the survival clause. Many investment agreements contain the survival clause, and the duration of the survival clause ranges from 5 to 20 years after termination as to investments made prior to termination (However, more than half of them refer to 10 years survival period)[1063]. It is already set up in the precedents that the effectiveness

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[1061] CRAWFORD, James, «The Ideal Arbitrator: Does One Size Fit All», *American University International Law Review* Vol. 32 Issue 5 (2017), 1003-1022;

[1062] United Nations Conference on Trade and Development (UNCTAD), «Recent Developments in the International Investment Regime: Highlights», *IIA Issues Note* Issue 1 (2018), available online at <www.unctad.org>.

[1063] See statistic by UNCTAD, available online at <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping>.

There are many investment agreements contain survival clause. For example, See, 2012 U.S. Model Bilateral Investment Treaty Article 22 (3). See also, Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Uzbekistan Article 13 (3). See also, Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela Article 14 (3). See also, Agreement between the Swiss Confederation and the Republic of Mozambique Concerning the Promotion and Reciprocal Protection of Investments Article 12 (2).

of the survival clause is not a dispute as long as foreign investors establish their investment prior to the termination of the treaty[1064].

Under customary international law, there are two ways of termination of investment treaty as stated in the Vienna Convention on the Law of Treaties (VCLT); which are, either by unilateral termination or termination by consent[1065]. In case of unilateral termination[1066], the survival clause shall automatically apply and will stay as long as agreed in the treaty. In case of termination by consent, states usually mutually agree to terminate the treaty without renegotiating the new one[1067]; or in the current trend, states usually terminate by consent and re-negotiation a new trade agreement (For example, the EU start to replace member states' BITs with third countries with agreements at the EU level[1068]). It is interesting to note that in case of termination by consent, parties usually cancel or shorten the survival period[1069].

However, the existence of the survival clause concerns us; in particular, the consequence of the clause that could potentially limit the host state's sovereignty for a decade or more after the termination of the treaty, since foreign investors could still use the ISDS regime against state's actions with a terminated investment agreement (In some case, up to 15 or 20 years). We observe that some states (Especially, developing states) might not even consider the effect of the survival clause at the time they concluded the treaty. It is irrational that how and why a sovereign entity would agree to limit its sovereignty for that long period. Presumably, if both parties agree to terminate a treaty, such a situation could imply that the treaty is not suiting their needs in some way. Yet, the survival clause still makes such a treaty be able to function for a very long period. In this connection, we also see that the duration of survival clauses is very long, considering the fact that we are in a globalizing world with rapid change in almost every sector. Thus, in the scheme of administrative law in which states have the duty to arrange public services which are dynamic in

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1064 Marco Gavazzi and Stefano Gavazzi v. Romania, (ICSID Case No. ARB/12/25).

1065 Vienna Convention on the Law of Treaties (VCLT), Article 54.

1066 For example, Ecuador terminated one BIT in 2011, and later terminated 16 BITs in 2017, all unilaterally. See, JARAMILLO, Javier &MURIEL-BEDOYA, Camilo, «Ecuadorian BITs' Termination Revisited: Behind the Scenes», Kluwer Arbitration Blog (2017), available online at <http://arbitrationblog.kluwerarbitration.com>. For statistics of IIAs terminations and IIAs' text, See, <https://investmentpolicy.unctad.org/>.

1067 For example, the effort of EU member states to terminate all intra-EU BITs in order to preserve a supremacy of EU law. See, Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection. See the detail discussion in Chapter 5 of the thesis.

1068 See detail discussion regarding the replacement of investment agreements in the EU level in Chapter 5 of the thesis.

1069 For example, the newly concluded BIT between Australia and Uruguay (2019) has cancelled the survival clause in the former Australia-Uruguay (2001). See, Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments of 2019, Article 17 (6). In similar manner, See, Comprehensive Economic and Trade Agreement (CETA) Article 30.8.

nature. It would be a challenge for states to enact any rules that affect foreign investments since they will have a risk of getting involved in investment arbitration.

Although states could mutually consent to cancel or shorten the period in the survival clause, yet, such circumstance is not absolute. It brings us substantial doubt about how far the majority of capital-exporting countries would agree with developing countries to cancel or shorten such a clause. Especially, the developing countries where many investors from their home states have committed a huge amount of capital in. We are strongly suggesting that states should no longer conclude the survival clause in the future treaty and also modify the current one in the same manner. If total elimination is not a choice, at least the period of survival clause should be more reasonable by shortening them down (For example, shorten them to one to three years). The more reasonable period shall decrease the problems and give a reasonable duration for governments to be able to plan their future policies. This will, of course, enhance the overall legitimacy of the current ISDS regime.

6.2.9 The Environmental Concern

Environmental concerns in investment arbitration are in the current debates over the balancing between the protection of investors' property and the host state's right to regulate for the public interest. There is more interaction between investment law and the environment these days[1070]; especially, in the western states who are engaged in their energy transition policies (Ex. revocation/alteration of incentives/tariff regimes for renewable energies, or the abandonment of nuclear and coal energy)[1071]. Only in these couple of decades, there have been more than forty cases of international arbitration claims related to environmental regulatory disputes[1072], which is different from the time during 1990, when there were only nine investment claims that had an environmental component. Contrary to the growing trend, ninety-two percent of the treaties have not expressed environmental concerns[1073]. The low percentage of investment agreements that

[1070] VIÑUALES, Jorge E., Foreign Investment… *id.*

[1071] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I), ICSID Case No. ARB/09/6. See also, Vattenfall AB and others v. Federal Republic of Germany (II), ICSID Case No. ARB/12/12. See also, Cavalum SGPS, S.A. v. Kingdom of Spain, ICSID Case No. ARB/15/34. See also, Tennant Energy, LLC v. Government of Canada, PCA Case No. 2018-54.

[1072] For example, Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1. See also, David R. Aven and Others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3. See also, Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia (Pending).

[1073] According to OECD' studies in 2011, covering 1,623 IIAs (Approximately 50 Per Cent of IIAs of that moment), there is only 8.2 per cent of IIAs have expressed environmental concerns in it. See, GORDON, Kathryn &POHL Joachim, «Environmental Concerns in International Investment Agreements: A Survey», OECD Working Papers on International Investment 2011/01, OECD Publishing, available online at <www.oecd.org>.

express environmental concern is understandable, because most of them were concluded before the 20th century, a time when environmental issues did not get adequate attention from the global communities; therefore, those old model agreements are mainly focused on investment protections.

Although many arbitral tribunals acknowledged the existence of the state's duty of environmental protection in their territory, in which arbitral tribunal could not just "close their eyes" and solely select those norms that just to promote investment protection[1074]. Nevertheless, the lack of language on environmental protection in investment agreements put a huge obstacle to the arbitral tribunal to properly strike a balance between the state's action to protect the environment and protect the foreign capital under investment protection's substantive standards.

The detail of balancing the state's right to regulate and investor protection shall not be repeated here, since we already explored them in the earlier part (Issue on Limitation of Host State Policy Space). However, it is interesting to note that the pro-ISDS side usually argues that arbitrator never restricts states to regulate in order to protect their environment, since arbitrators could only order the damage against those order that breach the substantive protection in investment agreements. We object to this view. If we accept this view, it means that states would not bother to lose their reputations when they engage in investment arbitration procedures, which always catch the attention of the international community. Upon the threat to start international arbitration from foreign investors[1075], many states might not want to lose their reputation or their domestic political preferences; in consequence, the state might avoid enacting good countermeasures in order to protect the environment in their territory (Regulatory Chill). In our opinion, the current regime has created heavy burdens for the states and their people, where the economic growth and wealth objectives (from foreign direct investment) are not equally distributed to them; however the cost of those economic growths came from national resources, which equally belongs to the people.

Therefore, the important question here is how to balance environmental protection and investment protection in the current ISDS regime. We strongly support that there should be more

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[1074] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1. See also, Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1.

[1075] For example, in March 2016, the Eco Oro mining company threat to bring the dispute to arbitration against Colombia under the Canada-Colombia FTA (2008) if they could not reach amicable solution with Colombia. See, Notice of Intent by Eco Oro Minerals Corp of 7 March 2016, available online at <https://icsid.worldbank.org/>.

Currently, the dispute is in pending. See, Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41.

implementation of environmental protection in arbitral tribunal decisions[1076]. The simplest solution is to put the environmental protection clause as the exception for the state to regulate in the investment agreements, in order to reduce the tribunal's discretion and secure the state's regulatory space. In this way, we could also enhance the predictability and legitimacy of the system. However, the vast majority of the investment treaties at the moment are still silent about environmental regulatory space, although the new generation of investment agreements tends to give more space to host states to regulate in order to protect their environment[1077]. In this connection, we would like to conclude that the current regime of the ISDS system does not adequately protect the right of host states to regulate in a manner to protect their environment. Thus, we would like to observe that even though the new trend of investment agreements tends to leave space for states to issue the policy to protect their environment, but the multilateral companies could still use their branches in other countries. In this way, those multilateral enterprises are entitled to use other investment agreements that do not express the environmental protection clause and secure a better chance to win in the arbitral proceedings in relation to an environmental dispute[1078].

6.2.10 The Human Rights Concern

For many years, international investment law and human rights law developed in separate paths[1079]. In a similar manner to the environmental protection clause, there are not so many investment treaties that allow the state to regulate for legitimate purposes in relation to human rights[1080]. Although the newly concluded treaties tend to secure those spaces for the states (As we usually see the term, such as, protection of public health, public welfare, safety, public morals, labor rights, and social or consumer protection[1081]); however, the majority of the treaties are silent

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1076 VIÑUALES, Jorge E., «International Investment… *id.*

1077 For example, See, The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 8.9 (1). See also, United States–Mexico–Canada Agreement (USMCA) Article 14.6.

1078 For example, there are investment treaties that carried "gold standard" of investment protection (Mostly BITs concluded by capital exporting countries like Dutch, German, France, USA, and the UK). Multilateral companies might set up a "mailbox company" in those countries in order to be entitled to use better clause of investment agreement of capital exporting states against developing host state. In this connection, the innovative clause in newly concluded agreements could be evaded in many disputes. See, Conference Report «Bridging the Gap between International Investment Law and the Environment», 4th and 5th November 2013, The Hague, The Netherlands, available online at <www.utrechtjournal.org>.

1079 BALCERZAK, Filip, *Investor State Arbitration and Human Rights*, 1st Edition, Brill, Leiden, 2017;

1080 DE BRABANDERE, Eric, «Human Rights Counterclaims in Investment Treaty Arbitration», *Belgian Review of International Law* Vol. 50 Issue 2 (2017), 591-611;

1081 For example, See, Comprehensive Economic and Trade Agreement (CETA) Article 8.9 (1) & (2). See also, the Netherlands model Investment Agreement of 2019. See also, DIAMOND, Nicholas J., on the topic of «2019 in Review: International Investment Agreements and Human Rights», Kluwer Arbitration Blog (2020), available online at <www.arbitrationblog.kluwerarbitration.com>.

about it. It is also important to note that states have an obligation to take necessary measures to protect human rights. States do not only bear a duty to respect the human rights of the individuals in their territory, but they also have a duty to ensure that private actors, including foreign investors, do not violate those rights.

Notwithstanding the absence of international human rights obligations for corporations, there is a visible trend towards such responsibility[1082]. Yet, those visible trend does not impose any direct human rights obligation toward cooperation. In other words, although there are many initiatives toward cooperate social responsibility; still, there are not sufficient on their own to oblige corporations to put their policies in line with human rights law[1083]. A great example is Argentina's defense in arbitral proceedings aftermath of its financial crisis; among many other defenses, Argentina also made an argument that the measures in responding to the financial crisis were needed in order to protect the human rights of its citizens by ensuring basic order, public health, and welfare. However, those human rights defenses were outweighed by foreign direct investment protection under the BITs. The main reason is that foreign investors do not have a direct obligation to human rights. In the realm of BIT law, the only way that human rights obligations could be imposed on foreign investors is through the peremptory norms of international law (*jus cogens*). If the action of a foreign investor has violated the *jus cogens* (For example, genocide, slavery, human trafficking, forced labor, child labor, torture, and some crimes against humanity), foreign investors must be liable for their action. The liability under *jus cogens* could not be prohibited by investment treaties because the doctrine will override inconsistent principles of investment protection[1084].

In sum, the obligation toward human rights lies down with states since the majority of investment agreements do not impose any human rights obligation on foreign investors[1085]. The lack of language in the investment agreements that refer to human rights protection deters the ability of the arbitral tribunal to properly balance investment protection and human rights protection, since arbitral tribunals generally have to be strict with the language in the investment

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[1082] The idea of enhancing corporate social responsibility through the adoption of various soft law initiatives (non-binding instruments). For instances, See, The Labour Principles of the United Nations Global Compact: A Guide for Business. See also, Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration), 5th Edition (March 2017). See also, The OECD Guidelines for Multinational Enterprises (OECD Guidelines). See also, UN Guiding Principles on Business and Human Rights (UNGP).

[1083] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, award of 8 December 2016.

[1084] Vienna Convention on the Law of Treaties (1969), Article 53.

[1085] Spyridon Roussalis v Romania, ICSID Case No ARB/06/1, Award of 7 December 2011, para. 870-871.

agreement[1086]. The lack of a language of human rights protection in investment agreements is understandable, since investment treaties have traditionally been drafted in order to provide rights to foreign investors and corresponding obligations to States, rather than to balance between the protection of foreign investment and the host state's development. Yet, there is a problem since there is more connection between investment arbitration and human rights protection these days. Investment treaties may also deter a state from interfering to correct a human rights situation that may have arisen (Regulatory chill). The most obvious solution is to insert the language of human rights protection in the newly concluded investment agreements and amend the existing ones, in order to allow states to achieve legitimate policy objectives, in particular, human rights. If the human rights values cannot find their way to incorporate into the investment agreements, the ISDS regime will be (more) undermined, and many more shall question about the legitimacy of the system.

[1086] Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana (UNCITRAL), Award on Jurisdiction and Liability of 27 October 1989, para. 188 &203. See also, Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award of 6 May 2013, para. 170-172.

6.3 Possible Reforms: Alternative Dispute Resolutions, Dispute Prevention Measures other than Arbitration, and the Establishment of the Multilateral Investment Court

6.3.1 Introduction

Throughout the thesis, we examine *inter alia* that there is a different degree of recognition of administrative law in the vast majority of jurisdictions. Some jurisdictions where they embrace a strong idea of administrative law tend to distinguish between the administrative contract (Public contract) and private contract. In general, administrative contract contain special functions; for example, the power of administration to unilaterally terminate or modify the contract for the purpose of public interest without the prior consent of a private party[1087]. Conceptually, administrations do not terminate or alter contract on their own will, but rather on the ground of public interest with the principle of legality to control such actions along with compensation to be paid to affected parties. Many jurisdictions: especially, those where they embrace a strong idea of administrative law have found some difficulties to fully accepting arbitration as a suitable administrative law dispute resolution[1088], mainly because they regard arbitration as a branch of law which deeply rooted in the private law regime and recognize the autonomy of the parties (Freedom of contract & *pacta sunt servanda*) as the ground to determine the contract obligations. Some also consider arbitration as a "private court". Although there are many benefits from arbitration in which the details shall not be repeated here[1089], many believe that administrative disputes that have public interest implications should have special tools/organizations to resolve the issues[1090]; therefore, the public interest implications could be adequately applied to the dispute, not just freedom of contract that solely based on the idea of private law.

The issue is considerably more complicated when administrative contract disputes come to cross with the use of inter-state dispute settlement (ISDS). ISDS arbitration has a potential conflict with public law norms[1091]. Apart from particular concerns from arbitration itself, such as, lack of transparency, lack of appellate mechanism, and inconsistency, ISDS arbitration also post a threat to the public law regime because although the origin of the dispute has arisen from administrative law nature; yet, in practice, the international arbitral tribunals decide the cases solely

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[1087] WADE, Henry William Rawson, *Administrative Law*, 11th Edition, Oxford University Press, Oxford, 2014; See also, SĂRARU, Cătălin-Silviu, «The Termination of Administrative Contracts in the Romanian and French Law», *Acta Universitatis Danubius Juridica* Vol. 7 No. 3 (2011), 17-24;

[1088] BOUSTA, Rhita &SAGAR, Arun, «Alternative Dispute… *id.* See also, STELKENS, Ulrich, «Administrative Appeals… *id.*

[1089] See details in Chapter 4 &Chapter 5 of the thesis.

[1090] BOUSTA, Rhita &SAGAR, Arun, «Alternative Dispute… *id.* See also, STELKENS, Ulrich, «Administrative Appeals… *id.*

[1091] VAN HARTEN, Gus, Investment Treaty Arbitration… *id.*

based on investment agreements' substantive standards, but not under administrative law aspects. In other words, the administrative law context finds a certain level of difficulty to reach in the ISDS arbitration process. Thus, as already elaborated in Part II of this chapter, there are many legal problems that occur within the ISDS system; in particular, it results in the loss of the host state's economic sovereignty and the host state's rights to regulate. At the enforcement stage, many states refuse to comply with international arbitral awards, despite the fact that those states have international obligations to the binding/finality rules of international conventions (Ex. New York Convention or ICSID), by setting barriers up in their domestic laws/ policies against those international awards[1092]. These situations lead to questions regarding the effectiveness of ISDS since many states seem to "do their best effort" not to comply with the international arbitral awards in the first place. Meanwhile, other countries like Ecuador, Indonesia, and India have currently terminated investment agreements. All those situations lead to the question regarding the effectiveness and legitimacy of the ISDS regime.

States and international organizations realize those issues and weaknesses posed by the current ISDS regime. Therefore, they are leaning toward reform options toward the current ISDS regime (Some of the reform measures are already implemented, and some are still in discussions)[1093]. They hope the way of "thinking outside the box" and reforms by finding alternative ways rather than using the current ISDS system that has been used for decades could be the solution. As we mentioned throughout the thesis, we currently see four major reform approaches to encounter with the current ISDS issues already implemented or being in discussion; which are, 1. Dispute prevention policies (DPPs), 2. Methods of development of alternative dispute resolution (ADR) other than arbitration, 3. The trend of developing the new model BITs or replacement with multilateral treaties, and 4. The proposal of the establishment of the Multilateral Investment Court (MIC) as a permanent body to resolve international investment disputes.

In our view, if those aforementioned approaches could be successfully implemented, it would solve, or at least ease the tensions and problems in the current ISDS regime. It would ease an uneasy situation for domestic courts when they must determine the collision between administrative law and international investment law, since we could expect to see fewer ISDS

[1092] See detail discussions in 6.2 (Analysis on the Legal Problems on Inter-States Arbitration under the Investment Agreements).

[1093] For example, the work by United Nations Commission on International Trade Law Working Group III: Investor-State Dispute Settlement Reform. The main purpose of the working group is to consider and develop solutions for the current ISDS regime. See, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020).

claims than we have seen these days. States could avoid expensive international investment arbitration that could ruin their reputation and investment environment[1094]. Most importantly, states could secure their right to regulate for legitimate purposes. At the best result, if many states could agree to set up a permanent international investment court system, we could foresee the more efficient, more predictable, and more effective enforcement of foreign arbitral awards. Overall, these initiatives should enhance the efficiency and legitimacy of the system. In this connection, this part shall analyze each of the current development in the field of the ISDS regime. In the end, we should be able to determine whether these reforms are adequate or appropriate to encounter with the current problems or not.

6.3.2 Dispute Prevention Policies (DPPs)

Dispute prevention policies (DPPs) refer to a set of policies, measures, and concrete procedures that attempt to prevent conflict between foreign investors and states from emerging and escalating into formal investment disputes. DPPs approaches tend to focus on the pre-dispute phase rather than the post-dispute phase (The post-dispute phrase refers to the phrase when the dispute has already been brought to arbitration). In general, states have developed and currently developing DPPs measures in order to prevent the escalation of foreign investment disputes into international arbitration[1095]. Those measures could be done both at the national level or international level; for instance, raising awareness on investment obligations among government officials and training[1096], capacity building for administrations to be able to handle the dispute in a speedy manner (Early settlement)[1097], enhance cooperation between states including information sharing and best practices[1098], or asserting the dispute mitigation and prevention clause in newly conclude investment agreements. It is also important to mention that the use of alternative dispute resolution (ADR) other than arbitration is also considered as one of the methods to achieve dispute

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[1094] Even where the respondent state successfully defends itself, it typically incurs significant arbitration costs, often amounting to several million U.S. dollars. This is of particular concern to developing countries, which may struggle to cover the damages and costs. See, ROSERT, Diana, «The Stakes Are High: A review of the financial costs of investment treaty arbitration», *The International Institute for Sustainable Development Research Report* (2014), available online at <www.iisd.org>.

[1095] Possible reform of investor-State dispute settlement (ISDS) Dispute prevention and mitigation - Means of alternative dispute resolution, Note by the Secretariat of 19 January 2020 (A/CN.9/WG.III/WP.190), para. 10. See also, OECD, «Stocktaking of Investment Dispute Management and Prevention in the Southern Mediterranean Region», OECD Publication, Available online at <www.oecd.org>.

[1096] Possible reform of investor-State dispute settlement (ISDS) Dispute prevention and mitigation - Means of alternative dispute resolution, Note by the Secretariat of 19 January 2020 (A/CN.9/WG.III/WP.190), para. 20 &21.

[1097] *Ibidem.*

[1098] Possible reform of Investor-State dispute settlement (ISDS): Submission from the Republic of Korea of 31 July 2019 (A/CN.9/WG.III/WP.179).

prevention. However, we shall discuss about the use of alternative dispute resolution (ADR) other than arbitration in the next topic since there are many details to be explored.

As pointed out by many literatures, ISDS has become more and more costly, a right-based process which could leave a dissatisfied outcome both for host state and foreign investors[1099]. It could result in a bad relationship between them and undermine the host state's development and global interest in the long run. This would totally be contrary to one of the main objectives of the IIAs which is to promote the investment environment of the host state. We strongly believe that interest-based of social and economic factors should also take into account rather than solely paying attention to the legal aspect. In this connection, it is understandable that foreign investors have an uncomfortable feeling when taking their dispute to domestic litigation due to culturally different and fear that domestic judges might take a great amount of public interest protection when considering the case.

Although DPPs could potentially add one more tier of proceeding both for states and foreign investors before the dispute could submit to arbitration, which would result in more time-consuming and costly if such measures could not lead to a settlement in the end. Yet, DPPs show many benefits that supersede their downsides. DPPs consider as important tools to prevent investment issues from escalating into formal investment disputes; the stronger the DPPs could result in fewer cases of investment arbitration. The development of DPPs is not against the essence of arbitration, but rather complements arbitration, and enhances the legitimacy of the overall ISDS system[1100]. It was claimed that DPPs contributed to creating a stable and predictable climate for investment. They play a significant role both in attracting and retaining investment, since DPPs could keep a good relationship between foreign investors and states better than what arbitration could offer. DPPs present as a more cost-effective approach than international arbitration. Meanwhile, DPPs also produce side benefits by enhancing the equality between foreign and

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[1099] The Organisation for Economic Co-operation and Development (OECD) has published that the average cost of each ISDS case is around 8 million dollars in which in some case could go up as high as exceed 30 million dollars. Meanwhile, the case with the biggest award given in Yukos v. Russia cost almost 80 million dollars to the Claimant. See, OECD, Investor-State Dispute Settlement Public Consultation of 16 May - 9 July 2012, para. 32; See also, KAHALE, George, «Rethinking ISDS», *Brooklyn Journal of International Law* Vol. 44 Issue 1 (2018), 11-50; See also, Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227, final award of 18 July 2014, para. 1887;

It is noted that the purpose of arbitration was never to repair a broken relationship between the parties, but rather worsen it. A statement made by Grant Kesler, the Chief Executive Officer of Metalclad after his company won in international arbitration case against Mexico and secure 17 million dollars award. Despite the fact that the win, he suggested that the result of arbitration is dissatisfying, and he wish his company has chosen a different part by taking a "political option" to resolve dispute. See, FRANCK, Susan D., «Integrating Investment Treaty Conflict and Dispute Systems Design», *Minnesota Law Review* Vol. 92 Issue 1 (2007), 161-230;

[1100] UNCTAD, Investor–State Disputes… *id.*

domestic investors if those approaches are to be applied/enforced equally to all investors regardless national or foreign. Most importantly, effective DPPs could reduce the caseload to the court. As a consequence, they could ease the tension between administrative law and international investment law since the dispute shall not reach the domestic court, but rather has already been solved or prevented.

We shall not explore all kinds of DPPs measures in detail. Instead, we shall analyze them in the big picture and determine on the effectiveness of DPPs measures as one of the reform options. To us, it is very convincing that investment disputes could be prevented or minimized with the right measures from relevant parties; especially, from states. We believe that most of the disputes could be foreseen, and then could be controlled[1101]. Most disputes could be anticipated with the right tools and knowledge sharing between relevant parties. The statistics have shown that investment disputes are more likely to arise in certain types of contracts, state activities (Ex. expropriation), or in certain economic sectors[1102]. In other words, disputes are more likely to occur in certain areas or activities than in others. The statistic from UNCTAD's database has shown that there are roughly 200 investment disputes in relation to the energy sector; meanwhile, there are only six investment disputes in the fishery business[1103]. In this connection, the EU FDI screening regulation is the prime example of a dispute prevention measure[1104], as the regulation allows EU Member States to impose measures toward investments in critical infrastructures[1105]. By the aforementioned regulation, they could determine which area of business activities needs to apply

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[1101] Many states are already on their way to establish the focal authority to anticipate investment dispute in order to settle potential dispute in a swiftly manner. This based in the idea inter alia that investment dispute could be anticipate, and therefore, controlled. For example, Brazil has insert DPPs into the new Brazilian cooperation and Facilitation Investment Agreement (CFIA). Dispute prevention is made possible through two institutions, with joint committee and national focal point or ombudsman. Many countries for example South Korea, Georgia, Greece, and Japan also implement the similar model. See, TITI, Catharine, «Non-Adjudicatory State-State Mechanisms in Investment Dispute Prevention and Dispute Settlement: Joint Interpretations, Filters and Focal Points», *Brazilian Journal of International Law* Vol. 14 Issue 2 (2017), 37-49; See also, <https://www.iisd.org/itn/en/2018/07/30/making-the-right-to-regulate-in-investment-law-and-policy-work-for-development-reflections-from-the-south-african-and-brazilian-experiences-fabio-morosini>. See also, CHAN-JIN, Kim, «Foreign Investment Law of Korea: Past and Present», *Korean Journal of International and Comparative Law* Vol. 31 (2003), 1-30;

[1102] Empirical data show that investment disputes are more likely to arise in the context of certain types of contracts or activities and in certain economic sectors. For instance, disputes are more common in complex State contracts involving build-operate-transfer contracts, privatization schemes, concession agreements for public services, and mining and petroleum extraction projects. See, Possible reform of investor-State dispute settlement (ISDS) Dispute prevention and mitigation - Means of alternative dispute resolution, Note by the Secretariat of 19 January 2020 (A/CN.9/WG.III/WP.190), para. 17. See also, statistics by UNCTAD, available online at <www.investmentpolicy.unctad.org>.

[1103] *Ibidem.*

[1104] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

[1105] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union Article 4(1)(a-e).

special measures and attention in order to prevent the occurrence of disputes. In addition, the FDI screening regulation also encourages cooperation between the EU Member States both in surveillance and information sharing, which could increase the capacity among Member States to monitor the business sectors that are more likely to be created disputes[1106].

In sum, we strongly support the current reform by strengthening the DPPs' approaches. We foresee that the reform could enhance the overall legitimacy of the current ISDS system[1107]. The shift from a right-based process into an interest-based process could enhance a better investment environment of the host state. The successful reform should lead to a more predictable investment climate, better governance, and fewer international arbitration disputes. Thus, more effective DPPs measures could ease the tension between administrative law and international investment law, including the inconsistency of interpretation of substantive standards by arbitral tribunals since many potential disputes could already be settled in the DPPs process. States should identify sensitive sectors and reasonable impost measures to prevent the escalation of disputes, such as, a well-draft contract[1108], raise awareness/ educate administrations regarding to potential disputes and the existence of the state's liability under the ISDS regime, or engage continuous communication with investors in sensitive sectors[1109]. Most importantly, states should encourage information sharing among themselves; by that, states could learn best practices from various DPPs measures and assist each other in monitoring the sensitive sectors and issuing appropriate measures.

6.3.3 Alternative Dispute Resolutions other than Arbitration

Alternative dispute resolutions (ADRs) other than arbitration have a strong connection to dispute prevention policies (DPPs) because they serve a similar purpose which is to prevent the potential dispute from escalating into a formal international arbitration proceeding. The weaknesses and skyrocketing cases of the current ISDS regime bring stakeholders[1110], scholars, and

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[1106] See details in Chapter 5 of the thesis.

[1107] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session of 10 November 2020 (A/CN.9/1044).

[1108] For example, Thailand has update its "form of agreement between administration and private party" in 2017. See, Regulations of the Office of the Prime Minister on Procurement B.E.2560 (2017).

[1109] Possible reform of investor-State dispute settlement (ISDS) Dispute prevention and mitigation - Means of alternative dispute resolution, Note by the Secretariat of 19 January 2020 (A/CN.9/WG.III/WP.190), para. 17-19.

[1110] There are around 50 cases registered through ICSID and ICSID Additional Facility each year. There are record of 68 cases in the year 2020. The demand seems to be continuously growing. The share of cases in the year 2020 involved States from South America (32%), followed by Eastern Europe and Central Asia (20%), Western Europe (13%), and the Middle East and North Africa, and Sub-Saharan Africa (10% each). States in the Central America and the Caribbean region accounted for 7%, North America for 5%, and South and East Asia and the Pacific for 3% of

international organizations including the European Union and the United Nations to explore alternative reform options such as investor-state mediation and other forms of amicable solutions to complement the existing regimes[1111]. Amicable solutions, including mediation are considered alternative and complement to arbitration and domestic litigation, which have proven to be expensive, delayed, political challenge, and reluctant of the state to comply with arbitral awards. As we already discussed throughout the thesis, there are many forms of alternative dispute resolutions other than arbitration, such as, consultation, negotiation, mediation, conciliation, ombudsman, and any other amicable settlement mechanisms. In general, those alternatives have non-binding nature and could secure many benefits at the same level of international arbitration (Confidentiality, efficiency, and less cost involved when compared to arbitration). Alternative dispute resolutions other than arbitration also permitting parties to continue a good working relationship[1112]. The settlement is usually faster and less costly, without prejudice to the right of the parties to resort to other forms of dispute resolution[1113]. Alternative approaches could improve good governance and other regulatory practices of states. Most importantly, those approaches are considered as dispute mitigation methods, as they potentially could prevent the escalation of disputes to arbitration and could alleviate concerns about the costs and duration of it[1114].

Traditionally, disputes between two or more parties are decided by the third neutral person to secure the fairness and effectiveness of those decisions. Those ideas have become domestic courts in these modern days. However, the traditional way of deciding disputes by domestic courts does not seem to be most appropriate for international investment disputes, which involve huge market capitals, cultural and legal differences, complexity, economic development, and long-term relationship between foreign investors-states and between states themselves. International investment usually involves with long term relationship between the host state and foreign

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newly registered cases. See, The ICSID Caseload — Statistics Issue 2020-2, available online at <www.icsid.worldbank.org>

[1111] Consultation Document: Prevention and amicable resolution of disputes between investors and public authorities within the single market by the European Commission (2018), available online at <www.ec.europa.eu>. See also, UNCTAD's Reform Package for the International Investment Regime (2018 Edition), available online at <www.investmentpolicy.unctad.org>.

[1112] Severance of the relationship between the investor and the State, which runs counter to the goal of host countries when concluding investment agreements which is to attract and promote foreign investments that provide a meaningful contribution to economic development. At the same time, bad relationships are worsening and jeopardizes an investor's prospects for a profitable long-term investment in the host country. See, OECD, «Foreign Direct Investment… *id.* See also, Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China of 19 July 2019 (A/CN.9/WG.III/WP.177), para. 5.

[1113] Possible reform of Investor-State dispute settlement (ISDS): Comments by the Government of Thailand of 11 April 2018 (A/CN.9/WG.III/WP.147), para. 7. See also, Submission from the Governments of Chile, Israel, and Japan of 15 March 2019 (A/CN.9/WG.III/WP.163).

[1114] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session of 19 November 2017 (A/CN.9/930/Rev.1), para. 31.

investors, in which those long-term investment contract obligations are drafted by government lawyers on the state side, and usually by a group of skillful lawyers on the foreign investor side. Whenever a dispute arises, arbitration is not keen as a tool to fix a broken business relationship but rather worsen it[1115]. Parties usually know the weak spots of the opposing side and then engage against each other in arbitral proceedings in a hard fashion. Thus, without any resort to an amicable solution, such disputes must be decided by arbitrators or domestic judges whose never been a part of those relationships in the first place. All these facts could potentially escalate the conflict and potentially ruin not only their business relationship in the long term but also the livelihood of many workers/ businesses who make their living from foreign investments. In this connection, it would be interesting to note that the arbitral tribunal in *Achmea B.V. v. The Slovak Republic* made an uncustomary remark to the parties at the close of hearing merits that the use of mediation or conciliation would benefit more to the parties rather than just take the dispute to international arbitration[1116].

Despite many benefits from alternative approaches, there are also challenges to their usage. Foreign investors might not attract to the alternative approaches since they consider them as non-binding in nature. Parties often lack experience and knowledge of those approaches[1117]. For many people, alternative approaches are regarded as a waste of time and money if they cannot lead to a successful settlement, considering the reality that in the end, the dispute must be resorted to by an international arbitration anyway. Alternative approaches may also not be suitable for all investment disputes especially when states are the party to the dispute[1118]. From the perspective of states, there is a huge barrier set by its domestic law regarding finding compromise solutions with foreign

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[1115] It is noted that the purpose of arbitration was never to repair a broken relationship between the parties, but rather worsen it. A statement made by Grant Kesler, the Chief Executive Officer of Metalclad after his company won in international arbitration case against Mexico and secure 17 million dollars award. Despite the fact that the win, he suggested that the result of arbitration is dissatisfying, and he wish his company has chosen a different part by taking a "political option" to resolve dispute. See, FRANCK, Susan D., «Integrating Investment Treaty… *id.*

[1116] The arbitral tribunal in *Achmea B.V. v. The Slovak Republic* stated that "…,the Tribunal remarked that it had a sense "that a settlement in this case would be a good thing, in that the aims of both sides seem to be approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case." The Tribunal emphasised that it was not its role to "get involved in this in any way at all" but suggested that should the Parties desire to seek out somebody who might act as a mediator or reconciliator, the Secretary-General of the PCA might be in a position to assist. The Tribunal noted that any such steps would be taken in parallel with the continuation of the case"". Despite such observation by arbitral tribunal, the parties did not attempt to resort their dispute in the amicable ways but rather continue to refer their dispute to the arbitration. See, Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), award of 7 December 2012, para. 60.

[1117] Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Thailand of 8 March 2019 (A/CN.9/WG.III/WP.162), para. 25. See also, Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of South Africa of 17 July 2019 (A/CN.9/WG.III/WP.176), para. 49 &50.

[1118] JOUBIN-BRET, Anna, «International Dispatch: Investor-State Disputes», *Dispute Resolution Magazine* Vol. 20 Issue 1 (2013), 37-41;

investors. Many times, government officials do not possess the authority and power to execute a deal with alternative approaches[1119]. From our own experiences, it is understandable that those local government officials could not and would not make a settlement decision in alternative approaches where the benefits of the state are at stake due to the fear of "backfire consequences", including a lawsuit against them from those decisions.

In the ISDS regime, there is a requirement called the "cool-off period" which requires parties to settle their dispute in an amicable way for a certain period before the right to resort their dispute to international arbitration. The amicable solutions work on interest-based processes[1120], in which there might include negotiation, conciliation and mediation, but do not extend to the exhaustion of local remedy rule (ELR); which extends to the local administrative or judicial remedies[1121]. The change from a right-based arbitration process into interest-based under mediation and other forms under amicable solutions might be desirable for both parties since it could secure a good business relationship by finding more-or-less solutions[1122]. Those functions within the cool-off period could equal a level playing field between state and foreign investors, fill the gap of mistrust between the foreign investor and domestic court[1123], and able to put them in a more comfortable situation. They could give a better result in term of satisfaction and business environment when compared to domestic litigation or international arbitration. Amicable solutions could function as peace-making both terms of economically and politically. States are more likely to comply with voluntary settlement rather than arbitration award since any resolution reached in mediation is made from a voluntary agreement of both parties.

Apart from the problem of inconsistency interpretation regarding the mandatory status of the cool-off period as a pre-arbitration requirement which we already discussed earlier[1124], there is also a problem with the unpopularity of mediation and other forms of amicable solutions in

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[1119] CHEW, Seraphina et. all, Report: Survey on Obstacles to Settlement of Investor-State Disputes, NUS - Centre for International Law Working Paper 18/01, available online at <www.cil.nus.edu.sg>.

[1120] According to the approach used by the parties in attempting to resolve their disputes, dispute resolution theory classifies the universe of dispute resolution process into three broad categories. First, the parties involved in a quarrel may attempt to solve their disagreements by determining who is more powerful which called "power-based resolution". Second, by determining who is right which called "rights-based resolution". Third, by reconciling their interests which called "interest-based resolution". See, SMITH, Stephanie &MARTINEZ, Janet, «An Analytic Framework for Dispute Systems Design», *Harvard Negotiation Law Review* Vol. 14 Issue 1 (2009), 123-170;

[1121] UNCTAD, Investor–State Disputes… *id.*

See general discussions of exhaustion of local remedy in 6.2 (Analysis on the Legal Problems on Inter-States Arbitration under the Investment Agreements).

[1122] WELSH, Nancy A. &SCHNEIDER, Andrea K., «Becoming Investor-State Mediation», *Penn State Journal of Law and International Affairs* Vol. 1 Issue 1 (2012), 86-96;

[1123] SORNARAJAH, Muthucumaraswamy, The International Law… *id.*

[1124] See detail of pre-condition to arbitration and cool-off period in 6.2 (Analysis on the Legal Problems on Inter-States Arbitration under the Investment Agreements).

practice. Although the vast majority of investment agreements contain a cool-off period clause[1125], parties seem to overlook the benefits of the use of amicable solutions, as foreign investors usually focus on the use of international arbitration under investment agreements. From the statistics, despite the fact that the data might not reflect the actual numbers because of the limitation of confidentiality in the alternative dispute resolution process, yet; the current data demonstrate that there is rarely use of alternative dispute resolutions other than arbitration in international investment disputes. For instance, ICSID has only registered 11 international conciliation cases, alongside two additional facility conciliation cases so far[1126]. Thus, there is not yet any case under the ICSID Fact-Finding Additional Facility Rules[1127]. The statistics from other major institutions are even much lower, where there are very few to none of the party has registered for their services of alternative approaches[1128]. The rationale behind that is because it is very challenging for states to settle the international investment dispute as it might ruin their reputation, political popularity[1129], fears of allegations of corruption or the future prosecution for corrupt conduct[1130], and internal bureaucratic problems in intergovernmental coordination which could hardly achieve in a short time frame.

Apart from the problem of its unpopularity, investor-state mediation and other forms of amicable solutions also facing with their unique problem and controversy that need to be carefully considered before making investor-state mediation become a pre-condition before the right to resort to international investment disputes through the ISDS arbitration regime. The term mediation is quite broad as it could describe a variety of practices; in consequence, the inconsistency could be frustrating and confusing. The treaty practice is one of the problems to be considered since not every treaty from roughly 3,000 IIAs contains a cool-off period clause. In

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1125 Around 90 percent of the international investment agreements contain "Cool-off Period". See, POHL, Joachim, MASHIGO, Kekeletso &NOHEN, Alexis, «Dispute Settlement… *id.*

1126 The ICSID Caseload (statistics issue 2021-1), available online at <www.icsid.worldbank.org>.

1127 *Ibidem.*

1128 The Permanent Court of Arbitration has so far not administered mediation proceedings based on a treaty, nor the Energy Charter Secretariat and neither has the SCC administered any investor-State mediation. The ICC has so far administered only one treaty-based mediation, which ended unsuccessfully, due to partial participation of a party. See, Possible reform of investor-State dispute settlement (ISDS) Dispute prevention and mitigation - Means of alternative dispute resolution, Note by the Secretariat of 19 January 2020 (A/CN.9/WG.III/WP.190).

1129 W. Michael Reisman made a clear remark on relationship between political stance and decision to make a settlement in international investment dispute. He stated that "…In States in which there are active political oppositions waiting for an opportunity to pounce on the incumbents for having 'betrayed' the national patrimony by settling with an investor, modalities other than transparent third-party decisions can undermine or even bring down governments and destroy personal career". See, REISMAN, W. Michael, «International Investment Arbitration and ADR: Married but Best Living Apart», *ICSID Review - Foreign Investment Law Journal* Vol. 24 Issue 1 (2009), 185–192;

1130 For example, many of Thais officials are in the criminal prosecution alleged for their corruption conduct arisen from international investment contract and award from international arbitration. See, the Thai Supreme Court Criminal Division for Persons Holding Political Positions No. 2/2550 (2007) and No. 2/2551 (2008).

addition, states are not likely to renegotiate investment treaties for the sole purpose of adding an effective cool-off period clause, due to the complexity and political sensitiveness of such renegotiation. We believe that the conclusion of future mega-regional treaties should bring about more states to put an effective cool-off period clause or mandatory mediation as a pre-condition to arbitration could potentially increase the use of those alternatives. Also, the mandatory investor-state mediation must be carefully drafted since it could infringe the autonomy of the parties or even constitute a denial of access to justice[1131].

The most important key issue that must be noted for any future development of mandatory investor-state mediation and amicable solutions is the transparency of those processes. We agree with many literatures suggesting that there are much more international investment disputes which found their early settlement through amicable solutions[1132]. However, access to that information is limited due to the functionality of confidentiality of those processes[1133]. As confidentiality is the main function of mediation and other ADRs tools that persuade government and foreign investors to make a settlement and be able to secure both good business relationships and political reputations[1134]. Yet, the function of confidentiality could jeopardize the core of public law and allow the government to get away from its wrongdoing under the veil of mediation since the public could not have access to such a settlement[1135]. Thus, confidentiality could be a barrier to preventing the development of good practices in amicable solutions. Although different state shares different culture and legal background, however, the sharing of best practices in the settlement technique could substantially contribute to the development of mediation and all kinds of amicable solutions.

1131 CLAXTON, James M., «Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?», *Pepperdine Dispute Resolution Law Journal* Vol. 20 Issue 1 (2020), 78-100; See also, Note in, «Mediation of Investor-State Conflicts», *Harvard Law Review* Vol. 127 Issue 8 (2014), 2543-2564; See also, Expert Commentary from Key Participants by CLODFELTER, Mark A., "Why Aren't More Investor-State Treaty Disputes Settled Amicably?" in Investor-State Disputes: prevention and Alternatives to Arbitration II Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, held on 29 March 2010 in Lexington, Virginia, United States of America (Edit by Susan D. Franck and Anna Joubin-Bret), available online at <www.unctad.org>.

1132 *Ibidem.*

1133 *Ibidem.*

1134 As it is proved in some case that the result of mediation is not likely to be achievable in the adjudication process. See, MCGOVERN, Francis E., «Mediation of the Snake River Basin Adjudication», *Idaho Law Review* Vol. 42 Issue 3 (2006), 547-562; See also, an online article by REITMAN, Jonathan W. on the topic of "The Allagash: A Case Study of a Successful Environmental Mediation", available online at <www.mediate.com>.

1135 ALI, Shahla F. &REPOUSIS, Odysseas G., «Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat», *Denver Journal of International Law &Policy* Vol. 45 No. 2 (2020), 225-249; See also, MONEKE, Enuma U., «The Quest for Transparency in Investor-State Arbitration: Are the Transparency Rules and the Mauritius Convention Effective Instruments of Reform?», *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* Vol. 86 Issue 2 (2020), 157-186;

Therefore, states, international organizations and all relevant parties should carefully draft whether to what extent transparency should play its role in investor-state mediation.

As we demonstrated in this part, it is undeniable that the current alternative approaches to prevent the escalation of disputes to arbitration are neither popular nor effective in the current practice of the ISDS regime. In this connection, there is massive attention by the international community to enhance the effectiveness of alternative dispute resolutions other than arbitration. At the time of writing this thesis, there is an ongoing discussion by the UNCITRAL Working Group III on the importance of pre-arbitration amicable solution procedure, which lead to the reform proposal by establishing the "Advisory center" as a complement to other reform options[1136]. If the establishment could be successful, the center shall function as *inter alia* provide the service of mediation and other alternative dispute resolution (ADR) before the disputes escalate into formal proceedings such as arbitration[1137]; the effectiveness of the center shall reduce the number of cases of ISDS arbitration and enhance cost-effective of the whole system[1138]. Regardless of the ongoing discussions, it is clear that the international community urge for more effective use of alternative approaches. In which we totally agree with their view as alternative approaches could work as complementary tools to enhance overall legitimacy of the current ISDS regime. States should strengthen the alternative approaches as an important part of reforms[1139]. They should add a set of specific procedures in detail for amicable solutions, so that effectiveness can be ensured and achieved in the process. States and their officials should be educated and raise their awareness of the usages and benefits of alternative approaches; therefore, they could use explore their full potential of them. Besides, cool-off periods should have a sufficient duration so that the parties; especially, states could have enough time to prepare and make the decision in the settlements.

[1136] Possible reform of investor-State dispute settlement (ISDS) Advisory Centre, Note by the Secretariat of 25 July 2019 (A/CN.9/WG.III/WP.168).

[1137] Possible reform of investor-State dispute settlement (ISDS) Advisory Centre, Note by the Secretariat of 25 July 2019 (A/CN.9/WG.III/WP.168), para. 22.

[1138] The establishment of Advisory Centre shall address concerns identified, including with respect to the cost of ISDS proceeding, correctness and consistency of decisions as well as access to justice. It was also mentioned that an advisory centre could contribute to enhancing transparency in ISDS. The work of Advisory Centre shall focus on the "prevention" of disputes, rather than "post-dispute" regulation. The Advisory Centre would be tasked to provide legal advice on investment law before a dispute arises and act as counsel when there is a dispute. The center could also help States in capacity-building and the sharing of best practices. Thus, it would help States to prepare their defense in ISDS proceedings. Most importantly, the use of alternative approaches shall be promoted and enhance its effectiveness by the Centre. See, Possible reform of investor-State dispute settlement (ISDS) Advisory Centre, Note by the Secretariat of 25 July 2019 (A/CN.9/WG.III/WP.168).

[1139] ECHAND, Roberto, «Towards a New Approach to Address Investor-State Conflict: Developing a Conceptual Framework for Dispute Prevention», Nccr Trade Regulation Working Paper No 2011/46 (2011).

We would like to emphasize that the more effectiveness of alternative approaches shall not eliminate all future international investment arbitrations. Yet, ADR other than arbitration and DPPs could offer promising alternatives to the settlement of investment disputes through international arbitration[1140]. As the tools to complement the use of the current ISDS regime, they could potentially decrease the number of international arbitrations that pose many criticisms. The alternative approaches provide dispute settlement at lower cost and time when compared to international arbitration. Most importantly, a successful settlement could prevent an uneasy situation between investment arbitration and administrative law, including the controversy over the inconsistency of international arbitration. Many international awards shall not fall within the jurisdiction of domestic courts since the government could settle them through alternative approaches in the first place. Along with proper adjustment of the investment mediation model which should preserve a main core of public law, it would be logical to allow the executive branch to play its leading role in preventing a caseload to the court and protecting national interest from the disputes that arise from international investment agreements. Especially, since those investment agreements are concluded for the main purpose of promotion of foreign direct investment. The future development of compulsory investor-state mediation could be desirable, since the parties should only resort to their dispute by arbitration only when the parties convince that the use of other ADRs technique is not likely to be successful[1141]. All the above reasons should also lead to more cost-effective and effective enforcement since consensual solutions to Investor-State conflict would bring more compliance from states than decisions from international arbitrators[1142].

6.3.4 New Model of Investment Agreements

As we mentioned throughout the thesis, states are taking different reform approaches toward the booming of investment arbitrations that are subjecting to many criticisms including the substantial sum of damage in arbitral awards and the state's reputation[1143]. Those approaches range from discussing the development through the international forum[1144], wide scale termination of

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[1140] QTAISHAT, Ali, «Investor-State Arbitration: Exploring Contemporary Issues and Remedy», *Journal of Law: Policy and Globalization* Vol. 13 (2013), 12-18;

[1141] Report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration: Consistency, Efficiency, and Transparency in Investment Treaty Arbitration (November 2018).

[1142] QTAISHAT, Ali, «Investor-State… *id.*

[1143] Currently, there are 1,061 known treaty-based ISDS cases. The majority of the disputes have arisen during 2000-2017. See statistics at <www.investmentpolicy.unctad.org>.

[1144] For example, there are ongoing discussions in UNCITRAL Working Group III: Investor-State Dispute Settlement Reform. See, <www.uncitral.un.org>.

investment treaties, to denouncing the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). However, some states have chosen to develop new model BITs that seek to tackle weaknesses possessed in old model agreements by *inter alia* correcting the problematic language found in the old model of investment agreements (those languages usually vague and broad)[1145], adding treaty language that refers to stronger sustainable investment elements[1146], strengthening the use of mediations and other alternative approaches, limit access to ISDS, and secure more space for host state's policy space[1147]. The trend of improving investment agreements is not something new[1148], as many states keep amending new versions of investment agreements to suit their needs over time (For example, USA has already amended six versions of BITs). It became clear that the outcome of international investment arbitration is wholly disconnected from the sustainable development and host state development[1149]. Needless of any explanation that, the original version of IIAs that first developed over sixty years ago are no longer serve the need of the global economic context of the 21st Century anymore.

As we pointed out throughout the thesis, states generally change their regulations or exercise special functions under administrative investment contract usually based on the public interest reason. The rationale behind that is because most of those investment contracts contained public policy implications. In the ISDS dispute, we usually find the dispute in relation to public policy implications[1150]; for example, regulatory measures to solve an economic emergency or civil

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1145 See detail discussions in Chapter 3 of the thesis.

1146 Sustainable development should be one of the cornerstones of the international investment agreement. The desire of parties to create and foster economic cooperation must be in line with the pursuit of sustainable development in its economic, social, and environmental dimensions.

1147 International Institute for Sustainable Development, «Developing and Negotiating Based on a Model Investment Treaty: Background Note to the IISD Webinar Series on Investment Law and Policy», available online at <www.iisd.org>.

1148 The World Investment Report 2015 by UNCTAD noted that at "least 50 countries or regions are currently revising or have recently revised their model international investment agreements". See, UNCTAD World Investment Report 2015: Reforming International Investment Governance, available online at <www.unctad.org>. See also, GORDON, Kathryn &POHL, Joachim, «Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World», OECD Working Papers on International Investment 2015/02, OECD Publishing, available online at <www.oecd.org>.

1149 MANN, Howard et. al, *IISD Model International Agreement on Investment for Sustainable Development: Negotiators' Handbook*, 2nd Edition, IISD: International Institute for Sustainable Development, Winnipeg, 2006;

1150 See statistics at <https://investmentpolicy.unctad.org/>.

unrest[1151], protection of the environment[1152], energy policy[1153], protection of the architectural site[1154], public health[1155], or development of the country's infrastructure[1156]. With this situation, the problem has shrined especially in the issue of the restraint between investment protection and the state's right to regulate. Traditionally, the old model of investment agreements is vague and broad in which they only focus on investment protection standards and ISDS mechanism. Many of the old international investment models do not specifically express the room for the state's right to regulate for the purpose of public interest[1157]. In this connection, there is an ongoing trend of improvement of the international investment agreement model based on the idea of transformation of old model investment treaties which its sole intention is to provide foreign investments protection, into the new model treaties that balance foreign investment protection and host state's right to regulate. The new model treaties such as the Comprehensive Economic and Trade Agreement (CETA) or the United States–Mexico–Canada Agreement (CUSMA) allow the regulatory interest of the state in certain areas, such as, the environment, labor rights and the health and welfare of citizens[1158]. Those exceptions will lead to the exclusion of liability in the

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1151 CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8. See also, Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16. See also, in BG Group Plc v. The Republic of Argentina, UNCITRAL Arbitration Rules. See also, LG & E Energy Corp, LG & E Capital Corp and LG &E International Inc. vs. Argentina Republic, ICSID Case No. ARB/02/1.

1152 Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1. See also, David R. Aven and Others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3. See also, Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33. See also, Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia, ICSID Case No. ARB/17/32.

1153 Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12. See also, Isolux Netherlands, BV v. Kingdom of Spain, SCC Case V2013/153. See also, Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, SCC Case No. 2015/063. See also, Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50.

1154 Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3.

1155 Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12. See also, Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay). See also, Kingsgate Consolidated v. Thailand (Case Pending).

1156 Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand, UNCITRAL (formerly Walter Bau AG (in liquidation) v. Kingdom of Thailand), UNCITRAL.

1157 There are numbers of investment agreements that does not express the right of state to regulate in specific area that could lead to no compensation for such regulatory action or terminating of contracts. For example, See, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments of 1990. See also, Agreement on Economic Co-operation between the Government of the Kingdom of the Netherlands and the Government of the Kingdom of Thailand of 1972.

1158 KORZUN, Vera, «The Right to… *id.*

The clause that allows state's right to regulate for public interest, for example, United States–Mexico–Canada Agreement stated that "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives". See, United States–Mexico–Canada Agreement (CUSMA) Article 14.16. Many other newly

investment treaties themselves. The majority of the new model of investment agreements contain such clauses where they clearly allow states to adopting, maintaining, or enforcing any measure in order to achieve public interest[1159]. These new treaty models tend to simultaneously increase the legitimate exercise of power by host states. They clarify that in which sectors that host state could regulate in the public interest without liability for its commitment to investment agreement. In sum, those new model treaties simultaneously increased the legitimate exercise of power by host states, clarified the country's interpretation of particular phrases, imposed greater precision to the norms of host state behavior, and suggested innovations to overcome perceived problems with investor-state tribunals[1160].

Beside the development of a model treaty to allow the state's right to regulate for public policy objectives, the other element with no less importantly needed to develop in the new model of an investment treaty is to tighten and refine language around the standard of protections to avoid overly broad arbitral interpretations that interfere with public policy objectives. As we mentioned throughout the thesis that standards of protection under investment agreements are not really a norm, but rather sit somewhere between rules and principles[1161]. The term of the standards of protection is usually vague and broad which leave the duty of interpreting of those term to the arbitral tribunals that get appointed on a case-by-case basis, in which those interpretations including reasoning are not constituting as the precedents[1162], although with two cases that share a similar factual backgrounds or disputes which arisen from the same investment agreements[1163]. The particular concern of uncertain scope, inconsistency, and broad discretion given to the arbitral tribunal led to the reform by clarification of terms in the international investment agreements.

In our opinion, the language clarification of substantive protections in those investment agreements is one of the most important steps to increase the legitimacy of the current ISDS regime. The clear treaty language is close to the principle of legality which those treaty languages

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concluded investment agreements provide the language in a similar manner. For example, See, The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 8.9.

[1159] *Ibidem.*

[1160] VANDEVELDE, Kenneth J., *U.S. International Investment Agreements*, 1st Edition, Oxford University Press, Oxford, 2009;

[1161] See details discussions of standard of protections under investment agreements in Chapter 3 of the thesis.

[1162] Some of the treaties also clearly denied the important of arbitral awards as binding precedent in future arbitration. This view of unbinding precedent also reaffirmed in many arbitral tribunals. See, United States–Mexico–Canada Agreement (CUSMA) Article 14.D.13 (7). See also, Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Article 53. See also, Saipem S.p.A. v. The People's Republic of Bangladesh, Award of 30 June 2009 (ICSID Case No. ARB/05/07), para. 90. See also, AES Corporation v. the Argentine Republic, Decision on Jurisdiction of 13 July 2005 (ICSID Case No. ARB/02/17), para. 30-32.

[1163] PARVANOV, Parvan P. &KANTOR, Mark, «Comparing U.S… *id.*

should not carry any ambiguity in order to prevent any frustration of uncertain interpretation by arbitral tribunals. As we already elaborated in Chapter 3 of the thesis, there are controversies and various ways of treaties interpretations; for instance, in the term creeping expropriation, fair and equitable treatment (FET), minimum standard of treatment (MST), and most-favoured nation standard (MFN). As those investment protection clauses in the old investment agreements model are usually drafted in a minimalist, open-ended way. The precise language could enhance more predictability and consistency of interpretation and reasoning by the arbitral tribunal. For example, when apply to the *Maffezini* case, the precise treaty language could prevent the arbitral tribunal from allowing foreign investors to bypass the original treaty where there is an exhaustion of local remedies (ELRs) requirement, into another treaty that no ELRs requirement because arbitral tribunal might suggest that it is a more favorable clause[1164]. The clear treaty language, for example, adding the term as "the MFN clause shall not apply to the dispute settlement[1165]" shall totally prevent such controversial interpretations since it will only give a limit/certain discretion to the arbitral tribunal.

Another prime example of the broad interpretation of terms in an investment treaty is the interpretation of "legitimate expectation" under the FET standard. Many of the old model treaties do not give the exact definition of FET but rather drafted in a minimalist and open-ended manner[1166]; some of the old model treaties do not even mention about the term "legitimate expectation"[1167]. In which it leaves wide discretion to the international arbitrator to make their own interpretation of what is the legitimate expectation as one of the important elements to determine whether the host state has breached the FET standard or not. The tribunal in *MTD* v. *Chile* has taken account of the President of Chile's toast speech at the state dinner in an account as in favor of the respective investment project[1168]. Meanwhile, the tribunal in *Walter Bau v. Thailand* considered Thailand breached investor's legitimate expectations because Thailand had developed

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[1164] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 of 13 November 2000, para. 21.

[1165] For example, See, Agreement between the Portuguese Republic and the United Arab Emirates on the Reciprocal Promotion and Protection of Investments of 2011, Article 4(4). See also, Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia of 2010, Article III(2).

[1166] Agreement on Economic Co-operation between the Government of the Kingdom of the Netherlands and the Government of the Kingdom of Thailand of 1972. See also, Agreement Between the Government of the Republic of Finland and the Government of the Federal Republic of Nigeria on the Promotion and Protection of Investments of 2005. See also, Agreement between the government of the Arab Republic of Egypt and the Government of the Republic of Singapore on the Promotion and Protection of Investment of 1997.

[1167] *Ibidem.*

[1168] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, award of 25 May 2004, para. 133 &156.

better roads and closed their old airport then changed to the better one[1169]; all these actions were deemed breached investor's legitimate expectations due to less expectation of returns[1170]. We observe that the interpretation of the term legitimate expectation is broad and takes less account of public interest implications. In this connection, as old treaty models have not expressed the term of FET and legitimate expectation, the new model agreements should consider giving a clear definition of those terms. As the newly concluded treaties like the Comprehensive Economic and Trade Agreement (CETA) and the United States–Mexico–Canada Agreement (CUSMA) are already provided a details definition of FET and which situations are constituted a legitimate expectation to foreign investors[1171]. These clarifications could prevent controversy of broad and inconsistent interpretation by different arbitral tribunals. At the same time, such clarification could prevent the abuse of those languages by investors and lawyers.

Besides, we strongly suggest that the clarification of substantive protections should neither solely done for the purpose of decreasing a state's liability nor that those languages should not be too narrowly drafted in order to eaten up the scope of the principle of responsibility itself. The clarification of treaty language would benefit both foreign investors and states (Especially, developing states whose concluded various versions of investment agreements[1172]), since foreign investors could expect more predictability of the system, and states could emphasize that "How far/ or to what extent that they are really intended to be committed when they concluded the investment agreements". This would benefit many countries (Especially developing countries), since many of them are not aware of the potential of substantive protections when they conclude investment agreements. These clarifications could also benefit states whose concluded various versions of treaty languages, since the language clarification would solve the issues of controversy and uncertainty. The clarification of treaty languages would also enhance more predictability and effectiveness of the enforcement of international arbitral awards.

[1169] Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand, UNCITRAL (formerly Walter Bau AG (in liquidation) v. Kingdom of Thailand), award of 1 July 2009, para. 12.12 &12.38.

[1170] Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand, UNCITRAL (formerly Walter Bau AG (in liquidation) v. Kingdom of Thailand), award of 1 July 2009, para. 12.44.

[1171] The Comprehensive Economic and Trade Agreement (CETA) Article 8.10 (2) &(4). See also, the United States–Mexico–Canada Agreement (CUSMA) Article 14.6.

[1172] From our own observation, there are considerable variation between BITs, even among those signed by the same developed/developing country. Many developing countries have concluded many versions of BITs and contain various version of language of substantive protections. See BITs' texts, available online at, <www.investmentpolicy.unctad.org>.

Beside the development of creating exception clauses for the state's right to regulate and clarification of substantive terms, there is a variety of developments that could be achieved in the treaty model reform process. The new investment treaty model should limit the use of the ISDS mechanism and provide for alternative forms of dispute resolution[1173]. In this regard, mandatory mediation should be considered as a core of pre-condition to arbitration. Also, states should clarify the treaty language on what constitutes as an investment since the old model treaties usually provide the language that the term investment refers to every kind of investment[1174]. We believe that states should narrow down the term "protected investment" and at least bring the *Salini* test as the minimum requirement to qualify which foreign investment constitutes as a direct investment that is eligible for additional investment protection under the treaty[1175]. States should also include elements that seek responsible from foreign investors to make an active contribution to the country's sustainable development agenda. By this means, they should consider amending the treaty language, asking for investor cooperate social responsibility (CSR)[1176]. Although it is challenging since CSR is not directly asked for direct obligations toward foreign investors, yet the term could ensure that states shall encourage investor in their territory to put their best effort into CSR within the internal framework[1177]. Thus, the more innovative functions that we discussed throughout the thesis, such as, procedural provisions (Ex. Cool-off period, or exhaustion of local remedies), the clause that requires transparency of arbitral awards by publication of international arbitral awards with adequate details, the more reasonable period of survival clause, the establishment of a local focal authority to manage early investment dispute, and new function to maintain a panel of independent arbitrators. Those functions should be carefully reviewed, and later inserted them the new model agreements.

[1173] See general discussion in Chapter 6.3.3 (Alternative Dispute Resolutions other than Arbitration).

[1174] Agreement between the Government of Canada and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments of 1989, Article I(b). See also, Agreement between the People's Republic of China and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments of 2005, Article 1(1). See also, Agreement between the Government of the Kingdom of Thailand and the Government of the Argentine Republic for the Promotion and Reciprocal Protection of Investments of 2000, Article 1(2).

[1175] The tribunal of *Salini v. Morocco* gave a widely accepted of the following arbitral tribunals to interpret the term "investment" (Later known as "Salini test"). According to the tribunal, the term investment must; (1) involve the transfer of funds or the contribution of money or assets; (2) with certain duration; (3) have the participation of the individual transferring the funds in the management and risks associated with the project; and (4) bring economic contribution to the host state. See, Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction of 31 July 2001, para. 52-58;

[1176] New model of investment agreements tends to ask for more Cooperate Social Responsibility (CSR) from foreign investors. For example, See, United States–Mexico–Canada Agreement (CUSMA) Article 14.7.

[1177] *Ibidem.*

In sum, we support the current trend of development of the investment treaty model. Those developments should seek four goals (some of the newly concluded agreements already followed these approaches); which are, (1) to require more responsibilities, commitments and obligations from the investors (Ex. Obligation and commitment to environment and human rights protection), (2) to limit the use of international arbitration and encourage more use of effective investor-state mediation and other forms of alternative dispute resolutions other than arbitration, and (3) to tighten and refine language around standards of protection in order to avoid overly broad arbitral interpretations that interfere with public policy objectives. (4) Draft a treaty that recognizes the state's right to regulate for the public interest. We see those developments as a necessary step in order to balance the investment protections and the host state's right to regulate. These investment model developments should not be done solely for the purpose of decreasing the state's obligation, but those reforms; especially, by tightening and refining the languages of substantive protections should be done for the result of making the state's commitment more precise, and to clarify those responsibilities that states really wanted to commit in the first place when concluding investment agreement[1178].

6.3.5 The Changing of Global Context, the Institutionalization, and Mega-Regional Treaties

The changing global context in the increasing trend of institutionalization and concluding mega-regional treaties have a strong connection with the topic of improvement of the investment treaty model, especially for the dispute settlement provision. Formerly since the first BIT concluded in 1959[1179], the investor-state dispute settlement (ISDS) clause was negotiated under the BITs regime. Later, ISDS has been negotiating in the larger context of FTAs[1180]. Yet, the current trend has been moving significantly from BITs and FTAs into an even larger context, which is a mega-regional treaty (Regional Trade Agreements-RTAs)[1181]. The mega-regional treaties usually sign by many states, which makes each of them worth a substantial amount of global GDP (For

[1178] VANDEVELDE, Kenneth J., U.S. International... *id.*

[1179] The first BIT was signed after WWII period between West Germany and Pakistan in 1959. See, Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (1959).

[1180] For example, See, Free Trade Agreement between the Government of the Republic of Chile and the Government of the Kingdom of Thailand of 2013. See also, Free Trade Agreement between the Swiss Confederation and the People's Republic of China of 2013.

[1181] For example, See, Trans-Pacific Partnership Agreement (TPP). See also, The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States. See also, United States–Mexico–Canada Agreement (CUSMA). See also, Free Trade Agreement between the EFTA States and the Central American States (2018). See also, Regional Comprehensive Economic Partnership-RCEP (2020).

example, Regional Comprehensive Economic Partnership-RCEP is worth 26.2 trillion UDS, which is equivalent to thirty percent of the global GDP[1182]). Such agreements have become instruments of globalization, removing barriers to trade and investment, and intended to liberalize investment flows[1183]. Generally, the mega-regional treaties require more cooperation and more commitment from state parties than the BITs. They are normally provided with more innovation in every perspective and ask for broader and closer cooperation (Ex. trade, investment, competition, e-commerce, public procurement, intellectual property, anti-corruption measures, and combating climate change). The current proliferation of mega-regional treaties reflects, in part, a demand for deeper integration than what has been achieved by old model BITs or older multilateral agreements, in a more modern and progressive manner[1184]. Most importantly, those agreements have a significant development in investment provisions, including the ISDS clause, which is distinctive in several aspects.

We foresee many positive impacts from the current trend of concluding mega-regional treaties; especially, to the dispute settlement provisions. As we mentioned that the current trend of concluding mega-regional treaties has a strong connection with the development of the investment treaty model, we notice that those treaties have a strong development in the clarification of their language[1185]. Those treaty language clarifications tend to balance between investment protection and the host state's right to regulate, as we normally see the term provided that the treaty shall not prohibit states from regulating for public welfare[1186]. They clearly stated that which area of activities/ economic sectors that the treaty shall not apply to[1187]. We also see more restrictions on the term "covered investments" which distinguish what kind of investments

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[1182] As the data of 2020, RCEP participating countries account for about 30% of the global GDP and 30% of the world population. See, Summary of the Regional Comprehensive Economic Partnership Agreement (RCEP), the data available online at <www.asean.org>.

[1183] VANDEVELDE, Kenneth J., «A Brief History of International Investment Agreements», *U.C. Davis Journal of International Law &Policy* Vol. 1 No. 1 (2005), 157-194;.

[1184] CRAWFORD, Jo-Ann &FIORENTINO, Roberto V., «The Changing Landscape of Regional Trade Agreements», *Discussion Paper* No. 8, World Trade Organization Geneva, Switzerland, available online at <www.wto.org>.

[1185] As we usually see the term "for greater certainty" in many modern Regional Trade Agreements (RTAs) to clarify its' terms. For example, See, The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 2.9(2) (Fees and other charges). See also, United States–Mexico–Canada Agreement (CUSMA) Article 14.2(4).

[1186] For example, United States–Mexico–Canada Agreement stated that "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives". See, United States–Mexico–Canada Agreement (CUSMA) Article 14.16. Many other newly concluded investment agreements provide the language in a similar manner. For example, See, The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 8.9.

[1187] For example, See, Regional Comprehensive Economic Partnership (RCEP) Article 10.2(2).

are eligible for protection under the treaties. Normally, the mega-regional treaties require investment to commit the capital, bear the risks, and expectation for profits in order to be able to regard as the term "protected investment" under the treaties[1188], and then be eligible for additional investment protection under those treaties. Thus, those mega-regional treaties usually ask for corporate social responsibility (CSR), in which it requires state parties to encourage enterprises operating within its territory to incorporate with social responsibility of the host state (Ex. labor, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption)[1189]. This could make a huge impact on the arbitral proceedings since foreign investors seem to be more relevant in making a contribution to host state society rather than just contributing to them by generating wealth as in the old fashion. In sum, these treaties try to narrow the availability of investor treaty dispute resolution, and only open the availability to limit the number of investments that make a reasonable contribution to the host countries' development. Additionally, they ask for more risk-sharing from foreign investors when compared to the old model of investment agreements.

Furthermore, mega-regional treaties tend to give clarification of substantive protections under the treaty. We usually see the term "for greater certainty", in which those terms shall give a precise interpretation of those substantive protections to the international arbitral tribunal, and then limit their discretions only to what extent states really wanted to commit in the first place[1190]. For instance, the newly concluded United States–Mexico–Canada Agreement (CUSMA) provided the annexes to clarify most of the terms that usually have controversial of interpretations by arbitral tribunals in the past (Ex. Customary International Law[1191], Expropriation[1192], and all terms relating

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[1188] Those newly concluded Regional Trade Agreements (RTAs) usually import the idea of *Salini* test which required substantial commitment from investors in order to eligible for additional protections under investment agreement. For example, See, United States–Mexico–Canada Agreement (CUSMA) Article 14.1. See also, Regional Comprehensive Economic Partnership (RCEP) Article 10.1 (C). See also, The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 8.1.

See detail of *Salini* test in Chapter 3 of the thesis.

[1189] United States–Mexico–Canada Agreement (CUSMA) Article 14.17.

[1190] The prime example is the clarification of substantive protections; especially for the term "Fair and Equitable Treatment-FET", which has controversy of interpretation of the term be international arbitral tribunals. See detail discussions in Chapter 3 of the thesis.

To counter the issue, those mega-regional treaties usually clarified the term FET, legitimate expectation, and in which circumstances it would consider as breach of the FET standard. See, Regional Comprehensive Economic Partnership (RCEP) Article 10.5. See also, United States–Mexico–Canada Agreement (CUSMA) Article 14.6. See also, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 8.10 (2)-(6).

[1191] United States–Mexico–Canada Agreement (CUSMA) Annex 14-A.

[1192] United States–Mexico–Canada Agreement (CUSMA) Annex 14-B. In similar manner, See, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 8.12 (2).

to international arbitral proceedings[1193]). Meanwhile, the Comprehensive Economic and Trade Agreement (CETA) gave the clear and unambiguous investment protection standards[1194]. For example, CETA gave a clear definition to the term Most-Favored-Nation Treatment (MFN), in which MFN does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements[1195]. By this, the future dispute arising from CETA would not have a problem with the interpretation of the MFN clause in relation to the use of the less restrictive cool-off period in other treaties like the *Maffezini* case[1196]. These developments shall limit the discretion of international arbitrators when determining a state's liability under substantive obligations and enhance the predictability and legal certainty in the process.

Those mega-regional treaties also provide a major development and drive toward more legitimacy of the current ISDS regime. By concluding those treaties, state parties have the opportunity to enact joint interpretations in order to clarify terms under the treaties[1197]. This will allow state parties to update the interpretation guide of the treaty language over time. It could narrow down the international arbitrator's discretion and create an international investment law's legal standard on a global scale[1198]. In addition, transparency which is one of the core administrative law principles is more recognized in the current trend of mega-regional treaties, since they require arbitral tribunals to disclose the necessary information of arbitral proceedings, hearing procedures, and open the awards to the public[1199]; yet, subject to narrow exception[1200]. The CETA even pursues a further level of transparency since it requires parties to disclose information since the exhaustion

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[1193] United States–Mexico–Canada Agreement (CUSMA) Annex 14-D.

[1194] HSU, Locknie, «An Asian View on the CETA Investment Chapter», Makane Moïse MBENGUE &Stefanie SCHACHERER (Eds.), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)*, Springer, Cham, 2019;

[1195] The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 8.7 (4).

[1196] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 of 13 November 2000, para. 21. See general discussion in Chapter 3 of the thesis.

[1197] For example, See, Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001).

Thus, some mega-regional treaties also create a committee to review and issue the interpretative guide for the treaty language overtime. See, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 8.10 (3).

[1198] SCHILL, Stephan W., The Multilateralization… *id.* See also, BUTLER, Nicolette &SUBEDI, Surya, «The Future… *id.*

[1199] United States–Mexico–Canada Agreement (CUSMA) Article 14.D.8 (Transparency of Arbitral Proceedings). See also, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 8.36 (Transparency of proceedings).

[1200] *Ibidem.*

of local remedies (ELRs) and the cool-off period stage[1201]. In this connection, the mega-regional treaties tend to encourage parties to settle their disputes in the early stage (pre-dispute phase) since they strengthen the DPPs measures and encourage the usage of methods of alternative dispute resolution (ADR) other than arbitration (Ex. Consultation and mediation). Furthermore, mega-regional treaties also present opportunities for the development of effective appellate mechanisms within the treaty itself; for instance, CETA already replaced an *ad hoc* investment arbitration with an investment court system composed of a first instance tribunal and an appeal tribunal in a similar manner with the first instance tribunal[1202]. This would fill the gap of predictability, coherence, and more effective enforcement of the arbitral awards; those appellate tribunals shall serve as a higher hierarchy to correct or harness the decision by the first instance of the arbitral tribunal as in the same aspect with the court system[1203]. Thus, those appellate tribunals created under individual mega-regional shall have a systemic impact on the case law of other treaties out there as a whole.

In sum, we notice the shift of context of investment agreements, in the beginning from BITs to FTAs, and recently from FTAs into mega-regional treaties[1204]. We notice a fairer balance has been struck between investment protection and the host state's right to regulate in the mega-regional agreements. Moreover, we notice a huge development/ innovation of the investment settlement provisions in mega-regional treaties. There are mechanisms that systematically narrow the availability of foreign investors to assert their claim to international arbitration under investment agreements, along with the clearer terms in the treaties which could help to limit the discretion of arbitral tribunal and enhance more predictability in the international arbitral proceedings. Transparency has been strengthening in the newly concluded mega-regional treaties since almost all information must be disclosed to the public. Besides, there is more use of dispute prevention policies and more use of ADR in a pre-dispute phase in order to prevent the dispute from escalating into a formal dispute. Those mega-regional treaties also provide with bilateral investment court systems (ICS) or build-in treaty tribunals (Ex. CETA tribunal) in order to ensure their independence and quality, including consistency of their decision. By all these, we see a good sign of development made by mega-regional treaties; in particular, to the whole ISDS regime. Those overall innovations by mega-regional treaties should bring about more compliance,

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[1201] The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 8.36 (2).

[1202] The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States Article 8.28.

[1203] DICKSON-SMITH, Kyle Dylan, «Does the European Union Have New Clothes: Understanding the EU's New Investment Treaty Model», *Journal of World Investment & Trade*, Vol. 17 Issue 5 (2016), 773-822;

[1204] UNCTAD Research Paper No. 1 (2017), UNCTAD/SER.RP/2017/1 Rev.1. Available online at <www.unctad.org>.

effectiveness, fairness, and overall legitimacy of the system. It would surely create a positive impact on the whole international investment law regime. Thus, they could prevent an uneasy situation for domestic courts; especially, in the jurisdictions where they embrace a strong idea of administrative law, because they could avoid the interpretation of international investment law along with the administrative law. Since disputes could find an effective settlement or enforcement virtue of the mechanisms within those mega-regional treaties.

6.3.6 The Establishment of the Multilateral Investment Court

One of the major developments currently being in the international discussion purpose by the European Union is the establishment of the multilateral investment court (MIC)[1205]. As confirmed by the CJEU's opinion that the establishment of MIC is not contrary to the supremacy of the EU law[1206], the European Union (Represented by the European Commission) believe that the establishment of a permanent body to handle with international investment dispute is the most sensible options on the table which can effectively address the current ISDS issue. So far, the European Union has already replaced the ISDS mechanism with bilateral investment court systems (ICS) in its newly signed IIAs under the EU's exclusive competence over the area of foreign direct investment (For example, in CETA and CETA's tribunal[1207]). The idea of creating MIC proposed by the European Union has been emerged traced back to at least in 2014, when the European Commission President at that time expressed the view for the need to replace an outdated ISDS system that is currently used in the vast majority of investment agreements[1208]. This movement is

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[1205] In March 2018, the Council of the European Union (EU Council or Council) gave the 39 Commission of the EU (EU Commission or Commission) a mandate to negotiate a Multilateral Investment Court (MIC). See, Council of the EU (2018): Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes of 20 March 2018(12981/17 ADD 1).

See also, the current work of Working Group III: Investor-State Dispute Settlement Reform. Available online at <www.uncitral.un.org>.

[1206] The CJEU opinion reaffirm that the establishment of MIC is compatible with EU law, since the CETA tribunal does not interpret the EU law but rather the standard of protection under the agreement. The court further suggested that such tribunal does not constitute the inequality between foreign investor and EU investors nor prevent the principle of effectiveness and right to access the independent tribunal. See, Opinion 1/17 of the Court (Full Court) of 30 April 2019 (ECLI:EU:C:2019:341). See also, CROISANT, Guillaume, «Opinion 1/17 – The CJEU Confirms that CETA's Investment Court System is Compatible with EU Law», Kluwer Arbitration Blog (2019), available online at <http://arbitrationblog.kluwerarbitration.com>.

[1207] See general discussions of EU's exclusive competence over FDI in Chapter 5 of the thesis.

[1208] European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)). See also, Council of the EU (2018): Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes of 20 March 2018 (12981/17 ADD 1).

The European Commissioner Malmström expressed in 2015 that "My assessment of the traditional ISDS system has been clear - it is not fit for purpose in the 21st century. I want the rule of law, not the rule of lawyers. I want to ensure fair treatment for EU investors abroad, but not at the expense of governments' right to regulate. Our

driven by the current concern among states and stakeholders about *inter alia* issues over sole reliance on *ad hoc* international arbitrators, given its lack of transparency, issues over the predictability and consistency of their decisions, and the high costs involved[1209].

Apart from the first step of success by the European Union, in which they conclude the investment court system mechanism (ICS) in the newly concluded IIAs with its counterparts under the exclusive competence over the FDI[1210], the European Union is currently pushing forward to the idea of establishment of MIC in the multilateral level. This idea is an ongoing discussion in the UNCITRAL Working Group III: Investor-State Dispute Settlement Reform[1211]. The MIC proposal by the European Union aims to overcome the weaknesses in the current ISDS system. One of the most notable innovations by the MIC is the assurance of judicial accountability and independence in the international investment dispute. Instead of a one-time appointed arbitrator as traditional dispute settlement under the BITs, the MIC shall provide with a full-time adjudicator with non-renewable positions and salaries comparable to other courts system in order to ensure their independence. Ideally, those adjudicators would also be represented in terms of varied geography, expertise, and gender diversity[1212]. Those professional judges should possess with public law and public international law knowledge[1213]. However, we concern that if the MIC allows states to dominate their own adjudicator freely, it would potentially create another set of problems for the system. From our own experience, states (Especially the developing ones) tend to dominate judges or public officials rather than dominate professors or international lawyers in the international organization. The selection procedure from states could be inherently political. As a result, the idea of ISDS might be shifted from balancing investment protection and the state's right

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new approach ensures that a state can never be forced to change legislation, only to pay fair compensation in cases where the investor is deemed to have been treated unfairly (suffered discrimination or expropriation, for example).

Our new approach also makes arbitral tribunals operate more like traditional courts, with a clear code of conduct for arbitrators. It furthermore guarantees access to an appeal system. And, as a medium-term goal, it sets out to work towards the establishment of a permanent multilateral investment court.

…We need a robust and serious reform of investment dispute resolution, because it's an important part of global investment policy. Europe is the biggest investor and recipient of foreign investments in the world. It only makes sense that we lead the way to reform, and set out our vision for better rules on a global scale." See, the blogpost, available online at <www.europa-nu.nl>.

[1209] Research by the European Parliamentary Research Service (EPRS) on the topic of «Multilateral Investment Court: Overview of the reform proposals and prospects», PE 646.147 (2020).

[1210] For example, Comprehensive Economic and Trade Agreement (CETA) and European Union–Vietnam Free Trade Agreement.

[1211] Possible reform of investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms: Note by the Secretariat of 29 November 2019 (A/CN.9/WG.III/WP.185).

[1212] Possible Reform of Investor-State Dispute Settlement (ISDS): Selection and Appointment of ISDS Tribunal Members: Annotated comments from the European Union and its Member States to the UNCITRAL Secretariat of 19 October 2020.

[1213] *Ibidem.*

to regulate into another form of domestic court but at the international level, and it would eliminate the popularity of the international mechanism to resolve international investment disputes.

We suggest that the Plenary Body of the future MIC should adopt guidelines on how states should select and nominate adjudicators to the MIC. The guideline should specify the minimum qualification of the judges and the pre-selection at the national level should comply with a number of fundamental principles in accordance with the rule of law standards, for example, principles of democratic procedure, independence, transparency, and non-discrimination. The remuneration should be fairly to be able to ensure the independence of those adjudicators. Those adjudicators should not work for the benefit of their home state alone but rather under the MIC standard (The function of the judge's roles in CJEU could be used as a reference). The MIC should carefully put limitations on the scope of their professional engagements outside the court. They should further limit the professional engagement of those adjudicators within the MIC after their term in order to ensure the creditability of the MIC. We further suggest that the expense of MIC should calculate from the size of the economy to ensure equal participation from all states. We also propose that the definition states should extend to the entity that carries their own international trade; for example, Hong Kong or Macau, in order to ensure a wide range of participation from all economies.

The MIC proposal by the European Union includes setting up formal investment courts comprised of first instance and appellate tribunals. The appellate tribunal under MIC shall be appointed in a similar manner to the first instance; however, subject to their power to reverse legal findings or serious errors in the weighing of facts, but not to review facts[1214]. We suggest that those two-tier procedures should be similar to the procedure of the administrative court. The procedure should consider conducted in an inquisitorial manner; therefore, the MIC judges could use their full expertise to balance all the factors from both parties. Such existence of a dispute under the MIC should be open to the public to ensure transparency under the public law doctrine. MIC could impose the requirement of the UNCITRAL Transparency Rules and the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention) regarding transparency in their procedural rules. The procedural documents should be published and accessible to the public as long as they are not prejudiced against the essential interest of the parties. We believe that the MIC judges could make a fair decision since they could carefully strike a balance between trade secret and public interest, and then consider whether to publish the

[1214] CAPLAN, Lee M., «ISDS Reform and the Proposal for a Multilateral Investment Court», *Ecology Law Quarterly* Vol. 46 Issue 1 (2019), 53-60;

information to the public or not. Hearing should be open to the public subject to the high threshold of exemption at the same level as publishing the documents. The procedure should also allow submissions by third parties and non-disputing parties to the treaty (*Amicus curiae*).

The potential enforcement mechanism of the MIC is one of the major reforms that the MIC is worth to be considered in order to ensure the effectiveness of the enforcement of the decisions from the MIC. There are several choices of enforcement mechanisms on the table, which are, to use the existing mechanism such as the New York Convention or ICSID, a Fund system which allows MIC to compensate the award from the funds states given to MIC in advance or establish the entirely new language to ensure the finality of the arbitral award in the MIC statute[1215]. Each of potential enforcement mechanism has its own advantages and disadvantages[1216]; however, we believe that the MIC statute that provides its own enforcement mechanism is the most sensible choice to ensure compliance and effective enforcement from member states, although there might be enforcement issues in the third state. In this regard, the language of the finality of the award from the ICSID Convention could be used as a reference[1217].

As many scholars speculate substantial benefits and solving of current issues from the creation of MIC, however, the reform toward a more-like court mechanism might introduce a new set of problems to the system. The creation of a permanent body would erode the benefits of the current ISDS system, such as, the interest base and equal level playing field between state and foreign investors since they could choose their own adjudicator. Instead, the adjudicators dominated by states are likely to disproportionately put more public interest implications rather than balance them with investment protection. Some also claim that international arbitration is a superior model and provide a steadier development of international investment law[1218]. Moreover, the new institutions may give more advantages to powerful countries, considering that they tend to make a greater contribution than a smaller country[1219]. Therefore, it is highly doubtful whether

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[1215] BUNGENBERG, Marc &HOLZER, Anna M., «Potential Enforcement Mechanisms for Decisions of a Multilateral Investment Court», Güneş ÜNÜVAR, Joanna LAM &Shai DOTHAN (Eds.), *European Yearbook of International Economic Law: Permanent Investment Courts: The European Experiment*, Springer, Cham, 2nd Edition, 2020;

[1216] For general discussion, See, *Ibidem.*

[1217] HAPP, Richard &WUSCHKA, Sebastian, «From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma», *Indian Journal of Arbitration Law* Vol. 6 Issue 1 (2017), 113-132; See also, Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) Article 54.

[1218] SCHILL, Stephan W., «Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach», *Virginia Journal of International Law* Vol. 52 Issue 1 (2011), 57-102;

[1219] BENVENISTI, Eyal &DOWNS, George W., «The empire's new clothes: political economy and the fragmentation of international law», *Stanford Law Review* Vol. 60 Issue 2 (2007), 595-631;

a new MIC will be biased, and whether those selected adjudicators could develop the law in the right direction[1220].

In sum, we strongly believe that as investment treaty arbitration is a dispute settlement that forms a part of public international law, therefore, the system must comply with certain principles to maintain its normative legitimacy. The system should comply with the principle of global administrative law, for example, transparency, judicial accountability, legal certainty, participation, reasoned decision, legality, and review[1221]. A centralized court system could provide better compliance with these principles when compared to international arbitration. Although the shift from the traditional ISDS regime into a permanent court system might create another set of problems, however, the creation of MIC is the most sensible way to satisfy the rule of law requirements which must be considered when formulating international legal protection and the legitimacy criteria[1222]. In our opinion, we foresee many positive impacts from the creation of MIC (If it will come to exist) into the current ISDS regime *inter alia* adequate balance of investment protection and host state's right to regulate, uniform interpretation of the law, more predictability, accountability, judicial independence, transparency, effective enforcement, efficient and expedient procedures, effective appeal mechanism, and more recognition of public law doctrines in future settlement of international investment disputes. As a result, MIC would increase the overall legitimacy, and consequently, shall boost the willingness of states to comply and collaborate with them including their decisions or awards[1223]. We strongly believe that states are more likely to comply with strong institutions that could provide the predictable and consistent work. Furthermore, at its full potential, MIC could solve an uneasy situation between the domestic court and the current enforcement regime since MIC shall provide its own appellate mechanism and more effective enforcement tools. It may also improve regional consolidation and facilitate the

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[1220] DOTHAN, Shai &LAM, Joanna, «A Paradigm Shift… *id.*

[1221] These principles have been studied in the growing field of literature known as Global Administrative Law. Global Administrative Law scholars called for the development of procedures that ensure legal decisions comply with the following five principles: (1) transparency (2) participation (3) reasoned decisions (4) legality (5) review. The concept of Global Administrative Law could be found in many international treaties and domestic laws. See, KINGBURY, Benedict, KRISCH, Nico &STEWARD, Richard B., «The Emergence of… *id.* See also, MARKS, Susan, «Naming Global Administrative Law», *New York University Journal of International Law and Politics* Vol. 37 Issue 4 (2005), 995-1002; See also, LOPEZ ESCARCENA, Sebastian, «Contextualizing Global Administrative Law», *Gonzaga Journal of International Law* Vol. 21 Issue 2 (2018), 57-81;

[1222] Multilateral reform of investment dispute resolution: Accompanying the document Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes (SWD(2017) 302 final), Brussels, 13 September 2017.

[1223] BUNGENBERG, Marc &REINISCH, August, *European Yearbook of International Economic Law: From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*, 2nd Edition, Springer, Berlin, 2019;

consideration of all relevant interests better than ad-hoc arbitration[1224]. Furthermore, the member states of MIC shall have an opportunity to issue the joint declaration of how the treaty should be interpreted in order to limit the wide discretion of its' adjudicators.

6.3.7 Summary of Key Issues

Since the first BIT was signed in 1959, until now, no one could argue that the current feature of investor-state dispute settlement (ISDS) in international investment agreements (IIAs) does not need to be improved. Despite the fact that some states totally withdrew from the IIAs and other related international instruments such as ICSID, or even each country developed its own treaty in its own way (or 'BIT by BIT', as is often said[1225]), we recognize that the majority of states are leading toward the reforms of IIAs; in particular, the ISDS provisions. At the moment of writing, there are various reform options, some of them already being implemented and leaning toward more improvement, while others are still in the international negotiation between state parties and international organizations. We could categorize the major reforms into four approaches, which are, 1. Dispute prevention policies (DPPs), 2. Development of mediation and alternative dispute resolution (ADR) other than arbitration, 3. Developing new model BITs, and 4. Proposal of establishing Multilateral Investment Court (MIC) by the European Union.

All those reform options focus on one particular development, which is, encouraging more use of effective dispute mitigation by an encounter with a dispute in the pre-dispute phase rather than the post-dispute phase. They also seek to determine certain areas of business activities that have the potential to create disputes, in order to enact suitable measures to prevent the occurrence of disputes. Moreover, the current trend looks for the use of more effective ADR other than arbitration in order to settle the dispute with an amicable solution and to achieve the most satisfying solution both for states and investors. More effective ADR other than arbitration could also keep a good business relationship and the host state's reputation. In addition, states and international organizations also developed and continue to be developing a new model of IIAs in order to balance investment protections and the state's right to regulate for a legitimate purpose. Furthermore, those new model IIAs are starting to ask for foreign investor's corporate social responsibility (CSR) in the way that the old model never did before, with the aim of requiring share

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[1224] DOTHAN, Shai &LAM, Joanna, «A Paradigm Shift… *id.*

[1225] SALACUSE, Jeswald W., «BIT by BIT:… *id.* See also, SCHILL, Stephan W., TAMS, Christian J. &HOFMANN, Rainer, «International investment law and development: Friends or foes?», Stephan W. SCHILL, Christian J. TAMS &Rainer HOFMANN (Eds.), International Investment Law and Development: Bridging the Gap, Edward Elgar, Cheltenham, 2015;

responsibility and risk from foreign investors with the host state that they have invested in. Thus, those new models tend to limit the circumstances of disputes eligible for investment protection. Most importantly, they made the clarification of treaty language around the standards of protection to avoid an overly broad interpretation by the international arbitral tribunal.

In connection with the model treaties development, states are turning their interest toward bigger treaties. There has been a fast-moving trend of concluding IIAs, in which there were starting from BITs to FTAs, and recently from FTAs into regional trade agreements (RTAs). Apart from similar progress with the development of the new model of IIAs, RTAs further provide innovative clauses by allowing state parties to issue joint treaty interpretation guides in order to make clarification of treaty language. Additionally, those RTAs also contribute a huge development to the ISDS procedure, including the development of the appellate system by attaining a list of qualified adjudicators, and an in-treaty appellate and enforcement system. At the furthest, the European Union has proposed the establishment of a multilateral investment court (MIC) as a permanent body attaining with numbers of specialized adjudicators from various geography, expertise, and gender diversity. They will receive an adequate salary to ensure their availability and independence. Although the European Union supports the idea of the establishment of a permanent institution such as MIC, yet the proposal is still in international discussion at the moment. If the proposal of MIC could have come to an agreement by state parties, it would bring a huge development into the international investment law regime.

CHAPTER 7

CONCLUSION AND SUGGESTION

7.1 Conclusion

Globalization brings a notable rise in interconnectivity to the world economy and more investment in foreign countries (Foreign direct investment-FDI). Throughout the thesis, we pointed out both advantages and disadvantages of FDI, and then summed up that the benefits of FDI superseded its downside. Despite most literatures regarding FDI as a "good thing"[1226], effects from post-globalization also challenge the sovereignty of states as it requires *inter alia* regulatory changes, legal limitation in a non-aggressive and minimally just manner, and re-allocation of government power to the people and/or international organizations. In this connection, states also agreed to limit their power by concluding the international investment agreements (IIAs) with the main objectives of promoting and protecting FDI. Currently, there are roughly 3,000 IIAs globally since the first BIT was signed in 1959[1227]. The current trend has been moving from concluding bilateral investment treaties (BITs) into free trade agreements (FTAs), then nowadays into regional trade agreements (RTAs). It is widely agreed that the big values of FDI and its complications need special tools under the IIAs to resolve international investment disputes. Apart from the functions to promote and protect FDI, IIAs also prevent armed conflict between states since they do not need to exercise diplomatic protection as at the time of the gun-boat policy, which is proved to be aggressive and ineffective[1228]. Instead of using diplomatic protection, the power to resolve the investment dispute between foreign investors and host states now transformed into the hands of international arbitrators who resolve investment disputes according to substantive protections under the IIAs by a function of investor-state dispute settlement (ISDS) of each treaty.

[1226] SORNARAJAH, Muthucumaraswamy, The International Law… *id.* See also, ATIK, Jeffery, «Fairness and Managed Foreign Direct Investment», *Columbia Journal of Transnational Law* Vol. 32, Issue 1 (1994), 1-42; See also, CLARK, Hunter R. &BOGRAN, Amy, «Foreign Direct Investment in South Africa», *Denver Journal of International Law and Policy* Vol. 27 Issue 3 (1999), 337-358; See also, HEWKO, John, «Foreign Direct Investment in Transitional Economies: Does Rule of Law Matter», *East European Constitutional Review* Vol. 12 Issue 1 (2003), 71-79;

[1227] The first BIT was signed on 25 November 1959 between Pakistan and Germany. See, Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (1959).

[1228] Diplomatic protection or Gun-boat policy refer to the protection of investment by investor's home state through military intervention on the host state. For example, the Suez Crisis during 1956-57, which lead to Egypt invasion by Israel, British and French aimed to remove Egypt's president at that time who just nationalized the canal. See, HEINE, Lyman H., «Impasse and Accomodation: The Protection of Private Direct Foreign Investment in the Developing States», *Case Western Reserve Journal of International Law* Vol. 14 Issue 3 (1982), 465-492; See also, DALRYMPLE, Christopher K., «Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause», *Cornell International Law Journal* Vol. 29 Issue 1 (1996), 161-189; See discussion of Gunboat Policy in 3.1 (Historical Perspectives of Foreign Direct Investment).

Most of the international investment agreements (IIAs) comprise three major parts: preamble, substantive protections, and inter-state dispute settlement (ISDS) mechanism. The preamble explains the scope and objectives of each agreement, along with the clarification of terms under each treaty. In the substantive protections part, as we already explored in Chapter 3 of the thesis, most of the IIAs contain a set of substantive protections to guarantee certain additional protections and non-discrimination action from the host state against protected foreign investors. Among all substantive protections, we usually see the term as a guarantee against unfair expropriation, fair and equitable standard (FET), national treatment (NT), and most-favored nation treatment (MFN) that get invoked in international arbitral proceedings. It is important to emphasize that we have pointed out throughout the thesis that the term in substantive standards and preamble are sitting somewhere between rules and principles, which consist of a character of vague and broad terms. Therefore, the duty to interpret those terms belong to the international arbitrators who constitute on a case-by-case basis. Our thesis pointed out that these situations create unpredictability, incoherence, and uncertainty of interpretation of those terms, and then decrease the legitimacy of the overall system. There is no binding instrument to ensure the predictability of substantive standards' interpretation by the international arbitral tribunals. The question of coherence is critical here since there is nothing to ensure that every investment dispute shall have the same substantive standards' interpretation, neither for two disputes with almost identical backgrounds nor two disputes which arise from the same IIA.

In the inter-state dispute settlement (ISDS) mechanism, it contains the set of procedurals of international investment dispute settlement mechanisms. The international investment law, particularly the ISDS, has been developing in the scheme of public international law. The ISDS allows protected foreign investors to initiate international arbitration against the host state whenever they feel that the host state has breached substantive standards of protection contained under the IIAs. The ability to initiate international arbitration by foreign investor only requires unilateral consent from foreign investors, since the host state already give consent to international arbitration in advance through the IIAs. The ISDS mechanism has gained international attention and more usage by foreign investors in the past decades. Due to the limitation of confidentiality of the ISDS process in which the number in statistics might not reflect the real number of cases, there are 1,061 known treaties based ISDS cases[1229]. The skyrocketing number of those disputes is caused by the phenomenon of globalization, along with the wide acceptance of enforcement of

[1229] From 1,061 cases, there are 274 cases decided in favor of states (37 percent), 212 cases decided in favor of foreign investors (28.6 percent), 148 cases settled (20 percent), 90 cases discontinued (12.2 percent), and 16 cases decided in favor of neither party since no damages awarded (2.2 percent). See statistic at UNCTAD's database, available online at <www.investmentpolicy.unctad.org>.

international arbitral awards guaranteed by international conventions (Ex. New York Convention[1230]). By using the ISDS mechanism, foreign investors could avoid domestic litigations which foreign investors might have some mistrust against, and then be able to be on an equal playing field between state and foreign investors. As the verdict from domestic judges may take years, investors, however, could get the decision from the international arbitral tribunal in a much shorter time. Thus, they could expect the finality and worldwide enforcement of international arbitral awards through international treaties that support such causes.

The thesis also investigated into the essence of international investment law and concluded that this area of law is also relevant to many other areas of law which are private law, public law, and constitutional law. International arbitration is fundamentally different from commercial arbitration. Despite of some procedural similarities, international arbitration differs from commercial arbitration in the subject matter of the dispute, the relationship and status of the parties, and the scope of the state's consent to arbitration through the IIA. We pointed out that the investment treaty arbitration also has a strong connection with administrative law[1231]. In this connection, we further observed that there are practices of administrative law both in Thailand and the European Union. Thailand as a sovereign state, embraces the "dual court" system in which administrative disputes are governed by a unique set of principles, substantive, and procedural rules that are highly influenced by French and German Administrative law. Administrative disputes in Thailand fall within the jurisdiction of the Administrative Court by the virtue of Act on Establishment of the Administrative Court and Administrative Court Procedure B.E. 2542 (1999). Thai Administrative Court is a specialized court with experienced administrative judges deciding administrative cases in different manners from the Civil Court, based on the objective of protecting and balancing rights and liability between administrations and private parties.

We also observed that there is acceptance of administrative law's concept throughout the European Member States, as they either have specialized administrative court systems or special procedural rules on administrative law disputes between citizens and administrative authorities[1232]. At the European Union level, even though the European Member States gave up important parts of their sovereign power to the European institutions aiming to achieve their common value and similar objectives underpinned by the Treaties[1233], there is neither codification of the European

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[1230] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June
1958).

[1231] VAN HARTEN, Gus, Investment Treaty Arbitration… *id.*

[1232] DRAGOS, Dacian C. &MARRANI, David, «Administrative Appeals… *id.*

[1233] MACCORMICK, John, Understanding the European… *id.* See also, CHAMON, Merjin, EU Agencies:… *id.*

Administrative Procedure Act nor establishment of an authoritative catalog of general principles of EU administrative law, although there is a clear existence in the certain sectorial areas such as public contract, competition, and state aid. The number of rules and/or principles of the EU which focus on administrative law procedures/ principles are mainly embedded in the primary law, case law of the Court of Justice of the European Union (CJEU), international agreements concluded by the Union, secondary legislation, soft law, and unilateral commitments by the Union's institutions, and decisions made by the European Ombudsman[1234]. The development of EU administrative law is currently done in a sector-specific approach in which we usually see administrative law procedures/ principles such as the principle of subsidiary, non-discrimination, judicial review, proportionality, duty to give reasons, access to documents, transparency, etc.

As we had concluded that there is the existence of administrative law both in Thailand and the European Union, the thesis further pointed out that both Thailand and some of the European Union Member States allow the use of arbitration as an alternative administrative dispute resolution[1235]. In other words, administrative disputes, subjected to a different degree of the procedural requirement of each jurisdiction, are arbitrable both in Thailand and the European Union[1236]. However, arbitration does not seem to be warmly welcomed in some jurisdictions, especially; those jurisdictions where they embrace a strong idea of public law (Ex. France[1237], Germany[1238], and Thailand). As some believe that administrative law needs a special tool or a specialized institution to resolve an administrative dispute related to public life. In this connection, one of the tools for the state to arrange public service to the people is through contracts (Some jurisdictions recognize those contracts as different from a private contract by referring to them as "Administrative contract" or "Public contract") in which those contracts contain a special function that could not be found in a private contract; for instance, the power that allows administrations to unilaterally terminate these contracts when such contracts do not serve/ no longer serve the

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1234 CRAIG, Paul &DE BÚRCA, Grảinne, EU Law:… *id.*

1235 On the contrary, the European Union just recognizes arbitral decision if they come from a kind of institutionalized arbitral system. In *Ascendi v. Autoridade Tributária e Aduaneira*, the European Court of Justice (ECJ) ruled that the Portuguese Tribunal Arbitral Tributário possesses all the characteristics necessary in order to be regarded as a court or tribunal of a Member State. Therefore, the referring body could refer EU law in question for the preliminary ruling by the ECJ under Article 267 of the Treaty on the Functioning of the European Union (TFEU). In this regard, the ECJ considered number of elements, which are, the legal origin of the entity (Established by law), its permanence, the binding nature of its jurisdiction, the adversarial nature of the procedure, the application by such entity of the law (not equity), the application of rule of law, as well as its independence. See, Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira, Judgment of the Court (Second Chamber) of 12 June 2014, Case C-377/13, para. 22-35;

1236 For Thailand's perspective, See Chapter 4 of the thesis. For the European Union Member State's perspective, See Chapter 5 of the thesis.

1237 BOUSTA, Rhita &SAGAR, Arun, «Alternative Dispute… *id.*

1238 STELKENS, Ulrich, «Administrative Appeals… *id.*

public interest, the principle of administrative alteration which allow the administration to modify these contracts to serve public needs, or the ability for administrations to impose fine against a private party when failed to perform a contractual obligation. There are many reasons that states exercise special functions under these contracts, such as, terrorism, transnational crime, environmental protection, public safety, or public health. It is important to note that generally states do not execute those special functions under administrative contract (Public Contract) solely based on the ground that they want to, but rather on public interest reason with the requirement of the principle of legality to control such actions.

In this regard, we pointed out that arbitration has a potential conflict with public law norms, including the lack of transparency, inconsistency, unpredictability, legality, lack of appellate mechanism, and lack of risk-sharing doctrine. Thus, the judicial independency and accountability of arbitrators are also in question because they have got appointed by the parties on a case-by-case basis. In addition, the power of the arbitrator to decide administrative disputes also concerns us, as their decisions could potentially affect to the public interest at large. The current system gave a wide range of power to arbitrators by allowing them to decide on critical issues of public law (Ex. Legal issues, *de facto*, the issue on adjustment of administrative contract clause, and the determination of compensation) with no legal responsibility. Most importantly, it is highly doubtful whether the notion of public interest was adequately balanced or accounted for in arbitral proceedings.

In the scheme of international investment law, Thailand as a sovereign state had concluded IIAs with its trading partner by the virtue of its supreme power over international investment law to attract foreign investment[1239]. Meanwhile, the European Union that have, since the signature of the Lisbon Treaty, a full competence over FDI wants its member-states to terminate BITs, especially inter-member-states BITs (Intra-EU BITs)[1240], since it is clear after the *Achmea* judgment

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[1239] Data of 3 March 2019, Thailand has concluded 44 BITs with other countries (39 BITs in force), and Thailand also concluded 27 treaties with investment provisions-TIPs (23 treaties in force). See information and texts on Ministry of Foreign Affairs of Thailand's website at, <http://www.mfa.go.th/business/th>.

The Constitution of the Kingdom of Thailand regards BIT as a treaty with wide-scale effects on the security of economy, society, or trade or investment of the country. Therefore, the authority to conclude a BIT belong to the Royal Thai Government with a limitation to approval by the National Assembly and the public participation in the process. See, Constitution of the Kingdom of Thailand B.E. 2560 (2017) Section 187 para. 2.

[1240] The ideal to terminate intra-EU BITs could trace back at least in 2006, when the European Commission recommended Member States to terminate intra-EU bilateral investment treaties (BITs) as they considered that the content of intra-EU BITs had been superseded by European Community law. See, EC Note of November 2006 on the Free Movement of Capital.

Along with consequences from arbitral decision in *Micula v. Romania* and *Achmea BV v. Slovakia*, the European Member States reached agreement on a plurilateral treaty for the termination of intra-EU bilateral investment treaties (BITs) on 24 October 2019. Then, 23 Member States signed agreement for termination of the intra-EU BITs on 5 May 2020. See, Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and

that the EU law overrides the intra-EU BITs[1241]. It is also worth to mention that one of the main objectives of the EU in concluding international agreements is to increase international trade and to promote EU principles and values at the same time[1242].

As we pointed out that there are practices of administrative law both for Thailand and the European Union as a harmonized legal area of public contracts, the existence of the ISDS regime creates problems and controversies for both Thailand and the European Union. Public law and international investment law have long been a history of ignorance and mistrust[1243]. Although there is a high degree of relevancy and a close link between these two areas of law, these two areas of law have been developing in their own schemes. It is indisputable that states enter IIAs on their own will to attract FDI. Yet, it does not change the fact that there is a potential conflict between public law and the ISDS regime.

Apart from the potential conflict between public law norms and arbitration, public law also shares a similar set of conflicts with international investment arbitration. Thus, ISDS also contains its own unique problems that further jeopardize the core of public law. The ISDS regime overlooks the function of administrative contract by allowing the foreign investor to replace domestic court adjudication under the public law regime with substantive protections under the IIAs. In addition, our thesis also emphasizes the disadvantages and illegitimacy of the current ISDS system. The rationale behind that is because the IIAs were designed for the main purpose of protecting foreign investment rather than seeking the balance between foreign investment protection and the state's right to regulate. There is a conflict between the current ISDS regime and the state's right to regulate since the ability of foreign investors to initiate international arbitration against a state normally challenges the host state's ability to regulate for the public interest. In other words, we observe that the original purpose of IIAs has turned from the tool to prevent discriminatory action from the host state into the tool to fight regulation, and sometimes, a legitimate regulation. We must consider that in ISDS disputes, states change their regulations

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S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, final award of 11 December 2013. See also, Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), award of 7 December 2012. See also, Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection. See also, Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (SN/4656/2019/INIT). See detail discussion in Chapter 5 of the thesis.

[1241] DAMJANOVIC Ivana &QUIRICO, Ottavio, «Intra-EU Investment Dispute Settlement under the Energy Charter Treaty in Light of Achmea and Vatenfall: A matter of Priority», *Columbia Journal of European Law* Vol. 26 Issue 1 (2019), pp. 102-[iv];

[1242] Treaty on the Functioning of the European Union (TFEU) Article 218 (Ex Article 300 TEC). See also, Treaty on the Functioning of the European Union (TFEU) Article 207 (ex Article 133 TEC). See also, DIMOPOULOS, Angelos, EU Foreign… *id.*

[1243] VAN HARTEN, Gus, Investment Treaty Arbitration… *id.*

mostly for the cause of public interest, for example, a regulatory measure to solve an economic emergency or civil unrest[1244], protection of the environment[1245], energy policy[1246], protection of the architectural site[1247], public health[1248], or development of country's infrastructure[1249]. Those regulatory changes could be seen as political risks and lead to the breach of the treaty's standards when such a dispute reaches the international investment arbitration under the ISDS regime. This circumstance could potentially produce the regulatory chill effect in which states might not be able to enact proper measures for the public's benefits at large due to the fear of getting involved in international arbitration that could affect the state's reputation, investment atmosphere, and taxpayer's money to pay for the international arbitral award.

The thesis also pointed out that the ISDS regime currently overlooks many cores of public law such as transparency, judicial independence, legality, and legal certainty. The inconsistency of interpretations of standards of protection and outcome of the international arbitral awards is also mentioned. The duty to interpret those terms is laid down within the hands of international arbitrators, who have high-power to determine how states should regulate, but without legal responsibility for making those decisions. In this connection, we also recognize the potential impartiality and lack of variety of international arbitrators due to the old fashion of appointment procedure where the parties could choose their own adjudicator, since a similar person usually repeatedly got appointed as arbitrator[1250], because the parties normally choose the adjudicator who

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[1244] CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8. See also, Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16. See also, in BG Group Plc v. The Republic of Argentina, UNCITRAL Arbitration Rules. See also, LG & E Energy Corp, LG & E Capital Corp and LG &E International Inc. vs. Argentina Republic, ICSID Case No. ARB/02/1.

[1245] Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1. See also, David R. Aven and Others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3. See also, Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33. See also, Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia, ICSID Case No. ARB/17/32.

[1246] Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12. See also, Isolux Netherlands, BV v. Kingdom of Spain, SCC Case V2013/153. See also, Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, SCC Case No. 2015/063. See also, Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50.

[1247] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3.

[1248] Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12. See also, Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay). See also, Kingsgate Consolidated v. Thailand (Case Pending).

[1249] Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand, UNCITRAL (formerly Walter Bau AG (in liquidation) v. Kingdom of Thailand), UNCITRAL.

[1250] For example, Brigitte Stern got appointed 116 times in ISDS arbitration in which she got 111 times appointed by respondents. Stanimir A. Alexandrov got appointed 60 times in ISDS arbitration in which he got 53 times appointed by the claimants. Gabrielle Kaufmann-Kohler got appointed 60 times in which she served as a president of arbitral tribunal 43 times out of 60 times that she got appointed. Meanwhile, most international arbitrators only got appointed 1 time in ISDS arbitration. See statistics at <www.investmentpolicy.unctad.org >.

is likely to have a legal point of views in favor to investor or state's situation (based on their previous judgments), whichever case maybe. Besides, the current ISDS regimes, in particular, the IIAs also possess with many weaknesses which are the lack of text that requires risk-sharing from foreign investors (Corporate social responsibility-CSR), lack of texts to promote secondary objectives such as human rights and environmental, and others procedural clause under the IIAs itself such as survival clause that could put restrain for state's regulatory power for over a decade after the termination. These problems are aggravated by the problem of the effectiveness of the enforcement of arbitral awards. In many cases as demonstrated throughout the thesis, states are refused to comply with international arbitral awards since they are setting their internal barrier to prevent successful enforcement of those awards (For example, cases in South America, many developing states, and the European Union with intra-BITs issue). States and international organizations also foresee the problem and currently discussing for reform options.

In conclusion, we observed the potential conflict between public law norms and arbitration. The thesis has pointed to the difficulties of using arbitration, especially in jurisdictions where there is a strong adoption of public law's idea and the ideal of separate administrative contract (public contract) from commercial contract. The problem is even more serious in the ISDS arbitration as there is not only conflict between public law norms and arbitration, but also a unique set of problems arise from the ISDS arbitration and IIAs themselves. Especially, the constraint between investment protection and the host state's right to regulate, inconsistency of interpretation of substantive protections under the IIAs, and issues on international arbitrators. Thus, international arbitral awards are finding some difficulties in the enforcement regime both in Thailand and the European Union (Especially, the intra-EU BITs). We summed up that the current ISDS regime is experiencing a "legitimacy crisis," as claimed by many pieces of literature[1251].

[1251] DOLZER, Rudolf &SCHREUER, Christoph H., Principles of …*id.* See also, FRANCK, Susan D., «The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions», *Fordham Law Review* Vol. 73 Issue 4 (2005), 1521-1625; See also, SWEET, Alec Stone, «Investor-State Arbitration: Proportionality's New Frontier», *Law & Ethics of Human Rights* Vol. 4 Issue 1 (2010), 46-76;

7.2 Suggestions

As we concluded that arbitration has a set of conflicts with public law norms. Thus, the thesis also concluded that the current ISDS system is facing a legitimacy crisis as claimed by many pieces of literature. Therefore, there are two sets of issues that need their own suggestions. On the one hand, the conflict between arbitration and public law norms at the domestic level. On the other hand, the legitimacy issues in inter-state dispute settlement (ISDS) and the conflict with public law norms.

7.2.1 Conflict between Arbitration and Public Law Norms

As we observe that many states embrace the strong idea of public law and the idea of separation of administrative contract (Public contract) from the commercial contract, we suggest that there should be developments in the arbitration law, to allow arbitration to be able to go along with the administrative law without losing too much essence of each area of law. Therefore, the right balance between parties' autonomy to arbitration and the protection of public interest could be achieved. In other words, the reform should be made to develop arbitration into a more proper and suitable tool to serve as an alternative administrative dispute resolution. The most important step is to allow domestic courts interventions to the administrative law dispute with the court own recognition, not by the request of the parties. There should be an allowance for the necessary adjustment of the specific procedural regime of administrative court for arbitration in administrative law disputes. The language in administrative arbitration rule should be clear, precise, and provide details in order to give clarifications despite the broad language of the UNCITRAL Model Law on International Commercial Arbitration. At the broadest reform, the total set of different arbitration rules between commercial arbitration and administrative arbitration is considered desirable.

Contrary to the old fashion arbitration which possesses with characteristics of *inter alia* confidentiality and autonomy of the parties, some of the public law doctrines should be recognized in arbitration law text, particularly, arbitration in relation to the administrative dispute. The rationale behind this is because the result from such proceedings/decisions usually affects the public's benefit at large and the compensation of arbitral award if states are on the losing side always comes from the public purse. The new set of arbitration rules in relation to administrative law disputes should at least require transparency in its arbitral proceeding by publishing detail of proceedings to the public, from the existence of arbitration, reasoning, until the arbitral awards. Therefore, the public could be aware of such existence and be able to put the right pressure on

their government to conclude a contract and execute orders in a careful manner. Thus, transparency could enhance the coherence of the case law and result in more predictability in the process. In this regard, enhancing the quality of public contract drafting also consider a desirable option because states could minimize the risk of losing in arbitral proceedings by putting a well-drafted public contract forms for the administrations' usage. Apart from the well-draft contract, the state should consider including guidelines on how administrations should modify or terminate the administrative contract (Public contract). In the detail of the contract, the state should put the clause that clearly limited discretion from arbitrators so they would not use their discretion beyond the reach and hurt the public at large. In this way, states could ensure consistency of interpretation of legal terms and outcome of the arbitral awards in the process. In addition, those contracts should open the channel for arbitrators to assert administrative law doctrines and weighing factors for public interest in arbitral proceedings. Those arbitral contracts should also ask for risk-sharing from private parties according to administrative law doctrine. Moreover, those contract drafting should assert the clause for a private party to assert an administrative appeal clause as a pre-condition before the right to arbitration; therefore, administrations could have the chance to correct their wrongfulness, and avoid arbitration which could jeopardize the essence of administrative law. Thus, states should provide adequate training for administrations to enhance their knowledge and awareness about the potential of getting arbitration suits from their administrative decisions in order to avoid errors from their decisions.

The new set of administrative arbitration rules should also require the minimum requirement of arbitrator qualifications in order to ensure their knowledge and judicial accountability. We strongly suggest that the adjudicator who decides the matter in relation to public life should at least acquire public law knowledge. Therefore, they could adequately apply public law doctrines and strike an adequate balance between public interest and private interest, including responsibility from each party in the arbitral proceedings. At the domestic level, states should draft a contract that seeks assistance from arbitral institutions in the appointment of arbitrators in administrative law disputes rather than leave the duty of appointment arbitrators to the parties to the disputes, in order to ensure their accountability and independency of adjudicators in administrative law matters.

In the enforcement and set aside regime, we found it very important to change domestic judges' attitudes toward arbitration. Arbitration should not be considered as a "private court" that has been developed in the private law framework as in a separate manner from administrative law. It is generally accepted that the court could not refuse arbitration solely on the ground that such arbitration was conducted in relation to administrative law disputes. There are substantial benefits

from arbitration in which the state should not turn its back on it only based on the ground that arbitration overlooks the doctrine of public law and public interest. We believe that other components *inter alia* globalization, modern sovereignty concepts, and economic developments, should also take into account. Thus, arbitration could be seen as an effective tool to decrease the workloads of the court even for administrative law disputes, but with the right adjustment of domestic administrative arbitration laws/rules to make arbitration compatible with administrative law. We propose that a clear boundary should be set when the domestic judge could set aside/ refuse enforcement of the arbitral award. Especially, the term "public interest" as one of the most frequent grounds and considered as the most popular litigation strategy for the losing party to annul the arbitral award should be narrow to avoid wide interpretation, ambiguity, and controversy. The common and widely accepted the term "public policy" as a ground to refuse an administrative arbitral award could prevent the subjectivity and selectivity of the national court from refusing the arbitral award and enhance the predictability of the process. In addition, the clear boundary of "public policy" could secure one of the essences of arbitration which is the wide enforcement and balance the public interest protection in the essence of administrative law.

In sum, the reform by creating a new set of administrative arbitration rules could bridge the gap between administrative law and arbitration law. Therefore, arbitration could be more acceptable in the jurisdiction where the development of public law ideas. By proposed developments, arbitration could achieve more legitimate use as an alternative administrative dispute resolution and could be regarded as proper and suitable as a dispute settlement instrument in the administrative contract (Public contract).

7.2.2 Legitimacy Issues in Inter-State Dispute Settlement (ISDS)

We concluded throughout the thesis that the current Inter-State dispute settlement (ISDS) system is facing a legitimacy crisis. Evidentially, many states (For example, India, Indonesia, and several countries in South America) are turning back to the IIAs and international institutions (For example, ICSID) due to the weaknesses exposed by the IIAs and their mechanisms. The enforcement regime of those international arbitral awards is also in crisis as many times, either state puts a legal barrier, or the national court refuse to enforce those international awards. All these situations not only represent the legitimacy issue of the ISDS regime but also represent the ineffectiveness of the regime. As we are against the broadest approach of total cancellation of all IIAs since the ISDS mechanism still needed for the purpose of *inter alia* prevention of investment disputes to be escalating into political problems between two or more states, economic

development, equal level playing field between foreign investors and states; therefore, the reforms option is considered proper and desirable to tackle the issues. We propose that the reforms should be done both at national and international levels in order to bring the most effective result of reform.

At the national level, states should pay more attention to encountering foreign investment disputes on a pre-dispute phrase rather than a pose-dispute phrase. Dispute prevention policies (DPPs) is desirable since they could prevent the escalation of investment dispute into formal international arbitration. We believe that states should work proactively by analyzing and monitoring sensitive sectors where investment disputes usually occur. As it appears in statistics and best practices that international investment disputes are more likely to occur in certain business sectors or by government's activities, in one area/activity than another[1252]. We believe that dispute could be foreseen and then prevented with the right measure from involved parties, especially from states themselves[1253]. In this connection, the mechanism such as FDI screening regulation practiced by the European Union could be used as a prime example[1254], where states could set up certain barriers in some strategic sectors that might be constituted as security or public order, in order to prevent the escalation of international investment dispute in the first place. This kind of regulation could allow states to investigate, authorize, condition, or prohibit FDI. However, such barriers must not be done on a discrimination basis. Thus, it should be done with respect to the principle of proportionality, where the fair balance between freedom of capital movement and public order must be struck.

[1252] Empirical data show that investment disputes are more likely to arise in the context of certain types of contracts or activities and in certain economic sectors. For instance, disputes are more common in complex State contracts involving build-operate-transfer contracts, privatization schemes, concession agreements for public services, and mining and petroleum extraction projects. See, Possible reform of investor-State dispute settlement (ISDS) Dispute prevention and mitigation - Means of alternative dispute resolution, Note by the Secretariat of 19 January 2020 (A/CN.9/WG.III/WP.190), para. 17. See also, statistics by UNCTAD, available online at <www.investmentpolicy.unctad.org>.

[1253] Empirical data show that investment disputes are more likely to arise in the context of certain types of contracts or activities and in certain economic sectors. For instance, disputes are more common in complex State contracts involving build-operate-transfer contracts, privatization schemes, concession agreements for public services, and mining and petroleum extraction projects. Meanwhile, there is no dispute in education, only few in manufacture of certain products, and few cases in reproduction of media. See, Possible reform of investor-State dispute settlement (ISDS) Dispute prevention and mitigation - Means of alternative dispute resolution, Note by the Secretariat of 19 January 2020 (A/CN.9/WG.III/WP.190), para. 17. For statistics of international dispute settlement categorized by sectors, see, <www.investmentpolicyhub.unctad.org>.

In the national level, there are many evidence that could help to anticipate to which kind of disputes are more likely to occur than the others. As Data of 31 May 2019, Since March 2001, Thai Administrative Courts handled 32,110 cases regarding personal management and benefits, 24,676 cases regarding expropriation and torts, 19,787 cases regarding to building and environmental disputes, and 17,480 cases regarding to public procurement and administrative contract. See information at, <www.admincourt.go.th>.

[1254] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. See detail discussion in Chapter 5 of the thesis.

In addition, there are many methods that states could work to improve DPPs measures. States should set up a central administration/agency to specifically work with foreign direct investment as many disputes escalated into international arbitration due to slow and inexperienced responses from domestic administrations[1255]. Therefore, whenever a dispute arises, the central international investment administration could act in a swift manner and then could try to settle international investment disputes before escalating into a formal international arbitration suit. Central international investment administration could also act as a center of information sharing between administrations to ensure the integration of work. They could educate administrations about the existence of the ISDS regime and the potential consequences of the administration's decision that could potentially result in engagement in international investment arbitration. Most importantly, the national law should adapt for the possibility of asserting administrative law procedural into an international arbitral award when such award is related to an administrative law dispute to set a clear boundary, and to avoid controversy and ambiguity[1256].

At the international level, there are many reform approaches; in which some of them are already being implemented, and others are in the ongoing international discussions for future reforms[1257]. One of the weaknesses of the ISDS regime is the majority of investment treaties are still in the old model, in which many of them were concluded before the year 2000 and are characterized by vague and broad terms. Those vague and broad terms bring substantial amounts of critics and controversies in practices. The improvement of investment agreement models seems to be a desirable option since it could diminish weaknesses of the ISDS regime and put a clear stance on states to what extent they are committed to providing and binding by the investment protections under those agreements. We see ISDS as a necessary tool to resolve the conflict between states and foreign investors since we could not turn back to diplomatic protection channels which proved to be aggressive and ineffective. Many of public law doctrines could be asserted into newly concluded agreements, in which it could help to enhance the legitimacy of the overall process. For example, the doctrine of transparency, proportionality, judicial

[1255] Possible reform of Investor-State dispute settlement (ISDS): Submission from the Republic of Korea of 31 July 2019 (A/CN.9/WG.III/WP.179). See also, Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of South Africa of 17 July 2019 (A/CN.9/WG.III/WP.176). See also, Possible reform of investor-State dispute settlement (ISDS) Submission from the Governments of Chile, Israel, Japan, Mexico, and Peru of 2 October 2019 (A/CN.9/WG.III/WP.182).

[1256] For example, See, Portuguese Voluntary Arbitration Law 2011 (In force since 14 March 2012) Article 58: Foreign awards on administrative law disputes.

[1257] UNCITRAL Working Group III: Investor-State Dispute Settlement Reform. Available online at <www.uncitral.un.org>.

accountability[1258], the standard of review, legal certainty, and predictability could help in achieving the legitimacy of the ISDS system. The greater transparency of the ISDS regime and the wider publication of the ISDS process could benefit to the studies of the international investment law environment, public participation, enhancement of the rule of law, and any other future development. We suggest that states should enhance the transparency of international arbitration by considering signing and ratifying the Mauritius Convention on Transparency to amend old model treaties for transparency[1259]. We also see the benefit of new treaty drafting that could strike a fair balance between foreign investment protections and the host state's right to regulate. As we mentioned throughout the thesis that states change their regulation mostly based on public interest with the limitation of the principle of legality[1260], the improvement of new model treaties could preserve certain areas of the host state to regulate for public interest without liability under investment agreements (For example, environmental, public health, and labor rights). The language acknowledges of state sovereignty and public interest protection should be put throughout substantive parts of the investment agreements[1261].

[1258] Some of the new model regional investment treaty already implement Investment Court System (ICS) as a permanent body to retain the judicial accountability of the adjudicators. Generally, the ICS represent an equal number of adjudicators nominated by each parties along with adjudicators from third countries in the similar numbers with adjudicators dominated by state parties. Those adjudicators receive fixed salary to ensure their independency and availability. See, Comprehensive Economic and Trade Agreement (CETA). See also, European Union–Vietnam Free Trade Agreement. See also, GANTZ, David A., «The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreement», *Loyola University Chicago Law Journal* Vol. 49 Issue 2 (2017), 361-386;

[1259] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014).

[1260] In the ISDS dispute, we usually find the dispute in relation with public policy implication; for example, regulatory measure to solve economy emergency or civil unrest, protection of environmental, sustainable energy policy, protection of architectural site, public health, or development of country's infrastructure. For instance, See, CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8. See also, Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16. See also, in BG Group Plc v. The Republic of Argentina, UNCITRAL Arbitration Rules. See also, LG & E Energy Corp, LG & E Capital Corp and LG &E International Inc. vs. Argentina Republic, ICSID Case No. ARB/02/1. See also, Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1. See also, Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12. See also, Isolux Netherlands, BV v. Kingdom of Spain, SCC Case V2013/153. See also, Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, SCC Case No. 2015/063. See also, Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3. See also, Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12. See also, Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay).

See cases and statistics from United Nations Conference on Trade and Development (UNCTAD) Database, available online at <www.investmentpolicy.unctad.org/>.

[1261] For example, See, United States–Mexico–Canada Agreement (CUSMA) Annex 14-B (3)(b) stated that "The Parties confirm their shared understanding that:

… (b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.".

In connection to treaty model development, we strongly suggest that the new model agreement should tighten and refine language around the standard of protections (For example, Fair and equitable treatment, legitimate expectation, and most-favored-nation treatment) to avoid overly broad arbitral interpretations that interfere with public policy objectives. This development could avoid controversy and ensure the foreseeable and coherence of international arbitral reasoning/awards. States should also consider putting a clear definition of what kind of foreign investment constitute as the "protected investment" under the investment treaty. Despite the old fashion of old model agreement that broadly refers to "protected investment" to include every kind of investment, the new treaty should limit/narrow the access to those investment protections only to investments that pass the *Salini* test, in which those investments must; (1) involve the transfer of funds or the contribution of money or assets; (2) with certain duration; (3) have the participation of the individual transferring the funds in the management and risks associated with the project; and (4) bring economic contribution to the host state[1262]. In this connection, the corporate social responsibility (CSR) should be asserted in newly concluded agreements since the proper goal of investor-state arbitration should not be "to interpret clauses exclusively in favor of investors", but rather to give "due consideration to the balance of rights and obligations". Thus, the survival clause (Sunset clause) should not be overly long and restrain the state's ability to regulate. We suggest that the maximum period of not over three years is considered as a reasonable duration for such a clause. In the end, each state should review its investment agreements, and harmonize them where there is horizontal incoherence.

The thesis pointed out that the use of amicable solutions is neither popular nor effective in the current ISDS regime[1263]. There are also controversies about the arbitral tribunal's interpretation of whether the cool-off period is a pre-condition to arbitration or not[1264]. States and

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[1262] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction of 31 July 2001, para. 52-58;

[1263] For instance, ICSID has only registered 11 international conciliation cases, alongside with 2 additional facility conciliation cases so far. Thus, there is not yet any case under the ICSID Fact-Finding Additional Facility Rules. The statistics from other major institutions are even much lower, where there are very few to none of the party has register for their services of alternative approaches. See, the ICSID Caseload (statistics issue 2021-1), available online at <www.icsid.worldbank.org>. See also, Possible reform of investor-State dispute settlement (ISDS) Dispute prevention and mitigation - Means of alternative dispute resolution, Note by the Secretariat of 19 January 2020 (A/CN.9/WG.III/WP.190), para. 43.

[1264] Some arbitral tribunals regarded "cool-off period" as condition precedent. In which if parties failed to perform their duty within cool-off period, it would result as lack of the arbitral tribunal's jurisdiction to hear the dispute. See, Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)), Decision on Jurisdiction of 2 June 2010, para. 336-340. See also, Murphy Exploration and Production Company International v. Republic of Ecuador, ICSID Case No. ARB/08/4, award on Jurisdiction of 15 December 2010, para. 132.

Meanwhile, other arbitral tribunals only regard cool-off period as one way to resort the investment dispute, but not the obligation of foreign investors to resort it before the right to arbitration. Therefore, failure to perform cool-off period does not result the lack of arbitral tribunal's jurisdiction to hear the dispute. See, SGS Société

involved international organizations should explore and develop alternative dispute resolutions other than arbitration that are amenable to both private interests and public policy considerations. The improvement of amicable solutions such as mandatory mediation as a pre-condition to international arbitration is desirable because it could complement the existing investment arbitration regime and increase the legitimacy of the overall system. States could have a second chance to correct their wrongdoing and find a "more or less" solution with foreign investors. This concept is very close to administrative appeal in the administrative law. Apart from benefits from amicable solutions such as, faster, and less costly, without prejudice to the right of the parties to resort to other forms of dispute resolution, amicable solutions could also ease an uneasy situation between administrative law and international arbitration since the potential disputes are already prevented from escalating into formal international arbitration proceeding at the pre-dispute phrase. Thus, the shift from international arbitration which is right-base into amicable solutions which work more on the interest-based process should suit to the international investment dispute considering that they might be related to a long-term relationship, huge capitals, complexity, and the relationship between states at stake. States and foreign investors could keep a good relationship since arbitration has already been proven not to maintain a good relationship between states and foreign investors, but rather worsen it. Also, states are more likely to comply with amicable solutions since they result from voluntary agreements between states and foreign investors.

At the broadest reforms, we see many benefits from the future establishment of the Multilateral Investment Court (MIC) as the permanent international organ to resolve international investment disputes. The idea has been proposed by the European Union[1265], and is currently in

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Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003. See also, Ethyl Corporation v. The Government of Canada, UNCITRAL, Award on Jurisdiction of 24 June 1998, para. 85. See also, Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), Decision on Jurisdiction and Admissibility of 4 August 2011, para. 564.

[1265] The ideal of creation of Multilateral Investment Court (MIC) have been emerged trace back to at least in 2014, when the European Commission President at that time express the view for the need to replace an outdated ISDS system that currently using in the vast majority of investment agreements. See, European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)). See also, Council of the EU (2018): Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes of 20 March 2018 (12981/17 ADD 1)

The European Union has already replaced the ISDS mechanism with bilateral investment court systems (ICS) in its newly signed IIAs under EU's exclusive competence over the area of foreign direct investment (For example, in CETA and CETA's tribunal). It is important to mention that the ECJ already confirmed that the establishment of MIC does not contrary to the supremacy of the EU law. See, Opinion 1/17 of the Court (Full Court) of 30 April 2019 (ECLI:EU:C:2019:341). See discussion in Chapter 5 of the thesis. See also, Comprehensive Economic and Trade Agreement (CETA). See also, European Union–Vietnam Free Trade Agreement.

discussion of UNCITRAL Working Group III at the moment of writing this thesis[1266]. The ideal of the permanent investment court system that shall retain a number of full-time adjudicators with fixed salary and non-renewable terms shall secure judicial accountability and independence, in which it considered as one of the weaknesses of the current ISDS system that rely on the one-time appointment of a group of international arbitrators. Those full-time adjudicators should possess with public law and public international law knowledge in order to understand the legal texts and adequately strike a fair balance between investment protection and the state's right to regulate. The innovation of the appeal system within the permanent court with a clear standard of review and the appointment of the appeal tribunal in the same manner as the first instance could ensure consistency in uniform legal interpretation and results of the awards. The establishment of MIC, along with effective enforcement tools should be able to bring more compliance from states when they are on the losing side. The result should ensure more effectiveness of enforcement of the award which considers being one of the problems in the current ISDS system. The function of MIC should comply with a global administrative law standard by such as, transparency, judicial accountability, legal certainty, participation, non-discrimination, reasoned decision, legality, and review[1267]. The future Member States of the MIC could have a chance to issue the joint declaration on how MIC should operate and to what extent they should be responsible for investment protection under the MIC regime.

Although the shift from the traditional ISDS regime into the permanent court system could represent a new set of problems and disregard some of the benefits of the traditional ISDS system[1268], yet with careful adjustment[1269], MIC could support the rule of law, enhance confidence in the stability of the investment environment, a fair balance between investment protection and host state's right to regulate, uniform interpretation of laws, more predictability, efficiency, effectively, an effective appeal mechanism, taking more account of public law doctrine than the traditional ISDS regime, and could further enhance the legitimacy of overall regime. Furthermore,

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[1266] See the work in UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, available online at <www.uncitral.un.org >. See also, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes of 1 March 2018 (12981/17 ADD 1 DCL 1). See also, Possible reform of investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms: Note by the Secretariat of 29 November 2019 (A/CN.9/WG.III/WP.185).

[1267] These principles have been studied in the growing field of literature known as Global Administrative Law. Global Administrative Law scholars called for the development of procedures that ensure legal decisions comply with the following five principles: (1) transparency (2) participation (3) reasoned decisions (4) legality (5) review. The concept of Global Administrative Law could be found in many international treaties and domestic laws. See, KINGBURY, Benedict, KRISCH, Nico &STEWARD, Richard B., «The Emergence of… *id.* See also, MARKS, Susan, «Naming Global… *id.* See also, LOPEZ ESCARCENA, Sebastian, «Contextualizing Global… *id.*

[1268] See discussion in Chapter 5 and Chapter 6 of the thesis.

[1269] *Ibidem.*

the effective MIC should take the jurisdiction of investment disputes away from the national court, in which it could avoid the collision between administrative law and international investment law that already been having mistrust, ununiform, and controversial in practice.

In sum, the current ISDS regime is facing a "legitimacy crisis", and reforms are needed for this area of law. We concluded that many issues, such as, restraint between investment protection and the state's right to regulate, uniform interpretation of law, predictability, efficiency, effectiveness, judicial independency and accountability, and the appeal system should be taken into account for future reforms. In addition, public law doctrines should also be included in those reforms in order to enhance the legitimacy of the overall system. Every reform that we mentioned in the thesis lead to similar results, which are to enhance the legitimacy of the overall system and reduce or avoid the collision between administrative law and international investment law. The reforms could divide into three phases, which are, short-term, mid-term, and long-term. At the earliest reform, states should develop their domestic administrative arbitration law to allow necessary adjustments for administrative arbitration disputes. Dispute prevention policies (DDPs) could also implement in this phase to prevent the escalation of disputes into formal international arbitration (For example, the EU FDI screening regulation). In this connection, best practices from other countries could contribute to the DDPs reforms approach. In the mid-term reforms, states should develop their old model BITs to preserve their space for the right to regulate, and review them, then harmonize them where there is horizontal incoherence. They should also consider concluding regional trade agreements (RTAs) that contain more innovative clauses than the old model international agreements. In connection with the improvement of the new model agreement, the reform of alternative dispute resolutions other than arbitration, especially the mandatory investor-state mediation as a pre-condition before the e right to international arbitration are desirable because they prove to be effective, efficient, and be able to keep a good business relationship between the host state and foreign investors. In the long term, the establishment of MIC is desirable. It could overcome weaknesses in the current ISDS system. Thus, the future MIC seems to take more account of administrative law principles than the traditional ISDS, which could help to enhance the overall legitimacy of the system and increase acceptance/compliance from all parties.

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