6

Balance between Investment Treaty Obligations and Human Rights Obligation: What role can the Principle of Proportionality play in petroleum disputes?

Abdullah Al Faruque[1]

Investment disputes, whether arising out of breach of investment treaty or breach of investment contract, often revolve around how to resolve the tension between the sovereign right to regulate the foreign investment and the necessity to protect the legitimate interests of foreign investors. In recent times, States' obligation to protect human rights has come into forefront in investment disputes. Making an appropriate balance between investment protection and human rights obligations requires preserving greater policy space for governments to fulfil their human rights obligations and to afford protection of legitimate expectation of the foreign investors. This conflict of norms should be resolved for achieving greater coherence in decisions of investment arbitration and to avoid fragmentation of international law. This article argues that the principle of proportionality can be used as an interpretative tool in the investment dispute settlement in order to avoid conflict of norms and to make investment protection and human rights obligation mutually supportive.

Introduction

The relationship between investment protection and human rights law has figured prominently in the discourse of international investment law in recent times. The relationship is mainly explained by increasing interaction between two norms in dispute settlement process in interpreting substantive protective norms under investment treaties such as Bilateral Investment Treaties(BITs).[2]

1 The author completed his LL.B (Hons.) and LL.M from the University of Dhaka. He also completed his Ph.D from the Centre for Energy Petroleum Mineral Law and Policy (CEPMLP), University of Dundee, UK. Currently he is a Professor and Dean, Faculty of Law, University of Chittagong, Bangladesh. The author can be reached at faruquecu71@yahoo.com

2 Luke Eric Peterson and R. Gray Kevin, "International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration" (Paper presented by the International Institute for Sustainable Development (IISD) for the Swiss Department of Foreign Affairs, February 8, 2003).

The traditional view is that the difference in nature between human rights law and investment protection means that they operate on different planes and are thus not amenable to balancing. According to this view, investment law is a self-contained regime that is insulated from other branches of international law. But in the recent arbitral awards, non-investment obligations including human rights and environmental concerns are espoused and acknowledged as relevant factors in settlement of investment disputes.[3] In fact, investment law may come into contact with ever expanding notions of international human rights law in variety of contexts.

The human rights concerns are articulated in the investment contracts such as oil and gas agreements in view of increasing understanding of the public interest dimension of these contracts. Investment protection mechanisms such as stabilisation clauses included in the investment contracts can undermine the host state's ability to implement its international human rights and environmental obligations. The question may arise whether treaties and contracts can override human rights standards or impair the power of the state to legislate in the field of human rights protection. In this regard, a balanced approach should be taken in which the societal objectives of encouraging foreign investment is balanced with the objectives of protection of human rights. Such balancing approach should take the view that investment treaty obligations and human rights obligations are equally respected. A balancing approach to treaty interpretation is already evident in some arbitral awards. For instance, in its award in proceedings between *Suez (and others) v Argentine Republic,* the ICSID Tribunal stated: *"Argentina is subject to both international obligations i.e.human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive".*[4] Again, the tribunal in *CMS v. Argentina* argued: *"the right of the host states to adopt its economic policies together with the rights of investors under a system of guarantees and protection are at the very heart of this difficult balance, a balance which the ICSID Convention was careful to preserve."*[5]

3 M. Hirsch, "Interactions between Investment and Non-Investment obligations in International Investment Law," in P. Muchlinski, F. Ortino and Ch. Schreuer (eds.), The *Oxford Handbook of International Investment Law* (Oxford University Press, 2008), 154-181.

4 (Case No ARB/03/19 dated 30th July 2010)

5 *CMS Gas Transmission Co. v. Republic of Argentina,* ICSID Case No. ARB/01/8, 12 May 2005, para. 499

In investment disputes, the host state or third party may ask arbitrators to consider the human rights of host populations. In such cases, governments may defend their breach of protections owed to foreign investors and seek to justify such actions on the grounds that a valid human rights obligation compelled the government to act in a given situation.[6] In a number of investment treaty arbitrations, government's human rights obligations to its population have been invoked. In particular, over the last years, the human right to water came into forefront in investment disputes in view of the privatization of water supplies.[7] Although in these cases the arbitral tribunals did not absolve the host states from their investment obligation, the reduced amount of compensation was awarded in view of intensity of impact of regulation and public interest involved in such regulation. In the case of *Azurix Corp. v. Argentina*[8], Argentina had insisted that the intentions of the state- such as the protection of important public interests such as public health or the right to water- were crucial to drawing the line between 'legitimate regulation' and 'confiscatory regulation.' The arbitrators expressed support for the approach taken by Argentina and considered the degree of impact suffered by the claimant did not rise to the level of an expropriation at all. However, the tribunal provided award for reduced compensation and determined that *Azurix* was only entitled to 'fair market value' compensation for the breaches of the BIT.

In few cases, the issue of human rights has been implicitly discussed by arbitrators in relation to interpretation of impact of regulatory measures by the host states. For example, in *International Thunderbird v Mexico* the tribu nal stated in its decision that it would take into account the need to protect public morals.[9] The tribunal in *Saluka case* acknowledged that *"In order to determine whether frustration of the foreign investor's expectation was justified and reasonable, the host state's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well."*[10] Another significant case in this regard is *Methanex v US,* where

6 Luke Eric Peterson, *"Human Rights and BITs: Mapping the Role of human rights in investor-state arbitration"*,(Canada:Rights and Democracy, International Centre for Human Rights and Democratic Development, 2009), 23.

7 *Vivendi Universal vs. Argentina,* ICSID Case No. ARB/97/3-20, Award, 20 August, 2007; *BiwaterGulf(Tanzania Ltd. Vs. Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July, 2008

8 ICSID Case No ARB/01/12, Award, 14 July 2006.

9 *International Thunderbird Gaming Corporation v Mexico,* Award of 26 January 2006.

10 *Saluka Investments BV (The Netherlands) v Czech Republic* (Partial Award) (UNCITRAL, 2006) para 305.

the tribunal concluded that a non-discriminatory regulation for a public purpose is not deemed expropriatory and compensable unless specific commitments have been given by the regulating government to the foreign investor.[11] In *Marvin Feldman Karpa v Mexico*[12], the tribunal held that non-discriminatory, bona fide general taxation does not establish liability and not every business problem experienced by a foreign investor is an indirect or creeping expropriation under article 1110 of NAFTA.[13]

The Principle of Proportionality in Investment Arbitrations

The principle of proportionality based on the concept of 'necessity' is inherently flexible as its concrete content depends on the facts and circumstances of each case. This principle is generally applied by the courts and tribunals as a tool in balancing two different conflicting interests, namely public interest and individual rights in international, regional and national legal orders and systems.[14] The principle is widely applied in the field of human rights law, humanitarian law, criminal law and international trade law.[15] This principle has been first applied in investment law by ICSID tribunal in the *Tecmed* case to determine whether the regulatory measure breaches a balance between private rights and public interests and to determine the line separating a compensable expropriation from the legitimate exercise of regulatory powers for the protection of public health. [16] Proportionality test has been used by the tribunal to "achieve a balance between the affected property right and the public interest that is to be protected."[17]

11 *Methanex v US*, ICSID Case No ARB/98/3, Pt IV, Ch V, 7.

12 *Marvin Feldman Karpa v Mexico*, Award, 16 December 2002, ICSID Case No.ARB(AF)/99/1, available at http://www.state.gov/documents/organisation/1639.pdf.

13 ibid, See para 103.

14 Thomas M. Franck, "On Proportionality of Countermeasures in International Law," *American Journal of International Law* 102(2008):715; T. Jeremy Gunn, "Deconstructing Proportionality in Limitation Analysis," *Emory International Law Review* 19(2005): 465; Xiuli Han, "The Application of the Principle of Proportionality," in *Tecmed v. Mexico', Chinese Journal of International Law*6 (2007): 635-652.

15 Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," *Yale Law School Faculty Scholarship* Series No. 14 (2008); Mads Andenas and Stefan Zlepting, "Proportionality: WTO Law in Comparative Perspective," *Texas International Law Journal* 42 (2007): 371.

16 *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID case no. ARB(AF)/00/2, paras. 95-151 (29 May 2003). See Benedict Kingsbury, and Stephan Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law," *International Law and Justice Working Paper No. 6*, Institute for International Law and Justice,(New York : New York University School of Law,2009)

17 *Tecmed* case, para. 122.

The tribunal specially mentioned that *"there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."*[18] Subsequently this principle was applied in other investment cases such as *CMS v Argentina, LG&E v Argentina, Continental Casualty v Argentina.*

The principle of proportionality has been used by the investment arbitral tribunals in at least three areas: first, on the question of how to delineate between indirect expropriation that requires compensation and lawful regulation that does not entail compensation; second, to determine the amount of compensation in case of expropriation; third, on the issue of how to link the principle of proportionality with the broader concept of the fair and equitable treatment as the investment protection mechanism. In *Saluka case*, the tribunal applied the proportionality principle as a part of the fair and equitable treatment and as a way to balance the host states interests with the expectation of foreign investors.[19]

In applying the proportionality principle, the intensity of the impact of the measure on the property may be relevant. Thus, a mere diminution in the value of foreign-owned property alone is not sufficient for expropriation. The tribunal in *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v. Argentina* reiterated that an indirect expropriation does not occur "*where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for the expropriation*"[20] The *Continental Casualty*[21] case is another example where the tribunal considered this principle to strike a balance between indirect expropriation and a state's legitimate power to regulate. The tribunal accepted Argentina's defence of necessity arising out of its financial crisis. The tribunal ultimately found that there was no indirect expropriation and the tribunal observed that legitimate governmental regulation would cross the line where it affected an investment in an 'intolerable, discriminatory or disproportionate manner.'[22]

18 ibid.

19 General Public International Law and International Investment Law- A Research Sketch on Selected Issues, International Law Association, German Branch, Sub-committee on investment law, working Group-http://www.50yearsofbits.com/docs/0912211342_ILA_Working_Group_IIL_PIL.pdf

20 ICSID Case No.ARB/02/1 at 191.

21 *Continental Casualty Company v Argentina*, ICSID Case No. ARB/03/9, Award 5 September 2008

22 Ibid.

Role of Treaty Interpretation in Harmonizing Norms

The role of interpretation in the context of resolving conflict of norms can be approached in the following way:

First, in interpretation of investment treaties, particular attention is given to the object and purpose of the treaty as expressed in the preamble. It has been argued that *"preambular statements in investment treaties cannot simply be conflated with a general preference for the interests of the investor over those of the host state. The overall objective in fact requires a balanced approach."*[23] The preambles of BIT can be interpreted in line with human rights obligations if preamble of a BIT contains reference to human rights. Although preambles do not create any legally binding obligations, these can be used in guiding the interpretation of treaties where there is ambiguity in language. Art. 31 of the Vienna Convention states that the preamble constitutes part of the context of an argument. In this way, the presence of any public interest goal or development objectives in the preamble of an investment treaty can strengthen the human rights arguments by the host state or by the tribunal.[24]

Second, interpretation of investment treaty could also be approached from the perspective of conflict of norms. The scope of potential conflicts between international norms occurs because all norms of international law do not have same status. Some of them protect important and universal values, such as the prohibition of genocide, which constitute jus *cogens* or peremptory norms that do not allow derogation. It means that they have a hierarchical standing that is higher than other norms. Thus, in case of conflict between two norms, in some instances, the primacy of human rights should be recognized.[25] Even within the sphere of human rights, some human rights which are called non-derogable, have hierarchy over others. For instance, Art. 4(1) of the International Covenant on Civil and Political Rights (ICCPR) allows for derogation in emergency situations. However, some human rights, such as right to life or freedom from torture or slavery can never be suspend-

23 C McLachlan, "Investment Treaties and General International Law", (ICLQ, 2008), 361, 371.

24 Ernst-Ulrich Petersmann, "Human Rights, Constitutionalism, and 'Public Reason' in Investor-State Arbitration," in *International Investment Law For the 21st Century: Essays in Honour of Christoph Schreuer*, Christina Binder et al, (Oxford University Press, 2009), 877-893.

25 Marcos A. Orellana, "Science, Risk and Uncertainty: Public Health Measures and Investment Disciplines," in *New Aspects of International Investment Law*, ed. Philippe Kahn and Thomas Walde(Leiden: Martinus Nijhoff Publishers, 2007), 718-719.

ed or limited, even during times of national emergency. Indeed, an ICSID tribunal sitting under NAFTA in the *Methanex* case stated that:

> *"....as a matter of international constitutional law a tribunal has an independent duty to apply interpretive principles of law or jus cogens and not give effect to parties' choice of law that are inconsistent with such principles."*[26]

A balancing approach to treaty interpretation is already evident in some arbitral awards. Thus, the arbitral tribunal observed succinctly in a case:

> *"The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host states from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations".*[27]

More importantly, in its award in proceedings between *Suez (and others) v Argentine Republic*, the ICSID Tribunal stated: *"Argentina is subject to both international obligations i.e.human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive".*[28] Again, the tribunal in *CMS v. Argentina* argued:*"the right of the host states to adopt its economic policies together with the rights of investorsunder a system of guarantees and protection are at the very heart of this difficult balance, abalance which the ICSID Convention was careful to preserve."*[29]

Third, in order to achieve coherence and unity of international law and systemic

26 *Methanex Corporations v United States of America* (Final award of the Tribunal on Jurisdiction and Merits of 3 August 2005) ICSID Case, Part IV, ch 11.

27 *Saluka Investments BV (The Netherlands) v Czech Republic* (Partial Award) (UNCITRAL, 2006) para 300.

28 (Case No ARB/03/19 dated 30th July 2010)

29 *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No.ARB/01/8, 12 May 2005, para. 499

integration in interpretation of investment treaty, the central role of international law should be recognized in view of the public nature of the rights involved in such treaty.[30] The concept of systemic integration is based on the premise that investment treaties are not self-contained regimes but are creatures of international law and governed by it.[31] General principles of international law inform the content of the specific treaty norm and of States' obligation more generally.[32] Systemic integration requires harmonious interpretation of international law, which is essential for preserving the coherence and unity of international law.[33] Achieving such a purpose will obviously require the consideration of non-investment law including general principles of international law, human rights norm and customary international law in applying and interpreting investment law.[34]

Article 31(3)(C) of the Vienna Convention of Law of Treaties may serve as the legal basis for consideration of human rights in the process of the interpretation of investment treaties. This provision reflects a principle of integration and emphasizes both the unity of international law in the sense that rules should not be considered in isolation of general international law.[35] It requires that in the interpretation of a treaty, they shall be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties. The ICJ in the *Oil Platform* case emphasized that under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties.[36] The ICSID tribunal in its first case

30 Charles N. Brower, 'Whither International Commercial Arbitration: The Goff Lecture 2007', *Arbitration International*, Vol. 24, No. 2, (2008):181.

31 Campbell McLachlan, "Investment Treaties and General International Law," *International and Comparative Law Quarterly* 57 (2008): 361-401; See also, Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration,"*The British Yearbook of International Law*, 74 (2003): 151 (To treat international law as a self-contained legal order in the sphere of foreign investment is plainly untenable.) p. 152.

32 Ibid.

33 Anne van Aaken, "Fragmentation of International Law: The Case of International Investment Protection," University of St. Gallen Law School, Working Paper No. 2008-1. This paper can be downloaded from the Social Science Research Network Electronic Paper Collection: http://ssrn.com/abstract=1097529.

34 (Petersmann, 2009, 892), see note 24 above.

35 Philippe Sands, "Treaty, Custom and the Cross-fertilization of International Law,"*Yale Human Rights and Development Law Journal* 10 (1998): 3.

36 See, *Case Concerning Oil Platforms (Iran v United States of America)*, Judgement, 6 November, 2003, ICJ Reports 2003, at para 41.

Asian Agricultural Products Ltd. V Republic of Sri Lanka explained that a BIT

> *"....is not a self-contained close system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider judicial context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature."*[37]

The expression 'relevant rules of international law' must include international human rights law as applicable in interpretation of investment treaties. The human rights law can be used by investment tribunals as part of 'relevant rules of international law' to determine the generic terms of treaties to achieve the harmonization of treaty interpretation.[38] Indeed, many provisions of BITs are defined by other sources of international law in so far as they make direct and general reference to international law as a source of binding obligations.[39] For example, fair and equitable treatment clauses sometimes are defined with reference to customary international law or international law.

In *Saluka Investments BV (the Netherlands) v the Czech Republic,* the tribunal concluded that in interpreting the provisions of treaties such as BITs or FTAs, account has to be taken of any relevant rules of international law, including general customary international law, applicable in the relations between the parties.[40] This demonstrates that international investment law should not operate in isolation from the rest of the rules of international law, rather the investment tribunal *"should take into account other competing principles of international law."*

37 *Asian Agricultural Products Ltd. V Republic of Sri Lanka* (Award) (ICSID) (1990), 4 ICSID Report 245, 257.

38 See for analysis on this point, Bruno Simma and Theodore Kill, "Harmonizing Investment Protection and International Human Rights: First Steps Towards A Methodology" in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer,* ed. Christina Binder et al. (Oxford: Oxford University Press, 2009), 678-707. "The practice of referring to external rules to determine the meaning of generic terms would seem to be fruitful field for the harmonization of human rights and international investment law.", at 703.

39 See Joshua Robbins, "The Emergence of Positive Obligations in Bilateral Investment Treaties," University of Miami International & Comparative Law Review13, (2005-2006): 403-473, (argues that BITs combines multiple incorporating devices including separate treaties, other sources of international law or domestic law.)

40 *Saluka* case, see note 27 above.

However, till date, very few investment treaties refer to human rights obligations. For instance, Article 7.2.d of the COMESA Agreement include the human rights issue, along with other social issues in institutional structure established to implement the Agreement.[41]

The Principle of Proportionality as an Interpretative Tool

The exponential growth of BITs with diverse treaty language and various formulations of substantive obligations indicate the need for consistency and coherence in their interpretation.[42] In fact, arbitral tribunal have given a number of inconsistent awards and provided diverse interpretation of substantive obligations of BITs, which effectively contributes to fragmentation of treaty interpretation. In the context of increasing number of BITs, the resultant increase of investment disputes make the issue of policy coherence more important than ever before. This raises the question as to how to ensure a harmonised and coherent approach to the treaty interpretation.[43] The role of interpretation is increasingly recognised in harmonizing conflicting interests of the parties to the investment disputes. This is because interpretation is not only a part of the implementing process of a treaty, but also plays a fundamental role in avoiding antinomies between different treaty regimes.[44] A holistic approach should be adopted by arbitrators taking into account human rights law and relevant customary international law in interpreting relevant investment treaty provision to prevent fragmentation of international law. In this regard, the principle of proportionality can play a crucial role.

41 It reads as follows- "recommendations to the (COMESA) council on any policy issues that need to be made to enhance the objectives of this Agreement. For example the development of common minimum standards relating to investment in area such as: (i) environmental impact and social impact assessments; (ii) labour standards; (iii) respect for human rights; (iv) conduct in conflict zones; (v) corruption and (vi) subsidies." See the reference and discussion, Howard Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' International Institute for Sustainable Development, February, 2008, p. 10.

42 See on interpretation of treaty, Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation," *American Journal of International Law* 104 (2010): 179-225.

43 C Schreuer, 'Diversity and harmonization of treaty interpretation in investment arbitration', *Transnational Dispute Management*, 3(2) 2006).

44 Valentina Sara Vadi, "Reconciling Public Health and Investor Rights: The Case of Tobacco," in *Human Rights in International Investment Law and Arbitration*,ed. Pierre-Marie Dupuy, Francesco Francioni, and Ernest-Ulrich Petersmann, (Oxford : Oxford University Press, 2009), 470.

The role of interpretation based on the principle of proportionality in the context of making balance between treaty obligations and human rights obligations of the host states can be approached in the following ways:

First, it is necessary to delineate a non-discriminatory regulation by the host states in order to fulfill their obligations under human rights treaties and to promote the general welfare and compensable regulation that does not pursue public goals.

Second, the principle of proportionality should be interpreted as a part concept of fair and equitable treatment if the host states' regulation frustrates the legitimate expectations of a foreign investor.

Third, interpretation of investment treaty or contract could also be approached from the perspective of conflict of norms. The scope of potential conflicts between international norms occurs because all norms of international law does not have the same status. Some of them protect important and universal values, such as the prohibition of genocide, which constitute *jus cogens* or peremptory norms that do not allow derogation. It means that they have a hierarchical standing that is higher than other norms.[45] Thus, in case of conflict between two norms, in some instances, the primacy of human rights should be recognised.[46]

Fourth, in order to achieve coherence and unity of international law and systemic integration in interpretation of investment treaty, the central role of international law should be recognized in view of the public nature of the rights involved in such treaty.[47] The concept of systemic integration is based on the premise that investment treaties are not self-contained regimes and they are creatures of international law and governed by it.[48] General principles of international law inform the content of the specific treaty norm and of States' obligation more generally.[49] Systemic integration requires harmonious interpretation of international law which is essen-

45 J. Pauwelyn, *Conflict of Norms in Public International Law*: How WTO Law relates to Other Rules of International Law (Cambridge: Cambridge University Press, 2003), 32.

46 (Orellana, 2007,718-719) see note 25 above.

47 (Brower, 2007,181), see note 31 above.

48 (McLachlan, 2008,361-401), see note 30 above.

49 Ibid.

tial for preserving the coherence and unity of international law.[50] Achieving such a purpose will obviously require the consideration of non-investment law including general principles of international law, human rights norm and customary international law in applying and interpreting investment law.[51]

Finally, many BITs contain exceptions clauses, which are based on the defence of necessity or emergency.[52] It means that states can be exempted from liability for extraordinary events of social strife and disorder but the concept is qualified by a duty of the host state to exercise due diligence.[53] The principle of proportionality can be used to measure the proportionality and reasonableness of such exception clauses. The use of exceptions to general treaty provisions is one of the ways to achieve key policy objectives of the host states. These exception clauses generally reflect that the property rights of investors can be subjected to other competing interests. It has been said that use of such exception provision would lend a greater coherence and legitimacy to the interpretation process.[54]

Conclusion

The principle of proportionality can be used as a tool by arbitral tribunals in dispute settlement relating to oil and gas contract to strike a balance between host states' right to protect human rights and the legitimate interests of foreign investors. The analysis of principle of proportionality can be applied for sharing the burden of foreign investors and measuring appropriate compensation in case of expropriation depending upon the intensity impact of such regulation. The principle can be applied to protect regulatory measures enacted in good faith and in non-discriminatory manner and also aimed at the public interest at the same time. It can also be applied to provide compensation to the foreign investor in case of unlawful expropriation. The principle can be interpreted by the tribunals to achieve a co-

50 (Aaken, 2008), see note 33 above.

51 (Petersmann, 2009, 892), see note 24 above.

52 Andreas F. Lowenfeld, *International Economic Law,* (Oxford: Oxford University Press, 2008), 583; Rudolf Dolzer and Christoph Schreur, *Principles of International Investment Law,* (Oxford: Oxford University Press, 2008), 166.

53 (Dolzer andSchreur, 2008, 166), see note 52 above.

54 Daniel Kalderimis, "Investment Treaties and Public Good," (Paper presented at Asian International Economic Law Network Inaugural Conference, June 29, 2009), 10.

herent and comprehensive balance between investment law and human rights law. Further the rationale for balancing between human rights and treaty obligations can be demonstrated by the fact that both are part of the broader discipline of international law.