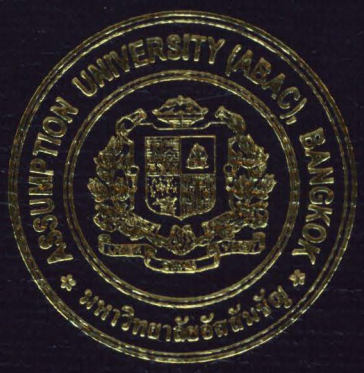

BALANCING OF INTEREST BETWEEN FOREIGN INVESTMENT AND HUMAN RIGHTS: AN INTERNATIONAL LAW PERSPECTIVE

BY

MS. JITTAWADEE CHOTINUKUL

AN INDEPENDENT STUDY SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE DEGREE OF MASTER OF LAWS (BUSINESS LAW)

GRADUATE SCHOOL OF LAW

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Independent Study Title	: Balancing of Interest between Foreign Investment and Human Rights: An International Law Perspective
Author	: Ms. Jittawadee Chotinukul
Major	: Master of Laws (Business Law)
Advisor	: Judge Vichai Ariyanuntaka

Faculty of Law, Assumption University approves this Independent Study as the partial fulfillment of the requirement for the Degree of Master of Laws.

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ABSTRACT

Since 1980s foreign investment has grown dramatically. According to many beneficial factors including cheap labor costs, cheap raw materials, abundant natural resources and market expansion, developing countries have become the most interesting target for foreign investment.

It is very true that foreign investment brings along with it some benefits to the developing countries as well, for example it creates job for local population, it helps to eradicate the poverty and it accelerates the economic growth for the host countries. These are certain reasons why the interest of foreign investment must be protected under international law.

However, it is also very true that in many cases, foreign investment also gives a reverse impact on the local people of the host countries. It creates a so-call "race to the bottom" phenomenon. And that reverse impact is human rights violation.

While an extreme concept of human rights protection would hinder foreign investment, an omission or an ignorance of the idea and merely focusing on the economic growth would certainly be unacceptable among international community in this era. Therefore, finding a fine balance of the two interests would be the most valuable answer. And that is the objective of this research. The key way to balance the interest of foreign investment and the interest of human rights, besides the legal tool, is a comprehensive co-operation between the involved parties namely the states, business sectors, civil society, international organizations and media under the principle of "protect, respect and remedy".

ACKNOWLEDGEMENT

I would like to express my deepest gratitude to all those who have assisted me, either directly or indirectly, in the successful accomplishment of this independent study.

In particular, I am grateful to Judge Vichai Ariyanuntaka, my advisor for his kindness, encouragement, support and valuable advice and my committee especially Professor Phijaisakdi Horayangkura for his sincere advice and his endeavor to correct my grammar and make this research more complete. Also I would like to thank Professor Vitit Muntarbhorn, my professor when I was an undergraduate at Chulalongkorn University for his teachings which encourage me to see the world in a different view and that consequently inspires me to conduct this research.

I am highly indebted to Rev. Bro.Bancha Saenghiran, my beloved uncle for giving me the opportunity to study and successfully achieve the Master of Laws at Assumption University.

Last, I don't know how to thank my lovely family- my father, my mother, my brother and my sister- for their love, support and understanding as always.

Ms. Jittawadee Chotinukul

Table of Contents

Chapter 1
Introduction

"Be the change that you want to see in the world."

-Mahatma Gandhi-

A. Background and General Statement of Problems

After the Second World War, the world recovered from the destruction brought by the conflict and then the economic growth became a main goal for international community, especially the industrialized countries to be achieved.

Between 1980 and 1990, Foreign Direct Investment (FDI) - defined as cross-border expenditure to acquire or expand corporate control of productive assets – has grown dramatically as a major form to accelerate the global economic growth. According to the economic rationales, including cheap labor costs, cheap raw materials, abundant natural resources, market expansion and a dumping of older-generation technologies, the developing world like Latin America and Asia became unavoidably the most interesting targets for Foreign Direct Investment (FDI).

While the objective of Foreign Direct Investment (FDI) is to do anything to yield the highest returns to the parent corporate in their home markets, together with the trend that many developing countries have abandoned protectionism and scrambled to attract the foreign investment, there lies a large scale of violation of human rights, for instance, local labors exploitation or the child labor abuse as generally known as "sweatshop labors", discrimination, coercion and unsafe and unsanitary conditions against local people in the host countries. The apparent examples of aforementioned situations could be seen in Burma (Unocal), China (NIKE), Sudan (ABB), Nigeria (Shell), Columbia (British Petroleum) and Indonesia (Freeport Mc Moran).

However, it would be unrealistic and unfair to rush to the conclusion that foreign investment undermines the pursuit of human rights. To look from the view of

business leaders, rather than presuming that foreign investment tends naturally to undermine the cause of human rights, it considers the reverse possibility: that foreign investment tends, equally naturally, to improve the condition of human rights in developing countries either as a direct result of a firm's activity or as the indirect result of improved conditions created by those investment.[1]

From this view, the business leaders claim that foreign investment, on the contrary, creates more opportunity to employment for populations of developing countries and brings with it raw materials for growth: capital, technology and know-how, the practices of Western business, the attention of Western media, their reputations and their brand names and a deep-seated desire not to engage in activities that could discredit their public image, the management techniques that are often gentler than those that prevail in developing economies as well as managers who frequently are eager to introduce social improvement alongside their financial investments.[2] And this shows that foreign investment does not undermine human rights principle but, by contrast, it improves and promotes such concept.

The debate of the fragile relationship between human rights and foreign investment seems to be indefinite and trying to reach an extreme support either on the first or the latter concept could be useless and leads nowhere.

The key point should be, instead of considering that advocates of human rights and leaders of the business community stand on separate sides of a vast divide, finding the way to balance the interest of these two concepts: the protection of human rights and the promotion of foreign investment is the most important and useful answer. Yet it probably leads to the surprising result that is the interest of the two concepts may actually coincide as much as they clash.

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[1] Debora Spar, "Challenge: foreign investment and human rights- international lessons," (March-April 1998), available at http://findarticles.com/p/ articles/ mi_m1093/ is_1_42/ai_53697782. (last visited 3 June 2008).

[2] Ibid.

B. Hypothesis of the Study

While an extreme concept of human rights protection would hinder foreign investment, an omission or an ignorance of the idea and merely focusing on the economic growth without being aware of impacts on human rights would certainly be unacceptable for an international community in this era.

Therefore, a fine balance of interest between the promotion and the protection of foreign investment and the promotion and the protection of human rights would probably be the key answer. The way of balancing could be achieved by the comprehensive co-operation between the involved parties namely, states (home and host countries), business sectors (foreign investors), civil society (affected community), international organizations and media.

C. Objectives of the Study

1. To study international law on foreign investment protection, see the objectives of the law, consider what interests of foreign investment are protected under international law and analyze whether or not international law on the protection of foreign investment has any drawbacks.

2. To study international legal instruments on the protection of human rights by focusing on the rights affected or violated by foreign investors and analyze whether or not international law on the protection of human rights has any shortcomings.

3. To find the way to balance the interests of foreign investment and human rights.

D. Study Methodology

The methodology of this research is a documentary research. International law on the protection of foreign investment, including international customary law concerning foreign investment, the GATT/WTO rules on foreign investment, and the

international treaty such as Multilateral Agreement on Investment (MAI) and Bilateral Investment Treaties (BITs) as well as international law on human rights namely, Universal Declaration of Human Rights, Covenant on Civil and Political Rights and other major UN human rights treaties shall be examined and analyzed. Furthermore, related books, case studies, articles in law journals and the internet will be also consulted.

E. Scope of the Study

The research shall examine the interest of foreign investment and the interest of human rights under the international law and try to find the way to balance the interests of the two aforesaid regimes as an end goal.

F. Expectation of the Study

1. To encourage the world community to see in a different view that, with an understanding and a fine balance by an effective co-operation between the involved parties, foreign investment and human rights are not always paradoxical, instead the two regimes can live in harmony and even support each other.

2. To propose a fine way to balance the interest of foreign investment and human rights in order to achieve the end goal which is foreign investment is protected at the same time that human rights situation is improved and the individual's rights are protected.

Chapter 2

The Interest of Foreign Investment

"There is a sufficiency in the world
for man's need but not for man's greed."
-Mahatma Gandhi-

A. Introduction

Foreign investment is one of the business forms, which Multinational Enterprise (MNE) can establish to conduct its business. Foreign investment generally involves the ownership of some of the equity in a foreign business. It may also involve control. Ownership and control issues are often complex, especially in a cross-border situation, as for example, when a corporation registered in one nation has its center of management in a second nation and its owners (shareholders) are citizens of a third nation. While identifying the nation of registration is usually easy, it may not be easy to determine who owns or controls the entity. Where the investor owns all the equity in the foreign investment, there is usually little question regarding who has ownership and control. But as the equity percentage owned by the investor from abroad diminishes, the question of control arises. Ownership of a majority of the voting equity of the foreign entity usually means the entity is a subsidiary under the control of the investor. If the investor from abroad has half the equity, who has control may be quite uncertain. No one has control by virtue of ownership of 50 percent, but one of the 50 percent owners may exert control. It may depend on the existence of and ability to control proxies. Where the ownership is less than 50 percent, often the case of a joint venture where the foreign owner is limited to 49 percent equity, control is quite likely to be the result less of the equity split, than some form of management agreement. Few multinational corporations with foreign investments in many nations

are willing to hold 49 percent without very substantial participation in management, if not assurance of absolute control.[3]

To be easily and shortly speaking, foreign investment is defined as a long-term investment by a foreign investor in an enterprise resident in an economy other than that in which the foreign investor is based. The foreign investment relationship consists of a parent enterprise and a foreign affiliate which together form a transnational corporation (TNC).

Foreign investment can be divided into 2 kinds; direct investment and indirect or generally called portfolio investment. In order to qualify as Foreign Direct Investment (FDI), the investment must afford the parent enterprise control over its affiliate. The United Nations defines control in this case as owning 10 percent or more of the ordinary shares or voting power of an incorporated firm or its equivalent for an unincorporated firm. And if lower ownership shares, it shall be deemed as portfolio investment.

Foreign investments are initiated for many different reasons. Sometimes it is the natural succession to a successful period of increasing export sales to a foreign nation, when a company believes the foreign market is sufficiently large to justify local production. Local production ought to reduce transportation costs of finished products sold in the domestic market of the foreign nation, and may benefit from the use of local resources available at lower cost, especially labor. The foreign investment may follow immediately after this successful period of export sales, or follow a period of foreign production not by means of a direct equity investment, but by licensing the technology for foreign production to a domestic firm in the foreign nation. And example is the aircraft manufacturing industry. In order to assure participation in sales in the increasing Asian market, especially China, United States aircraft manufacturing companies have the manufacture of some parts to Asia, both by licensing and by new direct foreign investment. The multinational company may dislike transferring the technology to a company owned by another, whether due to a fear of loss of that

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[3]Ralph H. Folsom, Michael Wallace Gordon & John A.Spanogle, JR., International Trade and Investment (United States: West Publishing Co.) 167-168 (1996).

technology, or an inability to control production quality. The fear of loss of the technology is of special concern when the technology consists of knowhow, which is often less well protected than patents, trademarks and copyrights. Such fear is particularly well founded with respect to nations which do not afford very strong protection to intellectual property rights. Even if a transfer of technology licensed to an unrelated company in another nation has resulted in a profitable relationship, the technology owning multinational may prefer to establish a wholly or majority owned subsidiary to take over the production of the goods or services. The multinational may not wish to share in the profits with the licensee when it could do the production itself, and, as noted above, keep better control over production quality. The foreign investment which follows export sales or a transfer of technology tends to be voluntary in the sense that the company makes the decision for business reasons, not because the framework of laws and policies of the foreign government essentially required local production. In some cases, however, especially in developing nations with balance of payments problems, the government may make it very difficult, if not impossible, for other nations' businesses to export to the country. High tariffs, quotas and other nontariff barriers may be used both to reduce imports and the consequent demand for scarce foreign currency to pay for the imports, and also to offer considerable protection to domestic industries. The answer for the multinational company may be to become one of those domestic industries by establishing a direct foreign investment. This would be to some degree an involuntary investment, in that it is not one of several alternatives but the only allowed form of doing business, although the final decision to invest is of course made by the foreign investor.[4]

As mentioned above, the reasons for establishing a foreign investment can be concluded as follow:

1. To expand the market for investors' products. This reason can be seen clearly as the case where many American companies set up their foreign investment in China.

2. To reduce transportation costs of investors' products sold in the domestic market of the foreign nation.

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[4] Ibid., pp.168-170.

3. To benefit from the cheaper local resources especially labor.

4. As for technology and knowhow, foreign investors prefer to protect their knowhow by establishing their own company abroad than licensing the technology to a domestic firm in the foreign nation.

5. According to the protectionism policy of host countries, especially developing countries, which appears in the forms of high tariff, quotas and other nontariff barriers in order to reduce export and protect their own domestic markets, setting up a direct foreign investment is the key for multinational companies to enter into the local markets.

B. Legal Basis: International Legal Instruments on Foreign Investment Protection

It has been generally known that foreign investment does not only give benefits to investors such as cheaper local resources especially labor cost, reduction of transportation cost and market expansion, but it also gives other benefits to the countries where the foreign investment is undertaken; the host countries. The advantages for the host countries are, for instance, job creation to local people, the influx of knowhow technology, well-managed practices or techniques and the flow of foreign currency which is one of the most important factors driving the economic growth.

According to the benefits of foreign investment, many countries especially developing countries have tried to attract foreign investors to invest in their countries. And one of the most vital tools used to attract the flow of foreign investment is legal rules and instruments. Laws become a tool to promote a good, friendly and facilitated environment for foreign investment, to assure the security and, the most important, to protect the interest of foreign investment.

The international laws concerning the protection of foreign investment are discussed as follow:

1. Foreign Investment under the Rule of Customary International Law

The rule of customary international law is one of the sources of international law. Other sources are including international agreements, such as treaties between states (discussed below), general principles of law recognized by civilized nations, and as secondary sources, judicial decisions and teachings of the most highly qualified publicists of the various nations. Customary law is established by a general practice of states around the world which is accepted as law and it binds all states.

The rule of customary international law which concerns foreign investment is the minimum international standard.

We can see how foreign investment is protected under the rule of minimum international standard which forms part of customary international law by discussing other relevant concepts under international law.

The first concept under the international law is the concept of absolute sovereignty. This concept says that all states are sovereign in their own territory, and that "pari parim non habit imperium, which means that no state could be expected to submit to the laws of another." This finds expression, for example, on the claims of certain developing states that they have the absolute right to expropriate property of foreign investors located in their territory, and are not bound by any law external to their own with regard to the compensation to be paid to the investor.[5]

However, the concept of absolute sovereignty is balanced by the rule of customary international law which is, in this case, the minimum international standard. Therefore, continuing the example from the previous paragraph, the state is obligated to pay compensation to a foreign investor following expropriation pursuant to international standard.

The second concept under the international law is national treatment. This concept says that a state is required to treat an alien only as well as it treats its own citizens. But if relying solely upon the concept of national treatment without considering other rules of customary international law, it could be meant that a state is

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[5] Paul E.Comeaux & N. Stephan Kinsella, Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk (United States: Oceana Publications Inc.) 24 (1997).

allowed to expropriate property of aliens without compensation, so long as it pays no compensation to its own nationals for expropriation of their property. Here is the point where the minimum international standard comes to play.

This standard protects foreign investment by ruling that a state that expropriates property of a foreign investor is required under international law to pay full compensation to the foreign investor, no matter what laws apply to the nationals of the offending state.

To conclude, the concepts under the international law such as the concept of absolute sovereignty and the concept of national treatment are recognized so long as the rule of customary international law is followed.

Thus, it can be summarized that the interest of foreign investment is protected under customary international law by the rule of the minimum international standard. And the question on how the rule of the minimum international standard applies in practice, the answer is that it varies, depending on which concept under international law is applied in that situation. For example, in the situation of expropriation, under the minimum international standard rule, a state that expropriates property of a foreign investor has to pay full compensation without delay.

2. Foreign Investment under the GATT/World Trade Organization (WTO)

Prior to Uruguay Round, the GATT did not address issues of foreign investment. But the Uruguay Round produced rules on foreign investment, referred to as Trade Related Aspects of Investment Measures, or TRIMs. The new rules are thus quite an important development.

The Agreement on Trade-Related Investment Measures (TRIMs) sets forth the principle to protect foreign investment in the provisions of Article 2 which states that:

The Agreement on Trade-Related Investment Measures (TRIMs)

Article 2 National Treatment and Quantitative Restrictions

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.[6]

In order to understand the provisions under the Agreement on Trade Related Aspects of Investment Measures (TRIMs), it's necessary to know the relevant mentioned Articles under GATT 1947, which is the original agreement dealing with trade in goods and now incorporated into GATT 1994.

The General Agreement on Tariff and Trade (GATT 1947)

Article III National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportion, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade

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[6] World Trade Organization, Agreement on Trade-Related Investment Measures, available at http://www.wto.org/english/docs_e/legal_e/18-trims.doc. (last visited 12 June 2008).

agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element for the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option that contracting party; Provided that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products

purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though confirming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

Article XI General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

(b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

(c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.[7]

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[7] World Trade Organization, The General Agreement on Tariffs and Trade (GATT 1947), available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.doc. (last visited 12 June 2008).

From the provisions concerning foreign investment under the Agreement on Trade-Related Investment Measures (TRIMs) as stated above, it can be summarized that this Agreement applies only to measures that affect trade in goods. Recognizing that certain investment measures can have trade-restrictive and distorting effects, it states that no Member shall apply a measure that is inconsistent with the provisions of GATT Article III (national treatment) or Article XI (prohibition of quantitative restrictions). Examples of inconsistent measures, as spelled out in the Annex's illustrative list, include measures which require particular levels of local procurement by an enterprise ("local content requirements") or which restrict the volume or value of imports such an enterprise can purchase or use to an amount related to the level of products it exports ("trade balancing requirements"). The Agreement contains transitional arrangements allowing Members to maintain notified TRIMs for a limited time following the entry into force of the WTO (two years in the case of developed countries, five years for developing country Members, and seven years for least-developed country Members). The Agreement also establishes a Committee on TRIMs to monitor the operation and implementation of these commitments.[8]

Therefore, to focus on the point of how foreign investment is protected under the GATT/World Trade Organization (WTO), it can be seen that the WTO investment rules or TRIMs provide the protection to foreign investment by setting forth a national treatment principle under Article 2 of the Agreement on Trade-Related Investment Measures (TRIMs).

However, according to the characteristic of the WTO which is a large organization with divergent views, there remains the question of how effective of those measures stated under TRIMs will be governing foreign investment. Thus, considering other sources of international law concerning the protection of foreign investment would be very useful.

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[8] World Trade Organization, A Summary of the Final Act of Uruguay Round, available at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#eAgreement. (last visited 12 June 2008).

3. Foreign Investment under the International Treaties

While customary rules of international law bind all states and the rules of the GATT/WTO may leave the question on how effective the rules could work, the treaties between or among states addressing investment protection become another interesting choice in recent years.

The treaties either multilateral investment treaties or bilateral investment treaties ("BITs") set forth the rules that affect investment by their nationals in one another's territory, sometimes merely repeating or clarifying rules of customary international law, and sometimes adding to such rules. Then to this point, the arising question might be that what are the additional benefits of a treaty?

The answer could be that one of the benefits is that a developing state may be more reluctant to violate a treaty which represents obligations that it has specifically undertaken towards another state. Another benefit of a treaty is that it can provide more specific and certain rules than the rules found in customary international law. For instance, while some developing states insist that there is an ambiguity in customary international regarding the standard of compensation owed to an investor following an expropriation, most bilateral investment treaties concluded by these same states expressly provide that compensation for expropriation must be "prompt, adequate, and effective." Additionally, a treaty often provides remedies for the investor that do not exist under customary international law and that the investor itself may not be able to negotiate with the host state. In particular, many bilateral investment treaties (BITs) give the investor a direct right and a forum to bring an action against the state for harm to the investor.[9]

Bilateral and multilateral treaties that attempt to protect foreign investment are discussed below.

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[9] Paul E.Comeaux &N. Stephan Kinsella, Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk (United States: Oceana Publications Inc.) 99-100 (1997).

a. Bilateral Investment Treaties

A bilateral investment treaty is an agreement concluded between two states in which each state agrees to offer certain protections to investors and foreign direct investment from the other state. It has been said that BITs have a two-fold purpose: to offer legal protection to investors and home states with respect to investment in host states, and to encourage the flow of investment. Some say that another purpose of BITs in the eyes of some developed states was to counter attacks on the traditional international law of expropriation by developing states in the 1950s through '70s.[10]

While nearly all BITs provide for reciprocal treatment of investment by each state for investment from the other state, most BITs are concluded between developed and developing states at the developed states' behest, and it is clear whose investors are in need of protection from whom.[11]

Therefore, in practice the home states (mostly developed countries) would like to have as much protection to their nationals as possible from host states, whereas the host states (mostly developing countries) would try to limit the protection for certain reasons like the national interest or the ability of their own domestic investors to compete in such business.

BITs usually address the following matters:

(1) the rights of investors from one state to enter and establish investment in the other state;

(2) the obligation of the host state to treat investors according to so-called "minimum international standard";

(3) the rights of investors to freely transfer currency out of the host state;

(4) the right of the host state to expropriate assets of the investor located in the host state, with a corresponding duty to provide compensation (usually full compensation); and

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[10] Ibid., p.101.

[11] Ibid., p.102.

(5) the settlement of disputes between investors and the host state through international arbitration.

According to the matters that are usually mentioned in BITs above, bilateral investment treaties (BITs) could be, thus, drafted with the following model:

(a) Definition

This part concerns the definition of the terms under the treaty, for example, the term "investment", "company" and "investment agreement".

(b) Standards of Treatment

This part concerns the standards of treatment that each party to the treaty must provide to investors from the other party and their investments, for instance, fair and equitable treatment, national treatment and most favored nation treatment ("MFN").

(c) Expropriation

This part concerns in what circumstances foreign investment could be expropriated by the host state and also how and how much the host state has to pay compensation to the foreign investors.

(d) Currency Transfers

This part concerns a free transfer of currency into and out of the each contracting state.

(e) Settlement of Investment Disputes

This part concerns the settlement of disputes between the investors and the host state.

(f) Termination

This part concerns the time the treaty will enter into force and how long it will remain in force. For example, the treaty may provide that the BIT enters into force thirty days after it has been ratified by both parties and remains in force for at least ten years.

The provisions/contents contained in bilateral investment treaties (BITs) may be different depending on the negotiation between the contracting parties, however if looking and studying the bilateral investment treaties (BITs) that exist

around the world, we can see that all bilateral investment treaties (BITs) have, except for some different details, an overall resemblance.

Here are the provisions/contents which are contained in most bilateral investment treaties (BITs):

1. Each state shall treat investment from the other state fairly and equitably and as required by international law, and will not interfere with investment arbitrarily or in a discriminatory manner (a consensus of the studied BITs also require national or most favored nation treatment);[12]

2. A state must allow the free transfer of investment income, service on regularly contracted loans, compensation for expropriation, and remuneration received by a national of the other state for labor or services relating to a covered investment;[13]

3. A state may only expropriate investment from the other state if the expropriation is for a public purpose, nondiscriminatory, and accompanied by full compensation, paid in freely convertible and transferrable currency;[14]

4. If a dispute arises between a state and an investor from the other state, the parties should first attempt to settle their differences by negotiation, but if this is not successful, may resort to litigation in the host state or international arbitration. Usually, BITs provide for arbitration through the International Centre for the Settlement of Investment Disputes, the International Chamber of Commerce, or the UNCITRAL arbitration rules. Each state agrees to enforce such arbitral awards.[15]

According to the provisions/contents contained in all bilateral investment treaties (BITs), it can be seen that bilateral investment treaties (BITs) provide obligations to the host states to protect foreign investment as follow:

1. Fair and Equitable Treatment, Full Protection and Security[16]

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[12] Ibid., p.103.

[13] Ibid., p.103.

[14] Ibid., p.103.

[15] Ibid., p.103.

[16] Treaty Department: Ministry of Foreign Affair, "Bilateral Investment Treaty-BIT," Chulalongkorn Law Journal 1 (June B.E. 2550): 112-114.

According to Article 1 of OECD Draft Convention on the Protection of Foreign Property, "fair and equitable treatment and full protection and security" means the minimum international standard which forms part of customary international law, including non-discrimination, duty of protection of foreign property and international minimum standard.

2. National Treatment

This principle means that each party must treat investment from the other party no less favorable than it treats investment by its own nationals.

3. Most-Favored-Nation Treatment

This principle means that each party must treat investment from the other party no less favorable than it treats investment from any third country and if there is any privilege for the third party, the investment of the other party shall also enjoy it.

4. Expropriation and Compensation

This principle, as the example; the agreement between The Kingdom of Thailand and The Republic of Turkey concerning the reciprocal promotion and protection of investments, Article V states that "investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects (hereinafter referred to as "expropriation") except for a public purpose, in non-discriminatory manner, upon payment of prompt, adequate and effective compensation and in accordance with due process of law and the general principles of treatment."

So, from the provision in the example above, it can be concluded that foreign investment shall not be expropriated unless it falls into an exception. And if so, a prompt, adequate and effective compensation shall be paid to the investment.

5. Free Transfer

While most developing countries try to limit the free transfer of money out of their territories because of the insufficiency of foreign currency and the impact on the economic image, foreign investors, of course, would like the opposite thing. Therefore to put a free transfer clause in bilateral investment treaties is necessary. The example of such clause could be seen under the agreement between The Kingdom of Thailand and The Republic of Turkey concerning the reciprocal

promotion and protection of investments, Article VI which states that "Each party shall permit in good faith all transfers related to an investment to be made freely in any currency that is widely used to make payments for international transactions and is widely traded in the principal exchange markets and without delay into and out of its territory…"

6. Settlement of Disputes

As aforementioned, bilateral investment treaties (BITs) are one legal channel which gives the investor a direct right and a forum to bring an action against the state for harm to the investor. However, the clause that gives the direct right to investors to bring an action against the state is not contained in every bilateral investment treaty, as for example, under Article X of the agreement between The Kingdom of Thailand and The Republic of Turkey concerning the reciprocal promotion and protection of investments, the provisions talk only the right to settlement of disputes regarding the interpretation or application of the agreement between state and state (parties).

To be concluded, under bilateral investment treaties (BITs), the interests of foreign investment are protected by these following principles:

1. Fair and equitable treatment, full protection and security
2. National treatment
3. Most-favored-nation treatment
4. Expropriation and compensation
5. Free transfer
6. Settlement of disputes

b. Multilateral Investment Treaties

The Multilateral Agreement on Investment ("MAI") was initially negotiated by governments at the Annual Meeting of the Organization for Economic Cooperation and Development ("OECD") Council at Ministerial level. The proposed objective of the MAI was to provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and

investment protection and with effective dispute settlement procedures, open to non-Members.[17]

When the first draft of the agreement was leaked to the public in 1997, it drew widespread criticism from civil society groups and developing countries. The most effective opposition to the MAI was launched by a wide-ranging coalition of civil society NGOs. These NGOs argued that the MAI would threaten protection of human rights, labor and environmental standards, and least developed countries. A particular concern was that the MAI would result in a 'race to the bottom' among countries willing to lower their labor and environmental standards to attract foreign investment.

After three years of intense negotiations, public protest against the agreement were influential upon the member states' reluctance to sign and, by the end of 1998, the OECD decided to cease pursuing negotiation of the MAI.

The most recent attempt at an international consensus on the regulation of foreign direct investment was the Guidelines on the Treatment of Foreign Direct Investment ("Guidelines") promulgated by the World Bank in 1992. These Guidelines, however, are not binding on states, but are merely meant as standards to which states are encouraged by the World Bank to aspire.[18]

Hence, up to date, there are no international multilateral agreements that regulate foreign direct investment, however there do exist regional agreements that regulate both trade and some foreign investment issues, such as the North American Free Trade Agreement ("NAFTA"), the Energy Charter Treaty, and the Treaty of the Establishment of the Caribbean Common Market.[19]

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[17] Organisation for Economic Co-operation and Development, Multilateral Agreement on Investment, available at http://www.oecd.org/document/35/0,2340,en_2649_201185_1894819_1_1_1_1,00.html. (last visited 13 June 2008).

[18] Paul E.Comeaux & N. Stephan Kinsella, Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk (United States: Oceana Publications Inc.) 117 (1997).

[19] Ibid., p.116.

In order to see how foreign investment is protected under the multilateral investment agreements, the North American Free Trade Agreement ("NAFTA") as one of the most successful regional agreement on trade and investment, and the Energy Charter Treaty as an interesting example of a multilateral investment treaty, though limited to the energy sector, shall be studied in this research.

(1) North American Free Trade Agreement ("NAFTA")[20]

The North American Free Trade Agreement ("NAFTA") regulates trade and various related issues between the current states party to the treaty, the U.S., Canada, and Mexico. The provisions protecting the interest of foreign investment can be seen in Chapter 11 of NAFTA with the details as follow:

(a) Expropriation

Article 1110 of Chapter 11 provides that no Party to NAFTA may expropriate investment of a national of another party except for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of compensation.

(b) Standard of Treatment

Article 1102(1)-(2) of NAFTA provides that each member state must treat investor from other member states the same as it treats domestic investors with respect to "acquisition, expansion, management, conduct, operation, and sale...of investments" (National Treatment). Article 1102(3) provides that subdivisions of the member nations (such as states or provinces) are bound by these obligations as well.

Article 1103 also provides that each state must treat investors and investments at least as well as it treats the investors and investments from states having most-favored nation ("MFN") status (Most-Favored-Nation Treatment). Investors should note, however, that these provisions are subject to a number of qualifications and exceptions. For instance, one exception provides that the requirements of Articles 1102 and 1103 (National Treatment and Most-Favored-Nation Treatment), along with other requirements, do not apply to any existing

[20] Ibid., pp.117-120.

nonconforming measures that are maintained by a nation at the federal, state, or local level (Article 1108 (1) (a) (ii), (iii)).

(c) Transfer of Currency

Article 1109 concerns the rights of investors to transfer profits and related payments. States are required to permit all transfers and international payments relating to an investment of the investor of another nation to be made freely and without delay. These transfers include profits, interest, royalties, proceeds from sale, payments under contract, payments relating to expropriation and compensation, and payments relating to settlements between the investors and the host states.

(d) Settlement of Investment Disputes

Article 1117 provides that an investor of a member state may institute arbitral proceedings in the event of an investment dispute, after first satisfying certain conditions precedent, such as attempting to reach a settlement through consultation or negotiation (Article 1118) and waiting until at least six months after the alleged breach (Article 1120(1)). A claim may be submitted under the ICSID Convention or the Additional Facility Rules of ICSID, depending upon whether the involved states are parties to the ICSID Convention. Disputes may also be resolved under the UNCITRAL rules.

(2) The Energy Charter Treaty ("ECT")

The Energy Charter Treaty ("ECT") was signed on December 17, 1994, by various members of the Organization of Economic Cooperation and Development ("OECD") and by East European and Commonwealth of Independent States ("CIS") countries. The ECT comprises three instruments, a "Final Act", "Energy Charter Treaty", and "Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects." The purpose of the ECT is stated under ECT, Article 2 (Purpose of Treaty) as follows:

"This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objective and principles of the Charter."[21]

The ECT came into effect in April 1998; an amendment to the trade-related provisions was also agreed that month. Until now the ECT was signed or acceded by 51 states and there are many states with observer status including U.S., China, Saudi Arabia, Iran, Venezuela, Tunisia, United Arab Emirates, and many other Persian Gulf states as well as international organizations such as the World Bank and the association of Southeast Asian Nations.[22]

The ECT provisions include (a) investment protections intended to create a "level playing field" and reduce to a minimum non-commercial risks associated with energy sector investments; (b) trade provisions consistent with WTO rules and practice; (c) obligations to facilitate transit of energy on a non-discriminatory basis consistent with the principle of free transit; (d) energy efficiency and environmental provisions which require states to formulate a clear policy for improving energy efficiency and reducing the energy's cycle's negative impacts on the environment; and (e) dispute resolution mechanisms for investment related disputes between an investor and a Contracting Party or between one state and another as to application or interpretation of the ECT.[23]

This research will focus only on the investment protections under this treaty.

The ECT provides for a variety of protections for foreign investments as follow:

(a) Expropriation

Article 13 provides that investments shall not be expropriated, nationalized or subjected to measures which have an effect equivalent to

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[21] Ibid., p.120.

[22] E.Sussman, The Energy Charter Treaty affords investor protections and right to arbitration, available at http://www.arbitralwomen.org/files/ publication/ 14091 70920332.pdf. (last visited 19 June 2008).

[23] Ibid.

expropriation or nationalization unless certain limited exceptions are met and then only if a prompt, adequate and effective compensation payment equivalent to fair market value is made.

(b) Standard of Treatment

Article 10, paragraph (7) provides the principles of national treatment and most-favored-nation treatment (MFN). These standards apply not only to the investments of investors of other Contracting Parties, but also to 'their related activities including management, maintenance, use, enjoyment or disposal'. Also Article 12, on Compensation for Losses, provides for non-discriminatory treatment of foreign investors with respect to restitution or other compensation for losses suffered "with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area..."

(c) Free of Transfer

Article 14, Transfers Related to Investments, guarantees freedom to transfer funds in and out of the country without delay and in a freely convertible currency.

(d) Settlement of Investment Disputes

Article 26, Settlement of Disputes between an Investor and a Contracting Party, provides the distinctive feature of the Treaty that is the main investment obligations under the provisions of Part III (Investment Promotion and Protection) can be enforced by private parties against non-complying member states by international arbitration.

By focusing only on the part concerning foreign investments of the two multilateral agreements mentioned above, it can be seen that foreign investment is protected under the same principles as it is under bilateral investment treaties (BITs), which are:

1. Fair and equitable treatment, full protection and security
2. National treatment
3. Most-favored-nation treatment
4. Expropriation and compensation
5. Free Transfer
6. Settlement of disputes

C. Analysis on International Laws Concerning the Protection of Foreign Investment

Under this chapter, I would like to analyze the international laws on foreign investment by pointing advantages and drawbacks of the existing laws on the angle of protecting the interest of foreign investment, and also suggest some ideas in order to develop the international laws on foreign investment protection.

1. The objective of the international laws concerning foreign investment is clear and obvious; it is to promote and protect foreign investment.

2. According to the characteristic/nature of the rule of customary international law, all states are bound to the rule of minimum international standard in order to protect the interest of foreign investment regardless of what their domestic laws say. However, in my opinion, the term "minimum international standard" is not rigid. It could be varied depending on the trend of the international community in each era. Therefore, to set a concrete bottom-line of the "minimum international standard" would at least make sure that the protection of foreign investment is guaranteed at certain level.

3. Though there are provisions under the WTO rules to protect the interest of foreign investment, the question on how effectively and efficiently the rules will work is still a big challenge among the Member States of the WTO.

4. When mentioning to the term "treaty", it, of course, should be a reciprocal treatment between the contracting parties, but if we closely look at the treaties on investment we can see that they are one-sided instruments. The treaties contain series of rights for foreign investors - protection against expropriation, guarantees of non-discrimination, and freedom to transfer funds out of a host state - and only obligations for the host states. The treaties lack any counter-balancing investor responsibilities. The arising important question is how a host state or its citizens get remedies if they are affected or get damaged by foreign investment, specifically under this research, human rights violation.

5. At the time of conducting this research, there is not yet any Multilateral Agreement on Investment (MAI) because of a controversy among the rich/developed

countries and civil society groups/human rights activists. Thus, to push the Multilateral Agreement on Investment (MAI) to be achieved would be another progressive step on the side of foreign investment protection.

Chapter 3

The Interest of Human Rights

> "It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law…"
>
> -Universal Declaration of Human Rights-

A. Human Rights Violation: Case Studies

1. UNOCAL in Burma[24]

Union Oil Company of California, or Unocal, was founded in 1890 to develop oil fields in California. By 1990s, however, most oil fields in the United States were nearing depletion so the company began investing in energy projects outside the U.S.

One project that attracted the company was the "Yadana Field," a natural gas field that belonged to Burma and that lay off its coast beneath the Andaman Sea. Estimates indicated the Field had over 5 trillion cubic feet of natural gas, enough to continue in production for 30 years.

In 1992 Burma had signed a contract with Total S.A, a French company that gave Total the right to develop the field and build a pipeline to transport the gas to Thailand, whose government wanted to buy the gas. Total invited other companies to buy into the project as partners. The government of Burma stood to net an estimated $200-$400 million a year for the life of the project. While Total and its partner companies would actually construct the project, Burma contracted to "assist by

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[24] Manuel Velasquez, Unocal in Burma (United States: Markkula Center of Applied Ethics), available at http://www.scu.edu/ethics/practicing/focusareas/business/Unocal-in-Burma.html. (last visited 8 July 2008).

providing security protection and rights of way and easements as may be requested by" the companies.

Burma is a poor developing Southeast Asian country with a population of 42 million. Economically, Burma's per capita gross domestic product is approximately $200-$300, while inflation is above 20 percent. Burma suffers a high infant mortality rate (87 deaths per 1000 live births) and a low life expectancy (53 years for males and 56 for females). The natural gas project would provide significant benefits to the impoverished nation.

Unocal was attracted to Burma for several reasons. First, labor was cheap and relatively educated. Second, Burma was rich in natural gas resources. Third, Burma was an entry point into other international markets, particularly in and around Southeast Asia. Finally, the political environment was extremely stable.

The only real problem the company saw with the project was that the government of Burma is a military dictatorship accused of violating the human rights of the Burmese people. In 1988, after crushing major countrywide pro-democracy demonstrations, Burma's military had seized power and made the State Law and Order Restoration Council (SLORC) head of the government. The SLORC, which was made up of 19 senior military officers, imposed martial law on the country.

The U.S. State Department, in its 1991 "Country Reports on Human Rights Practices" wrote that the SLORC maintained order through "arrests, harassment, and torture of political activists... Torture, arbitrary detentions, and compulsory labor persisted... Freedom of speech, the press, assembly, and association remain practically nonexistent." In its 1995 "Country Reports on Human Rights Practices," the Department of State wrote: "The [Burmese] Government's unacceptable record on human rights changed little in 1994... The Burmese military forced hundreds of thousands of ordinary Burmese (including women and children) to "contribute" their labor, often under harsh working conditions, to construction projects throughout the country. The forced resettlement of civilians also continued."

Despite the risks, Unocal decided to invest in the project. The company felt that the benefits to itself and the people of Burma and Thailand outweighed the risks. Moreover, the company would later assert, "engagement" rather than "isolation" was "the proper course to achieve social and political change in developing countries with

repressive governments... Based on nearly four decades of experience in Asia, [Unocal] believes that engagement is by far the more effective way to strengthen emerging economies and promote more open societies."

In December 1992, Unocal paid $8.6 million to Total for a stake in the project. Eventually, Unocal held a 28.26% stake in the project; Total a 31.24% stake; Thailand's PTT Exploration & Production Public Co. a 25.5% stake; and the Burmese government a 15% stake. It was agreed that Total would be responsible for overall coordination of the project, and would extract the gas at the Yadana Field. Unocal would construct the 256 mile pipeline that would carry the gas from Yadana to Thailand where it would be sold. Most of the pipe would lie under the ocean, but the final 40 miles would cross over southern Burma through the region inhabited by the Karen, a minority ethnic group hostile to the Burmese government.

The period between 1993 and 1996 was devoted to clearing land, and building roads, camps, housings, and other facilities. Actual construction of the pipeline began in 1996 and was completed in 1998. Throughout the period human rights groups-including Human Rights Watch and Amnesty International- issued reports claiming that the Burmese army was using forced labor and brutalizing the Karen population to provide "security" for Unocal workers and equipment. Roads, buildings, and other structures, they claimed, were being built with forced labor recruited from local Karen groups by the Burmese military, and hundreds of Karen were forced to clear way for the pipeline and to provide labor for the project. Greenpeace, Amnesty International, and Human Rights Watch met with Unocal executives in Los Angeles and discussed the forced labor and other violations of human rights that were taking place in the pipeline region.

Unocal hired a consultant in 1995 to investigate. The consultant reported: "My conclusion is that enormous human rights violation have occurred, and are occurring now, in Southern Burma... the most common [of which] are forced relocation without compensation of families from land near/along the pipeline route; forced labor to work on infrastructure projects supporting the pipeline (SLORC calls this government service in lieu of payment of taxes); and imprisonment and/or execution by the army of those opposing such actions."

Work on the project continued and commercial natural gas production in the Yadana project began in 2000. Unocal and the other companies had instituted programs to benefit the people along the pipeline corridor. Unocal claimed that it provided 7,551 paid jobs to Burmese workers during construction, and would continue to employ 587 Burmese. New medical programs reduced infant mortality along the pipeline region from 87 deaths per 1,000 live births, to 31 deaths per 1,000, and then to just 13 deaths per 1,000 by 2002. The company reported it built schools and roads and provided opportunities for small businesses along the corridor. These claims were corroborated by several independent groups who traveled to Burma.

By 2004, the project was delivering 500-600 million cubic feet of gas per day to Thailand, benefiting that nation's expanding economy and enabling Thailand to use clean burning natural gas to fuel its electrical plants instead of dirtier fuel oil. Revenues from sales to Thailand yielded several hundred million dollars a year to the Burmese military government. Unocal reported that besides its initial investment of $8.6 million, it spent a total of $230 million constructing the pipeline; it spent about $10 million a year to operate it. Unocal's share of gas revenues was $75 million a year, which would continue for the course of the 30-year contract. Unocal's total gain is expected to reach approximately $2.2 billion dollars.

In October 1996, 15 members of the Karen minority Burmese group, who alleged that they or their family members had been subjected to relocation, forced labor, torture, murder, and rape on the Yadana pipeline project filed a class action against Unocal in a U.S. federal court (Doe v. Unocal). The suit argued that Unocal should be held responsible for the injuries inflicted on hundreds of Karen by the Burmese military because the activities of military were conducted on behalf of the pipeline project in which Unocal held a major stake and from which Unocal benefited. And also the Karen villagers claimed on another theory that Unocal had "aided and abetted" gross violations of human rights. They said that when Unocal asked the Burmese army for help in building pipeline, it knew the army would violate human

rights of the villagers in order to help Unocal.[25] The suit in federal court was based on the Federal 1789 Alien Tort Statute which has been interpreted to authorize civil suits in U.S. courts for violations of internationally recognized human rights. On June 29, 2004, the U.S. Supreme Court upheld the right of foreigners to use the Statute to seek compensation in U.S. courts for violations abroad.

In December 2004, the parties reached an-out-of-court settlement in which Unocal agreed to compensate the plaintiffs and provide funds for programmes in Burma to improve living conditions, health care and education, and protect the rights of people from the pipeline region (the exact terms of the settlement are confidential). This settlement was accepted by the court, and the case was closed on 13 April 2005.[26]

Human Rights Issues Addressed

From the case study of Unocal in Burma, the human rights violations, by foreign investment, could be addressed as follow:

1. Forced relocation without compensation of villagers from land near/along the pipeline route
2. Forced labor to work on infrastructure projects supporting the pipeline construction, for example, cut down trees for survey roads, build barracks and outposts for troops guarding the pipeline, clear land and plant rice to feed soldiers.
3. Torture
4. Rape
5. Murder
6. Arbitrary detentions
7. Restriction on freedom of speech, the press, assembly, and association

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[25] Anthony J .Sebok, Unocal announces it will settle a human rights suit: What is the real story behind its decision? (United States, West Publishing Co.), available at http://wrir.news.findlaw.com/sebok/20050110.html. (last visited 8 July 2008).

[26] Business & Human Rights : Unocal lawsuit (re Burma), available at http://www.business-humanrights.org/Categories/ Lawlawsuits/Lawsuits regulatory action/LawsuitsSelectedcases/UnocallawsuitreBurma. (last visited 8 July 2008).

8. Environment: Unocal's oil pipeline in Burma traverses possesses the largest block of intact rainforest in Southeast Asia, according to the World Wildlife Fund. This area is certain to be damaged by access roads and infrastructure. The pipeline will also eventually extend into Thailand, where it will most certainly cut through other precious natural reserves.

2. NIKE in Vietnam, Indonesia and China

NIKE Inc. is a major American athletic footwear, apparel and sporting equipment company with revenues of $15 billion in FY06. Headquartered in Beaverton, Oregon, NIKE employs approximately 28,000 people in over 160 countries. Its subsidiaries include Cole Haan, Converse, Hurley International, and Exeter Brands Group.

NIKE contracts most of its production to factories overseas. Its business model was developed by its founder, Phil Knight, who saw that NIKE could outsource shoe production to lower-cost Japanese producers, as was being done in the US consumer appliance and electronics markets. When costs increased in Japan in the 1970s, NIKE moved its production to suppliers in Korea and Taiwan. When Korea and Taiwan began to develop economically and costs began to rise, NIKE's lead suppliers relocated some of their operations to others, lower-cost countries such as Indonesia, China, Thailand and Vietnam.

Currently, NIKE has 28,000 employees, in addition to the 770,000 workers employed in over 680 NIKE-contracted factories across 49 countries. The majority of these workers are women between 18 and 24 years of age. The majority of NIKE footwear is manufactured in China (35%); Vietnam (29%); Indonesia (21%); and Thailand (13%). Independent contract manufacturers in 49 countries produce all NIKE branded apparel for sale to the international market as well as the U.S. Most of this apparel production occurs in China, Indonesia, Malaysia, Thailand and Turkey.

NIKE's largest single apparel factory accounted for approximately 5% of total FY06 apparel production.[27]

NIKE has come a long way from its scandal-ridden days of social irresponsibility in the international garment and footwear industry.

In Vietnam, in February and March 1998 several workers from Sam Yang factory, including Ms. Lap Nguyen, Ms. Khanh Chi and Ms. Hong were interviewed by the US sports channel ESPN. They described the problems at the factory, including use of violence by security guards towards workers. Ms. Lap was a section leader with three years experience at the factory and had received awards for her skill and commitment. While working overtime on Sunday March 29 she became sick (feverish) and put her hand on her head to rest. Her manager hit her on the arm. She went home, obtained a doctors' certificate for her fever and took one and a half days sick leave. On her return to the factory her manager shouted at her and demoted her from team leader to sewer on the grounds that "section leaders can't take sick days." In the next few days, the supervisor continued to switch her from one job to another and deliberately humiliated her in front of other workers. During this time, the factory manager interrogated her about her interview with ESPN three times, using words like "we know what you have been doing behind out back", "confess now and you will be able to keep your job." The factory manager demoted her to cleaning the toilets and continued to harass her. Eventually she was asked to sign a letter of resignation and decided that she could no longer take the harassment and intimidation and signed. In April 1997, 1,300 workers of NIKE went on strike demanding a one cent per hour raise. In May 1999, researchers from the Hong Kong Christian Industrial Committee and the Asia Monitor Resources Centre interviewed other workers from the Sam Yang factory. The workers indicated that their wages are inadequate to cover their living expenses, they are unable to save and at times they have to borrow money from their families. They also told the researchers that if workers are late or "do something

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[27] Parastou Youssefi, Embedding human rights in business practices II (United States: the United Nations Global Compact and the Office of the UN High Commissioner for Human Rights), available at www.unglobalcompact.org/docs/news_events/ 8.1/EHRBPII_Final.pdf. (last visited 11 July 2008).

wrong" penalties are deducted from their wages and they are sometimes struck by their supervisors- usually with bare hands but occasionally with rods. The workers told the researchers of one case where a worker had been hospitalized after receiving a beating from a supervisor.[28]

In Indonesia, there was a strike by NIKE workers over wage violation in April 1997. In September 1998, NIKE's supplier; P T Lintas dismissed Haryanto, a union official who had been distributing NIKE's code of conduct to workers. The local human rights group Sisbikum believes that Haryanto was fired because of his union activities. Sisbikum representatives approached NIKE's office in Jakarta and asked them to implement NIKE's promise to protect the right of workers to organize. They were told that NIKE couldn't intervene in the internal affairs of its suppliers. A year later Haryanto is still waiting for the local Indonesian labor court to determine whether or not he was sacked fairly. In September 1999, workers of PT Nikomas Gemilang factory in Indonesia reported that Indonesian soldiers were being deployed in and around the factory during wage negotiations. To this situation, NIKE's website responded that "this may be uncommon to Westerners but not to Indonesians-many of whom also want protection and safety from unpredictable elements in a time of political and economic reform in the country." This is grossly misleading. The military are frequently called in to factories in Indonesia not to protect workers but to prevent strike action and ensure that workers stay on the job during times of industrial unrest.[29]

More than a third of shoes are made in China, a country where workers are commonly sent to prison or "education through labor" camps if they try to organize independent unions. In the part NIKE has vigorously lobbied against proposals that the US government should use trade sanctions to pressure the Chinese government to

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[28] International organizations, unions and academic researchers, An open letter to Phillip Knight, CEO of Nike Inc., available at http://www.cleanclothes.org/companies/ nike-99-9-22.htm. (last visited 10 July 2008).

[29] International organizations, unions and academic researchers, An open letter to Phillip Knight, CEO of Nike Inc., available at http://www.cleanclothes.org/companies/ nike-99-9-22.htm. (last visited 10 July 2008).

improve its human rights performance. Research in July 1999 by the Hong Kong Christian Industrial Committee indicated that one of NIKE's suppliers' factories in Jiaozhous City (owned by Qingdau Sewon Shoes Co. Ltd.) has inadequate fire safety. The factory has anti-theft cages on all the windows, blocking one of workers' main escape routes in the case of a major fire. Workers in that factory are expected to work until 2 or 3am during peak periods, and it is extremely dangerous for women workers to travel home when they finish at this time.

Human Rights Issues Addressed

From the case study of NIKE in Vietnam, Indonesia and China, human rights violations, by foreign investment, could be addressed as follow:

1. Unfair labor practices
2. Forced labor
3. Underage workers (Child labor)
4. Harsh working conditions (Occupational health and safety is under the minimum standard.)
5. Slave wages
6. Inhumane punishment

3. ABB in Sudan[30]

ABB is a Zurich-based electro-engineering company that provides power and automation technologies and operates in roughly 100 countries. ABB has never had any manufacturing sites or operations in Sudan. Since 1970s, the company has acted as a supplier of equipment to other companies there and had not paid direct taxes to the government. At the end of 2006, ABB had one employee based in Khartoum. Virtually all of the work has been concentrated in the Arab-dominated north of the country. Furthermore, the company's volume of business in Sudan was

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[30] Ron Popper, Embedding human rights in business practices II (United States: the United Nations Global Compact and the Office of the UN High Commissioner for Human Rights), available at www.unglobalcompact.org/docs/news_events/8.1/ EHRBPII_Final.pdf. (last visited 11 July 2008).

comparatively low (in 2006 the company had double-digit million net revenue, whereas the company turnover was $28 billion).

In the past few years, there have been three areas of business focus:

a. Merowe Dam

The Merowe Dam project is 450 kilometres north of Khartoum. When completed in 2008, the dam will double the country's power supply. Power from the dam will be distributed mainly to Dongola on the Nile, the Khartoum region and Port Sudan on the Red Sea coast. ABB has supplied distribution and transmission equipment. This is by far the largest of ABB's power contracts in the country. ABB has supplied to contractors at the Merowe Dam, such as Harbin Power Engineering Company (China) and Alstom. The customer is the National Electricity Corporation. Other power transmission and distribution equipment has been supplied to other projects in the north of the country.

b. Heglig oil field

In 2003, ABB won a contract to supply flow control meters to the Heglig oil field in the "border" area between south and north Sudan. The meters, essential for safety, were supplied to the China Petroleum Engineering and Construction Company. The customer was the Greater Nile Petroleum Operating Company. This contract has been completed.

c. Equipment supply

Low-voltage equipment, such as light switches, was supplied through third parties to individual customers in Sudan. The volume of this business was very small.

ABB abides by international sanctions and export control regulations. But it has faced criticism from a variety of quarters about its involvement in Sudan and allegations of complicity in human rights abuses in the country.

(1) Investors in ABB stock in the United States, Switzerland and Sweden expressed concern in 2005/6 about the company's presence in Sudan, in view of the ongoing atrocities in the western Darfur region. In some cases this was accompanied by a threat of stock divestment and a demand to pull out of the country. The accusation was that presence in the country amounted to support for a government which the US administration had branded as responsible for "genocide"- a term not used by other governments.

(2) NGOs, particularly the International Rivers Network, opposed the Merowe Dam project for a number of reasons. The dam would displace 50,000 ethnic Amri people; there were allegations of forced movement, inadequate compensation and poor agricultural conditions in their new home areas; in addition, IRN pointed to environmental damage caused and the flooding of a significant archaeological site by the proposed dam.

(3) The supply of flow control meters to the Heglig oil field was, in some quarters, viewed as tantamount to supporting the government's campaign and activities in Darfur. The line of argument was and still is that oil is the government's main source of income, and therefore its main source of funds for military operations in Darfur. ABB was therefore accused of helping to bankroll the military.

In human rights term, ABB was accused of abetting the violation of civil and political rights in Darfur, and- in the main- the economic, social and cultural rights of the people affected by the construction of the Merowe Dam.

Human Rights Issues Addressed

1. Forced movement with inadequate compensation and this led to poor agricultural conditions for people in Darfur region
2. Forcibly displaced indigenous tribes, which led to mass murder, rape, famine and the current crisis
3. Environmental damage
4. Overall, abetting the violation of civil and political rights, and the economic, social and cultural rights.

4. EGAT: Hydropower Projects on Salween River in Burma[31]

Hydropower on Salween River is a joint-project between Thai state-owned enterprise; EGAT (Electric Generating Authority of Thailand), Chinese state-owned Sinohydro Corporation and Burmese government.

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[31] Petition Online, Salween Dams Petition Letter, available at http://www.petition online.com/9202006/petition.html. (last visited 15 July 2008).

The projects have been criticized by civil society, human rights and environmental activists for the following issues:

a. Lack of transparency in the decision-making process

The entire decision-making process for the planning of the Salween hydropower development projects has been shrouded in secrecy. There has been a total absence of public participation among the dam-affected communities in Burma already suffering the atrocities of civil war, or the over fifty ethnic Thai-Karen villages living along the Salween River in Thailand's Mae Hong Son province.

The Memorandum of Understanding (MoU) between the Thai Ministry of Energy and Burma's Ministry of Electric Power was signed in May 2005 for the development of five hydropower projects on the Salween and Tanaosri river basins. Then in December 2005, a Memorandum of Agreement (MoA) was signed for joint-investment and implementation of the Hutgyi dam construction between EGAT Plc. and Burma's Department of Hydropower stating that the construction would commence in late 2007. Recently, in June 2006, EGAT and Sinohydro Corporation, a state enterprise from the People's Republic of China signed an MoU for the development of the Hutgyi dam.

b. Violation of international good governance principles

The planned Salween hydropower projects have been conceived on double standards and loopholes to avoid compliance with relevant environmental laws in Thailand, as follows for the Hutgyi dam case:

(1) As a state enterprise, EGAT is strongly urged to maintain its good standards of practice for projects implemented in Thailand in other countries. This includes the compliance with the current Thai Constitution and other relevant laws and regulations. The following laws and regulations are currently being violated in the planning process for the Salween dams: complete disclosure of project information to the public; hearing process to receive input from as many groups of affected people as possible; and the official public hearing of the Environmental and Social Impact Assessment report and the review and approval process of such report as required by the Thai Enhancement and Conservation of the Environmental Quality Act B.E. 2535 (1992).

Specifically, the MoU's and MoA's go against Article 46, 58, 59, and 60 of the 1997 Thai Constitution, and the 1997 Official Information Act of Thailand. Article 46 states "Thai citizens have the right to...participate in the management, maintenance, preservation and exploitation of natural resources and the environment"; and Article 59 states "A person shall have rights to receive information, explanation and reasons from state agencies before the government gives permission for any project that could affect the quality of the environment or life." In addition, the reservoir caused by the Hutgyi dam construction will obviously distort the expanse of Salween River, which is being used as the demarcation line between Thailand and Burma, and thus may lead to geopolitical conflicts in the future.

(2) It remains unclear whether the MoA's signed by EGAT Plc. Remain valid and legally binding given the reinstatement of the status of EGAT to be a state enterprise. At the time of signing the MoA with Burma's Department of Hydropower in December 2006, EGAT was still declared as a public company. Yet, there was a consequent ruling from the Supreme Administrative Court of Thailand later the same month to revoke legal foundation for the privatization of EGAT.

Amidst this ambiguity, EGAT rush to sign another deal, the MoA for the study and development of hydropower of the Hutgyi dam with the Sinohydro from People's Republic of China. Such an impetuous effort may give rise to international conflict in the future if the contract is later found invalid and not legally binding due to the ruling for revocation of the listed status of EGAT.

c. Funding brutal suppression by the Burmese junta against ethnic groups in Burma

Notorious for its severe human rights violations, the Burmese junta over the past many decades has been attempting to wipe out entire ethnic groups in various parts of the country. This has included the burning and looting of villages in ethnic areas, forced relocation and forced labor, systematic rape, extra judicial killings, and ongoing wars waged against armed ethnic minority groups and civilians. At least 540,000 people inside Burma have been displaced and many more have fled across the Thai border, or taken refuge along the border. It is estimated that more than 140,000 people in Burma will be removed from their land due to the many development projects along the Thailand-Burma border, including the Hutgyi dam.

This initial one billion dollar joint-investment with the Burmese Army junta will provide them with more military resources for the Burmese Army to enable further conquest in ethnic areas, which will contribute to further human rights violations in the country.

Thailand stands accused of supporting the Burmese junta by continuing to make business deals with the military junta despite the regime's grave human rights violations. In addition, Thailand has to bear the cost of increasing waves of refugees who seek shelter in Thailand as their villages are burned by the junta and/or flooded by the dams. They will have no home to return to should the hydropower projects on Salween River materialized. From this point, it can be seen that Thailand directly aids the Burmese regime's ability to consolidate their grip of power over contested ethnic territory during a war, at the expense of the environment and further suffering of ethnic peoples.

Human Rights Issues Addressed

1. Forced relocation
2. Forced labor of ethnic minorities
3. Systematic rape
4. Extra judicial killings
5. Right to informed participation in decision-making processes of a local community in the case where a project could affect their environment or lives

Conclusion

It can be said that in many cases foreign investment, besides bringing technology, creating jobs and accelerating economic growth into the host countries (developing ones, mostly), it also gives reverse impacts, which are human rights violation and environmental destruction to the local community if there is no fine balance of the interest between foreign investment and human rights.

From the four case studies above, the human rights which are widely and repeatedly violated by foreign investment around the world can be concluded as the following:

1. Unfair labor practices, for example slave wages and forced overtime working

2. Forced labor, especially ethnic minorities who are local people
3. Forced relocation without compensation or with inadequate compensation
4. Harsh working conditions and an under-standard of occupational health and safety
5. Torture
6. Rape
7. Extra judicial killings
8. Arbitrary detentions
9. Freedom of speech, the press, assembly and association
10. Child labor
11. Inhumane punishment
12. Right to informed participation in decision-making process
13. Environmental destruction

B. Legal Basis: International Legal Instruments on Human Rights Protection

To talk about human rights legal system, which consists of the law itself and the enforcement mechanism, the human rights system can be divided into 4 categories according to the model of integration of countries around the world as follow: the United Nations human rights system, the European system for the protection of human rights, the Inter-American human rights system, and the African system of human and peoples' rights.

The scope under this research is limited only to the United Nations human rights system, which I, myself, believe that it would be the most useful as under this international system, though of course restricted merely to Member States, the human rights principles could be applied anywhere.

Furthermore, the human rights legal instruments which shall be mentioned under this chapter are limited to the legal instruments relating to human rights and fundamental freedoms affected by foreign investment.

1. The UN Charter[32]

Modern international human rights law is a post-World War II phenomenon. Its development can be attributed to the monstrous violations of human rights committed during the Hitler era and to the belief that these violations and possibly the war itself might have been prevented had an effective international system for the protection of human rights existed in the days of the League of Nations.

The international human rights law cause was eloquently espoused as early as 1941 by President Franklin D. Roosevelt. In his famous "Four Freedoms" speech, he called for "a world founded upon four essential human freedoms." These he identified as "freedom of speech and expression," "freedom of every person to worship God in his own way," "freedom from want," and "freedom from fear." Roosevelt's vision of "the moral order," as he characterized it, became the clarion call of the nations that fought the Axis in the Second World War and founded the United Nations.

The United Nations Charter is the treaty that forms and establishes the international organization called the United Nations. It was signed at the United Nations Conference on International Organization in San Francisco, California, United States, on June 26, 1945, by 50 of the 51 original member countries (Poland, the other original member, which was not represented at the conference, signed it later). It entered into force on October 24, 1945, after being ratified by the five permanent members of the Security Council- the Republic of China (later replaced by the People's Republic of China), France, the Union of Soviet Socialist Republics (later replaced by the Russian Federation), the United Kingdom, and the United States- and a majority of the other signatories.

As a Charter, it is a constituent treaty, and all members are bound by its articles. Furthermore, the Charter states that obligations to the United Nations prevail over all other treaty obligations. Most countries in the world have now ratified the Charter.

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[32] United Nations, UN Charter, available at http://www.un.org/ aboutun/ charter/. (last visited 17 July 2008).

Human Rights in the UN Charter

Article 1(3) of the Charter of the United Nations proclaims the following goal as one of the "purposes" of the UN:

> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

The basic obligations of the Organization and its Member States in achieving these purposes are set out in Article 55 and 56 of the Charter. These provisions read as follows:

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for principle of equal rights and self-determination of peoples, the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Although the subject matter mandate spelled out in Article 55 is broad, it confers only limited powers on the Organization. The charge is to "promote," and that responsibility is assigned to the UN General Assembly and the Economic and Social Council, both organs whose resolutions on this subject are not legally binding. The

"pledge" of the Member States under Article 56 is limited to the promotion of the "achievement" of the purposes set forth in Article 55," that is "to promote…universal respect for, and observance of, human rights and fundamental freedoms…." Article 55 (c) Moreover, the UN Charter does not define what is meant by "human rights and fundamental freedoms." Article 55 (c) does, however, contain a very unambiguous non-discrimination clause which, when read together with Article 56, makes clear that the Member States and the Organization have an obligation to promote human rights and fundamental freedoms "without distinction as to race, sex, language, or religion."

Article 56 requires Member States "to take joint and separate action in co-operation with the Organization" to accomplish the objectives spelled out in Article 55. To facilitate this cooperation, Article 13(1) of the Charter provides that the General Assembly "shall initiate studies and make recommendations for the purpose of: … (b)… assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." The Charter confers similar power on the UN Economic and Social Council (ECOSOC). It authorizes the ECOSOC to "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all" and requires it to "set up commission in economic and social fields and for the promotion of human rights…."(Article 62(2) and 68.)

Despite their vagueness, the human rights provisions of the UN Charter have had a number of important consequences. First, the UN Charter "internationalized" human rights. That is to say, by adhering to the Charter, which is a multilateral treaty, the States Parties recognized that the "human rights" referred in it are a subject of international concern and, to that extent, are no longer within their exclusive domestic jurisdiction. Although the validity of this proposition was frequently challenged by some states in the early years of the United Nations, the issue is today no longer open to doubt. The fact that a state which has ratified the Charter cannot assert that human rights as a subject falls within its exclusive domestic jurisdiction does not mean, however, that every violation of human rights by a Member State of the UN is a matter of international concern. What it does mean is that even in the absence of any other treaty obligations, a state today can no longer assert that the maltreatment of its

own nationals, regardless of how massive or systematic, is a matter within its exclusive domestic jurisdiction.

Second, the obligation of the Member States of the UN to cooperate with the Organization in the promotion of human rights and fundamental freedoms has provided the UN with the requisite legal authority to undertake a massive effort to define and codify these rights. That effort reflected in the adoption of the International Bill of Human Rights (discussed below), and the numerous other human rights instruments in existence today. The result is a vast body of legal norms, veritable human rights code that gives meaning to the phrase "human rights and fundamental freedom" and clarifies the obligations imposed by Article 55 and 56 of the Charter.

Third, the Organization has over the years succeeded in clarifying the scope of the Member States' obligation to "promote" human rights, expanding it and creating UN Charter-based institutions designed to ensure compliance by governments. Today it is generally recognized, for example, that a UN Member State which engages in practices amounting to a "consistent pattern of gross violations" of internationally guaranteed human rights is not in compliance with its obligation to "promote"... universal respect for, and observance of..." these rights and that, consequently, it is in violation of the UN Charter. The UN has sought to enforce this obligation with resolutions calling on specific states to stop such violations and by empowering the UN Commission on Human Rights and its subsidiary bodies to establish procedures to review allegations of violations.

To be concluded, UN Charter mentions about human rights and fundamental freedoms under Article 1(3) as one purpose of the UN, which is to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. And under Article 55, the provision talks about the obligation of the UN Member States to promote (a)... (b)... (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Moreover, there are other articles under the UN Charter such as Article 13, 56, 62 and 68 which are set to support and achieve such purpose at the end.

2. The International Bill of Human Rights

a. The Universal Declaration of Human Rights (1948)

The Universal Declaration is the first comprehensive human rights instrument to be proclaimed by a global international organization. It is adopted by the UN General assembly on 10 December, 1948 at Palais de Chaillot, Paris. It consists of 30 articles which outline the view of the General Assembly on the human rights guaranteed to all people.

The Universal Declaration is not a treaty. Therefore, it has no force of law. Its purpose, according to its preamble, is to provide "a common understanding" of the human rights and fundamental freedoms referred to in the UN Charter and to serve "as common standard of achievement for all peoples and all nations..." However, some provisions of the Universal Declaration of Human Rights which proclaim some rights such as slavery, torture or other cruel, inhuman or degrading treatment or punishment, have become customary international law and thus this gives the legal effect that such provisions bind all states.

To see the overall picture of the Universal Declaration, it proclaims two broad categories of rights: civil and political rights, on the one hand, and economic, social and cultural rights on the other. Its catalog of civil and political rights includes, for example, the right to life, liberty, and security of person; the prohibition of slavery, of torture and cruel, inhuman or degrading treatment and the right to fair trial in both civil and criminal matters. The catalog of economic, social and cultural rights includes, for instance, the right to social security, to work, and to "protection against employment," to "equal pay for equal work," and to "just and favourable remuneration".

Under the scope of this research, only certain articles, which relate to human rights mostly violated by foreign investment, shall be discussed.

Article 1

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

Article 2

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdiction or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

Article 3

"Everyone has the rights to life, liberty and security of person."

Article 4

"No one shall be held in slavery or servitude; slavery and the salve trade shall be prohibited in all their forms."

Article 5

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 9

"No one shall be subjected to arbitrary arrest, detention or exile."

Article 19

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Article 20

"(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association."

Article 23

"(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protect against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests".

Article 24

"Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay."

Article 25

"(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

To be clearer, the articles mentioned above can be linked to the human rights violations under the case studies by foreign investment respectively as follow:

Article 3- extra judicial killings as occurred in the case study of EGAT.

Article 4- Forced labour is known nowadays as modern slave.

Article 5- Torture, rape and inhuman punishment such as beating.

Article 9- Arbitrary detention.

Article 19- The employees of Nike Inc. was threatened after they had interview with ESPN about their working conditions.

Article 20- The employees were restricted from assembly and association.

Article 23- The wages for those employees are lower than the minimum standard.

Article 24- The employees worked over-hours without enough rest time.

Article 25- According to forced relocation without compensation, many villagers had to face difficulties to live their lives. They don't have enough food, clothes, housing and medical care.

b. The Covenant on Civil and Political Rights (1966)

The Covenant on Civil and Political Rights was adopted by the UN General Assembly and opened for signature in December 1966. Being a treaty, the Covenant creates binding legal obligations for the States Parties. The catalog of civil and political rights enumerated in this Covenant is drafted with greater juridical specificity and lists more rights than the Universal Declaration of Human Rights. It consists of 53 articles.

Under the scope of this research, only certain articles, which relate to the human rights mostly violated by foreign investment, shall be discussed.

Article 6

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Article 7

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 8

"1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude."

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations."

Article 9

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrarily arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before the judge or other officer authorized by law by exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not

be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be en titled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

Article 19

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals."

Article 21

"The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

Article 22

"1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protections of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."

The question on how the above articles under the Covenant on Civil and Political Rights link with the human rights violations by foreign investment can be answered by comparing with the explanation on the part of the Universal Declaration of Human Rights aforesaid.

Furthermore, under the Covenant on Civil and Political Rights, there are two Optional Protocols to the Covenant on Civil and Political Rights. They are:

(1) The First Optional Protocol to the Covenant on Civil and Political Rights

This treaty, adopted as a separate instrument, supplements the measures of implementation of the Covenant on Civil and Political Rights. It enables private parties, claiming to be victims of a violation of the Covenant, to file so-called "individual" communications or complaints with the Human Rights Committee. The complaints may only be filed against State Parties to the Covenant that have ratified the Protocol. Of the more than 140 countries that have become parties to the Covenant, nearly 100 have ratified the Optional Protocol.

(2) The Second Optional protocol to the Covenant on Civil and Political Rights

The Second Optional Protocol was opened for signature on December 15, 1989 and entered into force on July 11, 1991. Pursuant to its terms, it is

deemed to be an additional provision of the Covenant on Civil and Political Rights. The Protocol's objective is the abolition of the death penalty.

c. The Covenant on Economic, Social and Cultural Rights (1966)

The Covenant on Economic, Social and Cultural Rights was adopted by the UN General Assembly and opened for signature in December 1966 the same time as the Covenant on Civil and Political Rights. As a treaty, the Covenant also has a legal binding however, by ratifying this Covenant, a State Party does not assume the obligation of immediate implementation found in the Civil and Political Covenant. This can be seen from the language indicated under Article 2(1), which shows that a state does not undertake to give immediate effect to all rights it enumerates. Instead, the state obligates itself merely to take steps "to the maximum of its available resources" in order to achieve "progressively the full realization" of these rights. The reason on what account for the differences in the methods of implementation adopted in the two Covenants can be explained that the burden tends to be heavier and the task more complicated when economic, social or cultural rights are involved.

The Covenant on economic, Social and Cultural Rights contain longer and much more comprehensive catalog of economic, social and cultural rights than the Universal Declaration. It consists of 31 articles.

Under the scope of this research, only certain articles, which relate to the human rights mostly violated by foreign investment, shall be discussed.

Article 2

"1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination

of any kinds as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

Article 3

"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

Article 6

"1. The States Parties to the present Covenant recognize the rights to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this rights.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."

Article 7

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

Article 8

"1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organization;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of

Association and Protection of the Right to Organize to take legislative measures which would prejudice, the guarantees provided for in that Convention."

Article 10

"The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law."

Article 11

"1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."

Article 12

"1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

To be clearer, the articles mentioned above can be linked to the human rights violations under the case studies committed by foreign investment respectively as follow:

Article 6- Forced labour

Article 7- The employees face the harsh working conditions, the wages paid to them are not fair and even under the minimum standard, and they have to work over-time without enough rest hours.

Article 8- The employees are restricted from the right to form a union or association.

Article 10- Children in many developing countries are being exploited by the business sectors. Because of poverty, many with very young age have to work in harmful conditions to their morals or health such as working in a dim and unsanitary factory for many hours non-stopped. (Article 10(3))

Article 11- According to forced relocation without compensation, many villagers had to face difficulties living their lives. They don't have enough food, clothes, housing and medical care. Many of them suffered from hunger.

Article 12- Some employees got a chronic disease from the work they were forced to do and some villagers living around the area of factories got a severe impact on physical and mental health according to the environmental destruction.

3. Other major UN Human Rights Treaties

a. Convention on the Rights of the Child (1989)

This treaty was adopted by the UN General Assembly on November 20, 1989 and entered into force on September 2, 1990. By the end of 2001, 191 states had ratified the Convention, making it the most widely accepted of all human rights treaties. Although many of the rights the Convention proclaims are set out in one form or another in existing international human rights treaties, this is the first time that children have been singled out as exclusive subjects of international rights and protection. The Convention consists of 54 articles.

Here are certain articles related to the issue of human rights violations by foreign investment, especially child labour.

Article 1

"For the purpose of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

Article 19

"1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

Article 31

"1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity."

Article 32

"1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article."

Article 37

"States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent, impartial authority, and to a prompt decision on any such action."

Besides, there are two optional protocols to the Convention on the Rights of the Child which were adopted by the General Assembly on May 25, 2000. They are

designed to strengthen the protections afforded children. The two optional protocols are:

(1) The first optional protocol to the Convention on the Rights of the Child

The first optional protocol concerns the involvement of children in armed conflicts. It aims to raise the minimum age of persons participating in armed conflicts to eighteen years of age. This protocol entered into force on 13 February 2002.

(2) The second optional protocol to the Convention on the Rights of the Child

The second optional protocol deals with the sale of children, child prostitution and child pornography. It entered into force on 18 January 2002.

b. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (1984)

This treaty was adopted by the UN General Assembly on December 10, 1984 and entered into force on June 26, 1987.[33]

The human rights violations concerning the provisions under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment can be seen in the case study of Unocal in Burma, where the military Burmese Government used forced labour, brutalized and tortured the Karen people to provide "security" for Unocal.

The relevant important provisions are mentioned as follow:

Article 1

"1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a

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[33] United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at http://www.hrweb.org/ legal/cat.html. (last visited 28 July 2008).

confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

Article 4

"1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

C. Analysis on International Human Rights Laws

We can see that there are many international legal instruments on human rights protection, both in general rights such as Universal Declaration of Human Rights, and specific rights such as International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and Convention on the Rights of the Child, to fight against human rights violation committed or abetted by foreign investors. And there are many countries which have ratified and become the States Parties to those treaties. The arising question is obviously that why while the number of States Parties to the international treaties on human rights is increasing, still people in those countries are suffering from human rights violation without any remedy.

Therefore, at this point, it can be seen that the problem on the perspective of human rights protection is not the lack of the existence of international human rights laws nor of the consent of countries to become States Parties to the treaties, but the problem is the lack of the human rights mechanism to effectively enforce such international laws.

Chapter 4
Balancing of Interest between Foreign Investment and Human Rights

"Poverty anywhere constitutes a danger to prosperity everywhere."
-Declaration of Philadelphia,
1944-

The objective under this chapter is to find a fine way to balance the interest of foreign investment and human rights or in another word is how to promote and protect foreign investment while human rights is being promoted and protected at the same time.

To begin, it is important to remind ourselves that foreign investment brings large benefits to the host countries, including job creation, economic growth, poverty reduction, technology transfer, market expansion, management techniques and, as businessmen claim, even the improvement of human rights standard. Therefore, on the perspective of the interest of foreign investment, a favorable investment climate should be established in order to promote and protect foreign investment.

A. Promoting and Protecting Foreign Investment

To establish the favorable investment climate, the two important actors, which are home countries and host countries, need to take a vital role by undertaking the following policy measures.

1. Home Country Policy[34]

[34] Ibrahim F.I. Shihata, Legal Treatment of Foreign Investment: "The World Bank Guidelines" (The Netherlands: Martinus Nijhoff Publishers) 13-19 (1993).

Home country policies and institutions affecting FDI can be divided into three areas. The first area is the domestic policy framework, which includes foreign exchange controls, fiscal and monetary policies, the trade regime and the regulatory framework. The second area relates to the official instruments and programs adopted for, and the institutions in charge of, promoting and regulating FDI in developing countries. These include investment treaties, promotion services, investment guarantees and financial support services. The third area consists of the regulations regarding the conduct of the home country multinationals in developing countries.

a. Policy Framework in the Home Country

On a very general level, global savings are a prerequisite to international capital flows. By maintaining sound macroeconomic policies which promote savings and investment and contain inflationary pressures, capital exporting countries create conditions conductive to the increase of investment outside their respective territories, including investment in developing countries. In addition, sound fiscal and monetary policies prevent real interest rates from becoming so high as to divert investment flows away from FDI into higher interest bearing debt instruments.

The more specific policies that could be undertaken by home countries to encourage investment flows include the maintenance of open trade and payment systems, particularly the removal of barriers to the import of products from developing countries. Export oriented industries are becoming more attractive to both investors and host countries. But the corollary to export-oriented FDI is the existence of open trade arrangements with developed countries which provide the markets for their goods. Hence the important of the GATT as a mechanism for ensuring the reduction of tariff and non-tariff barriers to imports from developing countries. The successful conclusion of the Uruguay Round trade negotiations is a critically important objective in this respect. Home countries can also encourage investment flows to developing countries through the promotion of debt conversion programs which would convert developing country debt held by home country banks into portfolio investment and FDI.

Another important area where home countries can encourage FDI is in their taxation systems. Tax policy can be adapted to provide incentives, or at least

remove disincentives, for businesses to locate their production facilities in developing countries. For instance, capital exporting countries can conclude tax-sparing agreements with developing countries whereby revenues earned in the developing country are exempted from home country taxation or whereby taxes forfeited by the host country as investment incentives (e.g., tax holidays, grace periods) are treated as liabilities by the home countries. To this extent, tax regime is thus one of policies used by home countries as a mechanism for the encouragement of FDI flows.

b. Home Country Promotional Instruments

The promotional programs from home countries could be to provide subsidies for outgoing FDI. While such subsidies may encourage investment flows, they are likely to create distortions in the host country since they discriminate against host country investors or other foreign investors not eligible for the subsidy. A less recognized but particularly relevant promotional instrument which a home country may use is to provide information to investors on the investment conditions and opportunities in developing host countries, and to provide technical assistance to host countries to build up their information and promotion capabilities.

c. Home Country Regulations

One of the major safeguards for the continued acceptance of FDI lies in its respect of the public interest in the host countries. Private investors, including foreign investors, are required to observe environment, labor, tax and other regulations of the host country. In achieving a balance between the public interest and the private sector's understandable interest in maximizing its profit in a free market, there are important roles to be played by both host and home governments. A major area of activity for home country governments in this respect is the regulation of the practices of their businesses abroad and the encouragement of fair and sound business behavior. Some developed home countries have issued legislation to this effect. Countries members of the Organisation for Economic Co-operation and Development (OECD) have worked together on the elaboration of guidelines to regulate the behavior of OECD investors abroad and to cope with the conflicting requirements which ensue from the exercise of such extraterritorial jurisdiction.

In describing the various policies which could be undertaken by source countries it is worth noting that although some are advisable under all circumstances, for instance those dealing with the general macroeconomic management of economies, other policies may need to be justified by home governments as part of their development assistance strategies.

2. Host Country Policy

The existence of an attractive investment climate in a given country is a complex phenomenon which defies simple definition. There are, however, certain elements to this optimal environment which countries that wish to attract foreign investment and promote private domestic investment, should aim at establishing. While this optimal environment may seem idealized and unrealistic, it is described here as a target that should be pursued in the promotion of private sector development generally and foreign investment in particular- although its relevance is greatest with respect to portfolio investment. Broadly speaking, the elements of such an environment may be grouped in three categories: the economic and financial framework, the political and cultural conditions, and the legal and regulatory regime.

a. Economic and Financial Framework

First, a sound economic and financial framework must include consistent and stable macroeconomic policies, which encourage long term sustainable growth. Liberal exchange and interest rate policies are an important part of a market-based macroeconomic framework. Controls on the convertibility and transfer of foreign exchange are particularly unattractive to foreign investors. Macroeconomic policies must create not only a stable investment climate but also the expectation of continued stability and growth. Second, a sound economic framework should include appropriate microeconomic policies which ensure in particular the absence of distortion in the price and wage regimes and the availability of well functioning financial and regulatory institutions. Third, the financial framework must include effective financial intermediation systems, including banks and other credit and financial services organizations capable of mobilizing savings and channelling them

to productive investments on reasonable terms. The financial sector should also develop a well-regulated securities market which provides ready means for the mobilization of additional funds and for the trading of securities. Fourth, there should exist an open trading environment which allows imports and exports without excessive tariffs and is free from non-tariff barriers, except to the extent necessary in exceptional circumstances. Fifth, the tax regime should be transparent, characterized by moderate and stable rates, and should provide a clearly defined and measured tax base. Treaty or other arrangements to guard against double taxation of the same tax base are a particularly relevant protection for foreign investors. Tax administration should also be carried out by efficient and honest institutions. Sixth, the overall economic environment, in its wider sense, should ensure the availability of adequate infrastructure. Such infrastructure includes not only traditional physical infrastructure such as roads, electricity, and telecommunications, but also the human capital necessary to design, operate and manage investment projects, including such ancillary technical, legal, accounting and other consulting services as may be required. The availability of adequate infrastructure is a function of both the host country's initial endowment and its government's policies regarding the development and management of its resources. If qualified human capital is lacking, this is all the more reason for the host country to allow the foreign investor to employ expatriates.

The relatively low costs of labor and raw materials in developing countries, though relevant factors, seem to have become less important in recent years in attracting FDI. The share of such factors in the total cost of production is declining in many industries. More important today is the quality of human capital and infrastructure. In the age of high-technology, export directed investment, a high skilled, disciplined and motivated labor force has become an important factor in attracting FDI. Hence the importance for the host country of parallel financing for human and physical infrastructure development.

b. Political and Cultural Conditions

The second broad element of an attractive investment climate is the existence of a stable political and cultural environment which is either open and outward oriented or, despite its limitations, is seen by foreign investors as favorable

and reliable. The existence of such an environment is partly a factual matter and partly a function of certain psychological factors such as the perceptions of the actors involved. From an investor's point of view, a stable political and cultural environment translates into an expectation of long-term political stability, and a confident belief that the domestic policy and public opinion of the host country towards the private sector in general and FDI in particular will remain favorable. The political environment also includes the degree of openness and external orientation of the host country's government, the extent of the access of local business to external financing, and the possibilities for marketing products or services outside the host country. From the foreign investor's perspective, all these diverse political conditions and perceptions may result in perceived non-commercial risks. To some extent, these risks can be mitigated by insurance mechanisms, such as those provided by MIGA, the World Bank's program of Expanded Cofinancing Operations, or national investment guarantee agencies. Nonetheless, the investment climate should instill confidence in the investors, both local and foreign, who do not only rely on the protection available to them through political risk insurance. Indeed the prevalence of positive, stable policies contributes to enhancing such confidence to a much greater extent than the availability of compensation for a loss. A feeling of confidence, if shared by a few large investors, is likely to generate a broader positive outlook which could significantly contribute to a favorable environment that attracts competitors and a large number of smaller investors.[35]

c. Legal and Regulatory Regime

It can be separated into two levels of legal and regulatory regime:

(1) Domestic legal and regulatory regime[36]

The legal systems in many developing countries are based on a combination of traditional laws and customs (which mostly regulate matters of personal and family status), and more modern structures based on colonial or other

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[35] Ibid., pp.20-24.

[36] Ibid., pp.24-26.

western models on which the laws governing the modern sectors of society are based. Legislation is often incomplete and at times non-existent, particularly in the areas relating to complex financial transactions.

Some of the problems facing the development of the private sector in a typical developing country include difficulties in the enforceability of contracts and property rights, land tenure uncertainties, barriers to the entry and exit of firms, rigid labor laws, regulatory inadequacies relating to banking and investment activities and rigid bureaucracies in charge of implementation.

The development of an efficient and fair legal and regulatory regime is a particularly important element of an attractive investment climate, especially in those countries undergoing a transition from centrally planned to market economies. Contrary to a pervasive perception in developing countries, an attractive legal framework is not one simply which offers prospective investors tax holidays or other favorable treatment. Such measures may in fact constitute market distorting incentives and involve an unjustified financial sacrifice for the host country. Much more important is a framework which provides investors with reliable protection for property and contractual rights through comprehensive legislation, effective enforcement and the availability of efficient conflict resolution mechanisms. In this context, the efficiency and honesty of the civil service, as the primary executor and administrator of the legal and regulatory regime, and the integrity and good functioning of the judiciary and the law enforcement agencies, are particularly important.

Adequate legal regulation of the financial sector in particular is an important corollary to the promotion of FDI because of the particular appeal to foreign investors of host countries with developed financial markets. This includes the elaboration of sophisticated accounting, auditing and disclosure standards. In fact, much of the recent private capital flows to developing countries are being channeled through these financial markets (e.g., purchase of equity participations in privatized companies and different types of portfolio investments). The development of a regulatory framework for the financial sector has thus been identified as a standard element in the reform programs of developing countries, particularly those moving towards market economies.

Labor laws and regulations are also an important element of the investment climate. Indeed, one of the main challenges for all countries is to find a generally acceptable balance between social stability and justice on the one hand and an orderly work force on the other hand. Social security and comprehensive safety nets are natural counterparts to a relaxation of labor laws which introduces flexibility in favor of employers.

An appropriate regulatory framework should aim at removing the barriers to the entry of inputs (goods and services, especially foreign technology), allowing the flow of information, and promoting competition. Restrictions, when justified, should be transparent, clearly stated and fairly applied, and their application should be subject to appeal in case of alleged abuse.

The element of the legal and regulatory framework which immediately affects the attractiveness of the investment climate to foreign investors is, of course, those laws which regulate the activities of foreign investors in a given developing countries. The rules applicable to the entry, treatment and exit of investments are often codified in a single code but this is by no means an essential requirement. In fact, most of the countries which have attracted large volumes of foreign investment in the past do not have such codes. What is important is that the applicable rules be clear and easily identifiable, that they provide fair, non-discriminatory treatment, restrict the role of government agencies in investment decisions and not vest broad discretionary powers in the hands of government employees.

(2) Bilateral Investment Agreement (BIT)

Under the bilateral investment treaties, host countries must abide by obligations in order to promote and protect the interest of foreign investment.

The obligations are to provide the protection to foreign investment under these following principles:

1. Fair and equitable treatment, full protection and security
2. National treatment
3. Most-favored-nation treatment
4. Expropriation and compensation

5. Free transfer

(The details can be seen in Chapter 2).

Besides the policy measures undertaken by each party: home countries and host countries, there are certain frameworks that require the co-operation of both parties to help achieve an objective to promote and protect the interest of foreign investment, which are:

1. The international community, both home countries and host countries, when foreign investment is conducted, should sign Bilateral Investment Agreement (BIT). At least it is a written legal tool to guarantee that the interest of foreign investment shall be protected.

2. The international community, both home countries and host countries, should take more effort to deliver Multilateral Agreement on Investment (MAI) in order to broaden the protection of foreign investment under multilateral treaty framework.

3. The international community, both home countries and host countries, should take obligations under the WTO rules and enforce them more seriously, efficiently and effectively.

Conclusion

All policies undertaken by home countries and host countries recommended above are ways to attract foreign investment flows into host countries especially, developing countries under the reason, which is definitely true, that foreign investment brings benefits such as job creation, economic growth, management techniques, and technology transfer to the host countries. The policies are to set some measures, including promotional instruments, economic and financial framework, political and cultural conditions, and legal and regulatory regime to promote and protect the interest of foreign investment.

However, we must not forget to consider the impact of the other side of the same coin; foreign investment flows, which, under this research, is the abuse and the violation of human rights.

B. Promoting and Protecting Human Rights

The problem on human rights violation has been a big issue for a long time. It became more controversial among international community when it dealt with transnational investment especially in the situation where foreign investment is conducted in developing countries and it leads to the human rights violation against the local populations.

In order to solve the problem, we cannot solely rely upon the business sectors, but also other relevant parties including, states (governments), of both home countries and host countries, affected civil society, the international organizations, both governmental and non-governmental ones and the media. Therefore, to me, a comprehensive co-operation is the key to promote and protect the interest of human rights.

The co-operation framework for human rights protection should be done under the three foundational principles of "protect, respect, and remedy". And under the three foundational principles, here come all relevant parties to play their own parts to achieve the goal.

1. States (Governments)

The state duty to protect against human rights abuses by third parties, including foreign investors is critical because it lies at the very core of the international human rights regime. The states have a vital role to make the difficult balancing decisions required to reconcile different societal needs, including balancing of interest between foreign investment and human rights.

Here are the roles the states can take in order to promote and protect human rights:

(1) The states should take an effort to become a State Party to the international treaties on human rights as much as possible. At least it would create legal framework to guarantee human rights and fundamental freedoms for its own people.

(2) Once the states become a State Party to international treaty on human rights, the states should strictly conform to the obligations, including the obligation to promote, respect and protect human rights, and the obligation to submit an initial report to the treaty body within either one or two years after becoming a party to the treaty and periodic reports every four or five years and additional information as required by the treaty body.

(3) Governments need to ensure that human rights compliance becomes part of defining an ethical corporate culture.

(4) When negotiating trade agreements or investment treaties, the states need to include human rights issue and also consider not only the benefits on foreign investment, but also human rights impacts. To this extent, the states should put a remedy clause under the investment treaties in case human rights and fundamental freedoms are violated. The clause should indicate how affected community or individuals can access to remedy and how foreign investors take responsibility for. This will volume down the critics voice from human rights activists saying that investment treaties are one-sided instruments which contain series of rights for foreign investors and only obligations for host countries and its people.

(5) The states should provide human rights education to its citizens in order for them to learn, understand and be aware of their rights and fundamental freedoms, and be able to protect themselves against human rights violation or find a way to get appropriate remedy when the violation occurs. This could be done by widely containing human rights issue in the educational plans and opening forums or seminars concerning the topic of human rights promotion and protection.

(6) The states should set up a community-led human rights impact assessment to assess the human rights situations in each period of time. The impact assessment should be designed in the model that allows those most affected by the investment to identify its specific human rights impacts and to seek appropriate remedies. The human rights impact can be very useful as it would help to measure the gap between the legal norm and the experience.

(7) The very essential thing, if not the most, is the states must establish human rights mechanism as a channel for local community or individuals to access remedy against human rights violation. The human rights mechanism could be, for

example, in the form of the National Human Rights Commission with the powers and duties to examine and report the commission or omission of acts which violate human rights or which do not comply with obligations under international treaties relating to human rights to which the state is a party, and propose appropriate remedial measures to the person or agency committing or omitting such act for taking action. And once the mechanism is established, the efficiency and effectiveness of its function must be achieved.

(8) The states should also regulate domestic laws concerning human rights protection and enforce them more strictly, efficiently, and effectively. For example, to criminalize bribery for public officials in international business transactions, which may help prevent local officials from abusing human rights, or environmental law by, such as, setting higher standard of criteria for foreign investors to establish industries in the states.

(9) The states should train local judicial officers and lawyers to get familiar with international human rights law under international treaty and customary law or at least the concepts/norms of human rights stated in the provisions of the national constitution, statutes and regulation. To this extent, especially (domestic) courts in order to be able to apply the law to the human rights violation case filed within its jurisdiction.

(10) Governments [of home countries] should pursue their traditional function of promoting trade and business. By supporting economic growth, we are supporting democracy. Once cannot exist without the other. The strongest foundations for stability, predictability, and security necessary for a sustainable business environment are democratic governments that protect human rights and labor rights.

(11) Governments [of home countries] must work with companies to promote strong corporate values. This means promoting legal and ethical behavior as well as respect human rights and labor rights. Corporations of the host countries abroad can play an important role in changing global perceptions about the host countries.

(12) Governments [of home countries] have an important role in supporting and facilitating public-private efforts to promote corporate responsibility. This does

not mean dictating what should be done. Rather it means bringing seemingly disparate groups together for serious efforts to address mutually recognized problems.[37]

(13) Governments [of home countries] can support international standards by adopting the policy that governments will only support projects in countries that are taking steps to meet internationally recognized core labor standards. And when country environments become difficult, government should also tell foreign companies they may not invest.

2. Business Sectors (Foreign investors)

(1) The corporate has a responsibility to respect human rights- meaning, in essence, to do no harm- both stipulated under the laws and expected by society. The baseline social expectation of companies is, anyway simple, that they respect rights.

(2) Foreign investors have to strictly conform to domestic laws and rules of the host countries concerning human rights issue. For instance, foreign investors must limit the pollution emitted from their industries in accordance with the limitation under the environmental laws or rules.

(3) Businesses must make sure that they are not complicit in human rights abuses.

(4) Focusing on labour rights, businesses should uphold the freedom of association and the effective recognition of the rights to collective bargaining, eliminate all forms of forced and compulsory labour, effectively abolish child labour and eliminate the discrimination in respect of employment and occupation.

(5) Focusing on environment, businesses should support a precautionary approach to environmental challenges, undertake initiatives to promote greater environmental responsibility and encourage the development and diffusion of environmentally friendly technologies.

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[37] Lorne W. Craner, Privatizing Human Rights: the Roles of Governments, Civil Society and Corporations, available at http://www.state.gov/g/drl/rls/rm/2001/6684.htm. (last visited 22 August 2008).

(6) Businesses should work against corruption in all its forms, including extortion and bribery.

(7) Nowadays, many leading foreign companies are aware of a strong current of human rights protection and attempting to manage this turbulence. Here are the things the corporations can do in practice:

(7.1) Understand and manage their supply chains;

(7.2) Produce codes of conduct on employment standards for their operations and those of their vendors;

(7.3) Appoint specialist staff to set up and monitor codes of conduct or deploying existing specialist- primarily with sourcing or environmental management experience;

(7.4) Engage with NGOs and other organizations to address the issues; and

(7.5) Establish means of verifying the implementation of their codes and initiating remedial action[38]

Certainly, all the steps above must be done with transparency.

3. Civil Society (Affected community)

Civil society as a party who gets a direct effect from foreign investment has a very vital role on human rights protection. It is not only to protect themselves against human rights violation but also to help improve the human rights situation in their own country.

(1) The local community should be aware that human rights concept is not something far from them or far beyond their understanding, but instead it is a basic inherent concept for all human beings.

(2) The local community must be aware of their rights which are protected under the international law.

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[38] George Tsogas, Labor Regulation in a Global Economy (United States: M.E. Sharpe, Inc.) 13 (2001).

(3) The local community has to learn how to protect their rights against the human rights violation for example, they should learn how to do risk assessment and once being violated, they must know how to seek redress for instance, how to minimize risk and how to access human rights protection mechanisms.

(4) The local community must interact directly with governments, participate directly in policy debates at the national level and help to bridge the gap between human rights in theory and human rights in practice.

(5) There should be a close co-operation between social members (affected community) and NGOs concerning human rights issue. At least, NGOs could provide greater mobilization and political pressure on behalf of the social members.

(6) Ultimately, it may sound like a Utopia, however I still believe that the key role to achieve human rights protection is the local community must learn, understand, embrace and apply human rights principles to their daily lives. This can be started by respecting fellow humans and allowing everyone to participate in the community. I believe that if the community at local level is strong, it would strengthen the whole country.

4. International Organizations

International organizations, especially the United Nations (UN), have a broad role on human rights protection from creating international legal instruments to monitoring the human rights situations in each country and enforcing the laws.

I would like to separate international organizations into two types to clearly see how each type can participate in order to protect the interest of human rights:

a. Governmental Organizations

(1) Within the UN system, there have already existed procedures for making human rights complaints by individuals. However, it seems there are not such enough complaints filed against the states. Therefore, I think the UN and the human rights based-treaty committee should provide access to information and understand, for people around the world, on how the procedures for making complaints within the

UN system work. Because I, myself, believe that there are still many people lacking of knowledge about this. They have rights but they don't even know how to exercise them. And if so, the existence of the procedures would yield nothing in practice but fabulous mechanism on papers. Shortly speaking, the UN should strengthen its existing human rights mechanism. However, to reach this goal, a co-operation from national government is also required.

(2) According to the fact that the system of individual petition alleging violations by a state is optional, there are still many states which ratified to become a State Party but not to empower the treaty-based committee to scrutinize petitions. Thus, if possible, the international organizations, especially the UN, should find a channel to make the petition system work more widely among Member States to the human rights treaties.

(3) Once the petition is filed by the victim of the human rights violation, the procedures from filing period to a final decision should be undertaken under transparency and without delay.

(4) In case any state violates human rights or does not comply with obligations under international treaties relating to human rights to which the state is a party, the international organizations should take a step to pressure on such state by condemning or imposing measures like political, diplomatic or legal, to help improve human rights situation. Under the framework of the UN, though sanction is one among other available choices, it should be the last resort and if imposed, the impact on the state's population should be considered in priority.

(5) The international organization, especially the UN, should more closely co-operate with Non-Governmental Organization (NGOs) in order to efficiently and effectively solve the human rights problem, and to promote and protect human rights. This could be done by, for example, inviting NGOs to join and discuss in seminars/forums concerning human rights.

(6) An adequacy of resources and staffing should be taken into account because it is one of the most important factors for the international organizations to run its activities, concretize its ideas, and finally to achieve its objectives.

(7) Nowadays, there exist many regional systems for the protection of human rights, including the Inter-American Human Rights system, the European

Human Rights system and the African Charter on Human Rights and Peoples' Rights. However, the question on the efficiency, effectiveness and transparency is still a challenge for certain regional human rights mechanisms.

(8) While other regional organizations have regional human rights mechanisms, ASEAN still has none for this moment. Though the provision under Article 14 of ASEAN Charter mentions about the establishment of ASEAN Human Rights Body, there is no detail on neither how the Body will be, when the deadline of the establishment is, what authority the Body will have nor any other details. Therefore, the international community as a whole and especially ASEAN itself should take a serious effort to set up human rights mechanism within the South-East Asia region.

b. Non-Governmental Organizations (NGOs)

(1) NGOs should devote more of their energies to influencing the work of the five main human rights treaty-based committees: the Human Rights Committee (HRC), which monitors implementation of the Covenant on Civil and Political Rights (CP Covenant); the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the Covenant on Economic, Social and Cultural Rights (ESC Covenant); the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), which monitors the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention); the Committee against Torture (CAT), which monitors the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention); and the Committee on the Rights of the Child (CRC), which monitors the Convention on the Rights of the Child (Children's Convention).

There are three broad areas in which NGOs can contribute in significant ways to the work of the human rights treaty bodies:

(1.1) by supplying information to committee members

Committee members need not rely only on information submitted by the reporting states but also information from NGOs. Committee members frequently use NGO reports when questioning government representatives and finalizing their concluding

observations. Therefore, it would be helpful if NGOs provide information, highlight areas of concern, and suggest concrete recommendations.

(1.2) by drawing a committee's attention to particular issues during consideration of state reports

Having an NGO representative present at a committee session can help to focus the committee's attention on certain issues and supply additional information to support follow-up questions to government representatives.

(1.3) by ensuring that other NGOs are promptly informed about developments that may help to promote human rights in their countries

One of the most important aspects of working with treaty bodies is to ensure that the process of reporting involves a full cycle of information flowing from national and international venues and then back to national and local groups that can publicize highlights of the reporting process domestically. NGOs can also facilitate the exchange of information between the treaty bodies and other UN entities.[39]

(2) While human rights education tends to be the primary responsibility of the states, NGOs can also take participation into this. The human rights education could be done through the Internet. There are numerous NGOs programmes on human rights education, including the courses/programmes offered by the African Centre for Democracy and Human Rights Studies in the Gambia and the South Asian Forum for Human Rights in Nepal.

(3) There should be a stronger and comprehensive co-operation and the exchange of information between national NGOs and international as well as regional ones.

(4) If requested and required, NGOs should assist the United Nations in drafting international legislation, and at the national level, assist governments in bringing their legislation into line with international human rights standards.

(5) Within reasonable framework, NGOs should provide protection to victims and potential victims under repressive regimes, also in some cases, legal advice and moral support to the families of victims from human rights abuse.

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[39] Hurst Hunnum, Guide to International Human Rights Practice (New York: Transnational Pubishers, Inc.) 196-199 (3rd ed. 1999).

(6) NGOs can also promote and protect human rights by keeping the political system open to other elements of civil society. In working for freedom of association, freedom of opinion, freedom of expression and freedom of assembly, human rights NGOs make it possible for civil society to function; they create political space for democratic forces and therefore, for democracy.

5. Media

Media, either international, national or even local, can play a vital role as educators and promoters of human rights protection because it is the best place to communicate economic, social and environment information and develop an educated public. It is where people's voices are heard. Therefore, to strengthen the free press, broadcasters and other media is a challenge and should be a high priority.

Chapter 5
Conclusion and Recommendations

"Start with what is right rather than what is acceptable."
-Franz Kafka-

A. Conclusion

The interests of both foreign investment and human rights are protected under the international law regime. However, the objectives of the international legal instruments created to protect the interest of each are different. The objectives of the GATT/WTO rules or the Bilateral Investment Treaties (BITs) are to promote, protect and attract foreign investment and in order to achieve the objectives, this unavoidably creates obligations to the host countries. The objectives tend to weigh on economic view. Whereas the objectives of international human rights law are to promote and protect human rights which tend to weigh on social perspective.

According to the two different objectives, it makes the interest of foreign investment and the interest of human rights seem to stand on the opposite sides of a vast divide and cannot be protected together at the same time. The picture could be seen as once foreign investment is conducted in developing countries, there follows the human rights violation.

However, in every difference, there lies a way to balance and to reach a compromise and that leads to the most useful end goal: the win-win situation. So as it does in the case of balancing the interest between foreign investment and human rights.

The key ways to balance the interests of foreign investment and human rights are first, an understanding of each interest aimed to be protected from both sides: business sectors and human rights activists. Second, a comprehensive co-operation of every involved party including, states, business sectors, civil society, international organizations and media under the principle of "protect, respect and remedy". This

principle means in order to protect the interest of foreign investment, states, both home and host countries, and local population of the host countries have the obligations under the international law to protect and respect the interest of foreign investment and if its interest is violated, the remedy must be provided. At the same time, in order to protect human rights, states have the obligations under the international law to protect human rights, the foreign investors must respect human rights and if any human rights violation occurs, there must be an effective channel to access remedy.

Theoretically, the key ways to balance the two interests sound simple, still the challenge is to make them be effectively done in practice. And if we can successfully balance the interest of foreign investment and the interest of human rights, at the end we may find out that the two interests are not only incompatible, but they can surprisingly support each other. The example scenario of the end goal could be that foreign investment is promoted and attracted into developing countries. It creates jobs for local population of the developing countries, helps reduce poverty, makes the host countries' economic grow and finally lifts up the standard of living for the population. And that helps to improve the human rights situation.

B. Recommendations

In order to achieve the goal of balancing the interests of foreign investment and human rights, relying merely upon international law as a legal framework to protect the interest of each by establishing obligations to the Party States is not enough. To achieve the successful balance of the two interests, other factors namely the political policy, the domestic laws and judicial proceedings, the social and cultural conditions and the economic perspective must be also taken into account. Under the consideration of all relevant factors, the key way to balance the interest of foreign investment and the interest of human rights requires a comprehensive co-operation from every involved party, including states (governments), business sectors (foreign investors), civil society (affected community), international organizations and media, to actively, seriously and effectively act on their own parts. Moreover, in order to help

guarantee the success of the co-operation, there should be a follow-up system to assess the progress.

Last but not least, we must bear in mind that the basic root of balancing the interests, no matter what they are- the interests between nation and individuals or as in our case: the interests between foreign investment and human rights- in the society, no matter what level- local, national or international- is an understanding and the understanding can be created by an education with an open mind.

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