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Comparative Public Law To Balance State Sovereignty And Investment Protection In International Investment Treaties

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Abstract
The international legal framework governing foreign investment consists of an extensive network of international investment treaties (IIGF) supplemented by general regulations of international law. Although other international treaties interact with this network, PII is a major public international legal instrument governing the promotion and protection of foreign investment. PII regulates the relationship between foreign investors and the government of the host country. International Investment Treaties act as key instruments for countries in the world to attract and manage Foreign Investment. International investment treaties are instruments of international law that countries use to regulate their relations in the field of investment. Through IIGF, countries want to create a stable international legal instrument to facilitate and protect the flow of foreign investment and increase the growth of the national economy. Based on the above background, this article aims to reconceptualize investment treaties as treaties that can balance the interests of state sovereignty and investment protection. Therefore, methodologically, this article describes the conceptual framework for the application and interpretation (de lege lata) of PII so that it can balance state sovereignty and investment protection. However, when viewed from the perspective of investors, the premise is opposite or vice versa, that is, if the state is given complete freedom to exercise its authority in full, then the investment treaty system will not provide adequate guarantees to investors to promote efficient investment. Therefore, international investment law has core functional similarities with domestic administrative and constitutional reviews of government actions at both the domestic and international levels, including under various human rights instruments, such as the European Convention on Human Rights. From a functional perspective, international investment law is therefore a discipline of public law.

Keywords: International Investment Treaty/IIGF, Investment Protection, State Sovereignty.

I. Introduction

The international legal framework governing foreign investment consists of an extensive network of international investment treaties (IIGF)[1] supplemented by general regulations of international law. Although other international treaties interact with this network, PII is a major public international legal instrument governing the promotion and protection of foreign investment. International Investment Treaties (IIGF) are modern instruments of foreign investment regulation. PII regulates the relationship between foreign investors and the government of the

[1] Understanding PII deep article Ini be Covenant Investasi Bilateral (*Bilateral Investment Treaties*-BIT), Covenant trade Free with Conditions nvestasi (*Free Trade Agreements* -FTA).

host country. IIGF is signed at the bilateral, regional, or multilateral level by two or more countries to protect investments made by investors from a *home* country in another country or [2]*host state*. Countries fall into IIGF assuming the establishment of[3] *a reciprocal* relationship or mutually beneficial relationship between the protection and promotion of investment on the one hand and the economic growth of the *host state* on the other.[4]

In its early history, PII was created with the aim of protecting investors from unilateral actions of the host country, such as uncompensated expropriations, discriminatory treatment and allowing *investor-state dispute settlement* (ISDS) arbitration to enforce these obligations. However, in its development, the application and interpretation of PII is not balanced between investment protection on the one hand and the roundness of the host country on the other. This imbalance is caused by three factors. ***First,*** investment liberalization and vague, ambiguous and overly broad standards of treatment, as well as their expansive and pro-investor interpretations by arbitral tribunals. ***Kedua***, the mechanism of the investor-state arbitration process is improper, because in essence investor-state disputes are disputes due to private (*non-sovereign*) parties' lawsuits against the *public regulatory disputes* of a *sovereign* state. ***However***, there is an asymmetry of obligations in IIGF because IIGF imposes obligations on the host country in connection with protection and guarantees to investors and their investments, but no related international obligations are imposed on foreign investors. [5] The implication is thatthe application and interpretation of PII by international investment regimes severely limits the sovereign authority of states. The PII limits the sovereignty of state legislatures to make and amend laws, limits the judicial sovereignty of domestic courts, and limits the sovereignty of state administration to make decisions and policies (*policymaking*).[6]

Based on the above background, this article aims to reconceptualize investment treaties as treaties that can balance the interests of state sovereignty and investment protection. Therefore, methodologically, this paper describes the conceptual framework for the application and interpretation (*de lege lata*) of PII so that it can balance state sovereignty and investment protection. This article will develop an understanding of international investment law as an internationalization of the discipline of public law to regulate the relationship between countries and foreign investors in the current era of globalization of the developing economy. PII and investment treaty arbitration are conceptualized as public law disciplines and integrated into the public legal model so that applications and interpretations, as well as investor-state disputes are resolved using a public law approach with specific public legal methods, namely comparative public law. A comparative public law approach can provide solutions to problems arising in investment treaty arbitration by not being treated separately, but by utilizing solutions and concepts applied in public legal systems at the domestic and international levels.

Method

The research method used is descriptive with a qualitative approach. The data is collected by reviewing literature from relevant and current research, and then it is analyzed to draw conclusions based on the phenomena that occur. The research flowchart is explained figure 1 bellow:

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[2] Country *'host state'* or 'host' refers to the country in which foreign investors or the investment is located. Country'*hOme State*' or 'as long as' refers to the country in which the investor is a citizen.

[3] Jeswald W. Salacuse, 1990, ''BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries'', hlm. 24

[4] M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, Deep Appeals Mechanism In International Investment Disputes, hlm. 39.

[5] Andrew Newcombe and Lluis Paradell, 2009, *Law and Practice of Investment Treaty: Standard of Treatment*, Kluwer Law International, hLm. 64.

[6] Gus Van Herten, 2005, *The Emerging System of International Investment Arbitration*, UMI Dissertation Publishing, Pp. 114.

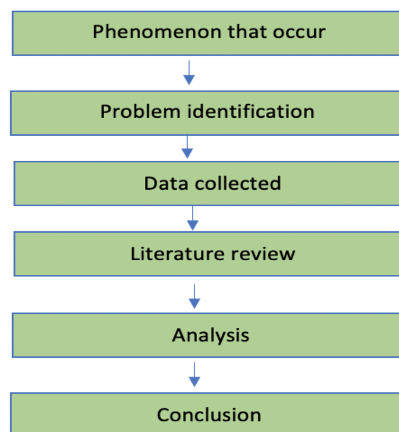

Figure 1.
Research flowchart

Result and Discussion

II.International Investment Treaties (PII)

II. 1 Development and Function of PII

Foreign direct investment (FDI) has been considered the main driver of economic growth in many countries around the world. Many academic publications, governments and international institutions have discussed issues regarding the impact of FDI on a country's economic development. The management of Foreign Direct Investment (FDI) is built on the premise of a *reciprocal* relationship or mutually beneficial relationship between the protection and promotion of investment on the one hand and the economic growth and prosperity of the *host state* on the other. However, in reality, the implementation of FDI is not only concerned with economic development, FDI affects other important aspects, namely state sovereignty, protection of human rights, the environment, labor, public health of the host country. Modern Foreign investment is regulated through IIGF, IIGF regulates the relationship between foreign investors and the government of the host country. IIGF is signed at the bilateral, regional, or multilateral level by two or more countries to protect investments made by investors from home countries in other countries or *host countries*. Countries fall into IIGF assuming security guarantees for investments through investor protection resulting in greater investment flows to their countries.[7][8]

After the second World War, international investment treaties (PII) progressively developed as a source of international investment law. Since 1980, IIGF investment treaties have emerged as[9] *champions* in the international investment law system. In recent decades, the number of PIIs has continued to grow from 385 in 1989 to 2265 in 2003, covering 176 countries. At the end of 2012, the IIA as a whole consisted of 3196 agreements, including 2857 bilateral investment treaties ('BIT') and 339 other IIP, including free trade agreements ('FTAs') with investment provisions, economic partnership agreements and regional agreements, (except double tax treaties). International Investment Treaties act as key instruments for countries in the world to attract and manage Foreign Investment. International investment treaties are instruments of international law that countries use to regulate their relations in the field of investment. Through IIGF, countries want to create a stable international legal instrument to facilitate and protect the flow of foreign investment and increase the growth of the national economy. International investment treaties have a dual purpose: That is to guarantee the protection of investors investing in the host country, and on the other hand to encourage the

[7] Jeswald W. Salacuse, 1990, ''BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries'', Pp. 24.
[8] M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, Deep Appeals Mechanism In International Investment Disputes, Pp. 39.
[9] K. Vendevalde, *A Brief History of International Investment Agreement, University of California Davis Journal of International Investment Law, and Policy*, 2005-2006, Vol. XII, p.157-194

inflow of investment and capital and the transfer of technology to the [10][11]*host country (host state*). With this agreement, the host country receives obligations related to the treatment of foreign investments and recognizes the right of foreign investors to file a lawsuit against the state in case of violation of the agreement.

The substance of PII is to regulate the behavior of the host country by determining a standard that must be adhered to regarding its treatment of investors and their investments. The provisions of IIGF guarantee investment security when investors invest in the host country. These provisions include fair and *equitable treatment* (FET), national treatment (*National Treatment*), *Most favoured nation*, as well as protection from direct *expropriation* and indirect *expropriation*, as well as an investment dispute resolution mechanism known as investor-state dispute resolution (*Investor-State Dispute Settlement)*

II.2 Characteristics of the Investment Treaty System

As explained above, that currently the investment treaty system has been built by more than 3000 agreements. The treaties create their own complexity because they differ in minor and major terms in some ways. Investment treaties create gaps and ambiguities caused by incomplete agreements; are short and have broad meaning. Although individual [12]agreements of countries may differ, there are many similarities in investment treaties because most investment treaties are based on a small number of treaty models, which have similarities in structure and provisions. In addition, the similarity exists because alarge part of the investment court interprets the investment agreement with reference to one body of jurisprudence without limiting the consideration of whether cases arising from the same agreement or from the agreement with identical terms. As a result, the investment treaty system is actually bilateral, but substantially multilateral, with treaty terms and general interpretations evolving. Investment[13] treaties impose certain obligations on the host country to guarantee protection to foreign investors and investments, but do not specify whether such obligations give rise to substantive rights for investors. Investment treaties often include an investor-state arbitration clause to ensure an impartial tribunal to enforce treaty obligations because not all host countries have effective domestic courts and are impartial to the interests of their own governmental actions.[14]

In addition to the two characteristics mentioned above, there are procedural characteristics themselves giving rise to hybridity in PII. The nature of hybridity means that the investment treaty system combines international public law on the substance level with elements of commercial international arbitration at the level of procedure in resolving investment disputes. According to Thomas Walde,[15] this is not the case with investment treaty arbitrations wherethe actions of a sovereign state are tried by the international private court of the ICSID (*International Centre for Settlement of Investment Disputes*). [16] As a result, the Court of arbitration of investment treaties served as a political tool to influence the host state. The

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[10] O. T. Johnson, J. Gimblett, *From Gunboats to BIT: The Evolution of Modern Investment Law in K. P. Sauvant Ed., Yearbook of International Investment Law and Policy*, 2010/2011, P. 685

[11] UNCTAD World Investment report 2013, *"Global Value Chains: Investment and Trade for Development",* The UN New York and Geneva, Pp. 101

[12] Ian Ayres & Robert Gertner, 1989, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules,* Yale L.J. Edition 87

[13] Anthea Roberts, 2014. *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*Harv. Int'l L.J. 1

[14] Stephanie Biljmakers, 2012. *Effect of Foreign Direct Investment Arbitration on State's Regulatory Autonomy Involving The Public Interest*, The American Review Of International Arbitration, Vol.23 No.2. Pp. 245-266

[15] Thomas Walde, 2007, *The Specific Nature of Investment Arbitration*, deep *New Aspect of International Investment Law*, Philippe Kahn & Thomas WaLde Eds hLm. 118

[16] Convention to Settlement dispute investment between country and citizen country from other countries., 18 March 1965, (1965) 4 International Legal Matrials, Pp. 524. Convention Ini usually called with term ICSID or Convention Washington.

politicization of arbitration is used by foreign investors as bargaining tools to impose their interests on the regulatory authority of the host country and also to weaken the prospective policies of the government through the threat of arbitration proceedings. Both effects create what is known as a "*regulatory chill*", i.e. the host country may be reluctant to change or refrain from taking a policy out of fear of the threat of an arbitral tribunal.[17]

II.3 Substantive Objectives of Investment Protection, Investment Promotion, and State Sovereignty in International Investment Treaties

In order to understand the relationship of investment protection, investment promotion and sovereignty of the State in investment treaties, it is necessary to better understand what is considered the substantive purpose of the host State, the state of origin and the investor in enteringinto an investment treaty. There is a tendency of investment treaty regimes to treat investor protection as a primary and absolute goal, not as a means to achieve more specific goals and not just end up on the protection of the investment itself.

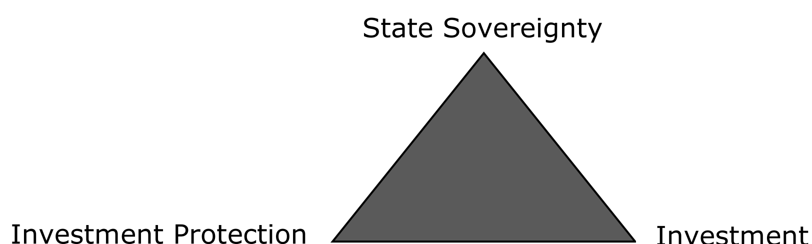

Figure 1.

According to Anthea Roberts, an investment treaty is ideal if the host State, the country of origin and investor's view[18] investment protection as a means to enhance development, and not as an ultimate goal for the protection of investment itself. Investment protection is notan absolute goal. The ideal investment agreement is for the state to balance the interests of the state to protect investment in order to promote foreign investment against the interests of the state in protecting sovereignty in order to achieve other welfare goals, such as the protection of occupational health and safety. [19] Investment protection should be understood as a means to promote efficient investment and thereby improve the economy of the host country and the country of origin. Investment protection does not end for itself. As van Aaken explains:

> *"... that is the sole purpose of PII the protection of investments? Or what is the real purpose of PII? Because most preambles reveal that investment protection and promotion is a means to achieve* the *ultimate* goal *of improving the welfare, development, or prosperity of the host country and the country of origin."*[20]

For the country of origin, an efficient increase in foreign investment will not only benefit their citizens whoinvest in the host country, it may also benefit citizens who do not invest because the development of the country tends to increase through increased tax revenue. For the host country, promoting investment means increasing development through the creation of new jobs, the development of new infrastructure, and the increase in tax revenue. Investment promotion is not an absolute goal becausesovereign canyons are not entities that pursue profits solely.

On the contrary, the purpose of the state is better understood as an attempt to maximize the welfare of its citizens. Therefore, the state will carefully consider the interests of increasing

[17] Stephanie Biljmakers, *Op.Cit*
[18] Anthea Roberts, 2015, *Triangular Treaties: The Extant and Limits of Investment Treaty Rights*, Harvard International Law Journal, Vol. 56. No.2 Pp. 353-417.
[19] *Ibid.*
[20] Anne van Aaken- Tobias Lehmann, 2013, *Sustainable Development and International Investment Law: An Harmonious View from Economics*, Deep InternationAl Investment Law and Policy, Roberto Echandi and Pierre Sauv´e Eds. hLm. 329-332.

foreign investment in order to maximize economic benefits on the one hand, and the interests of achieving other welfare goals, such as protecting public health and safety. redistributing wealth through taxation and protecting security interests on the other side. This approach is consistent with interpretive statements adopted in some investment agreements and the Model BIT which states that legitimate and non-discriminatory regulatory actions by one party to an agreement designed and implemented for the purpose of protecting public welfare, such as public health, safety, and the environment, do not constitute an indirect takeover. [21]

It is also consistent with the increasing references in *preambles* about the need to protect foreign investment without compromising other important objectives such as the protection of health, safety, and the environment. [22] Pthere is a domestic level, no country protects investment to the exclusion of all other interests. In addition, the goal of promoting foreign investment tends to be inversely proportional to the actions of states to protect their sovereignty in order to achieve welfare goals. The premise is that nomatter how much protection is afforded to foreign investors, the less sovereign authority the state maintains to pursue the goals of public welfare. However, when viewed from the perspective of investors, the premise is opposite or vice versa, that is, if the state is given complete freedom to exercise its authority in full, then the investment treaty system will not provide adequate guarantees to investors to promote efficient investment. The above article shows that the investment treaty framework needs to be conceptualized as a balanced agreement between state sovereignty and, investment promotion and investor protection. As also pointed out in the decision ofthe investment court that recognizes thepurpose of protection and promotion of investment is important but not absolute. For example, in the *dispute El Paso vs Argentina*. The court held that "a balanced interpretation is necessary, taking into account the sovereignty of the state and the responsibility of the state to create an adaptation framework for the development of economic activity, and the need to protect foreign-party investment and the continued flow of investments." Likewise, [23]in the *Saluka vs Czech Republic* dispute, the court held that:

> *The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for **a balanced approach** to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.*[24]

This approach will encourage countries to have a solution that sits between the extremes of investment protection and the full protection of state sovereignty. Therefore, an approach is needed to determine the right balance to be achieved by this goal.

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[21] See ASEAN Comprehensive Investment Agreement 2009Feb. 26 2009, Annex 2; American BIT model Union 2012, Annex B; Type covenant to promotion and protection Investment Canada 2004, Annex B, available at http://italaw.com/documents/Canadian2004FIPA-model-en.pdf accessed at 6pm June 2017

[22] See American BIT model union Year 2012, Preamble ("*Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards; Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration; Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights*").

[23] El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, (Apr. 27, 2006).

[24] Saluka Investments B.V. (Neth.) v. Czech Republic, UNCITRAL, Partial Award, (Mar. 17, 2006)

III. State Sovereignty and International Investment Treaties

III.1 The Concept of State Sovereignty

The theory of state sovereignty according to Jean Bodin postulates that the State has the power to make and carry out laws over its territory and / or jurisdiction which are fixed, original, unanimous, and indefinite in internal and external contexts. The concept of sovereignty denotes the freedom of a State to act within its territory within the limits prescribed by international law. The right and capacity of the state to make authoritative decisions over its territory without having to submit to higher authorities. In this concept, Bodin posits sovereignty as the main source of establishing laws. Sovereignty as a source of authority that is at the highest level in [25]*the legal hierarchy (legal hierarchy*). Sovereignty as the highest and exclusive authority of a state, as well as the capacity to make authoritative decisions within its territory.[26][27]

Martin Dixon and Robert McCorquadale developed the meaning of the concept of territorial sovereignty. According to them, on the basis of territorial sovereignty, then a country has authority over three aspects. ***First***, the prescriptive/legislative jurisdiction, namely regulatory and legislative authority. ***Second***, *adjudication/judicial jurisdiction process*, the authority to carry out judicial proceedings. ***Third***, *administrative/enforcement jurisdiction*, the authority to enforce the provisions that have been set by the state concerned including administrative actions or enforcement of law and order in its territory. In practice, the meaning and implementation of territorial sovereignty requires the consolidation of the domestic power of the country concerned. [28]

As a subject of international law, the actions of states are not without restrictions. Limitations can occur in any sovereign territory of the country. This can occur within territorial sovereignty, within the authority of the courts, e.g., states are exempt from the jurisdiction of courts of other states (*acta iure impreii*). In the legislative authority, the national hukum must be in harmony with international law. or also the executive authority of the canyon, that is, each canyon isprohibited from using military force or forced attacks against other countries. There are several groups of regulations that limit state sovereignty that apply to each state. These groups include imperative norms of international law; sovereignty of other statesn; general principles of international law; customary international law; limitations agreed upon by states (in international treaties or unilateral declarations).

In its development, the definition of state sovereignty is constantly evolving. The practice of states in interpreting the concept of sovereignty in the context of international relations has long been debated and the debate on this subject is still ongoing today. There is no general agreement regarding the definition of sovereignty. [29] In reality, sovereignty is a changing concept, which has developed significantly in the past century. The greatest role in this process was played by the nation-state that emerged throughout the 20th century. Based on historical relations, the 20th century can be[30]known as the era of "independence" or "nationalization". Therefore, in the 20th century it is also known as the era of integration, with tendencies to regionalism, supranationalism, or even economic globalism. The emergence of an arrangement

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[25] Jean Bodin, 1576, *Les Six Liverse de la Republique*, Preamble*, Rue de la Council*

[26] James Sheehan, 2006, *The Problem of Sovereighty"* Loaded at deep The American History Review Vol. III. No. 1 February 2006. As Quoted deep Dissertation Sigit Riyanto, Pp. 103

[27]Ersun N. Kurtulus, 2005 *State Sovereignty: Concept, Phenomenon and Ramifications,* Palgrave Macmillan.

[28] Martin Dixon and Robert McCorquadale, 2000, *Cases & Materials on International Law: Third Edition,* London : Black Stone Press Limited. Pp. 284

[29] Raustiala,Kal.2003*." Rethinking the Sovereignty Debate in International Economic Law". (6) Journal of International Economic Law*Desbucket,2003. Pennsylvania: University of Pennsylvania Law School. Asaman Quoted deep Sigit Riyanto, *Sovereignty Country deep Skeleton Law International Contemporary*, Yustisia Vol 1 No.3 2012, hlm. 9.

[30] Wallace, C. 2002, *The Multinational Enterprise, and Legal Control: Host State Sovereignty in an Era of Economic Globalization*, Martisquid Nijhoff Publishers, hlm. 61.

of the integration of free trade in sub-regional economies is a very typical example of this era. [31]

The process of globalization on the economic aspect increases the volume of international trade as well as the increasing economic interdependence among countries of the world. Raustiala considers that interdependence between states indicates that the sovereignty of a country is gone,[32] so the implication of globalization on sovereignty is that the authority and capacity of states are eroded. The globalization movement poses new challenges and fosters norms of international law that countries must observe and adhere to as members of the international community. At the same time, the views of the "*status quo*" and traditional interpretations that place state sovereignty as an absolute concept began to be questioned.

Krasner lays out sovereignty in several components: ***First***, international legal sovereignty, refers to practices related to mutual recognition, usually between territorial entities that have formal juridical independence. ***The second***, theedaulatan Westphalian, refers to political organizations based on the exclusion of external actors from the structure of authority in a particular region. ***Third***, domestic sovereignty, refers to the formal organization of political authority in the state and the ability of public authorities to exercise effective control within the boundaries of their own government. ***Fourth***, interdependence sovereignty refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, or capital that crosses state borders.[33] In Kransner's view, domestic sovereignty, interdependence sovereignty, Westphalia sovereignty, are closely related to how much authority and capacity, or control, the state actually has as a result of interdependence and Globalization. Raustiala argued that the actual authority and capacity of states were inconsistent as a consequence of international agreements. Because the essence of international agreements is to control the behavior of states and intervene or form state choices.[34]

III.2. Impact of Investment Treaties on State Sovereignty

In the context of international investment treaties, states have the freedom and authority to act in their territories according to the principles of customary international law. The state as a sovereign authority has undeniably jurisdiction to establish, invite and regulate all foreign investment within its territory. In fact, the existence of PII itself is the will of the State, without the *consent* of the State, pii will not exist. Memasuki PII is also one of the ways, by which the State can exercise its sovereign authority. Such an understanding was consolidated in the case of *the 1923 WIMBLEDON PCIJ*. Where the Court held that:

> *"The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."*[35]

According to Schreuer, States derail some elements of their sovereignty in investment treaties with the aim of attracting foreign investors. States act on behalf of their sovereignty when they decide to enter into a treaty, including when they agree to the content of the treaty (including the obligations contained therein). Therefore, when a state enters into a treaty, its sovereignty

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[31] *Ibid*., hlm. 3.
[32] Raustiala, Kal. *Loc. Cit.*
[33] Krasner, Stephen D., 1999, *"Sovereignty: Organized Hypocrisy."* Princeton, NJ: Princeton University Press.
[34] Raustiala, Kal.. "*Rethinking the Sovreignty Debate in International Economic Law."* Journal of International Economic Law, 2003 Vol. 6 No.4 Things. 847
[35] Judgement of 28 June 1923, The SS 'Wimbledon', United Kingdom and Ors and Poland (intervening) v Germany, Intervention, PCIJ Series A no 1, ICGJ 234 (PCIJ 1923), Permanent Court of International Justice (historical).

is limited by the treaty itself. Consequently, the State cannot act unilaterally to change the terms and obligations agreed upon in the treaty. After all, the State must act in accordance with the agreement, so that investors trust the host country's invasion regime. The implementation of IIP is currently considered unbalanced and more beneficial to investors because the IIP provisions exist to guarantee a stable and legally safe investment climate so that FDI runs well. However, the host countries discovered the fact that their sovereignty was eroded. The implementation of PII is solely to protect foreign investors by imposing restrictions and even erosions on the sovereignty of the host State. There are three crucial aspects of state sovereignty that are severely affected by the implementation of investment agreements today[36][37][38]***. First***, legislative sovereignty. The application of investment treaties greatly affects the host state due to the shrinking of the domestic policy space caused by vague and ambiguous investment protection standards, interpreted inconsistently by international arbitrators who have significant interpretation power over the content of investment treaty obligations, resulting in *regulatory chill* on the host country, even *de facto* able to limit the policy choices made by democratically elected legislators, whereby those legislators cannot fully carry out the democratic mandate that has been accepted through the democratic process.[39]
The vague and ambiguous characteristics of PII are prone to resulting in differences in interpretation by arbitration and can result in decision inconsistencies. The inconsistency occurred as indicated by the decision of the arbitral tribunal in the dispute between[40] *Lauder* v. *Czech Republic* and *CME* v. *Czech Republic*. Although these disputes have the same facts and arguments, there is a contrasting perspective to the facts that results in the decisions of different arbitral tribunals. The vague provisions of the PII give enormous discretionary consequences to arbitral tribunals in interpreting the regulative sovereignty of the host state that it takes to govern its public interest. [41][42][43] ***Second***, judicial sovereignty. PII provides a *specialist lex*, that is, investors can sue the host State to international arbitration for alleged violations of investment treaties, but on the other hand the state cannot initiate a lawsuit to international arbitration. Lawsuits are made by investors directly and can ignore the national justice system. This means that the state releases its immunity and agrees that third parties (mostly also *ad hoc* parties) can judge its decisions, laws, or actions. In international arbitration, national legislation has no stronger role to play than evidence. Arbitral tribunals tend to ignore the decisions of national courts (even constitutional courts), thus taking the position of being the highest institution for the judiciary. The investment arbitration tribunal reviews the decisions of state executive bodies to find out whether they are in accordance with international law. This puts great pressure [44] on the country's executive because it considers not only all national laws before acting, but also the rules of international bodies.

Third, administrative sovereignty. As with every international treaty, investment treaties reduce the scope of sovereignty. In particular, an investment treaty would restrict a country's sovereign

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[36] Dolzer R. Schreurer, *Principles of international investment law*. 1st pub. Oxford: Oxford University Press, 2008, Pp. 23
[37] *Ibid*.
[38] *Ibid*., hlm. 10.
[39] M. Sornarajah, 2010. *Toward Normlessness: The Ravage and Retreat of Neo-Liberalism in International Investment Law*, Y.B. INT'L INVESTMENT L. & POL'Y 595. p.635–641;
[40] Jose E. Alvarez, *The Emerging Foreign Direct Investment Regime*, 99 AM. Sec. INT'L L. (Proceedingss of the Annual Meeting) Pages 94-97.
[41] See *Lauder v. The Czech Republic*, Final Award, 3 Sept. 2001, 9 ICSID REP. 66 and *CME v. The Czech Republic*, Partial Award, 1Sept. 3. 2001, 9 ICSID REP. 121.
[42] Barton Legumes, *Options to Establish an Appelate Mechanism for Investment Disputes*, deep APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES, Karl P. Sauvant; *The Rise of International Investment Agreements and Investment Disputes*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 3.7 (Karl P. Sauvant ed., 2008).
[43] Gus Van Harten, 2007, Investment Treaty Arbitration and Public Law, Volume. 18.
[44] Gus Van Harten. 2014, *Restraint Based on Relative Accountability. In: Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration*. Published to Oxford Scholarship Online: January. Pp. 2.

rights to require foreign investors to comply with the domestic administrative legal system. Allsubstantive clauses of PII are in various ways pursued so as to determine and narrow down the types of domestic administrative regulations that foreign investors must comply with. [45] The yurisprudence tribunal of the resulting investment is based on a very vague and common clause in almost all areas of administrative law, from tax law to bankruptcy issues, from government immunity laws to export regulations and, in particular, licensing process requirements. The right time to appeal, the process of determining the relevant facts, and the administration of justice in general. Thisis a response to investor concerns about the predictability and stability of the domestic legal framework governing their investments. Foreign investors' expectations of administrative stability and thehost country's expectation of its sovereignty to control its administrative laws are governed by investment treaties that essentially benefit the interests of investors.[46]

These three crucial aspects show that the IIGF applies standards that limit the sovereignty of the legislature, judiciary, and administration of the state, because in fact, the making[47] or amendment of laws is clearly an act of sovereign authority because laws cannot be promulgated by private parties (in this case, there is a view that the state act in a private capacity). Likewise, the ruling of trials by domestic courts and the decision-making of governments by the government are inherently [48]the sovereign authority of the state. The above article explains the asymmetrical importance between investment protection and state density. Protection in PII is *one-sided*, imposing obligations only on the State. Furthermore, many IIGF support investment protection as the primary purpose of the agreement and divert non-investment purposes as secondary purposes. Therefore, the need to pay more attention to the sovereignty and interests of the host country is increasingly highlighted in today's generation of PII. Today's negotiations and interpretation of investment treaties explicitly require guarantees of the host country's sovereign authority. This intention in the negotiation of investment treaties reflects the need for a balance in the international investment protection system to guarantee a balance between state sovereignty and investment protection, between domestic courts and arbitral tribunals, and between investment and non-investment matters.

IV. Comparative Public Law Concepts for Balance in PII

IV.1 International Investment Treaties as Public Law

The protection of investment treaties has really become a global phenomenon because it limits the actions *of countries vis a vis* foreign investor, this phenomenon occurs in developing countries as well as developed industrial countries. With regard to the conflict that arises from the relationship between the sovereignty of the state of investment protection, several crucial factors are behind it, namely, ***first***, agreements that are less clear, or even ambiguous, the principles of investment protection are broadly formulated, thereby limiting the sovereignty of states without providing clear guidelines to arbitral tribunals with respect to the scope of obligations under such agreements. ***Second,*** conflicting, and inconsistent interpretations by arbitral tribunals regarding the principles of investment protection standards. Differences in interpretation do not only occur in disputes over different investment treaties, but also disputes over the same agreement. *K**etiga***, the fragmentation of international investment law became a polemic of arbitration decisions, consequently lacking stability, and predictability in decision-making by arbitral tribunals for both investors and countries. ***Fourth***, the perception of internal bias that benefits foreign investment is related to non-investment policy choices, such as protection of public health, cultural heritage, labor standards, or the environment.

These four factors greatly affect the sovereignty of the state, and in turn affect all aspects of administrative, legislative and judicial decisions, as well as state *policy-making*, for example

[45] Rudolf Dozler, 2006, *The Impact of International Investmetn Treaty on Domestic Administrative Law*Internalational Law and Politcs, IILJ, hLm. 953-972.
[46] *Ibid*, hLm. 970.
[47] Gus Van Herten, 2005. *The Emerging System of International Investment Arbitration*, UMI Dissertation Publishing, Pp. 114.
[48] C. Harlow and R. Rawlings, 1997. *Law and Administration*, London: Butterworths, Pp. 605.

disputes over the cancellation or non-extension of hazardous waste disposal operation licenses, the scope of[49] *the legislator's emergency powers* when there is an economic crisis, the regulation of supervision of public facility companies, the rules and prohibitions of harmful substances, the protection of cultural property, or the implementation of non-discrimination and anti-tobacco policies. Such investment treaty disputes essentially involve key issues of public law and areas of economic policy. Thus, the impact of investment treaties on public law is enormous. [50][51][52][53][54][55][56] Overall, the main issue of the four crucial factors above is the criticism of PII which can be called a *public law chalange* challenge. This is closely related to investment treaty arbitration which limits the authority of the government; therefore, it concerns public legal issues, but without pursuing a dispute resolution mechanism that is in accordance with the main values of public law, namely democracy, equal treatment, separation of powers, legal certainty and predictability, or in other words *the rule of law*. Although investment arbitration is [57] acceptable in a commercial context, dispute resolution mechanisms are unacceptable in the view of public law, whereby the legality of the exercise of the authority of public power by the state is tried based on standards made by third parties (international arbitrators) appointed by the parties to the dispute where the third party has no democratic legitimacy. The international investment protection system, in this perspective, poses a threat to the sovereignty of states, to the integrity and values of domestic public law and, and most importantly, the right to *self-determination (national self-determination)*. [58] The practice of this investment protection system is actually based on the logic of substitution. The point is that internationalinvestment treaties are functionally the same as the principle of constitutional guarantees and administrative law at the domestic level.[59]

Furthermore, aninvestment treaty rbitrase can be understood to be more similar to a domestic administrative or constitutional *judicial review* than commercial arbitration, although

[49] See *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003: *Metalclad Corp.. v.United Mexican States*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award of August 30th, 2000.

[50] See *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case ARB/01/8, Award of 12 May 2005; *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006; *BG Group Plc v. Argentina*, UNCITRAL, Award of 24 December 2007; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008; *National Grid plc v. The Argentine Republic*, UNCITRAL, Award of 3 November 2008.

[51] See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2004; *Aguas Del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction of 21 October 2005; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic*, ICSID Case No ARB/03/19 and *AWG Group v. Argentine Republic*, Decision on Liability, 30 July 2010 (all cases concerning the water sector).

[52] See *Methanex Corporation v. United States,* UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005; *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL (NAFTA), Award of 2 August 2010.

[53] See *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits of 20 May 1992: *Glamis Gold, Ltd. v. United States of America*, UNCITRAL (NAFTA), Award of 8 June 2009.

[54] See *Piero Foresti, Laura de Carli, and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award of 4 August 2010.

[55] See *FTR Holding S.A., Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, registered on 26 March 2010 (pending).

[56] See *Cf*. Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 NYU JOURNAL OF INTERNATIONAL LAW AND POLITICS 953 (2006).

[57] Gus Van Harten, 2007, Investment Treaty Arbitration and Public Law 152–75.

[58] Noah Rubins & N. Stephan Kinsella, 2005, International Investment, Political RUti And Dispute Resolution: A Practicioner's Guide, Pp. 309

[59] S. W. Schill, 2010. International Investment Law and Comparative Public Law, Oxford: OUP

international investment law uses arbitration procedures to resolve investor-state disputes. Likewise, international material tests, for example at the ECJ, ECHR, or the World Trade Organization (WTO). Overall, PII is more appropriately viewed as a public legal discipline because the provisions of IIGF impose restrictions on the authority of state power *vis a vis investor* and give investors access to independent dispute resolution forums to implement such restrictions. Where the guarantee of dispute resolution itself is equivalent to the guarantees that exist in the administrative law and the law of the domestic constitution, in this case, administrative law and domestic constitutional law constitute the crystallization of the national public legal system. Thus, a straight line can be drawn that the law of investment treaties is actually a public law.

4.2. Comparative Public Law

The concept of comparative public law was put forward by Stephen Schill. There are many similarities between disputes arising in investment treaty arbitration and at the domestic level, i.e. when individuals are faced with abuse of power by governments. However, at the same time, it is important to understand that PII remains a discipline of international law separate from the domestic public law of any country. In other words, similarities also exist between international investment law and other international regimes. Thus, in a comparative public law approach to international investment treaties, the same problems in domestic public law and other international legal regimes must be studied in order to develop solutions in international investment arbitration. This approach was supported by Thomas Wälde, who was illustrated by his [60]*separate opinion* in the international *Thunderbird Gaming Co. v. United Mexican States* dispute. Wälde states that the normative background of protection against logical expectations can be explained and realized using comparative contract law concepts, such as[61] *estoppel* and *venire contra factum proprium*, but most importantly by using comparative public legal analysis for similar concepts applied in ECJ, ECHR, and WTO jurisprudence.

How is the Implementation of a comparative public law approach so as to provide a solution to outline the conflict between investment protection and state interests as mentioned above? Santiago Montt demonstrates this by referring to the classical doctrine of comparative law in public international law, which is a reference in Article 38 (1) (c) of the Statute of the International *Court of Justice (statute*) on 'general legal principles recognized by civilized states' as a source of international law applicable to the interpretation of general agreements through Article 31 (3) (c) *Vienna Convenstion on the Law of Treaty* as part of "the governing international law rules applicable in the relationship between the parties." As a source of international law, the general principle of public law as well as customary international law, can influence the interpretation of investment treaties. These principles of common law consist of principles generally recognized in domestic law, general principles derived from international relations, and general principles inherent in any type of legal order. Such principles of common law can be developed by quality comparative legal comparison methods, taking into account domestic legal regimes as well as other international legal regimes. Therefore, comparative public law and the development of general principles of international investment law are relevant and appropriate

[60] *Ibid*

[61] Int'l Thunderbird, NAFTA Ch. 11 Arb. Trib., ¶ 24 (Separate Opinion of Thomas) Wälde) (drawing on a wide range of related concepts under both domestic and international law in order to clarify the normative background of the protection of legitimate expectations as part of fair and equitable treatment under Article 1105 of NAFTA). As Quoted deep Stephan W. Schill, 2011, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*. Virginia Journal of Intrtnational Law. Vol.52.No.1 Pp. 87

tools for the application and interpretation of substantive provisions and investment treaty arbitration. The comparative public law approach does some rare in comparative analysis. [62][63][64]

First, develop the concept of standards for national treatment, fair and equitable treatment, the prohibition of direct and indirect expropriation of assets without compensation, as well as full protection and safeguards, as a concept of public law and draw similarities with the necessary concepts of public law used in domestic law and other international regimes. ***Second***, it analyzes more specifically how different public legal systems handle equal situations in terms of the authority of the state to take action against private parties.

The comparative public law approach provides several solutions to outline the conflict between the protection of investments and the interests of the state. ***First***, mclarifying the oftenunclear interpretation of investment protection standards and determining the level of state accountability in a specific context. Comparative public lawallows investment courts to infer institutional and procedural requirements of comparable domestic and international standards to interpretspecific contexts. [65] to determine the limits that the concept of acceptable expectations applies to the regulatory authority of the state if there are no certain promises to be fulfilled from the existing regulations. ***Second***, it balances investment and non-investment protection. comparative public law analysis can also be used to provide justification for a country's attitude towards foreign investors. For example, the waiver of investor-state contracts in emergency situations, generally accepted by the domestic legal system, investment courts may or transfer such findings to the international level as a statement of a general principle. In this context, comparative public law can be a benchmark not only for developing minimum standards of investment protection but also maximum standards of investment protection, that is, standards that do not impose restrictions on domestic legislators, administrations, and courts that are heavier than the restrictions extended in a comparative perspective, by each of the principles of domestic public law. Similarly, the approach and concept of public law explains how concerns about non-investment issues and the tensions related to the protection of investments they generate, are processed, and resolved at the domestic level, for example by applying the concept of proportionality to balance the protection of investment and the public interest. [66][67][68]

Third, ensure consistency in the interpretation and application of investment agreements because interpretive methods will be uniform for all investment treaties. ***Fourth***, ensure consistency of cross-regime analysis and reduce the negative impact of fragmentation by emphasizing the equality and openness of international investment law to other international international regimes. A very promising area for such an approach is the evaluation of comparative jurisprudence developed by international courts in the context of human rights and the environment. A comparative public law approach to international investment law can also be used in cross-regime comparisons with other international legal regimes. ***Fifth***, legitimize arbitration jurisprudence by showing that the remedies adopted by investment treaty arbitrations are the same as those adopted by domestic courts or other international tribunals.

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[62] S. Montt, 2009. State Liability in Investment Treaty Arbitration (Oxford: Hart) Pp. 372

[63] Wolfgang Friedmann, 1963, The Uses of "General Principles" in the Development of International Law, 57 Am. J. INT'L L, hp. 279

[64] Stefan Kadelbach - Thomas Kleinlein, 2007. International Law: A Constitution for Mankind? An Attempt at a Re-Appraisal with an Analysis of Constitutional Principles, GERMAN Y.B. INT'L L. Pp. 303

[65] Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Liability (Dec. 27, 2010)

[66] Stephan Schill, 2010. Umbrella Clauses as Public Law Concepts in Comparative Perspective, deep International Investment LAw And Comparative Public LAw, Pp. 317,

[67]Santiago MOnt, 2009, State Liability in Investment Treaty Arbitration, State Liability Investment Treaty Arbitration , *Global Constitutiona and Administrative law in The BIT,* Pp. 74–82

[68] Benedict Kingsbury & Stephan W. Schill, 2010. Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest: The Concept of Proportionality, deep International Investment LAw And Comparative Public LAw. hLm. 75–104.

Overall, the above comparative public law analysis may influence the interpretation and application of substantive provisions and international investment treaty arbitrations, both regarding investor-state dispute resolution and investment substantive provisions. Therefore, comparative public law can balance the sovereign authority of states and the interests of investor protection in international investment treaties based on public law and apply them in accordance with the general principles of law.

V. CLOSING

Therefore, international investment law has core functional similarities with domestic administrative and constitutional reviews of government actions at both the domestic and international levels, including under various human rights instruments, such as the European Convention on Human Rights. From a functional perspective, international investment law is therefore a discipline of public law.

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