

**ON THE APPLICATION OF THE PRINCIPLE OF
PROPORTIONALITY IN ICSID ARBITRATION AND
PROPOSALS TO GOVERNMENT OF THE
PEOPLE'S REPUBLIC OF CHINA**

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I. INTRODUCTION

The proportionality principle applied by the International Centre for Settlement of Investment Disputes (ICSID) has not caught the attention of Chinese scholars or authorities. Even though the principle is applied throughout courts and tribunals such as the Permanent Court of International Justice, the International Court of Justice and the Dispute Settlement Body of WTO, its application by ICSID seems to have just begun. Inasmuch as the application of the proportionality principle will affect the sovereignty of the host state more severely, and considering that from the perspective of China, most of the Chinese new round bilateral investment treaties (BITs) tend to accept ICSID jurisdiction across the board, and China is not very good at the administration of foreign investment, in the future, the principle of proportionality might be used in ICSID arbitration to challenge the Chinese government's regulatory power. This article discusses these issues in four sections. Firstly, it broadly explains what the principle of proportionality properly means, especially compared with relevant principles in international investment law. It concludes that the proportionality principle is more demanding and has more effects on the host state's regulatory rights to foreign investment than the principle of non-discrimination. In case it is considered as a key element of the fair and equitable treatment principle, it will be the biggest deterrent to the host regulatory power. Secondly, the article introduces the application of the

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principle of proportionality in *Tecmed v Mexico*¹ and subsequent cases. Above all, the effects of applying the proportionality principle in ICSID arbitration are analysed. Thirdly, the article outlines the realities and trends of Chinese practices in the BITs, and points out the severe problems within them. Finally, this article offers concrete proposals to the Chinese government from the aspects of laws and facts.

II. AN EXPLANATION OF THE PRINCIPLE OF PROPORTIONALITY

A. Introduction to the Principle of Proportionality

Generally speaking, the principle of proportionality deals with the relationship between end and means, and it demands there should be a reasonable relationship of proportionality between the means employed and the aim sought to be realized. Its underlying concept is to balance conflicting or competing benefits.² But in my opinion, conflicting benefits should be between public benefits and private benefits, a fair balance between the competing public and private interests is the objective of applying the proportionality principle, however, we cannot say that balance of benefits amounts to the proportionality principle. After comprehensively considering municipal law, European Community law, and international law, we may conclude that the proportionality principle constrains the power of states or international organizations, but protects private rights so as to balance different benefits. The principle of proportionality is also a structural concept that includes three sub-principles, the principle of suitability, the principle of necessity, and the principle of proportionality *stricto sensu*. The principle of suitability requires that the means be suitable or helpful to achieve the legitimate objectives, ie, the end itself must be legal and justifiable firstly.³ The principle of necessity requires that the

¹ ICSID, *Case No. ARB/00/2 Award* (2003)

<www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf> at 7 May 2006.

² Jost Delbrück, 'Proportionality', in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law Volume III* (1997) 396.

³ This is a controversial question, some authors argue it is not included in the proportionality principle, see Zhu Weiguo, *Rising stars over Europe : Selected Dissertation from EU-China Legal and Judicial Co-operation Programme* (2003) 595, but others argue it is included in the proportionality principle, see Michael Gruenberger, *A Duty to Protect The Rights of Performers? Constitutional Foundations of An Intellectual Property Right*, (2006) 24 *Cardozo Arts & Entertainment Law Journal* 676.

means be necessary to achieve the end and if there are any other less restrictive means to the applicants' interests capable of producing the same result, the less restrictive means should be adopted. The principle of proportionality *stricto sensu* demands that the means not excessively restrict the affected interests, compared with the interests pursued.⁴ The necessity principle is subsequent to the suitability principle, and demands comparison and choice among the different means with the same end. However, according to the principle of proportionality *stricto sensu*, namely, the true proportionality principle means, if the harm exceeds the benefits that the means pursue, and the side-effects will be too much, the end should be abandoned. Therefore, if the end is very significant, the means are more likely to be considered legal.

In the European Union, the principle of proportionality is becoming a constitutional principle.⁵ The principle also exists in international law and is spreading to various branches. In the fields of self-defence, retaliation, countermeasures, humanitarian law, and human rights law, the principle of proportionality has become customary international law.⁶ The existence of the principle of proportionality in WTO law has

I support the former, this opinion also has been confirmed by plenty of judicial decisions of the European Court of Justice and the European Court of Human Rights, and even a domestic court. For example, in the case of *R v Sharpe* [2001] 1 SCR 45, ¶83-110, there, as the first step in showing the proportionality, rational connection is tested, minimal impairment is the second prong of the proportionality test, and proportionality is the final balance.

⁴ See Takis Tridimas, *The General Principles of EC Law*, (1999) 91-92; Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (1996) 26-36; Meihard Hilf and Sebastian Puth, 'The Principle of Proportionality on its Way into WTO/GATT Law', in Armin Von Bogdandy and Petros C. Mavroidis (eds), *European Integration and International Coordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (2002) 199-218.

⁵ The use of Union competences is governed by the principle of subsidiarity and proportionality. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. *Treaty Establishing a Constitution for Europe*, opened for signature on 29 October 2004, [2004] OJ C 310, art 1-11, para 1, 4, in Barry E. Carter (ed), *International Law: Selected Documents* (2005) 298-299.

⁶ See Tanaka Yoshifumi, 'Reflections on the Concept of Proportionality in the Law of Maritime Delimitation' (2001) 16 *The International Journal of Marine and Coastal Law* 433, n 1.

indisputably been proven by reviewing legal texts and related judicial decisions. In legal texts, the phrases 'least trade restriction', 'necessary' and 'equivalent', embody the principle of proportionality. In judicial decisions, the proportionality principle requires that trade restrictions not be excessive to accomplish other legitimate objectives, and it tries to balance free trade and other interests.⁷ It is obvious that under different circumstances, the proportionality principle is used to harmonize different interests.

B. The Relationships with Related Principles

In international investment law, major principles related to the principle of proportionality include the non-discrimination treatment principle and the fair and equitable treatment principle. The significance of applying the principle of proportionality in ICSID arbitration can be clarified through comparing it with other relevant principles.

1. Non-discrimination treatment principle

In international investment law, the national treatment (NT) principle and the most-favoured nation treatment (MFN) principle embody and guarantee the realization of the non-discrimination treatment principle. Under the NT principle, the host state should offer the foreign investor and corresponding investment no less favourable treatment than the treatment offered to national investors and corresponding investment. The NT principle reflects a kind of relative treatment standard, and the reference standard is the treatment of national investors and corresponding investment. The MFN principle means that the treatment given to foreign investors and corresponding investments should not be less favourable than the treatment given to the third state investor and corresponding investment. Therefore, MFN is also a relative treatment standard and the treatment that the foreign investor and corresponding investment can expect depends on the treatment standard given to the third state investor and corresponding investment.

However, under the proportionality principle, a measure's legality does not depend on whether the measure is applied equally. Even an equally applicable measure must conform to the demand that the end be legal and the means necessary. This has also been reflected in the clause of the Korea-US Free Trade Agreement:

⁷ See Han Xiuli, *On the Principle of Proportionality in WTO Law* (2007) Chapter 2.

Except in rare circumstances, such as, for example, when a measure or series of measures is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.⁸

As one commentator points out, 'non-discrimination is not an easy applicable examination because it must involve necessity and proportionality examination when carrying out the non-discrimination treatment principle'.⁹ Some writers also consider that a discriminatory measure only conforming to the principle of proportionality can be legitimate. For example, McKean believes that discriminatory treatment is legitimate if it aims at pursuing a legitimate end, has objective reasons, and the means employed to achieve the end are proportionate.¹⁰

From time to time, the application of the proportionality principle is entangled with the non-discrimination treatment principle.¹¹ For example, in the case of *A v Secretary of State for the Home Department*, as part of their proportionality argument, the appellants attacked s 23 as discriminatory. They contended that, being discriminatory, the section could not be 'strictly required' within the meaning of article 15 and so was disproportionate. Among others, Lord Hope of Craighead held that:

I would hold that the indefinite detention of foreign nationals without trial has not been shown to be strictly required, as the same threat from British nationals whom the government is unable or unwilling to prosecute is being met by other measures which do not require them to be detained indefinitely without trial. The distinction which the government seeks to draw between these two groups- British

⁸ Free Trade Agreement between the Republic of Korea and the United States of America, June 30, 2007, Annex 11-B (3)b

< <http://www.mofat.go.kr/index.html> > at August 7, 2007.

⁹ Joel P. Trachtman, 'Lessons for the GATS from Existing WTO Rules on Domestic Regulation', in Aaditya Mattoo and Pierre Sauvé (eds), *Domestic Regulation and Service Trade Liberalization* (Fang Liying trans, 2004 ed) 61.

¹⁰ See W.A. McKean, 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *British Year Book of International Law* 287.

¹¹ See *Dean Milk Co v City of Madison*, 340 US 349 (1951); *Maine v Taylor*, 477 US 131 (1986).

nationals and foreign nationals—raises an issue of discrimination. But, as the distinction is irrational, it goes to the heart of the issue about proportionality also.¹²

In conclusion, non-discriminatory treatment is only a 'relative' treatment standard; it cannot guarantee the investment measure will not restrict and impair foreign investment excessively, or that the foreign investor and corresponding investment has been treated fairly and reasonably.¹³ It only ensures the treatment of the foreign investor and corresponding investment is not less favourable than that enjoyed by the like national investor and corresponding investment or the third state investment. In contrast, the principle of proportionality (including suitability, necessity, and proportionality *stricto sensu*) affords an 'absolute' standard which requires a country to provide certain treatment to foreign investors and corresponding investment. Reasonableness does not depend on the treatment conferred on national or third state investment. Compared to the non-discrimination treatment, the principle of proportionality's restrictions on state measures regulating investment appear more onerous with greater intervention of the international legal system in state regulatory power. Thus even if an investment measure adopted by a state meets the non-discrimination treatment principle, it might not satisfy the requirements of the proportionality principle. Furthermore, in most cases, it is easier and more objective to judge the existence of discrimination than the lack of proportionality, because the standard of discrimination is expressed such as nationality, race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language, and so on, but the standard of proportionality often has to depend ultimately on the facts and the conscience of judges or arbitrators.

¹² *A v Secretary of State for the Home Department* [2004] UKHL 56, ¶132 (Lord Hope of Craighead).

¹³ On the relativity of non-discrimination treatment principle and absoluteness of the principle of fair and equitable treatment, see Catherine Yannaca-Small, *Working Papers on International Investment, Fair and Equitable Treatment Standard in International Investment Law* (2007) Organisation of Economic Cooperation and Development <<http://www.oecd.org/dataoecd/22/53/33776498.pdf>> at 4 May 2007.

2. The fair and equitable treatment

The principle of proportionality is more concrete than the fair and equitable treatment principle. Although fair and equitable treatment is an important standard in investment protection agreements, it is a very flexible concept with an ambiguous definition. Different understandings exist between developing countries and developed countries. Most developing countries consider that the standard for judging the treatment of foreign investment as fair and equitable depends on the actual circumstances in the host state. Developed countries strongly argue that the baseline of fair and equitable treatment to foreign investors and corresponding investments is an 'international minimum standard of treatment'.¹⁴

However, traditionally, the fair and equitable treatment principle has not been regarded as including the principle of proportionality. Recently, some scholars have advanced this opinion. For instance, in the book edited by Professor Muchlinski, chief adviser of the United Nations Conference on Trade and Development, it is stated that:

The concept of fair and equitable treatment is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated on account of discrimination or other unfair measures being taken against its interests. It is, therefore, a concept that depends on the interpretation of specific facts for its content. At most it can be said that the concept connotes the principle of non-discrimination and proportionality in the treatment of foreign investors.¹⁵

This argument regards the principle of proportionality as included in the fair and equitable principle. This offers the legal system a basis for the application of the principle of proportionality in investment arbitration. It may also be regarded as an addition to the definition of the fair and equitable treatment principle. In fact, a certain ICSID arbitration case has related the principle of proportionality to the fair and equitable principle. In *MTD v Chile*, the parties accepted that the host state was obligated to treat the investment fairly and equitably. The parties also agreed with Judge Schwebel's statement that 'the meaning of what is fair and equitable is defined when that standard is

¹⁴ See *Fair and Equitable Treatment, Series on Issues in International Investment Agreements*, [31-32], UNCTAD/ITE/IIT/11 (1999).

¹⁵ J. P. Lavié, *Protection Et Promotion Des Investissements: Étude De Droit International Économique* (1985) 95, cited by Peter Muchlinski, *Multinational Enterprises and the Law* (1995) 625.

applied to a set of specific facts, fair and equitable treatment is a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, non-discrimination, and proportionality'.¹⁶ Since the principle of proportionality balances competing interests, it seems to be reasonable to regard it as a part of the fair and equitable principle.

III. ANALYSIS OF THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY IN ICSID ARBITRATION

A. *The Application of the Principle of Proportionality in ICSID Arbitration*

The principle of proportionality was applied for the first time in deciding indirect expropriation in *Tecmed v Mexico*. On July 28, 2000, the claimant, Tecmed, applied to ICSID for arbitration and argued that the non-renewal of Mexican authority constituted indirect expropriation of its assets, and breach of the BIT between Spain and Mexico. The Arbitral Tribunal analysed Mexico's regulatory investment measures under the principle of proportionality. The Tribunal noted and considered the economic impacts and burdens that the measure imposed on the investor, the regulating investment power of the host state, the public interests that the host state intended to protect, and the protection, including compensation, awarded by law to the investor. The Tribunal demanded a reasonable relationship between the burden imposed on the foreign investor and the interest that the expropriating measure wanted to achieve. The Tribunal considered the reasons for the non-renewal, and whether such reasons could render the measure proportional to the deprivation of rights sustained by the investor and the negative economic impacts on the claimant arising from such deprivation.¹⁷ The Tribunal held that the economic and commercial operations after the non-renewal of the permit were fully and irrevocably destroyed,¹⁸ and that these means were disproportionate to the ends.

¹⁶ ICSID, *MTD v Chile*, Case No. Arb/01/7 Award (2004) [¶109] <<http://www.asil.org/ilib/MTDvChile.pdf>> at 5 May 2004.

¹⁷ ICSID, *Tecmed v Mexico*, Case No. Arb/(AF)/00/2 Award (2003) [¶122, 132] <<http://www.worldbank.org/icsid/cases/lado-051903%/020-English.pdf>> at 15 November 2007.

¹⁸ *Ibid* ¶117.

Since *Tecmed v Mexico*, the principle of proportionality has been applied in subsequent ICSID arbitrations. *Tecmed v Mexico* seems to be a strong precedent. Some scholars have argued that this application has created a judicial precedent in international investment arbitration and thus is a leading case in regulatory expropriation.¹⁹

Soon after *Tecmed v Mexico* was decided, on June 26, 2001, MTD filed a request for arbitration with ICSID against the Republic of Chile. ICSID reported its verdict on May 25, 2004. The verdict invoked and developed the jurisprudence of *Tecmed v Mexico*, particularly the principle of proportionality and the fair and equitable principle.²⁰

In *Aucoven v Venezuela*, Venezuela emphasised that Aucoven's claim did not meet the requirement of proportionality stipulated in Venezuelan law.²¹ In *CMS v Argentina*, the Argentine government as Respondent claimed that the measure it adopted was reasonable and proportionate to the objective pursued.²² In *Azurix v Argentina*, the tribunal supported the proportionality test approach adopted in *Tecmed v Mexico*, and the US-based water services firm Azurix won its claim against the Argentine Republic and recouped a portion of its sunk costs, i.e., a \$165 million (US) award against Argentina for Argentina's breach of the US-Argentina BIT.²³

In *LG&E v Argentina*, the Tribunal's analysis referred to paragraph 122 of *Tecmed*:

With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed. The

¹⁹ See Jack J. Coe, Jr. and Noah Rubins, 'Regulatory Expropriation and the Tecmed Case: Context and Contributions' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005) 597, 624, 653-56.

²⁰ ICSID, *MTD v. Chile, Case No. Arb/01/7 Award* (2004) [¶1, 114] <<http://www.asil.org/ilib/MTDvChile.pdf>> at 5 May 2004.

²¹ ICSID, *Aucoven v Venezuela Case No. ARB/00/5 Award* (2003) [¶338] <www.worldbank.org/icsid/cases/Award_Total.pdf> at 22 February 2007.

²² ICSID, *CMS v Argentina Case No. ARB/01/8 Award* (2005) [¶288] <www.worldbank.org/icsid/cases/CMS_Award.pdf> at 12 May 2005.

²³ ICSID, *Azurix Corp v Argentine Republic, Case No. ARB/01/12 Award* (2006) [¶311] <www.iisd.org/pdf/2006/itn_azurix_argentina_july.pdf> at 12 May 2007.

proportionality to be used when making use of this right was recognized in *Tecmed*, which observed that “whether such actions or measures are proportional to the public interest presumably protected thereby and the protection legally granted to investments, taking into account that the significance of such impact, has a key role upon deciding the proportionality.”²⁴

In case of *Telenor Mobile Communications A S v Hungary*, Telenor contended that, “[r]egulatory measures pursuing aims other than the interest of the public (lack of legitimate aim) or that are disproportional (lack of fair balance between the aim sought and means employed) qualify as *expropriation* with no doubt.”²⁵

In *Siemens A G v Argentina*, the proportionality principle is mentioned several times. For example, Siemens argued that the State’s authority to modify the contract was limited by the proportionality principle (Article 28 of the Argentine Constitution).²⁶ On whether regulation would be expropriatory, Argentina referred to the proportionality test advanced in *Tecmed v Mexico* balancing the measures taken and the public interest pursued, as well as the deference due to the State when it defines public policy issues.²⁷ Siemens contended that proportionality and reasonableness may play a role in assessing whether the expropriation power was exercised properly. These criteria do not affect the question whether an expropriation exists or not.²⁸ Siemens also referred to *Waste Management Inc v United Mexican States* and *MTD v Chile*, where the tribunals used terms such as arbitrariness, idiosyncrasy, injustice, lack of good faith, lack of due process and proportionality.²⁹ Argentina also relied on *Tecmed v Mexico* as an example in terms of considering the purpose and proportionality of the measures taken. The tribunal observed that these considerations were part of its determination of

²⁴ ICSID, *LG&E v Argentina Case No. ARB/02/1 Decision on Liability Award* (2006) [¶195] <http://ita.law.uvic.ca/documents/ARB021_LGE-Decision-on-Liability-en.pdf> at 12 May 2007.

²⁵ ICSID, *Telenor Mobile Communications AS v Republic of Hungary, Case No. ARB/04/15 Award* (2006) [¶40] <http://www.worldbank.org/icsid/cases/pdf/ARB0415_telenor-v-hungary-award.pdf> at 13 September 2006.

²⁶ ICSID, *Siemens A.G. v Argentina Case No. ARB/02/8 Award* (2007) [¶155] <<http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>> at 17 May 2007.

²⁷ *Ibid* ¶223.

²⁸ *Ibid* ¶238.

²⁹ *Ibid* ¶285.

whether an expropriation had occurred, instead of its determination of compensation.³⁰

As the above examples illustrate, the term 'proportionality' is becoming an increasingly important concept in ICSID jurisprudence. A number of standards have been applied in nationalization cases, such as proportionality, necessity, and non-discrimination.³¹

B. How to Understand the Application of the Principle of Proportionality in ICSID Arbitration

In theory, ICSID's application of the principle of proportionality aims to review whether the regulatory investment measure is excessive and whether it constitutes expropriation. An arbitration tribunal analyses whether the regulatory measure breaches a balance between private rights and public interests. It also aims to identify the abuse of regulatory power to promote certain narrow political and economic interests. According to public choice theory, decisions of political officers often are subject to the need to achieve short-term political objectives or boost the given benefit they represent. Thus politicians do not always act in the public interest, and so, judicial review is necessary to ensure that their actions are not disguised as protectionism, or shady means to deprive the private sector of its property rights, or malicious and fictitious exercises of power. From time to time, investment agreements enumerate (non-exhaustively) public policy objectives such as health, safety and environmental protection. Protectionist measures may emerge under the pretext of protecting all kinds of public interests, even those not listed. For this reason, some scholars think that:

Similarly, the qualification that the regulation be "designed and applied" to protect "legitimate objectives" invites consideration of what might be termed "proportionality", both as to the breadth of the regulation and the manner in which authorities administer the law. Questioning what objectives are "legitimate" of course only begins the argument. Notwithstanding a legitimate objective, a facially unobjectionable regulatory regime may serve as cover for arbitrary official acts and over-reaching, such that the original objective is beside the point. Similarly, a clumsy or

³⁰ Ibid ¶1354.

³¹ See Thomas Waelde and Abba Kolo, 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law' (2001) 50 *International & Comparative Law Quarterly* 811.

poorly grounded attempt at regulation may produce a regime gravely disproportionate in its impact on the foreign investor in light of the evil to be addressed and the nature of the alternatives available to lawmakers.³²

The proportionality principle demands that the measures adopted are not only for legitimate objectives, but also to keep an appropriate balance between public and private needs. Therefore, the principle of proportionality has vast room for application in international investment arbitration.

In fact, both the judicial practice of the European Court of Human Rights and the regulatory takings jurisprudence of the United States use proportionality analysis of many elements to decide complaints against regulatory takings. The proportionality approach has been explicitly adopted in recent U.S. investment treaty practice by explicitly mandating tribunals to consider the three factors of the principle of proportionality in the expropriation analysis.

Although the analysis on the proportionality principle in ICSID arbitration is not detailed, however, the application of the principle of proportionality has shown a tremendous threat to the regulatory power of the host state over investment since the measures adopted by the host state may lose their legitimacy for not conforming to the principle of proportionality. In *Tecmed v Mexico*, the Arbitral Tribunal concluded that if the regulatory measure is excessive compared to public interests, it cannot be excluded from the definition of expropriation, and any burden imposed on foreign investors through expropriation must be proportionate to the objective pursued. Thus, the tribunal held that Mexico's regulatory measures were illegal because they did not satisfy the proportionality test. Thus the principle of proportionality is a more demanding principle which challenges the host state's sovereignty.

IV. SUMMARY OF BITS PRACTICES OF CHINA

According to statistics from the United Nations Conference on Trade and Development, by February 12, 2007, China has concluded BITs

³² See Jack J. Coe, Jr., 'Emerging Dilemmas in International Economic Arbitration: The State of Investor-State Arbitration - Some Reflections on Professor Brower's Plea for Sensible Principles' (2005) 20 *American University International Law Review* 943-944.

with approximately one hundred and twenty countries.³³ Moreover, China is negotiating and entering into new BITs and modifying the original BITs.³⁴ Since China ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States on February 6, 1993, it has accepted ICSID jurisdiction from partly and conditionally to completely and unconditionally. In Professor Chen An's words, the 'four great safeguards' have been dismantled, that is, (1) abandoning the right to consent case by case, (2) the right to local remedies with priority, (3) the right to apply the host state's laws with priority, and (4) the right to invoke the exception for material security.³⁵

Firstly, ICSID jurisdiction is expanding. According to my statistics, from September 30, 1992 to June 17, 1999, 31 out of 92 BITs did not accept ICSID jurisdiction, 15 out of 92 accepted ICSID jurisdiction,³⁶ but only after several months' negotiation before resorting to ICSID and only on the *amount of compensation* resulting from nationalization and expropriation. For other disputes, the remedies from the competent court of the Contracting Party accepting the investment *with priority to* ICSID arbitration or under the condition of alternative, ICSID arbitration must be agreed to by the *two parties*. A typical example is Article 9 of the Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments³⁷:

- (1) Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party

³³ See *China Bilateral Investment Treaties (2007) Investment Instruments Online* <<http://www.unctadxi.org/templates/DocSearch.aspx?id=779>> at 1 May 2007.

³⁴ For example, China has revised BITs with the Russian Federation. It is going to revise its BIT with the Republic of Korea. China concluded a new BIT with India.

³⁵ See Chen An, 'Four Great Safeguards in Bilateral Investment Agreements Shouldn't Be Rashly Dismantled During Sino-Foreign Negotiation-Comments on Critical Provisions Concerning Dispute Settlement in the U.S. and Canada's Model BITs Text' (2006) 13 *Chinese Journal of International Economic Law* 3.

³⁶ The other parties are Republic of Korea, Lithuania, Chile, Iceland, Peru, Morocco, Israel, Yugoslavia, Saudi Arabia, Gabon, Cameroon, Macedonia, TFYR, Yemen, Barbados, Bahrain and Qatar.

³⁷ *China Bilateral Investment Treaties (2007) Investment Instruments Online* <http://www.unctad.org/sections/dite/iaa/docs/bits/china_germany.pdf> at May 1, 2007.

shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

(2) If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.

(3) If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to an international arbitration of the International Centre for the Settlement of Investment Disputes (ICSID), created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on March 18, 1965.

From June 17, 1999 to May 15, 2007, China signed 26 BITs, and only 7 did not accept ICSID jurisdiction. 18 agreements accepted ICSID jurisdiction across the board³⁸. All of these 18 BITs have provisions stating that *any dispute* arising out of an investment between one Contracting Party and an investor of the other Contracting Party, whenever possible, should be settled amicably between the two parties concerned, and at the *choice of the investor*, be submitted to ICSID arbitration. This means that ICSID is more likely to hear the case, which also means that China, as a host state, will lose more regulatory sovereignty. These provisions abandon rights to local remedies with priority, and expand ICSID jurisdiction. In other words, an investor can refer a dispute to ICSID for arbitration without using the administrative and judicial remedies of the host state in advance if a dispute arises and certain consulting periods and administrative reconsideration periods have passed.³⁹ The most representative clause is article 9 of the Agreement between the Government of the Republic of Finland and The Government of the People's Republic of China on the Encouragement and Reciprocal Protection of Investments, which provides as follows:

1. Any dispute arising out of an investment between one Contracting Party and an investor of the other Contracting

³⁸ The other parties are Congo, Botswana, Cyprus, Sierra Leone, Mozambique, Kenya, Netherlands, Myanmar, Bosnia and Herzegovina, Trinidad and Tobago, Côte d' Ivoire, Guyana, Germany, Benin, Latvia, Uganda, Russia and the Seychelles.

³⁹ See Wang Hailang, 'Falling Behind or Going Far Beyond The Limit? — China's Consent to the Jurisdiction of ICSID' (2006) 13 *Chinese Journal of International Economic Law* 6.

Party should, whenever possible, be settled amicably between the two parties concerned.

2. If the dispute has not been settled within three (3) months, from the date at which it was raised in writing, the dispute may, at the choice of the investor, be submitted:

(a) to the competent courts of the Contracting Party in whose territory the investment is made; or

(b) to arbitration by the International Centre for the Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965...⁴⁰

Article 10 of BIT between China and the Netherlands is another typical format:

1. Disputes which might arise between one of the Contracting Parties and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party shall, whenever possible, be settled amicably between the Parties concerned.

2. An investor may decide to submit a dispute to a competent domestic court. In case a legal dispute concerning an investment in the territory of the People's Republic of China has been submitted to a competent domestic court, this dispute may be submitted to international dispute settlement, on the condition that the investor concerned has withdrawn its case from the domestic court. If a dispute concerns an investment in the territory of the Kingdom of the Netherlands an investor may choose to submit a dispute to international dispute settlement at any time.

3. If the dispute has not been settled amicably within a period of six months, from the date either party to the dispute requested amicable settlement, each Contracting Party gives its unconditional consent to submit the dispute at the request of the investor concerned to:

a) ICSID...⁴¹

⁴⁰ *China Bilateral Investment Treaties (2007) Investment Instruments Online* <www.unctadxi.org/templates/DocSearch.aspx?id=779> at May 14, 2007.

⁴¹ *China Bilateral Investment Treaties (2007) Investment Instruments Online* <www.unctad.org/sections/dite/ia/docs/bits/china_netherlands.pdf> at May 14, 2007.

In addition, nearly all MFN clauses in China BITs state that: '[t]he treatment and protection shall not be less favourable than that accorded to investment and activities associated with such investments of investors of a third State.' They do not exclude their applicability in dispute settlement jurisdiction expressly, and thus give the investor a chance to claim expanding ICSID jurisdiction through the MFN clause. In most BITs concluded by China, general exception and essential security exception clauses are not included. However, the United States, Canada, India and IISD models all pay more attention to withholding rights to invoke the exception for general and essential security. According to Annex B.4 of the US Model BIT, the second situation addressed by Article 6(1) [Expropriation and Compensation] is indirect expropriation:

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.⁴²

In addition, article 18 of the US Model BIT defines 'essential security' as:

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or 2. to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the

⁴² *Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment Model BIT* (2004) Investment Treaty Arbitration <<http://ita.law.uvic.ca/documents/USmodelbitnov04.pdf>> at 17 May 2007.

maintenance or restoration of international peace or security, or the protection of its own essential security interests.⁴³

Sections (b) and (c) of Annex B.13(1) of Canada's Model BIT have a similar stipulation.⁴⁴ According to article 12 of the India Model BIT, 'nothing in the Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non discriminatory basis.'⁴⁵ In part 10 of the IISD Model, national security, taxation measures, general reservations and exceptions are stipulated as general exceptions, and are 'a safety valve'.⁴⁶

Secondly, there is a trend to emphasise the application of BIT, international law, and conflict of law. For example, typical clauses, such as article 9.5 of BIT between Finland and China, stipulate that a tribunal shall adjudicate in accordance with the provisions of the Agreement, the law of the Contracting Party involved in the dispute (including the rules on the conflict of laws) and the rules of international law applicable to both Contracting Parties. In addition, the fair and equitable clause is generally included in recent BITs concluded by China and foreign countries.⁴⁷ For example, the fair and equitable principle is involved in article 3 of the agreement between China and Finland. Investments by the investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party. But there is no fair and equitable treatment in the BIT between China and Bahrain.

⁴³ Ibid.

⁴⁴ See *Agreement between Canada and [Country] For The Promotion and Protection of Investments Model BIT* (2004) Investment Treaty Arbitration <<http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf>> at 17 May 2007.

⁴⁵ See *Agreement between the Government of the Republic of India and the Government of the Republic of [Country] for the Promotion and Protection of Investments, Indian Model Text of BIPA* (2003) Investment Treaty Arbitration <<http://ita.law.uvic.ca/Indiamodelbit.htm>> at 17 May 2007.

⁴⁶ *IISD Model International Agreement on Investment for Sustainable Development* (2005) <http://ita.law.uvic.ca/documents/investment_model_int_agreement.pdf> at 17 May 2007.

⁴⁷ See Yao Meizhen (ed), *Comparative Foreign Investment Law* (1993) 293; Chen An (ed), *International Investment Law* (1999) 440. BITs after 1999 increasingly strengthen the fair and equitable clause.

In light of all of these, the understanding and support of ICSID, its application of the fair and equitable principle, which includes the principle of proportionality, will significantly impact on investment disputes relating to China.

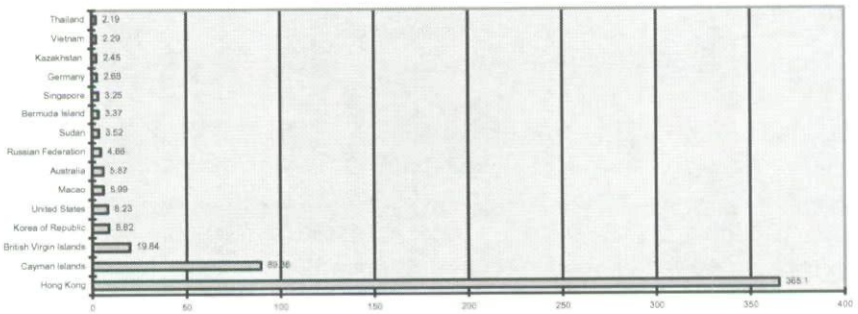
V. PROPOSALS TO THE CHINESE GOVERNMENT

A. *Paying Attention to Stipulating Clause of Jurisdiction on Investor –State Dispute Settlement by Distinguishing Different Instance*

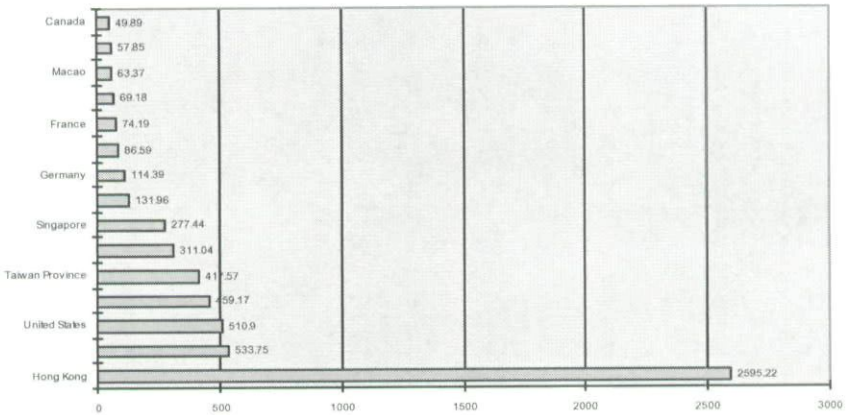
Jurisdiction ties up with applicable law in investment disputes. If China accepts ICSID jurisdiction without any reservations, it means China will be confronted with international law including the principle of proportionality, instead of only its municipal law. Therefore, ICSID jurisdiction is the sixty-four-dollar question. This paper argues that, in future BITs, China should accept ICSID jurisdiction to different extents according to different Contracting Parties. The following two graphs show the top 15 countries or regions in investment stock outward and inward to China in 2005;⁴⁸ they reflect China's investment trend as a whole.

⁴⁸ Worked out according to data from Ministry of Commerce of the People's Republic of China, *Statistical Bulletin of China's Outward Foreign Direct Investment* (2005) <<http://hzs.mofcom.gov.cn/accessory/200609/1157678204262.pdf>> at 18 May 2007. Data also from Ministry of Commerce of the People's Republic of China, *Foreign Direct Investment Inward China* (2005) <http://www.fdi.gov.cn/pub/FDI/wztj/lntjsj/wstzsj/2005nzgwtj/t20060906_61358.htm> at 18 May 2007.

Top 15 Countries and Regions of China's Outward Foreign Direct Investment by the end of 2005
(unit: a hundred million dollars)



Top 15 Countries and Regions of Foreign Direct Investment Inward China by the end of 2005
(unit: a hundred million dollars)



As seen from the graphs above, China is still an input country; therefore it should not accept ICSID jurisdiction across the board. China should reduce ICSID jurisdiction when it is the input country of direct investment, and enlarge ICSID jurisdiction if it is the output country of direct investment. In the former case, China should reserve more jurisdictional sovereignty to itself. For example, Japan, the Netherlands, and England all are major investing countries of China. For them, China should limit ICSID jurisdiction in BITs. In the latter case, China should strengthen ICSID jurisdiction to protect investment abroad in countries where investor rights are not already protected through existing agreements. As core benefits, BITs should give Chinese

investors the right to submit an investment dispute with the government of the other party to international arbitration and with no requirement of resorting to that country's domestic courts. Therefore, to some countries such as Congo, Botswana, Cyprus, Sierra Leone, Mozambique, Kenya, Myanmar, Bosnia and Herzegovina, Trinidad and Tobago, Côte d'Ivoire, Guyana, Benin, Latvia, Uganda, Russia and Seychelles, it is right to enlarge ICSID jurisdiction.

With regard to this, China can learn from the practice of Korea. According to the Korea-Chile Free Trade Agreement, settlement of a dispute between a party and investor of the other party should first attempt to be solved through consultation or negotiation.

Provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under: (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention; (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or (c) the UNCITRAL Arbitration Rules.⁴⁹

But during Korea US Free Trade Agreement negotiation, Korea did not agree with an investor-State dispute settlement clause like that in Korea-Chile FTA.⁵⁰ When the Korea-US FTA negotiation was concluded on April 2, 2007, Korea had to accept an Investor-State Dispute Settlement clause. It should be noted that Korea excluded ICSID jurisdiction over investment disputes caused by public reasons such as health, safety, environment, real estate and tax policy.⁵¹ In my opinion, the reason is that Korea has more investments in Chile, but the US has more investments in Korea. Therefore, Korea does not want to give investment money from the US a 'sanctified' status, and does not mean to maximise investors' interests by limitless procedures of dispute settlement. It successfully keeps the so-called 'barriers to investment' such as public interest. China's government should also classify the other parties of BITs by investment trend and amount, and conclude

⁴⁹ *Free Trade Agreement between the Government of the Republic of Korea and the Government of the Republic of Chile*, concluded on 15 February 2003 and entered into force on 1 April 2004, Article 10.24 (Submission of a Claim to Arbitration) <<http://www.mofat.go.kr/index.html>> at October 6, 2007.

⁵⁰ *Free Trade Agreement between the Republic of Korea and the United States of America*, June 30, 2007 [Annex 11-B]

<<http://www.mofat.go.kr/index.html>> at August 7, 2007.

⁵¹ *Ibid.*

BITs containing different investor-host state dispute settlement clauses with different countries.

Although it is not clear if a MFN clause can be invoked in the procedure, the jurisprudence of ICSID arbitration seems to be more inclined to recognise its applicability in procedure. In several cases, decisions on jurisdiction accepted the investor's claim invoking, by way of a most-favoured-nation (MFN) clause in the BIT of the parent country –host state, the provisions concerning dispute settlement procedures of a bilateral investment treaty between the host state and a third country.⁵² In order to prevent some investors from free riding by invoking the MFN clause in a BIT, claiming more favourable treatment in dispute settlement procedures and enlarging ICSID jurisdiction, it is necessary to exclude or expressly limit the application of MFN clauses in dispute settlement procedures.

Finally, it is not necessary to abandon the right to invoke the exception for material security. The Chinese government only needs to realize that if exceptional measures for material security conform to the necessity requirement as considered by the host state, they can be legal. This clause is very important for protecting substantial national interests.

B. *Paying More Attention to the Application of the Principle of Proportionality through Other Channels*

In fact, with the development of capital output, Chinese investors are likely to be involved in disputes with foreign governments. Therefore, the proportionality principle has more opportunities to be applied, in international or national law, in cases where the host state reserves the right to local remedies with priority and ICSID must first apply the host state law in arbitration. The above survey shows that in most BITs China has concluded, the arbitral award would be based on the law of

⁵² See, eg, *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7 Decision on Objections to Jurisdiction of January 25, 2000; *Salini Costruttori S.p.A. and Italstrade S.p.A v the Hashemite Kingdom of Jordan*, Case No. ARB/02/13, Decision of the Tribunal on Jurisdiction of November 29, 2004; *Siemens A.G. v Argentine Republic (Case No. ARB/02/8)*, Decision on Jurisdiction of August 3, 2004; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, August 3, 2006, Investment Treaty Arbitration <http://ita.law.uvic.ca/chronological_list.htm> at May 18 2007.

the Party to the dispute including its rules on the conflict of laws, the provisions of the Agreement and universally accepted principles of international law. Accordingly, conflict of laws may lead to the applicability of other rules, including the principle of proportionality. For example, if the host state is a member of the EU, then the principle of proportionality is a fundamental principle of its law. This is also the case in some other non-EU countries. As discussed above, in *Siemens A. G. v Argentina*, Siemens argued that the State's authority to modify the contract was limited by the proportionality principle in Article 28 of the Argentine Constitution.⁵³ Argentina explained that the Argentine Constitution recognised the property right and the right of the State to regulate it, provided it is done by law and subject to principles of reasonableness and equality. As further explained by Argentina, these principles meant that restrictions on individual rights must be warranted by the facts and meet a social necessity or convenience standard and the limitation must be in line with the ends sought.⁵⁴

C. Strengthening Legality of Its Own Regulating Investment Measure

As yet, there have been no ICSID cases involving China, but the trend of universal acceptance of ICSID jurisdiction and the application of international law and the fair and equitable principle, regarded as including the principle of proportionality, toll the alarm bell for the Chinese government⁵⁵.

It is necessary to point out that the concept of the proportionality principle is absent in Chinese administrative law and Constitution, although the principle can be found in Chinese traditional culture, in the philosophy of all things in moderation (the Ancient Greek maxim of: *pan metron ariston*). China still lacks uniform administrative legislation and also has no proportionality principle clause in it. Chinese scholars disagree about the main principle in Chinese administrative law. Scholars have different arguments, but few include the principle of proportionality. One scholar thinks that the fundamental principle of Chinese administrative law includes the principle of legitimacy and the

⁵³ *Siemens A.G. v Argentine Republic ICSID Case No. ARB/02/8 Award* (2007) [¶155] <<http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>> at May 18 2002.

⁵⁴ *Ibid* ¶74.

⁵⁵ Although Professor Chen An stresses that in Sino-foreign investment agreements, it is not suitable to abandon the 'Four Great Safeguards' however this has become a reality in most cases.

principle of reasonableness.⁵⁶ Another famous scholar thinks it includes the principles of rule of administrative law, administrative impartiality, openness, and efficiency.⁵⁷ Still another thinks it includes safeguarding the rights and freedoms of people, the principle of administration by law, and the principle of administrative benefit.⁵⁸ The principle of proportionality has never been regarded as the constitutional principle of China. Thus the administrative measures adopted by the Chinese government tend to be reversed according to the principle of proportionality.

In fact, some disputes in this respect have occurred. For example, a dispute over an electric power contract between Coastal Corporation and the Chinese local government⁵⁹. The parties in this case were the investor—Coastal Corporation, and the government authorities of Jiangsu Province. The investor entered into four joint ventures with local authorities in 1995~1996 based on a series of agreements with local authorities to construct three peaking power plants in the Jiangsu Province. The most important of these agreements were the power purchase contracts setting the rate at which power would be produced by the joint venture plants. The power purchase contracts were signed with local entities, semi-autonomous municipal and provincial bodies under the jurisdiction of local authorities when the power purchase contracts were concluded. Between November 17, 1998 and September 22, 1999, in response to a Chinese measure examining power policies at the national level, the Jiangsu Province promulgated a Comprehensive Tariff Policy that entered into effect as of July 15, 1999. The comprehensive Tariff Policy reduced rates across the board and divested local authorities of the right to purchase electricity, and pursuant to Notice No. 249 of March 5, 1999, issued in conjunction with the Comprehensive Tariff Policy, peaking power plants in Jiangsu were required to enter into new power purchase contracts with the Jiangsu Provincial Power Company, which was accorded a monopoly in the purchase of electricity from power plants and in power distribution to retail customers in the Province. In fact, the existing power purchase contracts and their cost plus approach previously

⁵⁶ See Zhang Zheng Zhao (ed), *Administrative Law and Administrative Procedure Law* (1999) 24-28.

⁵⁷ See Jiang Mingan (ed), *Administrative Law and Administrative Procedure Law* (1999) 43-54.

⁵⁸ See Fang Shirong (ed), *Administrative Law and Administrative Procedure Law* (1999) 48-60.

⁵⁹ See Lorin S. Weisenfeld, 'MIGA After Fifteen Years' (2004) 9 *Chinese Journal of International Economic Law* 169-173.

entered into with municipal authorities were unilaterally abrogated. The dispute was mediated by the Multi-lateral Investment Guarantee Agency (MIGA) in the end.

In 1992, the Industrial Groups of the United States registered in the British Cayman Islands in the Caribbean and situated in Los Angeles wanted to cooperate with the People's Park of Shanghai to establish a pleasure project called 'World Baileyuan'. In order to invest in this project, the group set up Shanghai Baileyuan Pleasure Ltd., whose board chairman, Shihao is the grandson of lineal descent from Shi Liangcai,⁶⁰ the boss of Shen Bao (Shanghai Daily). Industrial Groups' investment amounted to 43.5 million dollars, and the investment of People's Park of Shanghai was thirty-years land-use right for 150 thousand square meters. The Shanghai Government approved the project and enormous funds were invested. But in December of 1994, Shanghai Foreign Investment Commission announced that the 'World Baileyuan' project must be moved because the People's Park was fixed as the center of city planning. In June of 1996, the Shanghai Huangpu District Foreign Economic Commission promulgated the order that it agreed the project to be continued in the People's Park, and project was built again. But two years later, the Shanghai government Office Department issued another document that changed the address of 'World Baileyuan' again, and this led to the project running aground. At this point, the input of the Industry Group had reached 2.7 million dollars. The investor's petition for administrative reconsideration was rejected, and administrative litigation lodged subsequently also ended without any result, and the foreign investor was going to resort to ICSID. For unknown reasons, the case was not brought to ICSID.

Huijin China Limited invested 2.7 hundred million yuan to establish a cooperation company with Changchun Drainage Company. The cooperation company managed a sewage disposal factory that could deal with 390 thousand tons of sewage each day in the Changchun City of China. The Changchun Government issued a Managing and Administering Regulation on sewage disposal in Changchun Huijin. But due to the administration system and inefficient organ concerned, the Government did not perform its promise, and on February 28, 2003,

⁶⁰ Investment by the grandson of lineal descent from Shi Liancai and *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Southern Weekly (Guangzhou, China), 25 November 2004.

the Changchun Government abolished the above regulation.⁶¹ Finally, after Huijin China Limited lost the lawsuit, the Changchun Government repurchased the Huijin Sewage project under the provisions of the two parties' agreement in order to settle the dispute between the government and the foreign investor.⁶²

There are other cases where the governments did not fulfill their promises and obligations in a bona fide manner. Even though the Chinese government or courts have not called these incidents 'expropriation', this is what they are. In conclusion, the actions of the Chinese government should be regulated by itself in order to create a good investment environment, above all, the actions should not be forced by foreign forces such as ICSID decisions. With the trend of internationalizing of investor-host state dispute settlement, the Chinese government must realize the effects and challenges brought by international jurisdiction and the application of international law to its regulatory power to foreign investment and use the public resources.

VI. CONCLUSION

Relying on the principle of proportionality may encourage ICSID to review the legitimacy of public policy and the appropriateness of investment measures pursued by a state. The development of review from a superficial level to a deep level restricts national regulatory power. Compared with the non-discrimination treatment principle, the proportionality principle is flexible, which beyond question, will increase the power of the arbitral agency, and lead to uncertainty. Accordingly, the Chinese government should pay more attention to bilateral investment treaty clauses on ICSID jurisdiction to reduce the possibility of applying the principle of proportionality, and also carry out regulatory investment measures to conform to the principle of proportionality. The Chinese government must be able to promote legitimate objectives, the means adopted must be the least restrictive to the interest of the foreign investors compared to other feasible means, and the means must be proportionate to the ends.

⁶¹ Also see Liu Wenguo, Three Bottlenecks Must Be Broken through for Reducing Discharge of the Urban Sewage, *Economic Information Daily* (Beijing, China) 26 September 2007.

⁶² 'Chang Chun Government buying back by Agreement Huijin Sewage Project, and Legal Dispute Concluded', (2005) 113 *Information on the Water Industry in China* (Beijing, China)..

Even though the status and function of the principle of proportionality in international law has not been recognised universally, it should arouse the attention of the Chinese government. Chinese government practice regulating foreign investment is 'one size fits all'. Often the bureaucratic phenomenon takes over, the administrative procedure is very simple, and it lacks legislative authority and transparency.⁶³ Therefore, government authorities in the future might face frequent complaints from investors. Moreover, according to the principle of proportionality, administrative action without exercising discretion in good faith dooms it to failure. Therefore, the practical sector of the Chinese government should advance its level of regulatory measures. An expropriating measure that interferes foreign investment, must be based on the application of duly adopted laws, considering the public interest, not discriminating against foreigners, providing compensation,⁶⁴ above all, it must still be proportionate to the public interest now. Professor Wälde has argued that the investment arbitration disciplines are an instrument of 'tough love' to help transition countries, i.e., quite underdeveloped in terms of governance quality, to upgrade governance.⁶⁵ Although I do not think this is love to such countries but to investors, China must face the reality of strengthening restrictions against such countries' governance. At last, I want to point out that as far as Chinese Administrative Procedure Law is concerned, the concrete administrative acts done by the administrative body can be challenged, but the abstract administrative acts can not be the object of the Administrative Litigation. However, an international forum, such as ICSID, the concrete and abstract administrative acts cannot not be differentiated.

⁶³ According to Vandeveld, developing host states have retained considerable discretion to employ interventionist tactics associated with nationalist and Marxist economics in the BITS. The problem for the developing state, however, is that it may not exercise its discretion well. Political pressure, corruption or administrative ineptitude may cause the host state to take illiberal action in the name of economic development that diminishes the welfare of the state as a whole or that only aggravates existing inequalities. This is a ubiquitous problem in developing countries. See Kenneth J. Vandeveld, 'The Political Economy of a Bilateral Investment Treaty' (1998) 92 *American Journal of International Law* 636.

⁶⁴ See Robert Jennings and Arthur Watts, *Oppenheim's International Law*, (1992) 920.

⁶⁵ Thomas W. Wälde, 'Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues Based on Recent Litigation Experience' in Norbert Horn (ed), *Arbitration Foreign Investment Dispute*, *Kluwer Law International* (2004) 193-235, 208.

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