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NOTE

The Non-Precluded Measure Type Clause in International Investment Agreements: Significances, Challenges, and Reactions

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I. INTRODUCTION

The balance between investor protection and the protection of public interests is an enduring theme in investor-state dispute settlement (ISDS) development. The conflict between the protection of investors' rights and the protection of the host State's regulatory rights has run through the international investment agreement (IIA) history and will continue to shape the IIA development in the next 50 years.

In the last decade, the global economic crisis broke out in 2008 led countries to reconsider their investment policies. In response to this IIA reform, in its 2015 World Investment Report, the United Nations Conference on Trade and Development (UNCTAD) set the non-precluded measure-type clause (NPM type clause) as an important option to safeguard the host country's right to regulate, to balance the protection of investor's rights and the protection of domestic public interests, and to achieve sustainable development.[2]

NPM-type clauses are general exceptions to protect certain public interests in IIAs. A NPM-type clause enables the host country to adopt measures that are otherwise inconsistent with its treaty obligations to protect the selected public interests, if the application of such a measure meets all of the conditions set out in the provision. In practice, the objectives protected by the NPM-type clause include, but are not limited to, public security, international peace and security, circumstances of extreme emergency, public order, securing compliance with laws or regulations, the conservation of living or non-living exhaustible natural resources, human, animal, or plant life or health, public morals, and cultural protection. For example, Article 13 of the Iran–Japan bilateral investment treaty (BIT) provides that:

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[2] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015: Reforming International Investment Governance* (2015) 124, 140–2 <http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf> accessed 1 June 2016 (World Investment Report 2015).

Article 13 General and Security Exemptions

(1) Subject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against, or a disguised restriction on investors of the other Contracting Party and their investments in the Territory of the former Contracting Party, nothing in this Agreement shall be construed so as to prevent the former Contracting Party from adopting or enforcing measures:

  (a) necessary to protect human, animal or plant life or health;
  (b) necessary to protect public morals or to maintain public order, provided that the public order exception may only be invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society;
  (c) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

    (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contract;
    (ii) the protection of the privacy of the individual in relation to the processing and dissemination of personal data and the protection of confidentiality of personal records and accounts; or
    (iii) safety; or

  (d) imposed for the protection of national treasures of artistic, historic or archaeological value.

(2) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures:

  (a) which it considers necessary for the protection of its essential security interests:

    (i) taken in time of war, armed conflict, or other emergency in that Contracting Party or in international relations; or
    (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons; or

  (b) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[3]

The NPM-type clause provides protection in the public interest of humans, animals, or plant life or health, public morals, public order, national treasures, the essential security interests of the host country, and international peace and security. To be qualified as a non-precluded measure under this provision, the measure must be adopted for the protection of selected public interests. It should also meet the nexus requirement of 'necessary', 'imposed for', or 'in pursuance of' attached to the different public interests. Meanwhile, the measure must also be applied in a manner that does not constitute a means of arbitrary or unjustifiable discrimination against, or a disguised restriction on, the investors or investments.

By safeguarding the host country's right to regulate, the NPM-type clause could help the IIA to reach a better balance between the protection of investors' rights and the paradigm of a sustainable development of the host country. It is not surprising

[3] Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment (signed 5 February 2016, not yet entered into force) (Japan–Iran BIT) art 13.

that the NPM-type clause is playing a significant role in the future of IIA development.

This note is organized as follows. The next section presents the significance of the NPM-type clauses and theoretically explains how the inclusion of a NPM-type clause would help to improve the traditional IIA. The third section discusses some challenges brought by the inclusion of the NPM-type clause and explores the possible reactions in practice.

II. THE SIGNIFICANCE OF A NPM-TYPE CLAUSE

Nowadays, the NPM-type clause has became a regular element of IIAs. According to UNCTAD, 14 out of the 18 IIAs concluded in 2014 for which texts were available include NPM-type clauses, while the number from 2013 was 15 out of 18, and the number from 2012 was 10 out of 17.[4] In practice, the NPM-type clause has already been invoked by Argentina in several cases as the justification for the measures it adopted to overcome its financial crisis at the beginning of this century.[5] In addition, the parallel security exception and general exception in the World Trade Organization (WTO) system have also played an important role in WTO case law.[6] The popularity of the NPM-type clause raises two questions: why the NPM-type clause is important to IIAs and how the NPM-type clause could improve the traditional IIA system? This section will answer the two questions from four aspects.

A. *The NPM-Type Clause Reflects the Principle of Fairness and Justice*

First and most important, the inclusion of a NPM-type clause in the IIA reflects the principle of fairness and justice. On the one hand, the NPM-type clause and the treatment requirement provisions, which are the traditional elements of IIAs, are two sides of the same coin. Nowadays, it is a common understanding that the encouragement and promotion of foreign investment should not be made at the expense of derogation to the domestic public interests. Investment in the territory of a host country may have considerable influence over environment, public health, public order, and other aspects of domestic life. As a general exception provision to protect these public interests, the NPM-type clause helps the IIA to

[4] See *World Investment Report 2015* (n 2) 112; UNCTAD, *World Investment Report 2014: Investing in the SDGs: An Action Plan* (2014) 116 <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf> accessed 1 June 2016 (World Investment Report 2014); UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013) 102 <http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf> accessed 1 June 2016 (World Investment Report 2013). The data in the *World Investment Reports* are about the general exceptions to protect certain community interests for the objective of sustainable development, such as general exceptions for the protection of human, animal or plant life, or health or for the conservation of exhaustible natural resources, while the concept of non-precluded measure-type clauses (NPM-type clauses) in this note refers to a wider scope that includes the general exceptions for sustainable development as well as the general exceptions for the protection of security interests.

[5] See *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Award (12 May 2005); *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Award (22 May 2007); *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007); *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006); *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008).

[6] See eg *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Panel, WT/DS332/R (12 June 2007); *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R (20 April 2005); *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R (20 May 1996); *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (12 October 1998).

reach a better balance between the protection of investors' rights and the paradigm of sustainable development of the host country.

On the other hand, the application of the non-precluded measure is not arbitrary. To avoid the potential abuse of the NPM-type clause, the adoption of exceptional measures under the NPM-type clause is restricted by the general principle of good faith and *jus cogens*. Meanwhile, similar to Article 13 of the Iran–Japan BIT stated above, some NPM-type clauses explicitly provide certain restrictions such as the necessity requirement, the requirement of no disguised restriction on investment, and the non-arbitrary or unjustifiable discrimination requirement to the application of the exceptional measure.

B. *The NPM-Type Clause Safeguards the Host Country's Right to Regulate*

Second, the inclusion of the NPM-type clause safeguards the host country's right to regulate and keeps the host country's discretion. As an exception, the legal effect of the NPM-type clause is clear. Once the host country successfully invokes the NPM-type clause, the measure in issue would be regarded as a lawful measure, which means that the host country would not be liable for the adoption of the measure and, therefore, would not have to pay any compensation. This legal effect of the NPM-type clause significantly distinguishes it from two other attempts to include the protection of public interests in an investment treaty without direct legal consequence: the principle of the protection of public interests such as health, safety, and environment, which is stated in the preamble of the treaty, and the hortatory health, safety, labour rights and environment provision.

For example, the preamble of the China–Trinidad and Tobago BIT provides:

> The Government of the Republic of Trinidad and Tobago and the Government of the People's Republic of China, hereinafter referred to as the Contracting Parties;
>
> . . .
>
> Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application.[7]

Being provided in the preamble, this statement clarifies the basic principle that the promotion and protection of investment should not be achieved by relaxing health, safety, and environmental conditions in the domestic country. However, the statement itself does not include any substantive requirement or obligation. In other words, it can only assist the interpretation of the substantive provisions stated later in the treaty.

Meanwhile, Article 26 of the Japan–Peru BIT is an example of the hortatory health, safety, labour rights, and environment provision. Article 26 of the Japan–Peru BIT provides that '[t]he Contracting Parties *recognise that it is inappropriate* to encourage investment by investors of the other Contracting Party and of a non-Contracting Party by relaxing domestic health, safety or environmental measures, or by lowering its labour standards.[8] The language 'recognise that it is

[7] Agreement between the Government of the Republic of Trinidad and Tobago and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments (signed 22 July 2002, entered into force 7 December 2004) (China–Trinidad and Tobago BIT) preamble.

[8] Agreement between Japan and the Republic of Peru for the Promotion, Protection and Liberalization of Investment (signed 22 November 2008, entered into force 10 December 2009) (Japan–Peru BIT) art 26 (emphasis added).

inappropriate' indicates that the hortatory health, safety, labour rights, and environment provisions is in fact a declaratory statement on the importance of the protection of the selected public interests and that they could not actually be invoked by the host country as a defence for the application of measures that are inconsistent with other treaty provisions. Therefore, if the host country adopts certain measures that are inconsistent with other treaty provisions, and if the NPM-type clause is available, the NPM-type clause would always be the first choice for the host country to make the public interests defence.

C. *The NPM-Type Clause Fills the Gaps in the Scope of the Permitted State Measures in IIAs*

Third, the inclusion of the NPM-type clause fills the gap in the scope of the permitted State measures in IIAs. One of the problems of the old generation of IIAs that do not include a NPM-type clause is that they could not provide enough regulatory space for the host country.

In the IIAs without a NPM-type clause, the explicitly permitted State measures could be divided into three groups: the normal exercise of State regulatory power that is not inconsistent with any treaty obligations; the measures covered by the specific exceptions such as the exceptions on tax matter and the exceptions for the enforcement of other international agreements; and lawful expropriation, which means the expropriation for public purpose, under due process of law, in a non-discriminatory manner and with certain compensation. Such treaty practice sometimes cannot meet the requirement of the host country to protect general public interests in the promotion and protection of investment.

On the one hand, the scope of the permitted State measures under the specific exceptions is restricted to limited situations that have been explicitly identified by the provisions. On the other hand, nowadays, host countries seldom take direct expropriation to protect public interests. However, they may adopt certain measures that have a negative effect on the investment to exercise regulatory power, and these measures may be challenged by the investor as indirect expropriation in front of an investment tribunal.

To safeguard the host country's right to regulate, many IIAs make the attempt to include a normal exercise of State regulatory power statement under the expropriation article. For example, Article 3 and 4 of Annex A of the India–Jordan BIT provides:

> Annexure-A Interpretation of "Expropriation" in Article 5 (Expropriation)
>
> . . .
>
> 3. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives including health, safety and the environment concerns do not constitute expropriation or nationalization. Such actions should be in accordance with laws and regulations of the host Contracting Party.
> 4. Actions and awards by judicial bodies of a Party that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns do not constitute expropriation or nationalization.[9]

[9] Agreement between the Government of the Republic of India and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment (signed 30 November 2006, entered into force 22 January 2009) (India–Jordan BIT) annex A, arts 3, 4.

The provision provides that, except in rare circumstances, measures adopted for the protection of public interests such as public health, public safety, and environmental protection do not constitute expropriation or nationalization. However, in this case, even if the measure passes the expropriation test and is not regarded as indirect expropriation, it could still breach other treaty provisions, and the host country would need to pay the relevant compensation.

The inclusion of the NPM-type clause in the IIA fills the gaps left by these classic State measures that are permitted and solves the puzzle of what could be done and what could not be done by the host country under the IIA. With a NPM-type clause, the permitted State measures under the IIA could be divided into four complementary groups: the normal exercise of State regulatory power; the measures covered by the specific exceptions; the lawful expropriation; and the non-precluded measures. On the one hand, the NPM-type clause is a catch-all provision and can cover all of the aspects that are not covered by the specific exceptions in the field of protecting selected public interests. On the other hand, in contrast to the normal exercise of State regulatory power to protect public interests that should not breach other treaty provisions stated under the expropriation article, a non-precluded measure could be otherwise inconsistent with other provisions, and the host country would not need to pay any compensation because the qualified non-precluded measure is a lawful measure in nature.

D. *The NPM-Type Clause Improves the Coherence and the Consistency between the IIA and Other Legal Regimes*

Fourth, the inclusion of the NPM-type clause in the IIA improves the coherence and the consistency between the IIA and other legal regimes. Given the public interests that it protects, the NPM-type clause could be an important bridge that connects the IIA, domestic law, and other international laws. Basically, the interaction of the different branches of laws under the NPM-type clause makes the NPM-type clause beneficial in improving the coherence and consistency between the IIA and other legal regimes.

On the one hand, the selected public interests protected by the NPM-type clause are always the host country's most essential interests, which lie at the heart of its domestic society. Therefore, if the decision that the tribunal makes on the basis of the IIA concerning the interpretation of a public interest protected by the NPM-type clause is inconsistent with the parallel concept in the domestic law, such a decision would certainly challenge the related domestic law and may affect the development of relevant rules in the domestic legal system. On the other hand, in practice, some NPM-type clauses make direct reference to other international laws to clarify the scope of the public interests that it protects. Such practice further improves the coherence and the consistency between the IIA and other international laws. Basically, it is a common practice for the NPM-type clauses that protect the objective of international security and order to refer to the parties' relevant obligations under the Charter of the United Nations.[10] For example, Article XVII of the Canada–Latvia BIT provides:

> Article XVII Application and General Exceptions

[10] Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945).

> . . .
> 6. Nothing in this Agreement shall be construed:
> . . .
> (c) to prevent any Contracting Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[11]

And some of the most recent IIAs have gone further and incorporated the WTO general and security exception article into the IIA directly. For example, Article 21.1 and Article 21.2 of the China–Korea Free Trade Agreement provides:

> Chapter 21 Exceptions
> Article 21.1: General Exceptions
> 1. For the purposes of Chapters 2 (National Treatment and Market Access for Goods) through 7 (Trade Remedies), Article XX of GATT 1994 and its interpretive notes are incorporated into and made part of this Agreement, mutatis mutandis.
> 2. For the purposes of Chapters 8 (Trade in Services), 9 (Financial Services), 10 (Telecommunications), and 13 (Electronic Commerce), Article XIV of GATS (including its footnotes) is incorporated into and made part of this Agreement, mutatis mutandis.
> Article 21.2: Essential Security
> For the purposes of this Agreement, Article XXI of GATT 1994 and Article XIV bis of GATS are incorporated into and made part of this Agreement, mutatis mutandis.[12]

In addition, the objectives, such as environment protection and public health, protected by the NPM-type clause also enable the provision to incorporate the related international human rights law in the future.

III. THE CHALLENGES BROUGHT BY THE INCLUSION OF THE NPM-TYPE CLAUSE AND THE POSSIBLE REACTIONS

The inclusion of the NPM-type clause in the IIA also brings several challenges to today's ISDS mechanism. This section discusses two of the most important challenges and explores the possible reactions in practice.

A. *The Participation of the Third Party, including the Participation of the Home Country and the Calling for a Well-Drafted Notification Requirement in the NPM-Type Clause*

The first challenge brought by the inclusion of the NPM-type clause is the issue of the participation of the third party. On the one hand, the inclusion of the NPM-type clause recalls the importance of *amicus curiae* in ISDS. In practice, *amicus curiae* have already played an important role in some investment cases.[13] Given the

[11] Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments (signed 5 May 2009, entered into force 24 November 2011) art XVII.

[12] Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea (signed 1 July 2015, entered into force 20 December 2015) arts 21.1, 21.2.

[13] See eg *Methanex Corporation v United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Parties to Intervene as "amici curiae" (15 January 2001); *Glamis Gold Ltd v United States of America*, UNCITRAL, Award (8 June 2009); *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 5 (2 February 2007); *AES Summit Generation Limited and AES-Tisza Erömü Kft v Hungary*, ICSID Case No ARB/07/22, Award (23 September 2010); *Watkins Holdings Sàrl and others v Kingdom of Spain*, ICSID Case No ARB/15/44, Procedural Order No 2 (21 March 2017); *ESPF Beteiligungs GmbH, ESPF Nr 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co KG v Italian Republic*, ICSID Case No ARB/16/5,

involvement of public interests, it is not surprising that *amicus curiae* may appear in future NPM cases with respect to the protection of the environment, public health, public morals, cultural protection, and other community interests. In these cases, *amicus curiae* submissions will assist the ISDS process by providing opinions from the locally affected communities who are the final beneficiaries of the exceptional measures to protect the public interests under the NPM-type clause. On the other hand, the real breakthrough brought by the NPM-type clause into the field of third party participation is that some NPM-type clauses explicitly require that the home country of the investor participate in the ISDS. For example, Ad Article 2 of the Colombia–Switzerland BIT provides:

> Ad Article 2
> . . .
> (2) Colombia reserves the right to adopt measures for reasons of public order pursuant to Article 100 of the *Constitución Politica de Colombia (1991), provided that Colombia promptly provides written notice to Switzerland that it has adopted a measure and that the measures.*[14]

The provision provides a notification requirement to the adoption of the non-precluded measure. It is interesting that the receiver of such notification is the home country of the investor rather than the investor himself. The rationale behind such treaty practice is probably to provide certain space for the host country and the home country to negotiate after the adoption of the exceptional measure. Such negotiation could avoid the application of the exceptional measure to create a further negative effect on the investor, on other investors from the same home country, or on the State relationship between the host country and the home country.

In practice, with such a notification requirement, the host country, by invoking a NPM defence, must prove that it has informed the home country of the adoption of the exceptional measure. And if the investor rejects the host country's NPM defence and makes the argument that the host country has failed to meet the notification requirement, it must turn to its home country for help to demonstrate that the home country has not received such a notification. In this case, the home country of the investor would participate in the ISDS directly, and its submission would certainly affect the outcome of the ISDS proceeding.

Principally, in this case, the home country of the investor would only play the role of assisting in the fact finding and would not affect the nature of the ISDS as a dispute settlement between a private investor and a State. However, there is also the possibility that the home country would act in a manner that is tantamount to diplomatic protection in this proceeding, especially if the NPM-type clause itself does not provide clear guidelines on certain key issues in the notification. One solution for this problem is to clearly address the timeline, the formulation, and the content of the notification in the treaty provision or the following agreements on the interpretation of the provisions reached by the parties of the treaty.

Procedural Order No 2 (28 February 2017). For more information, see ICSID, 'Decisions on Non-Disputing Party Participation,' <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Non-Disputing-Party-Participation.aspx> accessed 10 April 2017.

[14] Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (signed 17 May 2006, entered into force 6 October 2009) Protocol Ad art 2 (emphasis added).

B. *Two Filters to Solve NPM Disputes at an Early Stage*

The second challenge brought by an NPM-type clause to the ISDS system is based on the fact that the host country may be reluctant to change the State measure after the ISDS proceeding. As mentioned previously, the objectives protected by the NPM-type clause are usually the most important public interests for the domestic society. Some NPM-type clauses emphasize the strong protection of certain public interests by employing the term 'it considers' to clarify that the provision is self-judging.[15] Such a self-judging statement excludes the tribunal's jurisdiction over the issue of 'whether the measure was applied to protect the particular public interest'. In this case, what is left to be examined by the tribunal is only whether the adoption of the measure will meet the manner requirements and the procedure requirement in the NPM-type clause.

From looking at this background, it is not surprising that the host country will be reluctant to revoke, amend, or abstain from applying measures that protect the selected public interests even it fails in the NPM case. The situation is especially likely to happen under today's ISDS mechanism in which decisions are made by an *ad hoc* tribunal without an efficient appellate mechanism. In other words, it is very possible that, in a NPM dispute, even if the investor wins and gets compensation, the unfriendly domestic investment circumstances would not be changed. At the same time, the relationship between the investor and the host country would be permanently damaged.

Several options could be taken to face this challenge. This note will not study the options to fundamentally alter the existing ISDS, such as introducing an appeals facility or establishing a permanent international investment court. Instead, it will only discuss certain filters to prevent the frivolous claims and to solve the disputes at an early stage. The first option is to include a high standard transparency provision in the IIA. In practice, some IIAs explicitly provide that the host country has the obligation to provide adequate information that is relevant to the investment covered by the IIA to the investor. The transparency of the domestic legal circumstances can increase the predictability of the investment relationship. It could help the investor to make decisions in order to avoid the potential conflict if it is possible. However, it is noticeable that, in order to prevent a potential NPM dispute, the basic requirement of publishing 'laws and regulations' is far from enough since the State measure to protect the public interest under the NPM-type clause may also be made on the basis of certain procedures and administrative rulings or judicial decisions. In addition, an opportunity for public commentary before the adoption of the State measure is also in need. An example of a provision for a high level of transparency in an IIA could be found in the Japan–Peru BIT. Article 9 of the Japan–Peru BIT provides:

> Article 9: Transparency
> 1. Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, administrative procedures and administrative rulings and judicial decisions of general application as well as international agreements which pertain to or affect investment activities.
> . . .

[15] See eg Iran–Japan BIT (n 3) art 13.2.a.

> 4. The Government of each Contracting Party shall, in accordance with the laws and regulations of the Contracting Party, endeavour to provide, except in cases of emergency or of purely minor nature, a reasonable opportunity for comments by the public before the adoption, amendment or repeal of regulations of general application that affect any matter covered by this Agreement.[16]

Another option is to establish a special investment office or agency that is independent from the authority that makes the regulatory decisions under the domestic law. Such an office or agency may assist the investor to communicate with the domestic authority who has adopted the action to protect certain public interests and help the investor and the authority to reach an amicable settlement. Meanwhile, because the office or agency is independent from the authorities that make the regulatory decisions, it could also be a good platform for the parties of a NPM dispute to start an alternative dispute resolution proceeding and settle the dispute before bringing the claim to an investment tribunal or an international court.

IV. CONCLUSIONS

After briefly introducing the concept of the NPM-type clause, this note points out that the NPM-type clause is important in IIAs because it safeguards the host country's right to regulate, fills the gaps in the scope of permitted State measures in IIAs, improves the coherence and the consistency between the IIA and other legal regimes, and, most importantly, reflects the principle of fairness and justice. Then, the note moves to examine certain challenges brought by the inclusion of the NPM-type clause in IIAs and tries to find out some possible reactions to face these challenges. The note first discusses the issue of the participation of the third party in NPM cases and points out that the notification requirement in some NPM-type clauses will enable the home country of the investor to participate in ISDS and affect the result of the case directly. To avoid potential indirect diplomatic protection, the notification requirement under the NPM-type clause must be carefully designed and cannot miss some key issues. Finally, the note points out that considering the nature of the NPM-type clause, the host country may be reluctant to change the State measures after the ISDS proceeding, and it is better to solve the NPM dispute at an early stage. The options include increasing the level of transparency and establishing a special investment office or agency.

[16] Japan–Peru BIT (n 8) art 9.