



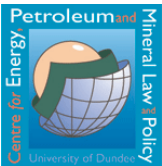
National Security: Past, Present and Future in Thai Investment Law

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- **Significant problems**
- **Analytical framework**
- **Methodology**
- **Development of national security (NS)**
- **Human rights jurisprudence**
- **Application of human rights jurisprudence**
- **Dilemma for Thai laws: Domestic and international level**
- **Conclusion**

- **Investment contracts are concluded between host States and foreign investors under the auspice of BITs**
- **The details in the investment contracts are to give more information of the promotion and protection under the BITs.**
- **Some are stated more precisely than in the BITs, while some are under the BITs provisions**

- **National security is one of the provisions that has been invoked under the BITs**
- **National security is a matter concerning, on the one hand, the duties of host States in safeguarding their security interest and, on the other hand is to observe treaty obligations.**
- **How the NS or the preclusion provision of BITs and Thai domestic law can be interpreted so as to balance the conflicting interests of foreign investor: stability and predictability, and host states: autonomy to regulate in the national interest)?**

- *Jurisprudence of human rights law, the margin of appreciation doctrine, can address the problem of national security.*
- This doctrine was adopted by the European Court of Human Rights (ECtHR) and it was adopted by the other regional Human Rights Tribunals (Africa and America regions)

- **Doctrinal research:**
 - The principle of necessity
 - The margin of appreciation doctrine
- **Comparative research:**
 - The jurisprudences of international investment law, human rights and WTO on the protection of the rights of foreign investor, individuals, and Member States
- **Analogy**



Hugo Grotius 1583-1645



Principle of necessity

To protect a State's interest (national security) for the purposes of military and social

Result

Just war

Be excused from observing international obligations (BITs)

Principle of necessity at present

present

- Environment:** *Gabčíkovo-Nagymaros case*
- Economic:** *Argentine energy case (such as CMS v Argentina, LG&E v Argentina, Enron v Argentina, Sempra v Argentina)*
- Terrorism:** *Dubai Port case, Kadi v the Council case...*
- Human rights:** *Kadi v the Council*



How does Thailand apply national security in her investment law at both domestic and international levels?



- **Host States can suspend or terminate the promotion schemes under the BITs.**
- **Host States can change its relating laws to safeguard their essential interest.**
- **Under international law, States invoking NS can be excused from not observing their international obligations. Nonetheless, they still hold liabilities to adversely affected foreign investors. (Art 27 of the ILC on State responsibility).**

- **Under human rights and investment laws, they share some similarity aspects:-**
 - **State regulatory autonomy**
 - **Individuals' rights, particularly right to property and right to fair trial**
 - **Part of public international law (development of int'law)**
- **Investment law, comparing to human rights, is at its infancy. Therefore, drawing the analogy on national security from human rights can address the same problem in investment law.**

- Drawing the lessons learned from HR jurisprudence, margin of appreciation, can address the problem of NS.
- Margin of appreciation (MA) is a threshold for a State to have a discretion on a matter in question whether such State has wide or narrow MA.
- Involving primary rights → narrow MA
- Involving secondary rights → wide MA
- By analogy, MA can assist a host State to adopt legitimate measures to protect its essential interests.

- **What Thai laws are to be considered?**
 - **Investment Act**
 - **Alien Labour Act**
 - **Alien Business Act**
 - **Thai Labour law?**
 - **Thai BIT Model law?**
 - **ASEAN BIT Model law?**

- **Art 3(3) of the ASEAN Comprehensive Investment Agreement:**
 - **For the purpose of liberalisation and subject to Article 9 (Reservations), this Agreement shall apply to the following sectors:**
 - a. manufacturing;**
 - b. agriculture;**
 - c. fishery;**
 - d. forestry;**
 - e. mining and quarrying; etc.**

- **Thai Alien Business Act Annex I**
 - **The sectors which are not allowed for aliens:**
 - (2) **agriculture;**
 - (3) **farming;**
 - (4) **forestry;**
 - (5) **fishery; etc.**

- **Thailand must take National Security matter and Human Rights into its consideration.**
- **Consider Thai laws relating to investment matters for the amendment.**
- **Prepare a BIT model law for negotiation.**
- **Raise the awareness of national security invocation and its fundamental concept including human rights protection to Thai authorities.**

**Thank you very much for your attention.
Constructive comments are more than
welcome.**

