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FUNDAMENTAL CHANGES OF INTERNATIONAL ECONOMIC LAW: CHALLENGES TOWARD LEGAL SYSTEM BASED ON FAIRNESS AND HUMAN VALUES

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Attachment II

SECTION . .
CONSULTATION AND ARBITRATION

11.1 Periodically, BPMIGAS and CONTRACTOR shall meet to discuss the conduct of the Petroleum Operations envisaged under this CONTRACT and will make every effort to settle amicably any problem arising there from.

11.2 Disputes, if any arising between BPMIGAS and CONTRACTOR relating to this CONTRACT or the interpretation and performance of any of the provisions contained in this CONTRACT shall be settled amicably and persuasively within ninety (90) days after the receipt by one Party of a notice from the other Party of the existence of the dispute.

11.3 Dispute pursuant to Sub-section 11.2 which cannot be settled amicably, shall be submitted to the decision of arbitration by a three (3) person arbitration panel conducted in accordance with the UNCITRAL arbitration rules contained in resolution 31/98 adopted by the United Nations General Assembly on December 15, 1976 and entitled "Arbitration Rules of the United Nations Commission on International Trade .Law" as in force at the time such arbitration is commenced. BPMIGAS on the one hand and CONTRACTOR on the other hand shall each appoint one arbitrator and so advise the other Party and these two arbitrators will appoint a third. If either Party fails to appoint an arbitrator within thirty (30) days after receipt of a written request to do so, such arbitrator shall, at the request of the other Party, if the Parties do not otherwise agree, be appointed by the Secretary General of the International Centre for Settlement of Investment Disputes. If the first two arbitrators appointed as aforesaid fail to agree on a third within thirty (30) days following the appointment of the second arbitrator, the third arbitrator shall, if the Parties do not otherwise agree, be appointed, at the request of either Party, by the Secretary General of the international Centre for Settlement of Investment Disputes. The third arbitrator appointed hereunder shall act as the chairman of the arbitral panel. If an arbitrator fails or is unable to act, his successor will be appointed in the same manner as the arbitrator whom he succeeds. Pending decision of the arbitral panel, the Parties shall diligently proceed pursuant to the provisions and terms of this CONTRACT hereof.

11.4 The award rendered in any arbitration commenced under this CONTRACT shall be final and binding upon the Parties, and judgment thereon may be entered in any court having jurisdiction for its enforcement. The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that neither Party shall appeal to any court from the decision of the arbitral panel and accordingly the Parties hereby waive the applicability of any provision of laws and regulations or any competent authority that would otherwise give the right to appeal the decisions of the arbitral panel. In addition, the Parties agree that neither Party shall have any right to neither commence nor maintain any neither suit nor legal proceeding concerning the dispute hereunder, except the legal proceeding required for the enforcement of the execution of the award rendered by the arbitral panel.

11.5 Arbitration shall be conducted in the English language at a place to be agreed upon by both Parties.

Fundamental Changes of International Economic Law: Challenges toward Legal System based on Fairness and Human Values

Adolf Warrouw[1]

Economic globalization supported by the latest technology information and communication has brought major influence in the structure and substance of international law development. Such globalization leads to market integration, transportation system, and communication, which makes possible to companies, states, and individual to reach the world. This article explains on the fundamental challenges of international economic law to legal system based on fairness and human values.

Keywords: *International economic law, legal system, Globalization.*

I. Introduction

The development of International society, which is increasingly integrated in various human aspects, has created demand for establishing new legal norms and for reviewing existing concept of international law concepts and rules. For the last few decades, there were major changes in the development of international law as the necessity of international people. Structural changes which began after World War II were demonstrated by enlargement of international society composition through inclusion of most new states that emerges from decolonization process. These states carried different interests and aspirations from their preceding nations, and also followed by new establishment of international organizations such as United Nations, and new born concept of human rights in international level. Economic globalization in the few last decades following the Cold War occurring in line with the economic development supported by advance communication and information technology, which provides

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extensive structural and substantial influence to international law development. Those developments were particularly caused by major decrease of cost and time needed for goods and services transportation, as well as due to improved communication. Globalization guides towards market integration, transportation and communication systems which enable corporations, States and even individuals to reach the world in faster, further, deeper and cheaper way. This condition urges the creation of a new production structure which results in great increase in interdependent relationships. Such development creates a challenge to State sovereignty and independence.[2]

II. The Increase Role of Non-State Actor

Traditional international law that has been giving main pressure in States' practice and role in international relations and begins to question its ability to regulate and facilitate inter State relationship which are getting more complex. This traditional relationship which has transnational character is unable to be regulated or handled in the interStates relationship context. The role of Non-state actor grows in the establishment process of international rules or norms. Aside from Intergovernmental Organizations, the rolling scope of non-state actor's include a broad spectrum performed by transnational entity or organization such as multinational companies and NonGovernmental Organization with operational scope and network beyond national system and integrated within global society[3]. We witness the increased role of civil society, particularly through Non-Governmental Organizations struggling their interest through public policy. At the international level they merge into single power to struggle for changes which are considered as domestic interest. They develop advocating techniques advocation and mobilize opinion in order to influence and ensure the governments and international organizations. For example there are movements for women rights, human rights, and environment. These impacts are quite significant to international law, as it can be seen in the process to establish legal rules by the international organizations or conferences which open for their advocation. They have become an important element in the establishment process of international laws various aspects to the interest of international society. The

[2] See John H. Jackson, 'Sovereignty-Modern: A New Approach to An Outdated Concept', 97 American Journal of International Law, October, 2003, p. 784.

[3] See Anthony Clark Arendt, Legal Rules and International Society, New York: Oxford University Press, 1999, p. 175.

role of civil society also reach functional groups which moved to economic and professional activities that operate cross-border through network, norms and procedure that established by themselves as law without effective State[4].

We witness main factor behind development of globalization are world market power that is increasingly integrated in last decades, which moved particularly by private transnational companies that operate in financial, industrial and trade fields. Their roles are getting stronger to control globalization process without governmental interference. David Korten describes current globalization as an integration of: 'the world's national economies into a single, borderless global economy in which the world's mega-corporations are free to move goods and money anywhere in the world that affords an opportunity for profit, without governmental interference'[5].

In the internal level of a state, independent institutions are developing, in function and policy making, which are integrated or being part of a network and international cooperation to establish norms and standard in frame of global governance, as we can see in financial and banking fields. For instance, the establishment of norms and standard as well as best practices by central bank through Basel Committee which created to strenghthen/ to enhance banking system control, and to establish framework of transnational security market by the International Organization of Securities Commissions (IOSCO)[6]. Slaughter shows development of domestic regulator agencies (regulatory agencies) creates networking with their partners in abroad to respond global issues by exchanging information, idea, resources, and policies. They are 'trangovernmental networks' with informal characteristic fastly developed particularly in cooperation in regulation field[7]. Domestic financial authorities such as Central Bank and Capital Market Authority are able to make direct interaction and participation in every international or cooperation plan of action in order to improve global governance.

[4] See further Oscar Schachter, 'the Decline of the Nation-State and Its Implications for International Law', 36 Columbia Journal of Transnational Law 7, 1997, pp. 9-11.

[5] See David C. Korten, When Corporations Rule the World 4 (2d ed. 2001)

[6] See Kanishka Jayasuriya, Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance, 6 Indiana Journal of Global Legal Studies, Spring 1999, p6,9-10

III. The Changes of Sovereignty in International Law

In line with the increasing role of a Non-State entity , globalization emerges experts of international law and international politics sues traditional international law based on the concept of national sovereignty assumed to be obsolete. The traditional sovereignty concept is followed by territorial jurisdiction-based concept which is exclusive from a State. This sovereignty concept emphasizes State as an actor in international affairs, and treaty is a central instrument for a State to establish international regime. This kind of sovereignty has supported national economic growth of nations in the world for centuries. However, the global economic development has transformed such sovereignty for decades. Rapid development of global economic, regional institutions growth, as well as emergence of international regulation regime limits effectiveness of such conventional sovereignty concept[8]. Professor Berman criticizes the existence of traditional international law that he assumed had no longer privilege as a primary conceptual framework to comprehend development of cross-border norms , and ignore the reality of world development in globalization era which filled of various elements and complexities. He opined:

"over the course of the twentieth century, international law lost its privileged place as the primary conceptual frame work for understanding the cross-border development of norms. The introduction of universal human rights standars, the recognition of interdependence among nation-states, the development of international courts and institutions, the growing diffusion of people, money, and information across terriorial borders, and the increasing interest in normative development and legal consciousness outside of formal governmental spheres have collectively eroded the foundations of traditional positivist public international law, which had often been conceived only as a set of rules entered into by nation-states to govern their relationships with each other"[9].

International law put a State as a central actor in transnational affairs. The

[7] Anne-Marie Slaughter, The Real New World Order, Fo. Aff. (1997)

[8] Seen from international law perspective, based on Jayasuriya observation, there are many rules yielded by international organization that experience failure in implementing it because such international organizations are conceived as organization consisting of nations established through formal treaty. See Jayasuriya, ibid., p. 429.

[9] Paul Schiff Berman, 'From International Law to Law and Globalization', 43 Columbia Journal of Transnational Law, 2005, p. 555.

state has sovereignty by monopolize its power. In transnational affairs, the state implements its sovereignty within international law borders. Dimension of monopoly power as a core of State sovereignty concept is being challenged for its implementation and effectiveness.

Kofi Annan, in his closing statement as General Secretary of United Nations before the General Assembly of United Nations on 19 September 2006, argued that international law system orientated on power is an unjust, discriminative system and has failed to respond global challenges He stated :

"this power-oriented international legal system is widely perceived as 'unjust, discriminatory and irresponsible' and has failed to effectively respond to the three global challenge to the United Nations. These three challenges – 'an unjust world economy, world disorder and widespread contempt for human rights and the rule of law' entail divisions that threaten the very notion of an international community[10]".

Regionalism and exclusivity characteristic from the sovereignty concept are mainly challenged its relevance, in particular within the perspective of global economic development level[11]. Globalization has changed or reformed the borders between domestic and international region. Global economic development and emergence of international regulation regime have limited effectiveness of such concept of traditional sovereignty. Territorial jurisdiction of State towards economy is increasingly limit by escalating of globalization in economic affairs. Meanwhile, the role of other actors such as multinational companies are growing increasingly to determine their control in globalization. Within the globalization, national economics are integrated into into a borderless global economic entity, whereas world-class corporations are free to move goods, service and money elsewhere profitable without governmental interference[12]. The clear example is financial market, whereas the integration of capitaland financial market have caused shift concept of 'place' (space of place) to 'network' (spaces of networks). Networking concept is contradictory with territorial concept of 'place', since currency domain not similar with State borders. Another example

[10] UN document GA/105000, 19 September 2006

[11] See Jayasuriya, ibid

[12] See Aaron Judson Lodge, 'Globalization: Panacea for the World or Conquistador of International Law and Statehood', Oregon Review of International Law, Spring 2005, pp. 229-230.

is the development of 'dolarization', whereas people are using US dollar as an exchange tool and no longer using local currency. State is often not being a single actor in the competition of international between States. There are other actors (such as private actors) which also have key role by using facilities for monetary purpose[13]. We witness the great role and power of financial market that limit State capacity to intervene economic effectively.

IV. Fundamental Changes in International Economic Law

The rising development of an integrated world conveys great changes of prevailing international law regime. The most fundamental change is in the field of international economic law aside from great changes in the other international law fields such as law related to human rights. International law instruments were established and developed to support or facilitates demand and necessity of economic globalization Capital and technology mobilities, as well as the rising global trade and investment which has become more integrated, need international regulation in the form of rules, standards, procedures and institution for dispute settlement. The International market needs regulation for telecommunication and transportation, rules and procedure for financial stability, standard of product and industry, rules on environment protection, etc. Two examples which experience great changes are International Trade Law, as stated in World Trade Organization (WTO) treaty, and International Financial Law regulated by International Monetary Fund (IMF) and other international financial institutions. According to Chimni[14], the scope of these fields directed to establishment process of 'unified global economic space', as stage towards establishment of a nascent global state in line with existence of State with territorial characteristic. The main core of this global regulation is the establishment of uniform global standards for various economic activities, which breakthrough State territorial sovereignty. Each State must comply to global norms which have been established, and accustomed to its national laws. World Trade Organization (WTO) multilateral agreements on goods, service and intellectual property contain norms and standards and must be complied by its member States. We witness a property internationalization process through the international law instrument. Simi-

[13] See Jayasuria, op.cit, p. 435

[14] B.S. Chimni, A Just World Under Law: A View From the South, American University International Law Review 2007, 22 Am.U.Int'l L.Rev.199

lar process also occurs through state privatization to State owned enterprises and public services such as health and education. From the scope and depth perspective of, internationalization of regulation involves turnover of States' broad authority into international domain.

In line with structural change and enlargement scope of international law, we can see a stronger role increase of international organizations, in particular the institutions operates in the field of international economic and financial. One of the characteristics in the current process of globalization is shifting State power in economy to international economic institutions. National laws stipulate regulation in various economic activities has been replaced by the uniform global rules and standards in order to eliminate barriers to obtain and acumulate capital at global level. Economics Institutions such as WTO, IMF and World Bank posses major influence to force sovereign States to adopt equals rules and standards without considering level of economic and social development of each such State. This is illustrated as a basic problem faced by the people recently, high importance economic and social policies which negotiated and decided in the global level, whereas the implementation is performed in the national level[15].

Globalization development requires recognition of role and responsible from a non-State actor such as companies, civil society, or Non-Governmental Organization (NGO), and even individuals. The question on how further these actors, such as corporation and NGO, can be given a place in international law as an entity that has rights and obligations. Ironically, economic globalization is moved by transnational corporations (TNC), however, efforts to direct these entities to international law regime have not yet been succesful. The efforts to regulate TNC performance had been initiated since the 1970s by the United Nations by establishing Commission on Transnational Corporation within its mandate to arrange an 'international code of conduct' for TNC. Through this code of conduct proposal, States are convinced TNC fulfill certain standards when make investment in a State , among others, by respect national sovereignty and human rights, avoid 'transfer pricing' practices, reveal informations relevant for local government, etc. Such UN efforts trigger debate and conflict

[15] B.S. Chimni, ibid., p. 214.

[16] See Virginia Haufler, Globalization and Industry Self-Regulation, in Miles Kahler and David A. Lake, Eds., "Governance in a Global Economy", Princeton and Oxford: Princeton University Press, 2003, p.235-239.

between developing and industrial States a long period. Developing States argue that TNC code of conduct should be mandatory, whereas industrial States support implementation of such code voluntarily. The developments in the 1980s have hampered and weakened such UN effort by developing liberalism of economy and finance which stimulates power and process of the globalization. Such development influenced international negotiation regarding TNC conduct; its final design has never been accepted and negotiation process discontinued in 1992[16].

NGOs play a major role in the effort to improve public and government concern toward important and sensitive issues in agenda of international negotiation with broad implication to human life. Advocation and campaign conducted by NGO functioned as counter-pressure to protect interest of developing ' State which often facing great pressure from powerful States. International practices have begun to provide roles to NGO to give advocation in the international conferences and international organizations. International organizations such as WTO have permitted NGO to deliver amicus curiae briefs[17] on WTO's dispute solving agency session, although there are l many opposition from several member States. The most significant role of NGO role is through global networks developed by networks communities. Through the global networks, they creates norms and procedures establish rules effectively with no States participation.

The increasing role of Non- State actors in international level brought implications in the current discipline of international law and in the future. Berman introduces comprehensive interdisciplinary approach throughout his idea on law and globalization. Focus of international law is not only on State or State institutions, but also the role of NonState actor, whereas sovereignty is not centered on State but also distributed to accomodate dynamic process to create international and transnational norms, as well as non territorial norms. Law related to globalization is not necessarily differentiates between international public law or international civil law, since it is conceived to be irrelevant[18]. International affairs which increasingly integrated motivates Petersmann to propose citizen-oriented law system so called 'international integration law' which protect individual rights and citizen-driven market integration' which developed based on international constitution law. This author points out the improvement and enlargement of international cooperation in the form of regional free-trade agreements, custom and the other integration agreements, and more focus on international economic law, environment and human rights law for the protection of individual rights and interest of the citizens.

[17] Amicus curiae points out individual or external parties that have no rights as party in a lawsuit but permitted to give argument or evidences in order to protect their interests. In handling lawsuit in front of Panel and Appelate Body WTO, NGO and individual may propose amicus curiae brief but the decision to accept or consider it is discretion from the two institutions. See Mitsuo Matsushita, Thomas J. Schoenbaum&Petros C. Mavroidis, "The World Trade Organization: Law, Practice, and Policy", Oxford: Oxford University Press, 2003, p.36-37.

Such progress requires establishment of new laws discipline such as integrated law in the regional and global level in order to improve mutual cooperation between Governments, individuals, societies and parliament members. Development towards such integrated law starts to appears through initiatives to transform regional free markets into regional communities such as ASEAN Community, Southern African Community, MERCUSOR, and Andean and Central American Economic Communities, following the succeede of Eropean community[19]. Meanwhile, Jayasuriya sees the future of transnational relations between States is more directed by global networking, which will create a system so called Governance system and global regulation, a network management system that creates general standard and regulation principle within decentralized law enforcement system[20]. In this regard, Slaughter stresses the development of transgovernmental networks as a form of informal international organization rapidly growing into a sector in international law[21].

V. International Law with Multiple Sovereignties

Problem faced are how regional-based sovereignty regulate economic activity and global business that are easily and rapidly crossing State borders such as online transactions. Such type of activities often involving actors from vari-

[18] Berman, ibid., pp. 523, 527

[19] Ernst-Ulrich Petersmann, "Justice in International Economic Law? From the 'International Law Among States' to 'International Integration Law' and 'Constitutional Law', European University Institute, EUI Working Paper LAW No. 2006/46 http://ssrn.com/abstract=964165, accessed on 17 April 2007

[20] Jayasuriya, ibid. p.453

[21] See Kal Raustiala, The Architecture of International Corporation, UCLA Law School, January 2002, 4-5

ous locations, resulting in a collision of sovereignty, jurisdiction and norms. Such situation involving 'multiple sovereignties' lead to Daniel Philpott called, as cited by Berman, as 'crises of pluralism'[22]. In various situation, sovereignty can be considered as an obstacle or limit space of law development which needed to support cross-borders activities. Such a condition provides opportunity for development of norms with no interfere nor involvement from Government.

The development of globalization and its impact to the lanscape of international law has raised great challenges to future law which regulates transnational relations. Fundamental challenge to the concept of national sovereignty is become basic normative to international law. Such sovereignty concept had and continuously to modify and transform in line with the development of globalization. The development of current and future international law norms is no longer oriented to the States as a single authority based on the concept of traditional sovereignty but also to increase the role of non-state actor. Although national States stay capable to maintain their existence, traditional sovereignty which they possessed had begun to be distributed and divided in order to accomodate various international, transnational and non territorial norms that developed through interaction among Non-States actors. Such development led them to apply concept of 'new sovereignty' which involved participation from national States in a broad scope regime and includes international and transgovernmental regimes, networks, institution and organization, companies, and other entities required by State government to reach their goals[23].

Such a description indicates trend of international law development which grow and develop through interaction between various international actors and individual loyalty will be divided among such actors. The idea that State as a subject which create international law will be extensive. In addition, the establishment ways of international law rules will change. The establishment process of international customary law will be more complex. There are options on the establishment of customary laws in various levels, both applied generally to all

[22] Berman, op.cit, p.528-529

[23] Jackson introduces term 'allocation of power' to refer to this sovereignty concept he calls 'sovereignty-modern'. According to him, debate on sovereignty developing this time is generally related to power allocation matter. He differentiates two forms of power allocation: vertical allocation (international and national, central and local government) and horizontal allocation (between various entities/governmental organs, between various international organization/agencies (WTO, IMF, World Bank, etc. See John H. Jackson, op.cit., p. 790-791).

actors and applied to certain actors (for example, among States, between States and international organization, between international organization and NGO, etc). The process of international negotiation by Non-State actors will take many ways that are different from ways or procedures taken by States[24].

VI. State Sovereignty and International Economic Law from the Perspective of a Developing State

The question on how the concept of State sovereignty concept keep being functioned in the middle of current world economic globalization and in the future. For developing State and third world countries, such sovereignty matter is a sensitive issue. Sovereignty has very high value for them as a 'cornerstone of international relations' to protect political freedom that was difficult to obtain. This is different from Western States, whereas the meaning of sovereignty had largerly declined as the increase of international relations[25]. The concept of sovereignty plays crucial role for political development for Asian and African States. Not surprisingly, President Aljazair, Boueteflika, as President of African Unity Organization, in the session of UN General Assemby in 1999 stated that sovereignty is "our final defense against the rules of unjust world[26]". As well as Abdullah Badawi, former Prime Minister of Malaysia emphasized that State sovereignty creates 'terhakis' because their position in political and economical institutions between States is weak, and therefore, in the era of globalization and interdependence these days, sovereignty has become more important, particularly for developing State and small countries[27]. Even, the debates on sovereignty is burning in the United States related to their participation in WTO organization and tied themselves to the result of Uruguay round[28].

[24] See Anthony Clark Arend, Legal Rules and International Society, Oxford: Oxford University Press, 1999, p.184-185.

[25] See Peter Malanczuk, Akehurst's Modern Introduction to International Law, London and New York: Routledge, 1997, p. 18

[26] Cited by Shashi Tharoor and Sam Dawa in 'Humanitarian Intervention: Getting Past the Reefs," World Policy Journal XVIII, no. 2 (Summer 2001), p.25

[27] Stated in Seminar of UMNO Club Alumni: Mempertahankan Maruah dan Kedaulatan Malaysia, Mei 2003 www.pmo.gov.my

[28] See John H. Jackson, The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results, 36 Columbia Journal of Transnational Law, 1997, 157

In the context of role transformation on sovereignty role and its function, Rustiala brought up the existence of international economic institutions as a vehicle, whereas sovereignty can be empowered and even improved. International institutions can be used to prevent domestic interests which will use State power to gain profit (rent-seeker). By the development of global economic which resulted in interdependence among States and the limitation of each State to improve public welfare, then international institutions is a link and instrument for States to reach its social and developmental goals thus they can preserve their legitimacy. Through these institutions as mediums, States functioned their sovereignty and participated in the various regimes of international system regulations.[29] Similar to Raustiala's argument, Barkin emphasizes that State participation and comitment in an international organization or international agreements are not indicators of sovereignty decrease which they had, but only based on 'trade-offs' consideration. States do not assume their sovereignties are threatened by international commitment which had been negotiated and created to reach mutual goals. In this respect, globalization provides an impact to strengthen State sovereignties rather than the opposite.[30] There are emerging perspectives which tried to emphasize defense of the concept of sovereignty in transnational affairs. However, we have difficulties to deny reality relations which have occured based on real politics, particularly in the field of economic and world trade.

We witness that restoration and strengthening sovereignty through international economic institutions often do not realize and hardly to be realized. Third world States involvement on the decision making process in the international economic institutions still have many obstacles , both in capacity and rules/ procedural reason, nor because of non -transparency and undemocratic negotiation mechanism. IMF has regulation on voting system which based on a 'weighted voting system' with a dominant role to industrial States; On the other hand, it resisted/closed the possibility for third world States to influence substance of 'conditionalities' that will be burdened to them. As well as in the trading field, negotiations on multilateral trade since Uruguay Round, continued by Seattle, Doha and Cancun negotiations did not involve any active participation from most of third world States, whereas the implementation assessed is not transparent and democratic.

[29] Kal Raustiala, Rethinking the Sovereignty Debate in International Economic Law, 6 Journal of International Economic Law, December, 2003 (6 J.Int'l Econ.L. 841)

[30] Samuel Barkin, Resilience of the State: The Evolution and Sustainability of Sovereignty, Harvard International Review Winter 2001, Vo.XXII, No. 4, p.45-46

However, limitations often faced by developing States, in particular States with weak economies, are their disability to empower their sovereignty to face industrial States with great position and economics power. By offering assistance, facilities or certain concession, these weak states are able to be 'controlled' to support proposal or blueprint from the industrial States. As Stiglitz stated, there is reality of 'power relationship' which emerge between the developed States and developing States.[31] It can be seen in the practices of international negotiations such as the WTO forum. We should not be enough to see the only fact that there was an voluntary approval given by weak and poor States to be bound themselves to WTO rules. This institution assessed has been developed as an political motives organization.[32] In fact, there is dilematic situation for weak and poor States on their efforts to build their economies. Limited resources that they own are not possible to increase their welfare and economy without any support and participation in the international negotiation and international commitment. Thus they compete to attract foreign investment and look for access to international financial institutions. They are open, 'outward-oriented' by adopting liberal economic system and participating in trade negotiations that refer to liberalization and trade restriction elimination. On the other hand, they have to face and receive existence from the system of international trade which strongly limit their moving space, asymmetric and unbalanced, no prejudiced for their interest. International regulations are bound them not only in transnational affairs, but also in internal affairs of each State. As stated by Sampson regarding WTO regulations that:

"these rules extend well beyond border measures and reach deep into domestic regulatory structures. Domestic regulations relating to patents, financial services, subsidies, and support measures for agriculture are all subject to WTO disciplines".[33]

VI. Unfair and Unbalanced International System

The perspective of globalization based on economic capitalism and liberalism philosophy bear law regime that is prejudiced for strong economic States and the interest of transnational companies. The demands which are often proposed by developing and least-developed States questioned the realization and

[31] Stiglitz, op.cit., p.75

reality of economic globalization and trade liberalization that, in fact, bring no benefit for such State interests. The Instruments of International economic laws which are based on the concept of market economic establish global rules and standards applied uniformly without considering level of State economic development and individual State development. Such law product only accomodate big international companies that control capital, technologies and services for the world economy. They are motivated by the power behind globalization acceleration which purposed to maximize profit.

Profit motivation shifts human values that are very important for every State's life, such as environment conservation, sustainable development, public health, access to education, civil rights, cultural diversity and other various human rights. Lodge states, related to free trade agreement, that

"globalization, via free trade agreement, fueled primarily by corporate pursuit of economic gain, has not replaced the traditional precepts and priorities of international law to protect humanity and the environment. The goals of economic gains and corporate profits are justified by the dubious theory that the poor and weak of the world will ultimately benefit or otherwise be better off. However, that has not proven to be the case."[34]

Transnational companies are not very fascinated to fulfill demand of public interest relating to food safety, minimum wage, privacy rights, reformation facilities of health care, environmental establishment, and other issues that may decrease their potential profit.

As it can be seen from an economic power perspective, there are realities of inequalities and, therefore, international rules and standards that should be established by considering these realities. Established rules should consider condition and level development of these States. Recognition of the differences should become basis to create more equal and balance international rules. A reality that we must also recognize is the current WTO rules do not eliminate the differences. The main concern for developing States is the result of trade negotiation results create asymetric and unbalanced impacts, in other words,

[32] See Margaret Liang, The Real Politic of Multilateral Trade Negotiations from Uruguay to the Doha Round, 8 Singapore Year Book of International Law 2004, 149

[33] Gary P. Sampson, Ed., The Role of the World Trade Organization in Global Governance, Tokyo, New York, Paris, United Nations University Press, 2001, p. 5.

[34] Aaron Judson Lodge, Globalization: Panacea for the World or Conquistador of International Law and Statehood?", Gregon Review of International Law, Spring 2005, p.295.

they only give benefit for the developed States but not for the developing States. For examples, in the case of multilateral trade on goods and services, the entire structured rules, discipline and procedures are built based on the liberalization basic concept. Liberalization which operates through the elimination or substraction of tariff and non-tariff restriction creates unbalanced and unjust conditions, considering great differences on economic power between developed and developing States. Consequently, developed States are group of States that generally have great opportunity and ability to apply trade liberalization which resulted in continuous trade negotiation rounds. This is not suitable with main objective of international trade system: to give mutual benefit (benefit-sharing, mutually advantages) to all member States as reflected in Preambule of Marakesh Agreement for WTO establishment. The first paragraph of the Preambule contains an 'ideal' objective for mutual advantages of States:

"recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadly growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different level of economic development"[35]

A healthy mind teaches that a system that regulates international trade can only work well, stable and effective if all integrated States i are getting benefit from such a system. Several basic principles and concepts which apply in the international trade relationship, in fact, do not give benefit as expected. [36] Reciprocity as a basic concept to give and to get concession in the transnational trade relation is not suitably applied in a multilateral trade system which involved most States with broad and variative differences in the level of economic development. This principle application will be more beneficial for developed States with their big economic capacity rather than developing States which have limited capacity, particularly in using foreign market opportunity.

[35] The Legal Texts, The Results of the Uruguay Round of Multilateral Trade Negotiations, Cambridge: Cambridge University Press, 1999.

[36] See Bhagirath Lai Das, The WTO and the Multilateral Trading System: Past, Present and Future, Penang: Third World Network, 2003, p.187.

Principle of national treatment restricts a State to give special treatment to certain domestic product if the same treatment is not given to the same product imported from other State. For developing States that are generally still in the stage of development to pursuit their economic and social goals, the gift of these facilities and special treatment to domestic products for developing sectors assumed to be important and critical is a policy that shoud be allowed. Economic instruments such as subsidies, import control and safeguard should be more flexibly used for development purpose of developing States. As well as services which provide public interest (public services) such as health, education, water, etc that included in 'traded services' in the dictionary of WTO'/ GATS'; policy making shoud be given up entirely to each member States. The WTO agreement on agriculture allows developed States to give major subsidies for their farmers, whereas developing States have to limit or decrease subsidies and tariff in such sector.

The problem of international standard establishment which applied to all member States without considering respective development and ability levels of each States indicates classic characteristic of international law development from Western world. In the traditional international law field, there are international minimum standards which applied to every State on the treatment to foreigner including foreign companies as well as their assets. Violation of these standards resulted as State responsibility. This concept was born and developed along with the broadened economic interests from Western States to Asia, Africa and Latin America. Rules based on this concept are continuously face challenges, particularly from the developing States.[37]

International economic regime developing norms and standards on trades on goods and services as well as intellectual property . WTO agreements such

[37] For example is protection standard relating to nation's action to make foreign-owned asset expropriation. Compensation standards that have to meet 'prompt, adequate and effective' criterions, that are initially perceived as international habitual law norm, then have correction through General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, 1962, and General Assembly Resolution 3171 (XXVIII) 1973 on similar matter. These two resolutions emphasize application of 'appropriate compensation' criterion and nation right 'to determine the amount of possible compensation and the mode of payment'. See Henry J. Steiner and Detlev F. Vagts, Transnational Legal Problems', New York: The Foundation Press, Inc., 1976, p.462-469, 515-520. See also I.A. Shearer, Starke's International Law, London: Butterworths, 1994, p.271-272].

as Agreement on the Application of Sanitary and Phytosanitary Measures (harmonization action in sanitary and phytosanitary), Agreement on Technical Barriers to Trade (international standard development and confirmatory assessment system) and the General Agreement on Trade in Service (relating to qualification, technical standard and license) having direct application of international standards goods and services trades. Similarly, Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) applies higher standards of intellectual property to be adopted by member States, where these standards are more biased to the Rights' holder (which generally come from developed industrial States) rather than developing States that also have to consider public interests .

Conditions and requirements in 'structural adjusment' which was established by the IMF to developing States having difficulties in their balance of payment do not consider social and developmental goals of related States. Conditions established by the IMF are around macro-economic factors, exchange value policy and structural policies that reach deep down domestic value policy of related States. Extending focus on structural problems allow this institution to enter micro-economic area and restore resisting factors or burdening production growth (economic, social and even cultural barriers).[38]The IMF applies international financial norms and standards to States which distributes funds that are mainly for developing States. This forced standard is not only taken from IMF product alone, but also from various transgovernmental institutions and organizations of industrial States and other international financial institutions. These standards are applied through 'conditionality' instrument as part of condition and requirement that must be met by borrower States. States that need IMF funding facilities to solve their balance of payment problem have no other option except to receive and implement such standards. Then, obedience of these implementation standards is monitored through 'surveillance' and consultation mechanisms. They are finally under IMF control both in macro- and micro-economy and the application of international financial standards.[39]

International trade regulations and the decision of WTO dispute settlement body tend to give priority to application of market access rather than applica-

[38] Delonis, op.cit, 574

[39] See Robert P. Delonis, International Financial Standards and Codes: Mandatory Regulation Without Representation, New York University Journal of International Law and Politics, Winter-Spring 2004, p. 595-629

tion of public protection policy on risks and threats which resulted from trading a product. As example is Hormone Beef case, whereas consideration to secure free trade without barrier is a priority other than consideration to protect public health from risk of disease caused by importing meat products which contain hormones.[40] Trade consideration is favored rather than other factors including environment protection. This dispute settlement systems often put developed States in a beneficial position. Complicated and high cost legal processes burden developing States that have limitation resources. The use of public legal assistance is often give no result as expected[41].

The question is: Shall international law accomodate a group of industrial States by violating rights of interest of the majority world States ? Stiglitz and Charlton question whether international laws whose function is to regulate transnational affairs are based only on real politic or consideration of social justice and fairness? International trade regulation should be based and guided by fairness principles, not economic power. Although implementation of this principle at the international level is perceived to be weaker than domestic domain, it is necessarily understood on its implication of this principle among States.[42]

VII. The Outlook of International Law from the Perspective of Human Values

The history of international law development is unseparated from the interests of Western States which form world order that more reflect justice. Its duty and function are more oriented in creating ordered international system rather than a just system. However, we may see the development of modern international law tends to pursue equality in relations between states and ensure human values. Nowadays, the national interest of each state is to develop capability to ensure civil and political rights, as well as fulfillment of the economic,

[40] See EC-Measures Concerning Meat and Meat Products, Report of the Appellate Body, 13 Feb 1998, WT/DS26/AB/R; WT/DS/48/R

[41] From 305 cases of bilateral disputes proposed to WTO in the period between 1995-2002, 143 of them come from Europe Union, Japan and America, whereas 49 countries grouped in 'less-developed countries' never prosecute even a case in the same period. See Stiglitz, op.cit., p.83.

[42] Joseph E. Stiglitz and Andrew Charlton, Fair Trade For All: How Trade Can Promote Development, Oxford: Oxford University Press, 2005, p.74

social and cultural rights of every citizen, and that international system will continuously grow and develop by accomodating state values and human values[43]. International society has been developing into human rights law for the last decades in order to give moral and legal bases for every aspect on human activity. The Development of human rights law is a most progressive topic conducted by international societies. The instruments of international law in the topic of human rights encourages the establishment of stable and law-based society, a condition needed for sustainable development and well functioned world economy and international trade system. In reality, rules relating to economic globalization have been rapidly developed with strong and effective dispute settlement system, whereas the important rules relating to human rights are neglected in international economic law regimes. Both regimes seem to work separately while in fact, the Human Rights are much related to international economic system. By integrating human rights norms into every aspect of policy making, we may expect the creation of market that is not only opened but also fair.[44]

Increasing the life standard for every state in the globe and decreasing poverty, as contained in WTO Preamble and Doha Development Agenda, are a raison d'etre of WTO that contains central elements of human rights relates to economic, social and cultural rights. The Right to development as a realization of human right is not only related to economic growth, but also to human welfare including health, education, job opportunity, social security and other human needs. United Nation through the UN Declaration on the Right to Development 1986 (UNDRD) defines 'development' extensively as follows:

"a comprehensive economic, social, cultural and political process which aims at the constant improvement of the well-being of the entire population and of all individual on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom".[45]

[43] Louis Henkin, International Law: Politics and Values, Dodrecht/Boston/London: Martinus Nijhoff Publishers, 1995, p.284, compare I.A. Shearer, Starke's International Law, London: Butterworth, 1994, p. 5.

[44] See Mary Robinson, Making the Global Economy Work for Human Rights, in Gary P. Sampson, Ed., "The Role of the World Trade Organization in Global Governance", (Tokyo, New York, Paris:United Nations University Press), 2001, p.210

[45] See Robinson, op.cit., p.217

These rights have various dimensions such as *respect for human rights* through recognition international economic system is closely related to human rights, *participation* that every people or state has the right to participate and enjoy development in economic, social, cultural and political field, *equality of opportunity* where states ensure equal opportunity to get access to resources, education, health, food, housing, job opportunity, etc., *differential treatment for developing states* when they need different treatment in international trade regulation, as well as *accountability* through international institutions reformation and the implementation of good governance.[46] From various dimensions mentioned above, according to the author opinion, most of them have not been realized in the reality of international relations. In the WTO perspective, right to development is carried out through concepts such as preferential treatment and special and differential treatment (S&D) for developing countries. S&D is focused on three main issues: preferential access to markets in the developed state, exception from certain WTO rules and providing assistance for the development. Doha Declaration 2001 demands review on S&D rules to be clearer, effective and operational, but it has not resulted in significant improvement[47]. Criticism towards S&D concept is particularly on its implementation that is still based on the 'best endeavour', thus it does not create commitment to be binding for developed states thus lawsuit can not be submitted to them that do not meet such stipulations. Ironically, the implementation of WTO agreements by developing states, although there is a transitional stage, has not become a condition for fulfillment of technical and financial assistances properly by developed states as a realization of S&D.[48]

International economic law has been growing and developed separated and without involvement of norms and standards of human rights. These two regimes should work in sync, fulfill, strengthen and be coherent to each other in creating international law order oriented on international society welfare. They must be developed to convergence direction; this is reliable with the international law function: to form international rules that are realization of common aspiration of different nations society. Chimni states

"International human rights law cannot deliver on its promise today, for the global economy is controlled by states and social forces that do not take human suffering and the language of rights seriously, in particular the implementation of economic, social and cultural rights"[49]

What it lack, Somarajah says, is an ethical base in international law policy and regulation. International law should be guided by the ethical consideration such as poverty elimination, improvement of economic development, environmental protection and human rights enhancement.[50] Therefore, international law is focusing on the enhancing of human values.

The establishment of an international economic system based on human values is a big challenge on effort to develop international law order oriented to fairness. In the liberal and dynamic global market situation, it is difficult to find spirit of 'fairness'. The main challenge, as Thomas Franck states, comes not only from an individual state that has sovereignty, but also from dynamic and more deregulated global market.[51] Fairness pursued is not only related to substantive fairness, but also procedural fairness. The conditions of National societies that are still in poverty (more than 1 billion world population live with US$1 or less a day), the absence of human rights security and the absence of democratic management in international organization are examples of the unfulfilled distributive fairness. The Participation of weak economy and poor states in the decision making process of the problems and policies relating to their sustainability life is absolutely needed. These two fairness aspects are described in more detail by Chimni. According to Chimni, there are at least three issues related to the effort of the creation of global justice.[52] First, there is a recogni-

[46] See Isabella D. Bunn, The Right to Development: Implications for International Economic Law, American university International Law Review, 2000, p.6-9 15 AMUILR 1425

[47] See the next Bernard Hoekman, More Favorable Treatment of Developing Countries: Ways Forward, in Richard Newfarmer (Ed.), trade, Doha, and Development: A Window into the Issues, Washington D.C.: The World Bank, 2006, p.209-215.

[48] See Bernard M. Hoekman and Michael M. Kostecki, The Political Economy of the World Trading System: The WTO and Beyond", Oxford: Oxford University Press, 2001, p.393

[49] Chimni, op.cit., p.206-207

[50] M. Somarajah, The Asian Perspective to International Law in the Age of Globalization, Singapore Journal of International and Comparative Law, 2001, p. 304-305

[51] "the challenge comes not from the recalcitrant sovereign state but from an equally unsympathetic foe, the dynamic and deregulated global market. Fairness is hardly the animating spirit in the boundary-less financial markets." Cited in Gerry J. Simpson, Is International Law Fair? Michigan Journal of International Law, Spring 1996, p.638 17 Mich. J. Int'l L.615

[52] See Chimni, op.cit. p.213-218

tion of mutual life in the nations communities guided by human rights law; second, there is a justice redistribution, where as weak and poor states remained have the freedom to determine their economic policies and international economic law rules that give necessity on human rights law; and third, fair representation to eliminate the democracy deficit that has been practiced by international economic institutions. Such three issues stated by Chimni, as outlined above, have not been reflected in the current international system.

Based on the above analysis, we may conclude that international law has faced fundamental changes. Aside from the structural changes relating to state's role with its sovereignty, and the more significant role of non-state actors, international law is faced by major problems of fairness. Economic globalization creates international law regime that is not prejudiced for major countries in the world. International law is established for mutual benefit of all nations, where human dignity and values become central elements. As stated by Lung-chu Chen that "the ultimate goal should be the establishment of a world community of human dignity"[53] The right to development for backward countries to enjoy better life is a most important part of the international law system oriented to fairness. According to the author's opinion, the sustainability and stability of international law as a system that regulates international relation will depend on how far this fairness dimension is accomplished in the reality of transnational life. This is a process that needs great effort and time.

[53] Lung-chu Chen, An Introduction to Contemporary International Law: A Policy-oriented Perspective, New Haven and London: Yale University Press, 1989, p.4

Investing and Protection of Investor in Stock Market

Adler Haymans Manurung[1]

This paper discusses three areas, namely investment, investors' characteristics, and a place of investment, which is stock market. In investing in stock market, investors need to utilize funds which are not currently used so they would not worry about the decrease value that may occur in a short term. Investors need to understand the risks which can be tolerated to invest. On the other hand, investors must be protected to prevent inappropriate transactions. Regulators must endorse rules regularly revised to suit the existing condition that can satisfy many parties.

Keywords: Investment, investor's characteristics, capital market.

I.Introduction

The last two years, the television and the newspapers have been reporting news many investors suffering financial losses, because of the ignorance or greed of investors themselves, or bad faith of bidders investment products. Institutions that inflicted financial loss to the investors in Indonesia are not only local investment institution but also international institutions such as experienced by Vincent Lingga, a customer of Citibank, which bought Lehman Brothers products from Citibank. The deceivers always offer a brilliant result. When using the interest rate, the interest is large enough and nearly equal to the interest rate for bank loans offered to rural. Table 1 shows the institutions or individuals who offer investment products and losses incurred.

There are many methods used by the institutions or individuals to funds that will not be returned to its owner. Fraud causes many investors suffered large and varied losses from Rp 2,4 billion to Rp800 billion.

This article presents three discussions: investing, investor characteristics,

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