KILLING THE GOOSE THAT LAID THE GOLDEN EGG: THE POLITICS AND LAW OF EXPROPRIATION IN DEVELOPING ECONOMY

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ABSTRACT

Expropriation and nationalization of foreign owned investments in the early 90s was in the minds of developing countries a gateway to economic growth and independence. Sooner than later, it was realized that foreign investments play a central role with regard to a state's economic growth, development and internal prosperity. Indeed, foreign investment has a particular significance not only from an economic standpoint, but also a social and political perspective in that it contributes to the infusion of capital and enhances people's living conditions by improving infrastructure, education and health standards. Presently, with the changing dynamics of world politics mainly as it concerns developing countries, it’s no longer surprising that these States have continuously sought to attract foreign investments by creating an investor-friendly climate within their territories. In this context, States have substantially circumscribed their regulatory powers in a number of sensitive areas relating to public order, national security, social and cultural policy and economic policy for sustainable development, as well as to fundamental human rights and the environment all in a bid to attract more foreign presence in form of foreign investments. This is evidently reflected in a huge number of international investment agreements (IIAs) and particularly in BITs which these developing nations now seek to enter with capital importing countries, thus moving away from their old habit of using expropriation as a means of achieving economic independence, thereby realising that these foreign owned investments are indeed the goose that laid the golden egg.

Introduction

The protection of properties of foreign nationals can be traced to rules of international law. For a long time, it was governed to a large extent by the customary international rules on the treatment of aliens and by treaties of friendship, commerce and navigation.[1] Most investment treaties and free trade agreements concluded worldwide contain expropriation provisions covering indirect expropriation implicitly or with specific clauses to that end. Almost all of these documents however provide broad and open-ended provisions and stay silent on the more exact definition of the term, opening up for broad debates on what should be the real meaning of expropriation and when indirect or regulatory expropriation has taken place. The terms "expropriation" or "regulatory taking" (also known as indirect/regulatory expropriation) are sometimes used interchangeably. However, there is a clear distinction characterising the terms. Thus, while expropriation in itself concerns compulsory acquisition of assets by the state[2], regulatory taking or indirect expropriation, on the other hand, entails regulatory action, which could be in the form of an enactment, law and other legal instruments as well as their implementation in a way that tends to interfere with the enjoyment of benefits inherent in the property or right, or which undermines or tends to undermine the economic value of private investment, even where legal title to the property is not affected[3]. These were the situations that characterized the early post- independence era among developing States especially African countries seeking to attain in a quick manner economic independence by using expropriation as a means of achieving that. However, there has been a paradigm shift from such attitude by these developing States who now embrace BITs and IIAs containing such clauses against expropriation and full market value compensation method when such happens all in a bit to attract foreign investment to their countries. That is to say, these States have substantially reduced their regulatory powers in a number of sensitive areas relating to public order and economic policy for sustainable development, all in a bid to attract more foreign presence in form of foreign investments creating an unbalanced system of BITs which primarily focuses almost entirely on the protection of investors and their investments.[4]

Against this background, this research work will attempt to give a brief introduction to the concept of expropriation looking into the various ways it can manifest to wit: direct or unlawful and indirect or lawful expropriation which usually takes the form of regulatory expropriation. The research work will also explore the history of expropriation measures conducted by developing states in Africa in the early 90s over foreign owned properties located within their territory. This research work will feature discussions on the emerging

[1]See R B Lillich, (ed) 'Current Status of the Law of State Responsibility for Injuries to Aliens' (1983) *International Law of State Responsibility for Injuries to Alien,* 1 et Seq. For a historical perspective of the public international law norms on the protection of property. See also W D Verwey and N J Schrijver, 'The Taking of Foreign Property under International Law: A new Legal Perspective (1984) 15 NYIL 3, 4 et.

[2] L Cotula, 'The Regulatory Taking Doctrine'*, International Institute for Environment and Development* (2007),

[3]*Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2, June 22, 1984.

[4]A. Kulick, *Global Public Interest in International Investment Law,* (New York, Cambridge University Press, 2012) 1.

change of attitude and politics of the developing countries regarding the laws of expropriation especially now they have realised the need to safeguard and protect these foreign owned investments because of their growing importance in the economic well-being of their states.

Background

Defining the concept expropriation has been done by many authors and scholars all postulating deprivation and depreciation of economic rights and benefits over an investment belonging to an individual or investors by a government of the host State. This research views expropriation to mean a dispossession of the right of ownership in a property by a sovereign or constituted authority. This can be achieved by physically dispossessing the investor of the proprietary right without any justification or by government policies or implementation of the policies, regulations or new legislation which tends to undermine the benefits or enjoyment in a property thereby neutralizing the use of that property even though no physical disposition of the property has taken place.

In Ethyl and Methanex[5] cases, the claimants both claimed that they had been deprived of the substantial benefit of their investments and had suffered significant economic losses as a result of the regulations, losses so significant that the regulations in question were tantamount to expropriation. Deprivation, however, is not the sole litmus test of expropriation. Under international law, not all deprivations of property are expropriatory.[6]Under a State's police powers, it may take property and property owners may suffer significant economic losses without giving rise to state responsibility. Property may be forfeited under a state's criminal law. Property might be destroyed for reasons of public health. General taxation is not expropriation. In all these cases, a state does not incur responsibility for the legitimate and bona fide exercise of certain types of sovereign police powers.

Expropriation can occur in a variety of ways.[7]The primary distinction in international law is between: (i) direct forms of expropriation where the government directs the transfer of

[5] Ethyl v. Canada (hereinafter Ethyl) was settled after a jurisdictional award (38 I.L.M. 1347). For background on the Ethyl dispute see J. Soloway, "Environmental Trade Barriers under NAFTA: The MMT Fuel Additives Controversy" (1999) 8 Minn. J. of Global Trade 55. See also Methanex v. United States (hereinafter Methanex), where Methanex has claimed that a Californian ban on MTBE, another fuel additive, as (among other claims) an expropriation of its methanol production business, a prime ingredient of MTBE. http://www.state.gov/s/l/c3439.htm accessed 23 September, 2018.

[6] Modern investment treaties uniformly use the term "investment" to cover the types of rights protected by the treaty. Discussions of customary international law often refer to "acquired rights", while "property" is often used in discussions of domestic law. On the scope of "investment" in investment treaties see Noah Rubins, 'The Notion of 'Investment in International Investment Arbitration' in 'Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects', N. Horn and S. Kröll (eds.), (*The Hague: Kluwer Law International*, 2004) 283.

[7] "Indirect Expropriation" and the "Right to Regulate" in International Investment Law", OECD Working Paper on International Investment, Number 2004/4 provides a comprehensive review of indirect expropriation in international law.<http://www.oecd.org/dataoecd/22/54/33776546.pdf>.accessed 22 September 2018

private property to the State or a State-mandated third party; and (ii) indirect forms of expropriation where a government measure, which does not appear on its face to be expropriation, results in the deprivation of a foreign investor's property. In addition to the term 'expropriation', terms such as "dispossession", "taking", "deprivation" or "privations" are also used.[8] As stated earlier, Expropriation or deprivation of property[9] could also occur through interference by a state in the use of that property or with the enjoyment of the benefits even where the property is not seized and the legal title to the property is not affected. The measures taken by the State have a similar effect to expropriation or nationalisation and are generally termed "indirect", "creeping",[10] or "de facto" expropriation, or measures "tantamount" to expropriation.

Professor Dolzer on his part adopted the approach known as the "sole effect doctrine" because of its sole emphasis on the effect of the State measure on the property owner.[11] This approach is reflected in the most commonly cited definitions of expropriation. For example in *Starrett Housing Corporation v. Islamic Republic of Iran* the tribunal held that "it is recognized in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner."[12]

However, under international law, not all state measures interfering with property are expropriation. As Ian Brownlie[13]has stated, "State measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation.

[8] R. Dolzer and M. Stevens, "Bilateral Investment Treaties", *International Centre for Settlement of Investment Disputes* 1995, 98.

[9]In the context of international law, "property" refers to both tangible and intangible property. Under Article 1139 of the NAFTA, the definition of "investment" covers, among other things, "real estate or other property, *tangible or intangible* [emphasis supplied], acquired in the expectation or used for the purpose of economic benefit or other business purposes." Likewise, most BITs contain a relatively standard definition of investment that also covers intangible forms of property: "intellectual property and contractual rights". Similarly, Under the Protocol 1 of the European Convention on Human Rights, the concept of property is broadly defined by reference to all the proprietary interests of an individual. It covers a range of economic interests: "movable or immovable property, tangible and intangible interests, such as shares, patents, an arbitration award, the entitlement to a pension, a landlord's entitlement to rent, the economic interests connected with the running of a business and the right to exercise a profession…"

[10]On this point, Dolzer notes that, "'creeping expropriation' suggests a deliberate strategy on the part of the state, which may imply a negative moral judgement". See Dolzer, "Indirect Expropriation of Alien Property",(1986) *ICSID Review, Foreign Investment Law Journal,* pp. 41-59 at 44

[11]R Dolzer, "Indirect Expropriations: New Developments" (2002) 11 *N.Y.U. Environmental Law Journal*, 64 and R Dolzer and F Bloch, "Indirect Expropriation: Conceptual Realignments?" (2003) 5:3 *International Law Forum* 155.

[12]Starrett Housing Corporation v. Islamic Republic of Iran (1983) 4 Iran-U.S. C.T.R. 122 at 154 per Lagergren.

[13]Ian Brownlie, "Public International Law", *Oxford University Press, 6th Edition, 2003 at 509*.

The concept of expropriation in international law has been traditionally defined as "…individual measures taken for a public purpose".[14] Much of what would be traditionally considered expropriation occurred historically in the context involving actions by developing states' who sought to reassert control over their resources, as part of their anti-colonial struggle.[15]

In modern practice, the use of direct expropriation by States has become increasingly rare, owing to the negative international political consequences that attach to such actions.[16] Investors will understandably invest in States that operate a stable economy in a prudential way, which have a history of honouring international commitments. States will attempt to provide such a forum, with a view to using foreign investment to develop their domestic interests. As a result, it is unlikely that a state will consciously seek to directly expropriate foreign investments, if such action can be avoided.[17]

Disputes on direct expropriation mainly related to nationalisation that marked the 70s and 80s have been replaced by disputes related to foreign investment regulation and "indirect expropriation". Largely prompted by the first cases brought under NAFTA, there is increasing concern that concepts such as indirect expropriation may be applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society. The question that arises is to what extent a government may affect the value of property by regulation, either general in nature or by specific actions in the context of general regulations, for a legitimate public purpose without effecting a "taking" and having to compensate for this act. One leading commentator suggests that the issue of definition of expropriation in this context may become the dominant issue in international investment law.[18]

Expropriation can occur through other, less obvious means,[19] the concept of indirect expropriation was developed to accommodate for this fact. What exactly this concept is supposed to cover, however, remains a matter of considerable contention. Some commentators have proposed to identify indirect expropriation as any act short of direct

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[14] R. Dolzer, and C. Schreuer, Principles of International Investment Law (Oxford, 2012) p12; See also K. Miles, The Origins of International Investment Law, (Cambridge, 2013).

[15] OECD 'Indirect Expropriation" and the "Right to Regulate" in International Investment Law', OECD Working Papers on International Investment, (2004, OECD Publishing) p2. http://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf accessed 23 September 2018.

[16] K. Schefer, International Investment Law: Texts, Cases and Materials, (2013, Glossary) 203.

[17] Kevin Winters, A thesis on Indirect and regulatory expropriation in international investment law: a critical review, (2015). http://theses.gla.ac.uk/6177 accessed 23 September 2018.

[18] Dolzer, "Indirect Expropriations: New Developments?" Article of the Colloquium on Regulatory Expropriation organised by the New York University on 25-27 April 2002; *11 Environmental Law Journal 64.* See also, OECD (2004), ""Indirect Expropriation" and the "Right to Regulate" in International Investment Law", *OECD Working papers on International Investment*, 2004/04, OECD Publishing. http://dx.doi.org/10.1787/780155872321 accessed 23 September 2018.

[19] L Fortier and S Drymer, 'Indirect Expropriation in the law of International Investment: I Know It when I See It or Caveat Investor?' (2004*) ICSID Review,* Vol.19 (2), p 297.

expropriation that "… leaves the investor's title untouched but deprives him of the possibility of utilizing the investment in a meaningful way".[20]

The Role of Foreign Investments in African Economic Development

Historically, before the Second World War, when expropriatory measures were not popular, international law concerned itself more with general acts of expropriation of private property.[21] It was during the Middle Ages that international law developed rules to regulate expropriation acts. The rules which emerged required that expropriation be carried out in furtherance of public purpose and upon payment of prompt adequate and effective compensation. After the Second World War, when acts of nationalization became popular, the same rule developed during the middle ages to regulate acts of expropriation was applied to regulate and protect foreign investors from acts of nationalization by the host states.[22]The conflict of attitudes and doctrines resulting from the clash of interests between developed and underdeveloped countries has expressed itself in a number of international legal controversies.

Like most developed or under-developed nations, African countries mainly during the post-independence era felt that in order to bridge the economic gap existing between the capital exporting countries and them was to adopt policies geared towards Africanization, Indigenization and joint-ventures. Just like other developing countries, they regarded the right to nationalise foreign-owned property as one deriving from the right of nations to economic self-determination.[23]Many new states of Asia and Africa have expressed the view that a state's right of interference with private property, either for tax, police, health, or utility purposes, or for more basic changes in the political, economic or social structure, is not limited by the rule that the State must respect the property of aliens.[24]

It moves were influenced by the indigenous capitalist class whose ultimate aims were to take over from the foreign investors. Their argument was that the driving force of these policies was predicated on the notion of economic independence.

These policies affected mainly small and medium scale business enterprises but left the multinationals intact. This can be attributed to analysis of their roles in economic development as seen by most of the host States. Because of this policy foreign investments were initially encouraged and allowed to enter almost all sectors. After some time, when most of the African States realized that the multinationals are getting out of hand, some countries

[20]R. Dolzer, and C. Schreuer, (n 13) 101.

[21]Ahmad s. Kilingo, A seminar paper on Nationalization of Foreign Investments In International Law: the Experience of Selected African Countries. http;//www.whole_KilingoAhmadSalum1986_thesis(1). Accessed 22 September 2018.

[22]Ibid.

[23]Ahmad s. Kilingo (n 10) 8

[24]S. P. Sinka, New Nations and the Law of Nations, cited at Tanzanian Nationalizations: 1967-1970, *Cornell International Law Journal* Vol. 4: Iss. 1, Article 4.http://scholarship.law.cornell.edu/cilj/vol4/iss1/4 accessed 23 September 2018.

attempted to limit their activities by way of imposing limitations. At the same time the more radical countries attempted to expropriate by way of nationalization some of the investments of the foreign nationals within the country. This however does not imply that foreign investments were not encouraged or protected. There are instruments such as Foreign Investment Protection Acts (FIPA) in almost all African countries geared towards protection of foreign investments and promising some form of compensation in case of expropriation.[25] However, these instruments were not accorded much recognition as various forms of nationalizations of foreign investments took place in many African countries especially those in post-colonial era.

These expropriations of foreign investments by African countries were done despite the fact that these investments were sources of employment and economic boosting opportunities, like other less developed countries in the world; their argument in support of this policy was that the control of important sectors of the economy by foreign nationals was impeding national economic development.[26]The enactment of anti- foreign investment laws together with expropriation was seen by less developed countries, who newly gained independence as an instrument for achieving political-economic objectives.[27] Such less developed countries especially in Africa, generally felt that expropriation was preferred when alternative policy instruments such as regulatory or administrative control of behaviour, were not perceived to be effective. These countries considered that direct control through ownership offered a greater chance of achieving objectives than indirect control through regulation.

In Nigeria, these objectives may also include the achievement of its foreign policy goals such as was in the case of the expropriation of the assets of the British Petroleum because of its perceived alliance with and sale of crude oil to the apartheid government of South Africa in contravention of Nigeria's foreign policy.

By 1977, the legal basis for expropriation of foreign investor owned assets became the Nigerian Enterprise Promotion Decree[28] which limited foreign interest in Nigerian registered companies to 40% and 60% respectively, depending on the type of company. Beginning from the promulgation of that decree there was the forced divestment of foreign interest in Nigerian registered companies which exceeded the stated percentages.[29] These expropriation and takings have been stated to have taken place as a result of political and economic reasons and not environmental protection or sustainability.[30]

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[25]Ibid.

[26]Tunde I. Ogowewo, 'The Shift to the Classical Theory of Foreign Investment: Opening up the Nigerian Market' (1995) 4 *International and Comparative Law Quarterly,* 915.

[27]Ibid.

[28]This Decree was however repealed in the late 90s and was replaced by the Nigerian Investment Promotion Commission (NIPC) Act which sought to attract Foreign Direct Investment.

[29]A listing of companies which fell into each category was in the schedules to the Decree.

[30] See Lowe Vaughan, 'Changing Dimensions of International Investment Law', *University of Oxford Faculty of Law Legal Studies Research Paper*. http://papers.ssrn.com/Abstract=970727.accessed 23 September 2018.

The Tanzanian nationalizations represented the first comprehensive program of nationalization to be undertaken in East Africa and were carefully planned in advance to maximize the benefit and minimize the risks attendant to such a dramatic step. Once the Arusha Declaration[31] made clear the areas that would be under public control or ownership, the only way to avoid a dwindling of confidence and further decline of productive capacity was to act swiftly.

On the part of Ethiopia, the history of Ethiopian nationalization of key sectors of the economy is related to the coming to power of the military government, which overthrew Emperor Haile Selassie in 1973. The ruling council of the military government proclaimed a socialist policy based on "social and economic equality"[32] which, among other things, provided for effective control over the financial institutions and the principal means of production. The declaration gave categories of enterprises that were preserved exclusively for the State, joint ownership between the State and private investors and those which were exclusively preserved for private ownership.

The Sector which was exclusively preserved for the State ownership included mineral exploitation; large scale salt mining; basic industries such as iron and steel; cement; leather and leather products manufacturing; large scale rubber manufacturing and fertilizer industry; drugs and medicines; tobacco; glass and bottle manufacturing; large scale printing and publishing; electricity generation; water, rail and sea transport; radio, television, post and telecommunication.[33] Following this political declaration, the government announced on lst January, 1975, the nationalization of all banks, insurance companies and financial institutions., the government announced further nationalizations on 3rd February,
1975, under which 72 foreign and locally owned manufacturing and trading businesses operating in Ethiopia were taken over by the government under the nationalization policy. The government also took majority shareholding in 29 other businesses in the same move.[34] The nationalized companies included 14 textile companies, 13 food processing plants, 9 leather and shoe factories, eight beverage companies including Coca-Cola and Pepsi-Cola;

[31]Tanzania came into existence in 1964 when the Republic of Tanganyika formed a union with Zanzibar. The Tanzanian Government has pledged itself to creating a socialistic pattern of society in a comprehensive policy statement called the "Arusha Declaration." Issued by the Government on February 5, 1967, the Arusha Declaration stresses the responsibility of the State to intervene actively in the economic life of the nation in order to insure the well-being of all citizens and to prevent exploitation or the accumulation of wealth to an extent that would be inconsistent with the concept of a classless society. National life is to be organized on the basis of promoting and encouraging free communal and cooperative activity for both general and individual benefit, and although private investment is to be encouraged, to a great extent economic activities must be promoted and owned by the State. The Arusha Declaration extensively treats public ownership of industrial and commercial property.

[32]See. Afr.Res.Bull. (1974), p.3359, quoting Radio Ethiopia in Broadcast of 20th Dec. 1974; African Cont.Records (l974-75), p. 8195.

[33]Ibid.

[34]Ibid, p 207.

eight chemical companies, five iron and steel works and four printing establishments.[35] While the Sector in which the government took over the controlling stake included oil companies (Shell, Agip, Tobal and Mobil); foreign manufacturers; two major Dutch sugar firms and several other companies owned by foreign firms.[36]

The shifting Attitude of Developing countries and the politics of Expropriation

The large- scale nationalization that took place in developing and less developed African and South American countries as highlighted above in the early 90s led to an increasing hostility towards foreign investment and raised the issues of the standard of the required compensation.[37]

This divergent views of the developed and developing countries raised issues regarding the formation and evolution of customary law. Triggered by the steadily growing uncertainty on the customary international law rules, states increasingly started to conclude treaties on the protection of investment in the second half of the 20th century.[38] This phenomenon was further accelerated by the fact that following the debt crisis in the 1980s, many developing countries changed their policy towards foreign investment and strived to create an investment friendly climate.[39] In addition to this, the continuous competition among various less developed and developing nations to attract more foreign investment in order to increase their economic base has led to the ever growing attitude of such countries ditching the previous rigid approach of expropriation and nationalisation which they thought could bridge the wide economic gap between them and the capital exporting countries to a more relaxed foreign investment policy with the sole aim of attracting more foreign presence with their countries.

Today, the more positive attitude of countries around the world toward foreign investment and the proliferation of bilateral treaties and other investment agreements requiring prompt, adequate and effective compensation for expropriation of foreign investments have largely deprived that debate of practical significance for foreign investors.[40] Recently, new

[35] Ibid.

[36] Ibid.

[37] While capital exporting countries favoured the Hull Standard as traceable to the famous exchanges in the 1930s and 1940s between the US secretary of state, Cordell Hull and the Mexican counterpart, concerning the Mexican agrarian reform of 1917 -1938, developing nations and communist countries challenged this standard and argued that only appropriate but not full compensation would be due. See I Seidl-Hohenveldern, ‘Communist Theories on Confiscation and Expropriation; Critical Comments’. (1958) 7 *The American Journal of Comparative Law* 541-571.

[38] U Kriebaum, “ Expropriation”, in M Bungenberg, J Griebel, S Hobe, A Reinisch (eds), *International Investment Law* (Baden Baden: Nomos, Forthcoming 2013) 2.

[39] T Waelde, ‘A Requiem for the New International Economic Order’ in (G Hafner et al) (eds) *Liber Amicorum Professor Ignaz Seidl-Hohenveldern* (1998) 771-803.

[40] A number of developed countries endorsed the “Hull Standard”, first articulated by the United States Secretary of State Cordell Hull in response to Mexico’s nationalisation of American petroleum companies in 1936. Hull claimed that international law requires “prompt, adequate and effective” compensation for the expropriation

generation of investment agreements, including investment chapters of Free Trade Agreements, have introduced specific language and established criteria to assist in determining whether an indirect expropriation requiring compensation has occurred. These criteria are consistent with those emerging from arbitral decisions.

Presently, most of the bilateral investment treaties concluded among States now contain express guarantees against uncompensated expropriation and provide that fair market value should be the amount of compensation due in case of an expropriation. In this way, treaty law incorporated the standard prevalent in classical public international law and reflect in the hull standard.[41]Although developing countries oppose Hull doctrine in multilateral forums, and deny its customary international law nature, they paradoxically embrace BITs that incorporate the same Hull standard.[42] One of the possible explanations for this is that developing countries derive a lot of benefits from these treaties.[43]

Presently, the language of Treaties are practically unanimous, Bilateral Investment Treaties (BITs) as well as regional investment protection treaties and investment chapters in Free Trade Agreements (FTAs) all speak of investments as the protected interest in their clauses on expropriation.[44] As many as are thousands of international investment agreements (IIAs) currently in force around the world, including Bilateral Investment Treaties (BITs) and investment chapters in trade agreements all seek to promote foreign direct investment by offering foreign investors increased security and transparency. Furthermore, most of the Treaties entered by them do not go beyond generic reference to indirect expropriation or measures equivalent or tantamount to expropriation, bearing in mind it implies a great variety

of foreign investments. Developing countries supported the Calvo doctrine during the 1960s and 1970s as reflected in major United Nations General Assembly resolutions. In 1962, the General Assembly adopted its Resolution on Permanent Sovereignty over Natural resources which affirmed the right to nationalise foreign owned property and required only “appropriate compensation”. This compensation standard was considered an attempt to bridge differences between developed and developing states. In 1974, the UN General Assembly decisively rejected the Hull formula in favour of the Calvo doctrine in adopting the Charter of Economic Rights and Duties of States. While Article 2(c) repeats the “appropriate compensation” standard, it goes on to provide that “in any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals…” Presently, the Hull Standard and its variations are often used and accepted and considered as part of customary international law.

[41]See U Kriebaum (n 27) 2.

[42]Andrew T Guzman, 'Why LDC's Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', (1998), 38 *Virginia Journal of International Law,* 666.

[43]R. Dolzer, 'New Foundations of the Law of Expropriation of Alien Property', *Netherlands Yearbook of International Law* 567.

[44]See e.g, Article 5 of Netherlands/Czech Republic BIT, it states; “Neither contracting party shall take any measures depriving directly or indirectly, investors of the other contracting party of their investment unless the following conditions are complied with...”

Similarly, Article VI(i) US/Argentina BIT provides: “investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (‘expropriation’) except...”

Article 1110 NAFTA: No party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take measures tantamount to nationalization or expropriation of such investment (‘expropriation’) except...”

of possible measures amounting to an indirect or *defacto* taking of foreign owned property which defies any more specific description.[45]

Developing and less developing countries now seek to enter into various BITs containing expropriation clauses with capital exporting countries despite the fact that the widespread use of expropriation clauses is controversial in that it usually provide for a wide range of acts which undermine or tend to undermine the economic benefits of such investment even if such acts come under the lawful exercise of police powers of such under developed and developing nature, a concept recognised under the sovereign powers of such countries. This wide interpretation of expropriatory measures have been strengthen by recent decisions of investment tribunals who do not take into consideration the motives of some of these developing countries and are quick to hold that such acts are expropriatory in nature and hence compensable. For example, in the case of ***Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia***,[46] this was a case involving a Chilean company Quiborax S.A. (Quiborax) and Bolivian-incorporated Non-Metallic Minerals S.A. (NMM), majority owned and established by Quiborax as its investment vehicle to extract ulexite in Bolivia and the Government of Bolivia.

According to the tribunal, an illegal conduct during the operation of an investment does not bar an investor from relying on guarantees under a BIT. Bolivia objected that the investments could not benefit from BIT protection as they were neither made nor operated in accordance with Bolivian law. The tribunal reasoned that “ongoing illegality” in the operation of the investment could not affect the availability of BIT protections. As to the allegation of an “original illegality,” the tribunal recalled its jurisdictional decision that the investments were made in accordance with Bolivian law. While Bolivia offered new evidence that the investments were fraudulently acquired, the tribunal found it to be inconclusive. Bolivia had also argued that the concessions were irregular and void from the outset, and therefore the investors did not have any rights subject to protection. But the tribunal did not support this argument. It found evidence that “the annulment… was an *ex post* attempt to improve Bolivia’s defence in this arbitration, not a *bona fide* exercise of Bolivia’s police powers”.[47] Furthermore, looking at Bolivian law, the tribunal held that the alleged irregularities were non-existent or did not serve as grounds for annulment. Consequently, the tribunal held expropriation unlawful despite legitimate public interest at stake.

Similarly, with the growing concern over the fact that most of these BITs concluded by developing nations are done to the benefits multinational corporations at the expense of states’ sovereign rights, the environment, and the public good, it stills boils down to the

[45]See U Kriebaum (n 27) 8.
[46](ICSID Case No. ARB/06/2, 2015)
[47]Ibid. para.139.

changing economic policies of developing nations all striving to attract foreign investments despite the harsh expropriation clauses contained in such treaties.

Conclusion

As stated above, expropriation (direct and indirect) requires compensation, based on clearly set rules of customary international law. In practice, by far the most important requirement for the legality of an expropriation is monetary compensation, this are now contained in virtually all investment treaties concluded by nations which invariably prescribe compensation as a requirement for the lawfulness of an expropriation.

The long and ancient practice of nationalization and expropriation of foreign owned investments by developing countries has now been relegated behind by the provisions in Bilateral Investment Treaties and other investment treaties. With most of the bilateral investment treaties concluded among States now containing express guarantees against uncompensated expropriation and providing that fair market value should be the amount of compensation due in case of an expropriation, it goes without saying that the current question surrounding expropriation especially when it involves developing countries are no longer whether compensation is payable when the exercise of their sovereign rights under police powers has occurred, presently, it is now surrounded by whether or not the exercise of such powers has in anyway affected the economic rights of such foreign owned investment and when decided it has affected such investments, the question of compensation and the amount payable becomes a settled issue.

With the growing quest by these developing States to attract more foreign owned investment to their countries, the balance of power has been shifted from these developing countries whose territory contain both the human and natural resource these foreign companies sought out for, to these multinational companies as various economic summits and forum are organised by different countries worldwide all in a bit to attract these same foreign companies that were subject of various forms of nationalization and expropriation policies many years ago.

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