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CHANGING TRAJECTORIES OF INVESTMENT PROTECTION IN INDIA: AN ANALYSIS OF COMPENSATION FOR EXPROPRIATION

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The standard of compensation for expropriation of alien property continues to remain one of the most contentious issues in international law. Despite persistent objection from the developing countries, the Hull formula and its variants have become an integral part of international investment jurisprudence. This paper examines the global discourse on the continuing relevance and the resurgence of the Hull standard in investment law and practice, with specific emphasis on the evolving Indian practice. The author views that the international processes have overwhelmingly favored the Hull standard and paid lip service to 'appropriate" standard, relegating the discourse to a remnant of a bygone era. The author urges that the contemporary relevance of 'appropriate' compensation is not at all lost, and the development of an international consensus should be the way-forward, rather than leaving the matter at the mercy of bilateral engagements dictated by the power imbalance or at the pleasure of the arbitration tribunals' interpretations, whose legitimacy is already suspect. Reviving the debate for seeking a universal standard is a crucial option available to the new Third World - Africa and other less developed countries.

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I. INTRODUCTION

The standard of compensation for expropriation of alien investments has remained the single most disputed issue in international law till date. It has been decades since the United States ("US") Secretary of State, Mr. Cordell Hull articulated the famous Hull Formula as the standard of compensation in the Mexican nationalization of American petroleum companies in 1936.[1] Mexico had invoked the 'Calvo clause' in the investment contract, wherein it was agreed that the investor shall be accorded national standard of treatment on par with the citizens of the host state. The compensation was to be judged by the host state's courts and according to national laws as opposed to international law interpreted by tribunals. Ever since the US articulated its' stand, the debate has centered on whether the host state laws or international law would determine the standard of compensation for expropriation of alien property. The debate continues to remain the most contentious in the developed v. developing countries' discourse. Persistent objection from a large section of states has had little impact on the existence and continued relevance of the Hull standard in dictating terms of compensation for expropriation of foreign investments.

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[1] HACKWORTH, DIGEST OF INTERNATIONAL LAW, 657 (1942)*in* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2001) [hereinafter SCHREUER]; *See also Indirect Expropriation & the Right to Regulate in International Investment Law* (Org. for Econ. Cooperation & Dev., Working Paper No. 2004/4, 2004).

Today, the Hull standard or its variants have become an integral feature of investment protection agreements. However, several United Nations ("UN") resolutions[2] and most developing countries' official position have refused to lend recognition to the Hull standard of 'prompt, adequate and effective' compensation, in establishing itself as the universal standard. In practice, the 2800 odd bilateral investment protection treaties ("BITs") and the arbitration awards have aided the Hull standard gain permanent status, *albeit* indirectly, in international law.[3] India and other larger developing countries, once the strongest proponents of 'appropriate' or 'less than full' compensation, have gradually accepted the Hull standard, owing to the political and economic realities and their need for Foreign Direct Investment ("FDI") inflow and outflow. India is a classic case of the evolving trends in expropriation discourse.

Recent decades have seen an expansion of compensation claims from outright or direct expropriation of foreign property, as has been traditionally understood, to include creeping or indirect expropriation and circumstances tantamount to expropriation. In this context, this paper examines the global discourse on the continuing relevance and the resurgence of the Hull standard in investment law and practice, with specific emphasis on the evolving Indian practice. Part II of the paper shall look briefly at the international law on expropriation of foreign property. Part III and IV shall deal with the general international standard of compensation and the practice of States and tribunals in the context of 'Hull' vs. 'Appropriate' compensation standard, respectively. Part V shall specifically deal with bilateral and multilateral treaty approaches to compensation, with Part VI focusing exclusinvely on the law and practice of India. Part VII deals with indirect expropriation and Part VIII concludes with recommendations.

The author notes that international processes have overwhelmingly favored the Hull standard and its variants in determining the standard of compensation for sovereign expropriations, paid lip service to the 'appropriate' standard, relegating the discourse to a remnant of a bygone era. The author contends that the 'appropriate' compensation standard is still relevant, and urges for the development of an international consensus on the standard of compensation,

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[2] *See* Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp No. 17, U.N. Doc. A/5217, at 15 (1962) [hereinafter G.A. Res. on Permanent Sovereignty]; The Charter of Economic Rights and Duties of States, G.A. Res. 3281(XXIX), U.N. Doc. A/Res/29/3281 (Dec. 12, 1974); The Declaration on the Establishment of a New International Economic Order art. 2(c),G.A. Res. 3201 (S-VI), U.N. Doc. A/Res/S-6/3201 (May 1, 1974).

[3] Tillmann Rudolf Braun, *Globalization: The Driving Force in International Law*, Ch. 21, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 493 (Michael Waibel et al. eds., 2010) [hereinafter Waibel].a

rather than leaving the matter at the mercy of bilateral engagements dictated by power imbalances inherent in the structure or at the discretion of the arbitral tribunals, the legitimacy of which is already suspect.[4] Reviving the debate for seeking a universal standard is the only option available for the new Third World – Africa and other lesser developed countries. An internationally accepted definition would bring clarity to an otherwise contested field, filled with random interpretations developed by different arbitral tribunals, which have lead to a confused state of affairs.

II. INTERNATIONAL LAW ON EXPROPRIATION

International law recognizes the right of a state to expropriate private property, both foreign and domestic, in the exercise of its territorial competence.[5] As the US Supreme Court held:

> "The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed essential to the life of the state. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will."[6]

Thus, the right to nationalize is unquestionable and is "established as a result of general practices considered by the international community as being the law".[7] However, this sovereign right to expropriate is not absolute, but conditional. Opinions diverge on the scope and limits of the state's exercise of power to expropriate.[8] In an early recognition of such limitation, it was noted that the right to expropriate "has no existence as a right apart from the obligation to make

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[4] See generally id..

[5] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 533-534 (7th ed., Oxford Univ. Press. 2008)[hereinafter BROWNLIE]; *see also* R. Higgins, *The Taking of Property by the State: Recent Developments in International Law in* 176 RECUEIL DES COURS (1982).

[6] Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924) *in* Emily A. Witten, *Arbitration of Venezuelan Oil Contracts: A Losing Strategy?*, 4 TEX. J. OIL, GAS & ENERGY L. 60 (2008).

[7] Texaco Overseas Petroleum Company v. Libyan Arabian Republic, Ad Hoc Award (Jan. 19, 1977), 17 I.L.M. 183 (1978) [hereinafter Texaco] (Libyan Government refused to participate in the arbitration).

[8] U.S. v. Sabbatino 374 U.S. 398 (1964); *see* I. Shihata, *Applicable Law in International Arbitration: Specific Aspects in Case of the Involvement of State Parties in* THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES 601 (I.F.I. Shihata & J.D. Wolfensohn eds., 1995) [hereinafter Shihata].

compensation."[9] More broadly, the concept of full reparation for violations of international obligations is well entrenched in international law. The Permanent Court of International Justice ("PCIJ") in *Chorzów Factory* case held that:

> "[I]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."[10]

The judgment remains the cornerstone of international claims for reparations, whether presented by States or other litigants.[11]

The obligation to compensate is also mirrored in the International Law Commission's ("ILC") Articles on State Responsibility 2001 (Articles on State

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[9] Eastern Extension, Australisia & China Tel. Co. (Gr. Brit. v. U.S.), American and British Claims Arbitration 73 (1923) *in* A. B. M., *Expropriation of Alien Property*, 109 U. PA. L. REV. 245, 246 (1960).

[10] Chorzów Factory (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 at 21 (July 26) [hereinafter Chorzów]. The *Chorzów* Judgment may have been drawn upon the decision of Judge Max Huber in *Spanish Zone of Morocco*, where it was emphasized that "all rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met". 2 R.I.A.A. 615 (1924) *in* MALCOLM SHAW, INTERNATIONAL LAW 696 (6th ed. 2008).

[11] *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion,1949 I.C.J. 174, ¶ 184 (Apr. 11); *see also* S.D. Myers, Inc. v. Canada (UNCITRAL (NAFTA)) Award on merits, ¶ 311 (Nov. 13, 2000), 40 I.L.M. 1408 (2001); Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, ¶ 122 (Aug. 30, 2000), 16 ICSID Rev-FILJ 168 [hereinafter Metalclad Corp.]; Petrobart Limited v. The Kyrgyz Republic, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 126/2003, Award, 77-78 (Mar. 29, 2005); Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, 559 (Apr. 8, 2013). The *Stati and Ascom v. Kazakhstan* Award considers that the starting point for the calculation of damages should indeed be the formula applied in the *Chorzów* Award. Anatolie Stati v. Republic of Kazakhstan, SCC Case No. V116/2010, Award, 1527 (Dec. 19, 2013). However, in the *ADC v. Hungary* Award finds that the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the claimants in the same position as if the expropriation had not been committed. But then, this was a *sui generis* type of case, where the standard requires that the date of valuation "should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed". ADC Affiliate Ltd&ADC & ADMC Management Ltd v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, 496-499 (Oct. 2, 2006) [hereinafter ADC Affiliate].

Responsiblity). Article 31(1) obligates the responsible state to "make full reparation for the injury caused by the internationally wrongful act", placing responsibility in a similar sense to the *Chorzów Factory* case.[12] Full reparation could be achieved through restitution. As far as such damage is not made good by restitution, the state "is under an obligation to compensate for the damage caused thereby" and such compensation shall cover "any financially assessable damage including lost profits insofar as it is established".[13] Further, international courts or tribunals are generally recognized to possess, as part of their jurisdiction, the inherent power to award compensation taking into account the context and situation.[14]

Thus, it is well settled that the obligation to compensate is integral to expropriation, and the same has "received considerable support from state practice and the jurisprudence of international tribunals".[15] The states have also accepted that a lawful or legitimate expropriation must, in addition to adequate compensation, be non-discriminatory and for a public purpose.[16] The World Bank Guidelines on Foreign Investment and the United Nations General Assembly ("UNGA") resolutions[17] emphasise on the public purpose and non-discriminatory nature of lawful expropriation, coupled with compensation for a lawful taking.[18] Regional trade arrangements like the North American Free Trade Agreement ("NAFTA")[19] and most BITs bind lawful expropriations to the criteria of public purpose, non-discrimination, just compensation and due process requirements.[20] The BITs may even provide additional investor protections in the form of an

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[12] Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts *in* Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, at 43 (2001) [hereinafter Articles on State Responsibility] art. 31 at p. 91.

[13] Articles on State Responsibility, *supra* note 12 , art. 36.

[14] *Id.* at 99.

[15] BROWNLIE, *supra* note 5, at 534.

[16] M. Sornarajah, The International Law on Foreign Investment 277 (1994)[hereinafter Sornarajah] ; *see also* Guide to ICSID Arbitration 53 (Lucy Reed ed al. eds., 2004).

[17] INTERNATIONAL LAW 1111 (Louis Henkin et al. eds., 2nd ed. 1987).

[18] World Bank Guidelines on Legal Treatment of Foreign Investment, guideline VI.1 (Apr. 12, 2013), available at http://italaw.com/documents/WorldBank.pdf [hereinafter World Bank Guidelines].

[19] North American Free Trade Agreement, U.S.-Can.-Mex., art. 1110 (1), Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

[20] *See* Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica, ICSID Case No. ARB/96/1, Award, ¶ 71 (Feb. 17, 2000), 5 ICSID Rep. 153 (2002) (where the tribunal held that "International law permits the Government of Costa Rica to expropriate foreign owned property within its territory for a public purpose and against the prompt payment of adequate and effective compensation".).

umbrella clause,[21] fair and equitable treatment standards, full protection and security, national treatment, etc.[22]

III. STANDARD OF COMPENSATION: THE DEBATE IN CONTEXT

Since the late 19th century, the Latin American and other erstwhile colonies have constantly argued their right not to honour contracts entered into by colonial authorities which deprived them of essential control over national resources.[23] They asserted economic self-determination as "inalienable and that the requirement of full compensation for expropriation should be inapplicable because it would make economic restructuring impossible."[24] According to them, the standard of compensation for expropriation must be national treatment, in other words, the alien and their investment should receive no better treatment than the state's own subjects, which was generally less than full compensation. The Latin American countries formalized their position by inserting the 'Calvo clause' into the investment contracts entered into with foreign companies. , stating that any dispute relating to investment shall be decided according to host state laws.

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[21] The 'umbrella clauses' for instance, could elevate any breach of contractual obligations between the state and investor into a breach of treaty obligations. *See* Shihata, *supra* note 8.*see also* OECD, INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS 107 (2008), *available at* http://browse.oecdbookshop.org/oecd/pdfs/product/2008011e.pdf. For a standard umbrella clause, *see* Agreement for the Promotion and the Protection of Investments, Swtiz. –India, art 13, Apr. 4, 1997, *available at* http://finmin.nic.in/bipa/Switzerland.pdf [hereinafter India-Switzerlan BIT] (which provides: "Each Contracting Party shall observe any obligation it may have entered into with regard to an investment of an investor of the other Contracting Party.…".); *see also* Agreement For the Promotion & Protection of Investments, Ger.-India, July 10, 1995, *available at* http://finmin.nic.in/bipa/Germany.pdf [hereinafter Germany-India BIT]; Agreement Concerning the Protection & Reciprocal Promotion of Investments, Den.-India, Sept. 6, 1995, *available at* http://finmin.nic.in/bipa/Denmark.pdf.

[22] Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in The Road*, J. WORLD INVESTMENT 231- 256 (2004); *see* Sempra Energy International v. Republic of Argentina, ICSID case No ARB/02/16, Decision on Objections to Jurisdiction, ¶¶ 100-101 (May 11, 2005); Noble Ventures, Inc v. Romania, ICSID Case No ARB/ 01/11, Award (Oct. 12, 2005); LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic, ICSID case No ARB/02/1, Decision on Liability, ¶¶ 169-175 (Oct. 3, 2006); *see also*, Julien Chaisse & Christian Bellak, *Do Bilateral Investment Treaties Promote Foreign Direct Investment*?, 3(4) TRANSNAT'L CORP. REV. 3-10 (2011).

[23] Noah Rubins & N. Stephan Kinsella, International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide 162 (2005) [hereinafter Rubins & Kinsella].

[24] Ibid.

The Calvo clause has its origin in the Calvo doctrine,[25] which emerged as the expression of resistance against the "aggression and conquest against military and economically weak Latin American countries as a means of collecting debts owed to their citizens by European states and the US".[26] The US - Mexican Claims Commission found that by agreeing to the Calvo clause, the investor had waived the right to request diplomatic protection in any matter arising out of the contract.[27] Incorporation of the Calvo clause was further justified in light of principles such as political and economic sovereignty, domestic jurisdiction, territorial integrity and permanent sovereignty over natural resources.[28] Such assertion by the newly independent states ensued a wave of expropriations of national and alien properties located within their territories.[29] Such expropriations invariably failed to meet the full compensation standard or the market value of the property expropriated.

The Hull standard marked the first formal opposition against the Calvo clause. In the US diplomatic communiqué in 1938, Hull wrote that "under every rule of law

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[25] Calvo stated that "Foreigners who held property in Latin American states and who had claims against the governments of such states, should apply to the courts within such nations for redress instead of seeking diplomatic intervention. Moreover, according to the doctrine, nations were not entitled to use armed force to collect debts owed them by other nations." CARLOS CALVO, INTERNATIONAL LAW OF EUROPE AND AMERICA IN THEORY AND PRACTICE (1868) *in Calvo Doctrine* BRITANNICA ENCYCLOPEDIA, www.britannica.com/bps/topic/90348/Calvo-Doctrine (June 15, 2013); *see also* Shihata, *supra* note 8, at 234.

[26] *See generally*, J. Dugard, Special Rapporteur, *Third Rep. on Diplomatic Protection*, Int'l Law Comm'n, U.N. Doc.A/CN.4/523/Add.1 (Apr. 16, 2002) *in International Law on Investment: The Minimum Standard of Treatment (MST)*, Center for International Environmental Law *(*ISSUE BRIEF) 1, 3 (Aug. 2003), *available at* www.ciel.org/Publications/investment_10Nov03.pdf [hereinafter CIEL]; *see also* INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 256 (Rihard Falk et al. eds., 2008); George Joffé et al., *Expropriation of Oil and Gas Investments: Historical, Legal and Economic Perspectives in a New age of Resource Nationalism*, 2 (1) J. WORLD ENERGY L. BUS. 3-23 (2009).

[27] North American Dredging Company of Texas (U.S.) v. United Mexican States, 4 R.I.A.A. 26 (Mar. 31, 1926) *in* CIEL, *supra* note 26, at 1.

[28] N. Schrijver, Sovereignty Over Natural Resources - Balancing Rights and Duties 177 (1997) [hereinafter Schrijver].

[29] There were 575 expropriation acts from 1960 to 1992, committed by 79 developing host countries against foreign multinationals. Quan Li, *Democracy, Autocracy, and Expropriation of Foreign Direct Investment*, (2005), *available at* http://www.princeton.edu/~pcglobal/conferences/IPES/papers/li_S1100_2.pdf. (10 April 2013).

and equity, no government is entitled to expropriate private property, for whatever purpose without provision for prompt, adequate and effective compensation", thereby disregarding the enforceability of the Calvo clause.[30] For the US and the other western countries, 'prompt, adequate and effective' compensation represented minimum standard of treatment for expropriation in international law.[31] Further, it was reasoned that the Calvo clause in essence is a clause by which private persons mistakenly pretended to renounce a right, which in law did not belong to them but to their national state.[32] The developed capital exporting countries have since reiterated the Hull standard as the international benchmark for compensation, which was forced into various commercial treaties and international agreements.[33]

The strong endorsement of the Hull standard as a universal norm by the US and other capital exporting countries, has not deterred the developing countries in collectively opposing such a move. They insisted on the national treatment standard and reiterated their position in several UNGA Resolutions, passed over the objection of developed countries, embracing less than full compensation.[34] The developing countries' position on compensation, however, ranged from the one extreme of no compensation (for which there is not much support), to a more accepted view of 'appropriate' compensation.[35] The basic justification for 'appropriate compensation' was that, if full compensation had to be paid, the nationalizing state would go bankrupt.[36] The 1962 UNGA Resolution on

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[30] A. Lowenfeld, International Economic Law 397-403 (Oxford Univ. Press2002).

[31], INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO DEVELOPING COUNTRIES NEGOTIATORS 157 (John Anthony et al. eds., Commonwealth Secretariat 2013); *see also* Paul Peters, *Recent Development in Expropriation Clauses of Asian Investment Treaties*, 5 ASIAN Y.B.INT'L L. 57 (1995).

[32] *See* AES Corporation v. Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶ 98 (Apr. 26, 2005).

[33] Francis J. Nicholson, *The Protection of Foreign Property under Customary International Law*, 6 B. C. L. Rev. 391, 402 (1965). The 1967 draft OECD Convention, for instance, states that taking of property is to be: "… accompanied by provision for the payment of *just* compensation. Such compensation shall represent the genuine value of the property affected, shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the national entitled thereto". *See also* SCHREUER, *supra* note 1.

[34] RUBINS & KINSELLA, *supra* note 23.

[35] SORNARAJAH, *supra* note 16, *at*. 208-209. The *draft TNC Code of Conduct* and the *AALCC Model* "B" BITs refers to the formula of 'appropriate' compensation. Peter Muchlinski, *The Framework for the Investment Protection: The Content of BITs in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOW 62 (Karl P. Savant & Lisa E. Sachs eds., Oxford Univ. Press 2009).

[36] Friedmann and Pugh, Legal Aspects of Foreign Investment 730-731 (1959).

Permanent Sovereignty over Natural Resources ("PSNR") took a balanced view in the event of expropriation, stating that "…the owner shall be paid *appropriate compensation*, in accordance with rules in force in the State taking such measures in the exercise of its sovereignty and *in accordance with international law*".[37] The standard prescribed by this resolution attempts to bring in a compromise position which combines the national treatment and international standards.

A more rigid approach was taken in the 1974 UNGA Resolution on the Charter of Economic Rights and Duties of States which stated that:

> "*appropriate compensation* should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. *In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals*....".[38]

Both UNGA resolutions 1803 and 3281 gave prominence to national law and refused to acknowledge the Hull standard as binding customary law. They adopted an approach towards 'appropriate' compensation, meaning less than full compensation.[39]

The UNGA resolutions, by itself non-binding, were considered to be political and programmatic statements.[40] The Resolutions only invoked mixed response from international tribunals. In *TAPCO* case,[41] the Arbitrator viewed Article 2(2)(c) of

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[37] G.A. Res. on Permanent Sovereignty , *supra* note 2, ¶ 4 (adopted by 87 votes to two, with twelve abstentions); *see also* G.A. Res. 3171 (XXVIII), U.N. GAOR, 28th Sess, Supp. No. 30, U.N. Doc. A/9030 (1973).

[38] Charter of Economic Rights and Duties of States , G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 at 50 (1974)(Adopted by a majority of 120 states over the objection of 6 industrialized countries and with the abstention of 10 others); *see* Shihata, *supra* note 8, at 238; *see also* KEVIN SMITH, THE LAW OF COMPENSATION FOR EXPROPRIATED COMPANIES AND THE VALUATION METHODS USED TO ACHIEVE THAT COMPENSATION, LAW & VALUATION (2001).

[39] UNGA Resolution 1803 (Art. 4) has made appropriate standard mandatory by use of the term 'shall', whereas in UNGA Res 3281 (Art. 2.2(c)) 'should' was used and the reference to 'international law' was omitted. SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 73 (2008) [hereinafter RIPINKSY].

[40] Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment 30 (2009) [hereinafter Newcombe & Paradell].

[41] Texaco*, supra* note 7.

the Charter of Economic Rights and Duties of States [42] as having the nature *de lege ferenda,* rather than constituting a rule of customary international law, whereas, in *Liamco* case, the resolution was referred to as "the dominant trend of international opinion".[43] The American Law Institute's restatement on Foreign Relations Law, which previously favored the Hull standard, preferred "just compensation" in the absence of exceptional circumstances, a language also supported in the Fifth Amendment of the US Constitution.[44] The European Commission of Human Rights ("ECHR") in *Shipbuilding Nationalization* case held that "the general principles of international law, according to which it used to be considered that compensation for non-nationals ought to be full, adequate, equitable, prompt and appropriate, have changed somewhat in the face of pressure from the Third World."[45] Therefore, while the official approach seems to favor 'appropriate' compensation, the power based bilateral engagements encouraged the Hull or its variant. The fragmented nature of the officially espoused position, on the one hand, and the approach adopted in bilateral engagements have led to a state of incoherent application and development of the standard of compensation. In the following section, we shall consider the two dominant approaches to compensation for expropriation - the 'Hull formula' and the 'appropriate' standard.

IV. COMPENSATION FOR EXPROPRIATION: 'HULL' VS. 'APPROPRIATE' STANDARD

Since the 1990s, state practice of compensation for expropriation, as evident from bilateral arrangements, has altered significantly. However, neither state practice,

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[42] "To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means." Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX),, U.N. Doc. A/RES/29/3281 (Dec. 12, 1974).

[43] *See* Libyan American Oil Company v. Libyan Arab Republic, Award, 53 (Apr. 12, 1977), 62 I.L.R. 140 (1982) . At the domestic level, the Hull rule is the 'maximum standard', which is not fully observed in the major capital-exporting countries. Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553, 569 (1981).

[44] 1 Restatement of the Law Third: The Foreign Relations of the United States 196 (1987) *in* The Energy Charter Treaty: An East-west Gateway for Investment and Trade 395 (Thomas W. Waelde ed., 1996) [hereinafter Restatement]. The ICC Guidelines also refer to 'just compensation'. *see International Chamber of Commerce Guidelines for International Investment* (2012), *available at* http://www.iccindiaonline.org/pdf.pdf.

[45] Lithgow v. United Kingdom, 102 Eur. Ct. H.R. (ser. A) at 516 (1986).

nor scholastic view or arbitral practices have offered a consistent view, resulting in no universal consensus or practice. The 'appropriate' compensation standard continues to remain the 'dominant' official world view, whereas, the 'prompt, adequate and effective' standard or its variants have found a place in 2800 plus bilateral and regional investment agreements and consequently the compassion of arbitral tribunals.[46] It is these agreements and tribunal jurisprudence, particularly of the ICSID, which lend legitimacy to the Hull standard. The developing countries themselves were forced to accept the Hull standard, abandoning their collective position, in their agreements with developed countries.[47] The tribunals have further ensured that even when the 'prompt, adequate and effective' standard is not directly used in the treaty, the provision is interpreted in roughly the same way. Further, the absence of any specific elements has not deterred the tribunals from awarding full compensation.[48]

The Hull formula provides for a triple test – 'prompt, adequate and effective' standard. The standard has also been known by the name of 'just' or 'full' or 'fair' compensation.[49] Mostly undefined, the content of these phrases have been interpreted by the tribunals as having the requirements of the Hull standard. Some BITs and Regional Trade Agreements ("RTAs") have specific provisions or explanatory note clarifying the scope of these terms. The Australia-US Free Trade Agreement, for instance, demands compensation to (i) be paid *without delay*;[50] (b) be equivalent to the *fair market value* of the expropriated investment *immediately before the expropriation* took place; (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be *fully realizable* and

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[46] UNCTAD, Taking of Property 28 (IIA Issues Paper Series, UNCTAD/ITE/IIT/15, 2000) [hereinafter UNCTAD – Paper Series]; see also Julien Chaisse, Exploring the Confines of International Investment and Domestic Health Protections – General exceptions clause as a forced perspective , 39 (2/3) AM. J. L. & MED. 352-354 (2013) (which provides a general summary of the cases' approach to the interpretation of expropriation provisions).

[47] A.T. Guzman, Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, 38 VA. J. INT'L L. 639-688 (1998).

[48] Though the *Italy-Egypt* BIT does not mention the word 'prompt' and states that compensation paid must be 'adequate and fair', the Tribunal considers that the absence "ought not to be seen to permit Egypt to refrain from paying compensation indefinitely". Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award and Dissenting Opinion, ¶ 434, ¶ 435, ¶ 465 (June 1, 2009).

[49] N. Jansen Calamita, *The British Bank Nationalizations: An International Law Perspective*, 58 (1) INT'L & COMP. L. Q. 119, 125-126 (2009).

[50] Schwarzenberger observes that "in equity, prompt compensation does not necessarily mean immediate compensation, but, after a reasonable interval taking into account, all means and relevant aspects of the expropriation". SCHRIJVER, *supra* note 28, at 357.

freely transferable. In *CME v. Czech Republic* (Final Award), the Tribunal notes that the BIT's requirement of compensation to be 'just' evokes the Hull Formula providing for payment of 'prompt, adequate and effective' compensation and concluded that when a state takes foreign property, 'full' compensation must be paid.[51] Similarly, in *Tippets v. TAMS-AFFA Consulting Engineers of Iran*, though the phrase used in the agreement was 'just compensation', the Tribunal found that 'full compensation' should be awarded and prompt payment of just compensation is an obligation, which is accepted as a general rule of customary international law.[52]

As far as 'appropriate' compensation is concerned, the UNGA resolutions, which introduced the phrase, have left the interpretation open. 'Appropriate' standard has generally been considered as compensation that would be "fair and reasonable given the circumstance of the taking",[53] implying something less than full compensation.[54] Less than full compensation is an argument specifically in the context of nationalization or for social reforms. Otherwise, it would be impossible to implement economic and social programmes by poorer countries, which may be against the principle of self-determination, independence, sovereignty and equality.[55] The Tribunal in *Ebrahimi v. Iran* noted that customary international law favors an 'appropriate' compensation standard. However, the tribunal added that the prevalence of the 'appropriate' compensation standard does not imply that the compensation quantum should always be 'less than full' or 'partial'.[56] Whereas, in *AIG v. Kazakhstan* case, the Tribunal held that although there is much

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[51] Australia-United States Free Trade Agreement, U.S.-Austl., art. 11.7, May 18, 2004, 118 Stat. 919 (2005); *see also* United States-Chile Free Trade Agreement, U.S.-Chile, art. 10.9, June 6, 2003, 42 I.L.M. 1026 (2003) ; United States - Singapore Free Trade Agreement,U.S.-Sing., May 6, 2003, 42 I.L.M. 1026 (2003) and most other US FTAs;CME Czech Republic B.V. v. Czech Republic (UNCITRAL), Final Award, 497 (Mar. 14, 2003) [hereinafter CME v. Czech].

[52] Tippets v. TAMS-AFFA Consulting Engineers of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219 (1984); CME v. Czech , *supra* note 51; *see also* American International Group, Inc. & American Life Insurance Co. v. Islamic Republic of Iran & Central Insurance of Iran, 23 I.L.M. 1 (1984); *see* Shihata, *supra* note 8 at 241; *see also* Aminoil, *infra* note 59; Anglo – American Oil Company (U.K. v. Iran), 1952 I.C.J. 93, 151 (July 5) (the Tribunals granted full compensation).

[53] LA O'Connor, The International Law of Expropriation of foreign-Owned Property: The Compensation Requirement and the Role of the Taking State, 6 LOY. L. A. INT'L & COMP. L. JO. 365 (1983) in RIPINSKY, supra note 39, at 73.

[54] E. Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments* 8 J. ENERGY NAT. RESOURCES & ENVTL. L. 241, 249 (1990).

[55] BROWNLIE, *supra* note 5, at 513; *see also* OPPENHEIM'S INTERNATIONAL LAW 352 (H. Lauterpacht ed., 8th ed.1992); SORNARAJAH, *supra* note 16, at 484-485.

[56] Shahin Shaine Ebrahimi v. Iran, 30 Iran-U.S. Cl.Trib. Rep. 170, 197, ¶ 88 (1994); *see also* Sola Tiles Inc v. Iran, 14 Iran-U.S. Cl.Trib. Rep. 223, 234-5, ¶ 43 (1987).

disagreement as to the 'appropriate' standard of compensation, customary international law has consistently recognized that the expropriation of a foreign investor's property, including contract rights, must be accompanied by 'compensation' – the traditional standard being that such compensation be adequate in amount, be paid promptly, and be effective in the manner and form of its payment, to recompense the owner for the loss of the property or investment.[57] The Tribunal in *INA Corporation* case observed that in the event of large scale nationalization of a lawful character, the doctrinal value of any 'full' or 'adequate' compensation could be undermined.[58] In *Kuwait v. Aminoil*, the Tribunal chose to broaden the definition of 'appropriate' compensation, to include the replacement values of the expropriated tangible assets plus an award for lost profit calculated by reference to 'reasonable rate of returns'.[59] Interestingly, the Tribunal had declared the expropriation as lawful, on the basis that the nationalization was for a legitimate public purpose consistent with Kuwait's overall policy for the development of its vital petroleum industry.[60] Declaring that 'fair compensation' is payable, the Tribunal preferred to adopt the term 'appropriate compensation' as used in the UNGA Resolution 1803 and explicitly rejected the UNGA Resolution 3281, which "purported to weaken the customary international law standard of compensation for expropriation and leave the matter entirely for determination under domestic law".[61] The Tribunal then concluded that 'appropriate compensation' could be "determined differently from case to case, depending upon the particular legal relationship between the parties and on the overall international context prevailing at the time, and awarded a compensation that closely resembles full compensation, which even included loss of profits to reflect the parties' 'legitimate expectations".[62]

The tribunal awards and practices do not offer a consistent view. However, evidence points towards recognition of the full compensation standard irrespective of the terminology used in the agreement. The ICSID tribunals, which are the frontrunners in attracting invester-state disputes from the BITs and other regional

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[57] AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan, ICSID Case No. ARB/01/6, Award, ¶ 12.1.3 (Oct. 7, 2003).
[58] INA v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 373, 378 (1985).
[59] Kuwait v. Aminoil, Award, ¶¶ 160-161 (Mar. 24, 1982) *in* RIPINSKY, *supra* note 39, at 75 [hereinafter Aminoil].
[60] International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law 361 (Todd Weiler ed., May 2005) [hereinafter Weiler].
[61] Aminoil, *supra* note 59, ¶¶ 143-44.
[62] Weiler, *supra* note 60, at 362.

arrangements, usually require some form of prompt compensation.[63] These tribunals have generally favoured granting of full value of the investment, including lost profit.[64] Both *damnum emergens* (actual or positive damages) and *lucrum cessans* (loss of future earnings or profit) are often claimed by the injured party, and often both are awarded.[65] In *AGIP v. Congo*[66] and *Benvenuti et Bonfant v. Congo*,[67] the ICSID Tribunal held that Congo must indemnify for loss as well as future profits.[68] ICSID tribunals, however, have been hesitant to award damages for lost profits to a new industry or one, where there is limited record of profits.[69] In the *Mihaly International Corp* case*,* in a separate opinion, it was observed that pre-investment expenditure must also be included in the 'investment' for the purpose of compensation, notwithstanding the fact that the proposed investment project failed to materialize and was ultimately abandoned.[70] Nonetheless, the majority of the Tribunal did not accept pre-investment and development expenditures as a

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[63] David Collins, Reliance Remedies at the International Center for the Settlement of Investment Disputes, 29 NW. J. INT'L L.& BUS. 195, 198 (2009) [hereinafter Collins].

[64] *See* SORNARAJAH, *supra* note 16, at 381.

[65] Collins, *supra* note 63, at 200. "While it has been noted that fair market value and *damnum /lucrum* are different approaches, the ICSID tribunals have admitted the notion of *damnum emergens* and *lucrum cessans* through the back door. The consequence is that the *damnum/lucrum* approach may over-compensate the investor." *See* Sergey Ripinsky, *Damnum Emergens and Lucrum Cessans in Investment Arbitration: Entering Through the Back Door in* INVESTMENT TREATY LAW: CURRENT ISSUES REMEDIES IN INTERNATIONAL INVESTMENT 59 - 60(Andrea K. Bjorklund et al. eds., 2009). According to Georges Abi-Saab, compensation is limited to actual ascertained loss, but does not include *lucrum cessans* according to general international law. *See* Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Separate Opinion of Professor Georges Abi-Saab, 15 (Dec. 11, 2013).

[66] AGIP S.p.A. v. People's Republic of the Congo, ICSID Case No. ARB/77/1, Award, 21 I.L.M. 726 (1982).

[67] S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2, Award, 21 I.L.M. 1478 (1982).

[68] SORNARAJAH, *supra* note 16, at 384.

[69] Asian Agrie. Prod. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, 4 ICSID Rep. 245, 293 (1990); Metalclad Corp., *supra* note 11, ¶ 232 ; Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, 6 ICSID Rep. 89 (2000) [hereinafter Wena Hotels]; *see* David Collins, *Reliance Remedies at the International Center for the Settlement of Investment Disputes*, 29 N.W. J. INT'L L. & BUS. 195, 200 (2009).

[70] Mihaly International Corporation v. Sri Lanka*,* ICSID Case No. ARB/00/2, Individual concurring opinion by Mr. David Suratgar, 163 (Mar. 15, 2002); *see also* A. Rohan Perera, *Current Trends in International Investment Agreements – New Legal Challenges for Developing Countries in* AALCO, COMMEMORATIVE ESSAYS IN INTERNATIONAL LAW 116 (2006).

valid denomination of 'investment'.[71] Furthermore, it is a standard practice in ICSID to award compound interest in expropriation cases[72] and is considered necessary to ensure full reparation.[73] In *Inmaris v. Ukraine*, it was noted that an award of interest is appropriate to ensure that claimants are made whole because interest reflects the time value of money.[74] Similarly, the *Marion Unglaube v. Costa Rica* Award confirms full reparation requires the payment of interest and discusses various approaches for determining the appropriate interest rate.[75]

In short, whether 'appropriate' compensation would mean 'full' or 'less than full' compensation in a given context, is left to tribunals' interpretation. Further, these tribunals have wide margins to justify an array of compensation, which may effectively result in full compensation being awarded. Sornarajah notes that:
"'Appropriate' compensation is a reference to a flexible standard, which could range from the payment of full compensation, the amount of profit lost, to the payment of no compensation at all, in circumstances where the foreign investor had visibly earned inordinate profits from his investment and the host state had no benefits from it."[76]

Brownlie's observation in *CME v. Czech Republic* is also pertinent. He notes that the standard of 'appropriate' or 'just' compensation carries the strong implication that, in the case of a going concern, compensation should be subject to legitimate expectations and actual conditions.[77] Shihata agrees that the official position of States reflected in the UNGA resolutions "should not exclude the possibility that in certain situations, full compensation with the three characteristics described in the Hull letter, could be the most appropriate compensation … under the

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[71] Mihaly International Corporation v. Sri Lanka, ICSID Case No. ARB/00/2, Award, ¶ 61(Mar. 15, 2002); *see also* Robert N. Hornick, *The Mihaly Arbitration: Pre-investment Expenditure as a Basis for ICSID Jurisdiction*, 20(2) J. INT'L ARB. 189-197 (2003).
[72] Middle East Cement Shipping and Handling Co. S. A. v. Arab Republic of Egypt, ICSID case ARB/99/6, ¶ 42 (Apr. 12, 2002); *see also* Wena Hotels, *supra* note 69, ¶ 919; Metalclad Corp.*, supra* note 11, ¶ 16; ADC Affiliate, *supra* note 11, ¶¶ 520-522.
[73] *See* Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Award, 659 (Mar. 3, 2010).
[74] Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine, ICSID Case No. ARB/08/8, Award, 429 (Mar. 1, 2012).
[75] Reinhard Hans Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09/20, Award, ¶¶ 319-323 (May 16, 2012).
[76] SORNARAJAH, *supra* note 16, at 480.
[77] CME Czech Republic B.V. v. The Czech Republic (UNCITRAL), Separate Opinion, ¶¶ 31-32 (Mar. 14, 2003),.

circumstances of a particular case".[78] Schachter is forthright when he notes that "…when a dispute over compensation for a particular taking reaches a court or arbitral tribunal, the property owner is quite likely to get fair market value and a satisfactory award, even though the magic words of the Hull formula are not invoked".[79]

In short, the semantic heterogeneity of the expressions has not detered investment friendly arbitration tribunals from awarding compensation that are by all means representative of 'prompt, adequate and effective' compensation. In the following section, we shall consider the state practice as is evident from the numerous bilateral and multilateral investment protection treaties.

V. STANDARD OF COMPENSATION: BILATERAL AND MULTILATERAL APPROACHES

A. Regional agreements

Among the regional agreements with investment chapters, the most prominent expression of the Hull standard is found in the NAFTA and the Energy Charter Treaty (ECT).[80] While the NAFTA essentially paraphrases the Hull standard, the ECT makes a direct reference.[81] Article 13 of the ECT departs from NAFTA provisions in the context of compensation by stating that, expropriation must be 'accompanied by the payment of prompt, adequate and effective compensation'.[82] The Charter's protection against expropriation extends from outright taking of investments by the host state, to "measures having equivalent effect of nationalization or expropriation", i.e. various forms of indirect or creeping expropriation; such as exorbitant regulations or confiscatory taxation, that undermines the operation or enjoyment of the investment".[83]

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[78] *See* Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F2d 875, 892 (2nd Cir. 1981) (The court in this case noted that an "appropriate compensation requirement would not exclude the possibility that in some cases full compensation would be appropriate"); Shihata, *supra* note 8, at 238.

[79] Oscar Schachter, *Compensation cases - Leading and Misleading*, 79 AM. J. INT'L L. 420, 421 (1985).

[80] UNCTAD – Paper Series, *supra* note 46;*see also* Kaj Hober, *Investment Arbitration and the Energy Charter Treaty*, 1(1) J. INT'L DISP. SETTLEMENT 153–190 (2010) [hereinafter Hober].

[81] See NAFTA, supra note 19, art. 1110; *see also* T. Levy, NAFTA's provision for Compensation in the Event of Expropriation: A Reassessment of the 'Prompt, Adequate and Effective standard', 31 STAN. J. INT'L L. 423-453 (1995).

[82] Annex I of the Final Act of the European Energy Charter Conference art. 13 (d), Dec. 17, 1994, 34 I.L.M. 373 (1995).

[83] Hober, *supra* note 80, at 161.

The World Bank Guidelines on Legal Treatment of Foreign Investment 1992[84] provides for a similar standard of compensation.[85] The Guidelines while using the term 'appropriate compensation', as was the case in UNGA Resolutions, goes on to redefine the standard as no different from 'prompt, adequate and effective' compensation. The Guidelines qualify 'appropriate' compensation, as "compensation for a specific investment taken by the State will, … be deemed 'appropriate' if it is 'adequate, effective and prompt';[86] deemed 'adequate' if it is based on the 'fair market value',[87] determined in accordance with a method agreed by the State and the foreign investor or by a tribunal or another body designated by the parties;[88] deemed 'effective' if the currency paid in, is freely convertible, and finally, considered 'prompt' if paid without delay.[89] Interest shall be paid at a commercial rate established on a market basis from the date of expropriation until the date of payment. A similar approach could be found in the APEC *Non-Binding Investment Principles* (1994)[90] and the draft *Multilateral Agreement on Investment* 1998 ("MAI").[91]

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[84] Almost all countries present in the meeting of the Development Committee 1992, supported explicitly the adoption of the Guideline. *See*, IBRAHIM SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES 143 (2003) 143. Guidelines on the Treatment of Foreign Direct Investment have been listed as 'binding instrument' in the official website of the WTO. *See* http://www.wto.org/english/news_e/pres96_e/pr057_e.htm (24 March 2011).

[85] *Communiqué* , Development Committee, *in* PRESENTATIONS TO THE 44TH MEETING OF THE DEVELOPMENT COMMITTEE 108 (1992); *see also* UNIDROIT Principles of International Commercial Contracts (2004) art. 7.4.2 (1), *available at* http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf. The aggrieved party is entitled to full compensation for harm sustained as a result of non-performance. Such harm includes both any loss which is suffered and any gain of which it was deprived ….".

[86] *Wolrd Bank Guidelines*, *supra* note 18, guideline IV.2; *see also World Bank Guidelines*, *supra* note 18, guideline IV.7, IV.8.

[87] *World Bank Guidelines*, *supra* note 18, guideline IV.4.

[88] Ibid.

[89] *Id.* at Guideline IV.7- IV.8.

[90] "Member economies will not expropriate foreign investments … against the prompt payment of adequate and effective compensation." *See The Asia Pacific Economic Cooperation Non-Binding Investment Principles*, endorsed at the Sixth Ministerial Meeting of APEC, Jakarta, *available at* http://www.apec.org/Press/News-Releases/2010/~/media/965E37FDA6D848B4A0350D68D2A4BE1C.ashx (Nov. 12, 1994).

[91] Multilateral Agreement on Investment, Draft Consolidated Text art. IV.2, Apr. 22, 1998, DAFFE/MAI(98)7/REV1, *available at* http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf.

B. BITs and the Hull Standard of Compensation

The most important development in investment law is the exponential growth of BITs to regulate and protect foreign investments.[92] BITs guarantee 'minimum standard' of protection for foreign investments in the territory of the host state. The majority of BITs are between developed and developing countries.[93] To begin with, BITs have been seen as "unequal treaties"[94] - a response from capital exporting countries to the threat of uncompensated expropriations.[95] Characterized by one-way flow of capital, the capital-importers attempt to attract, whereas, the capital-exporters enter into a BIT to protect its citizens' and corporations' investments in the host state.[96]

BITs, in other words, attempt to establish a favourable environment for private investors of developed countries in the territory of developing countries.[97] It "consciously seeks to approximate in the developing, capital-importing State, the minimal legal, administrative, and regulatory framework, that fosters and sustains

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[92] 2800 BITs and 250 other trade agreements with investment provisions. United Nations Conferece on Trade & Development, *Recent Developments in International Investment Agreements (2008–June 2009)*, UNCTAD/WEB/DIAE/IA/2009/8 (2009), *available at* http://www.unctad.org/en/docs/webdiaeia20098_en.pdf; *see also* Kenneth J. Vandevelde, *A Brief History of International Investment Agreements in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOW 3 (Karl P. Suvant & Lisa E. Sachs eds., Oxford Univ. Press 2009) [hereinafter Vandevelde].

[93] 40 percent of BITs are concluded between developed and developing countries. United Nations Conference on Trade & Development, *World Investment Report 2007*, 17, *available at* http://unctad.org/en/docs/wir2007_en.pdf.

[94] I. Detter, *The Problem of Unequal Treaties*, 14 INT'L & COMP. L. Q 1069 (1966). Alvarez describes them as –"one-way ratchet designed to benefit multinationals". J.E. Alvarez 86 ASIL Proceedings 552 (1992); *see also* J. W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24(3) INT'L LAW. 663 (1990).

[95] Vandevelde, *supra* note 92, at 13. The developing countries are generally compelled to accept the drafts offered by developed countries. Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 170 (2005).

[96] Vandevelde, supra note 92, at 15; see also Kate M. Supnik, Making Amends: Amending The ICSID Convention to Reconcile Competing Interests in International Investment Law, 59(2) DUKE L. J. 343, 348 (2009) [hereinafter Supnik].

[97] U.N. Centre for Transnational Cooperation & International Chamber of Commerce, *Bilateral Investment Treaties 1951-199*1, ST/CTC/136 (1992).

investment in industrialized, capital-exporting states".[98] BITs, in general, assure that the foreign investments will be guaranteed fair and equitable treatment, full and constant legal security, and 'prompt, adequate, and effective' compensation or more succinctly 'just' compensation.[99] This means that "compensation must represent the full and fair equivalent of the property taken, so that the investor will be restored to as good a financial position, as if the expropriation has not accorded".[100] For instance, nearly all UK's BITs provide for the standard of compensation that is 'prompt, adequate and effective'.[101]

Since the 1980s, the economic pressure on the developing countries gradually led to the acceptance of the Hull standard in their bilateral arrangements. Primarily, this change in stand, *albeit* at a bilateral level, could be attributed to the need to stimulate foreign investment from the developed countries. Foreign investment was seen as the tool for economic development and prompted developing economies to shift their approach of rigorous regulations on foreign investment to one of the "more flexible and pragmatic approaches aimed at facilitating and speeding up foreign investment inflows".[102] The Calvo clause went out of favour even among the Latin American countries. For instance, Mexico, a long-time proponent of the Calvo clause, accepted Chapter XI of the NAFTA.[103] Economic compulsions made the Hull standard in BITs increasingly acceptable and, became an integral part of BITs.

To further consolidate investment protection and make enforcement predictable, BITs generally provide a private right of action for foreign investors through international arbitration. BITs universally provide for direct investor-state

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[98] Robert D. Sloane & W. Michael Reisman, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115, 118 (2004).

[99] Brice M. Clagett, *Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal in* 4 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 31 (R.B. Lillich ed.,1987) [hereinafter Clagett]; *see also* MOHSEN MOHEBI, THE INTERNATIONAL LAW CHARACTER OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 325-327 (1999).

[100] Clagett, *Id.* at 37.

[101] N. Jansen Calamita, *The British Bank Nationalizations: An International Law Perspective*, 58 (1) INT'L & COMP. L. Q 119, 125-126 (2009).

[102] Rep. of the U. N. Centre on Transnational Corporations, Third Survey, 57 *in* SORNARAJAH, *supra* note 16, at 91.

[103] Under NAFTA Chapter 11, a NAFTA investor who alleges that a host government has breached its investment obligations has recourse to one of the arbitral mechanisms, including ICSID. Such final awards are enforceable in domestic courts. *See* www.nafta-sec-alena.org/en/view.aspx?conID=615.

arbitration, bypassing the national legal and judicial systems.[104] The World Bank sponsored ICSID and private international arbitration institutions, such as the American Arbitration Association ("AAA"), International Chamber of Commerce ("ICC") Court of Arbitration, London Court of Arbitration ("LCA"); are among the preferred institutions for conducting arbitration. The New York Convention on Enforcement of Foreign Arbitral Awards[105] ensures the smooth enforcement of such arbitral awards within the domestic boundaries. Such a clause subordinates the role of national legal systems in resolving investment disputes[106] and denies the host state courts' jurisdiction in determining compensation. By taking the disputes away from the national courts, BITs have ensured that the compensation standard is determined by private arbitral tribunals, on principles which generally lean towards the investor rather than the host state.[107]

Interestingly, however, a reversal in trend is evident among some developed countries,where increasing emphasis is given to domestic law and processes, in the context of expropriation. The US Trade Act 2002, for instance, ensures that foreign investors shall not be accorded greater substantive rights than US nationals.[108] The alien investments, in other words, shall be accorded treatment that is at par with the US citizens. Further, in the 2005 Australia-US Free Trade Agreement ("AUSFTA"), Australia refused to permit foreign investors to by-pass local courts and take their disputes to an international tribunal.[109] According to Australia, the legal systems of both the countries are robust to resolve disputes between foreign investors and the government.[110] The approach found place in the Australia's 2011 Trade Policy Statement, which indicated in clear terms that it will no longer prefer investor-state arbitration in future investment agreements.[111]

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[104] Bilateral Investment Promotion and Protection Agreement (BIPA), (May 19, 2013) *available at* http://business.gov.in/doing_business/bipa.php; NEWCOMBE & PARADELL, *supra* note 40, at 57.

[105] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, 21 U.S.T. 2517.

[106] B. S. Chimni, Third World Approaches to International Law: a Manifesto 8 INT'L COMMUNITY L.REV. 3, 12 (2006).

[107] For a detailed discussion, see R. Rajesh Babu, *Constitutional Right to Property in the Indian context*, 6(2) VIENNA J. INT'L CONST. L. 213-247 (2012) [hereinafter Babu].

[108] Trade Act of 2002, H.R. 3009, 107th Cong. §2102 (2002) (seeking to establish standards for expropriation and compensation for expropriation, consistent with US legal principles and practice).

[109] Luke Eric Peterson, Australia-US FTA Sets Precedent with Lack of Investor-State Dispute Mechanism INVEST-SD News Bulletin (Sept. 19, 203).

[110] *Id.*

[111] *See* Leon E. Trakman, *Investor-State Arbitration: Evaluating Australia's Evolving Position*, 15 J. WORLD INV. & TRADE 152 (2014) [hereinafter Trakman].

Though the trend may depend on which country is the host and the guest, both the above cases are reminiscent of the Calvo clause and the national treatment standard.[112] Interestingly, the Philippines-Japan FTA 2007 excluded investor-state arbitration from its perview.[113]

VI. STANDARD OF COMPENSATION: INDIAN EXPERIENCE

A. National standard of treatment

In India, the Constitution of India, Article 300A establishes that the state can expropriate, nationalize or acquire private property, provided the legislature has established a 'law' for the same. While the scope of eminent domain was contentious, the Constitution (Forty-fourth Amendment) Act 1978 permanently settled the debate in favour of the states' power to expropriate property, even without compensation, if the legislature so desires.[114] Under the current framework, there is minimal restrain on the power of the state against compulsory 'taking' of property without adequate compensation.[115] Neither fair compensation nor public purpose or judicial review remains an essential perquisite. Since the decisions in *Kesavanada Bharati*[116] and *Indira Nehru Gandhi v. Raj Narian*, the Supreme Court of India has upheld the right of the State to expropriate under Article 300-A, and restrained itself from entertaining any discussion on the adequacy of compensation.[117]

In one such classic instance, Justice Krishna Iyer in *Bhim Singhji v. Union of India* , while upholding the adequacy of compensation of USD 3400 for a property roughly worth USD 340,000 observed that:

> "Full compensation or even fair compensation cannot be claimed as a fundamental right by the private owner and that sort of paying a

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[112] The Korea-Australia Free Trade Agreement (KAFTA) concluded on 5 December 2013 provides for investor-state arbitration.

[113] *See* Ministry of Foreign Affairs of Japan, *Japan-Philippines Economic Partnership Agreement* (September 2006) (June 14, 2014), *available at* http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf.

[114] *See* The Constitutional of India (Forty-fourth Amendment) Act, No. 88 of 1978, INDIA CODE 1978.

[115] *See* INDIA CONST. art. 31A; art 31B; art. 31C; *see also* Babu, *supra* note 107.

[116] Kesavananda Bharati v. State of Kerala A.I.R. 1973 S.C. 1461, 1606.

[117] *See* Indira Nehru Gandhi v. Raj Narian (1975) Supp. S.C.C. 1 (India); Jilubhai Nanbhai Khachar v. State of Gujarat A.I.R. 1995 S.C. 142; *see also* Jaivir Singh, *(Un)Constituting Property: The Deconstruction of the 'Right to Property' in India CSLG Working Paper Series*, CSLG/WP/04-05, 17 (2004).

> 'farthing for a fortune', the question of compensation is out of bounds for the courts to investigate".[118]

From then on, the courts in India have accepted lesser compensation for expropriation of private property by the state. The Supreme Court in *K. T. Plantation (P) Ltd* case held that:

> "…. requirement of public purpose, for deprivation of a person of his property under Article 300A, is a pre-condition, but no compensation or nil compensation or its illusiveness has to be justified by the state on judicially justiciable standards. *Measures designed to achieve greater social justice, may call for lesser compensation and such a limitation by itself will not make legislation invalid or unconstitutional or confiscatory.* In other words, the right to claim compensation or the obligation to pay, though not expressly included in Article 300A, can be inferred in that Article and it is for the State to justify its stand on justifiable grounds, which may depend upon the legislative policy, object and purpose of the statute and host of other factors."[119]

Similarly, in *Rajiv Sarin v. State of Uttarakhand,* the court held that payment of market value in lieu of the acquired property is not a condition precedent or *sine qua non* for acquisition.[120]

Thus, the national treatment standard for taking private property is well settled in law and practice. The Indian State can expropriate property for public purpose or for private purpose (company), at less than full compensation and with very limited scope of judicial review.[121] The courts have, however, noted that compensation cannot at the same time be illusory.[122]

B. Standard of treatment for alien investments in India

The Constitution of India or any other national laws are inconsequential with respect to compensation paid to a non-citizen for expropriation of their property. India's international commitments under bilateral and multilateral investment protection treaties, have superimposed an international regime that limits the

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[118] Bhim Singhji v. Union of India A.I.R. 1981 S.C. 234, ¶ 239.
[119] K.T .Plantation (p) Ltd v. State of Karnataka (2011) 9 S.C.C. 1, ¶ 121.
[120] Rajiv Sarin v. State of Uttarakhand (2011) 8 S.C.C. 708, ¶ 68 [hereinafter Rajiv Sarin].
[121] Babu, *supra* note 107.
[122] Rajiv Sarin, *supra* note 120; *see also* State of Kerala v. Peoples Union for Civil Liberties (2009) 8 S.C.C. 46.

exercise of eminent domain against alien property. The applicable laws for the determination of compensation for a foreign investor would be the BITs and quantum of compensation shall be determined through the pre-approved process of investor-state arbitration. In other words, the compensation for expropriation of foreign property in India shall be determined by standards which are close to the Hull standard, the compensation for which are much higher than the compensation provided to Indian nationals.

India has so far signed 83 Bilateral Investment Protection Treaties ("BIPAs"), with 73 already in force.[123] Several agreements have also been finalized and/or are under various stages of negotiation. A survey of these agreements indicates that these treaties are inclined towards providing higher protection and compensation for alien property than those governed under the national laws. The standard of compensation as laid down in the Indian BITs generally specifies that: (i) compensation must be fair and equitable; (ii) be equivalent to the fair market value or genuine value; (iii) paid without delay; (iv) with interest; and (v) be fully realizable and freely transferable. For instance, India's general approach to the standard of compensation in BITs is reflected in the *India-Croatia* BIT 2001 which calls for:

> "…*fair and equitable* compensation…. Such compensation shall amount to the *genuine value* of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall *include interest at a fair and equitable rate* until date of payment, shall be made *without unreasonable delay*, be *effectively realisable and be freely transferable*."[124]

This approach is followed in most BITs with or without some variations.

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[123] The figure 73 BITs includes - 69 BITs and four FTA chapters on investment. *See* Prabhash Ranjan, *India and Bilateral Investment Treaties—A Changing Landscape*, ICSID Rev. 1 (2014);*see also*, Julien Chaisse & Debashis Chakraborty, *The Evolving and Multilayered European Union-- India Investment Relations - Regulatory Issues and Policy Conjectures* 20(3) Eur. L. J. 385-422 (2014).
As on July 2012, *Bilateral Investment Promotion And Protection Agreements (BIPA)* (Apr. 22, 2013), *available at* http://finmin.nic.in/bipa/bipa_index.asp.

[124] Agreement on the Promotion & Reciprocal Protection of Investments, India –Croat., May 4, 2001, Art. 5.1, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/861;*see also* Indian Model Text of BIPA, *available at* http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp?pageid=1 [hereinafter Indian Model BIT].

Broadly, thus, India must ensure payment of 'fair and equitable' compensation in case of expropriation of alien property. The 'fair and equitable' terminology is widely found, exceptin few agreements such as the BITs with Italy (1995), which refer to compensation to be "expeditious, *full* and effectively realizable without undue delay"; Malaysia (1995) "accompanied by provisions for the payment of *adequate and effective* compensation without undue delay"; South Korea (1996) "*adequate, effective* and paid without undue delay"; France (1997) "adequate and reasonably prompt compensation"; Argentina (1999) "fair, equitable and effective compensation";[125] Portugal (2000) "against prompt compensation"; Finland (2002) "against effective and adequate compensation without undue delay"; Armenia (2003) "payment of compensation according to the host country legislation"; Slovak Republic (2006) "against prompt, adequate and effective compensation"; Lithuania (2011) "against prompt, adequate and effective compensation". The German (1995) and the Russia (1994) BITs, however, chose to mention simply "compensation".

The trend in general, demonstrates an unequivocal influence of the Hull standard of 'prompt, adequate and effective' compensation in India's bilateral engagements.[126] Interestingly, in the two recent BITs with Slovak Republic and Lithuania, India chose to directly incorporate the 'prompt, adequate and effective' standard. These two countries could more likely be the destinations of Indian investment, and India must have incorporated this provision to make sure that a higher standard of protection is available for India's investment abroad. Similar language was used in the first BITs signed with UK in 1995, in the context of expropriation of the assets of a company, to guarantee 'prompt, adequate and effective' compensation.[127]

Further, India's BITs generally employ the term 'fair market value' to reflect quantum of compensation that the state owes to a foreign investor. Elsewhere, also referred to as'genuine value', 'actual' or 'true' value, it represents the value or worth of the property at a given time.[128] The ILC Articles on State Responsibility define 'fair market value' as reflecting the capital value of the property taken or

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[125] Agreement on the Promotion & Protection of Investments, & Protocol , Arg.- N.Z.,, art. 5 (1), Jan. 11, 1997, *available at* http://www.sice.oas.org/investment/bitsbycountry/bits/arg_australia.pdf .

[126] *See* India Model BIT, *supra* note 127, art. 5.

[127] Agreement for the Promotion & Protection of Investments, U.K. –India, art. 5, Mar. 14, 1994, available at http://finmin.nic.in/bipa/United%20Kingdom.pdf [hereinafter U.K.-India BIT].

[128] RIPINSKY, *supra* note 39, at183.

destroyed.[129] As per the provision, this should be the value of the "investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge". Value has been defined as the price, a willing buyer would pay to a willing seller (present worth of expected future benefits).

Comparison has been drawn between 'fair market value' and 'prompt, adequate and effective' compensation. In *Biloune v. Ghana*, the Tribunal held that:

> "…under the principles of customary international law, a claimant whose property has been expropriated by a foreign state is entitled to full – i.e., to prompt, adequate and effective – compensation. This generally means that such a claimant is to receive the fair market value or actual value of the property at the time of the expropriation, plus interest."[130]

The World Bank Guidelines and other regional instruments attribute similar meaning to 'adequate', if it is based on the 'fair market value'.[131] The Indian courts have also attributed a similar notion of market value under Section 23 of the Indian Land Acquisition Act 1894, wherein, it was said that "market value of the land would, *inter alia*, mean the value for which a free seller of land would transfer his right in the property to a free buyer".[132] In addition, over and above fair market value, interest is payable at reasonable or fair and equitable rate, or normal market rate, or sometimes commercial market rates. The general trend is towards using interest, which is fair and equitable, or based on normal market rate. Some treaties have benchmarked the interest rate on the London Interbank Offered Rate ("LIBOR").[133]

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[129] ILC Articles on State Responsibility, *supra* note 12, art. 36, ¶ 22; *see also* I. Marboe, *Compensation and Damages in International law: The Limits of 'Fair Market Value'*, 7 J. WORLD INV. & TRADE 723 (2006).

[130] Biloune & Marine Drive Complex Ltd v. Ghana (UNCITRAL), Award on jurisdiction and liability (Oct. 27, 1989), 95 I.L.R. 184, 210-11 (1993) *in* RIPINSKY, *supra* note 39, at 75.

[131] *See also* CME Czech Republic BV (The Netherlands) v. The Czech Republic (UNCITRAL), Final Award (Mar. 14, 2003) *in*, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS, AND COMMENTARY 1309 (R. Doak Bishop et al. eds., 2005).

[132] Methods of valuation which can be adopted for ascertaining market value are: Opinion of experts; price paid within a reasonable time in bona fide transactions; number of years; purchase of the actual or immediately prospective profits of the land acquired. Satish v. State of U.P. (2009) 14 S.C.C. 758, ¶ 29.

[133] Agreement for the Promotion & Protection of Investments, India-Lith., Mar. 31, 2011, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/1574; Agreement for the Promotion & Protection of Investments, India- Maced., Mar. 17, 2008,

Finally, Indian BITs mandate compensation to be freely transferable and without delay. These two attributes are the core of the Hull standard.[134] Indian BITs universally demand that the payment of compensation be made 'without unreasonable delay', which could be equated with the Hull standard of 'prompt payment' or 'without delay' standard.[135] Similarly, the compensation shall be effectively realizable and be freely transferable, meaning, the payment must be made in realizable exportable form; payment in nonconvertible currency, unmarketable bonds is not effective. In short, Indian BITs have, directly or indirectly, adhered to the Hull standard of 'prompt payment'; of 'adequate and effective' compensation. India has clearly departed from the 'appropriate' standard that it advocated all along.[136] Thus, an Indian expropriation of alien property, shall be guided by the standard set under the BITs, determined by an arbitration tribunal outside India's territorial jurisdicion.

The development can only be viewed from the perspective of the realities of India, hoping to project itself as investor 'friendly' destination and its emerging as a major capital exporter, specifically to Africa and other lesser developed countries.[137] According to the UN Report of 2011, the FDI outflow of India stood at US$14.8

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available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1575.; Agreement for the Promotion & Protection of Investments, India-Qatar, Apr. 7, 1999, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/1590.

[134] *See* Energy Charter Treaty art.14.2, Dec. 17, 1994, 2080 U.N.T.S. 95.

[135] *See* Agreement on the Promotion & Protection of Investments, India-Austl., Feb. 26, 1999, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/154 [hereinafter India-Australia BIT]; Agreement on the Promotion & Protection of Investments , India –Kuwait, Nov. 27, 2001, *available at* http://finmin.nic.in/bipa/Kuwait.pdf; Agreement on the Promotion & Protection of Investments , India-Fr., Sept. 2, 1997, *available at* http://finmin.nic.in/bipa/France.pdf; Agreement on the Promotion & Protection of Investments , India –Turk., Sept. 17, 1998, *available at* http://finmin.nic.in/bipa/Turkey.pdf; Agreement on the Promotion & Protection of Investments , India-Morocco, Feb. 13, 1999, *available at* http://finmin.nic.in/bipa/Morocco.pdf; Agreement on the Promotion & Protection of Investments , India-Mex., May 21, 2007, *available at* http://finmin.nic.in/bipa/Mexico.pdf; Agreement on the Promotion & Protection of Investments , India-Arm., May 23, 2003, *available at* http://finmin.nic.in/bipa/Armenia.pdf ('expeditiously').

[136] India has been a strong supporter of the UN Resolutions on PSNR and CERDS, which gave every state the right to decide the question of compensation as per its national laws and priorities.

[137] U.N. LDC IV & OHRLLS, Background Paper: Harnessing the Positive Contribution of South-South Co-operation for Least Developed Countries' Development, New Delhi (Feb. 18–19, 2011) [hereinafter Background Paper].

billion by 2009, up by over 500-fold from 1990.[138] During 2003 and 2009, India invested a total value of US$ 29 billion, and during the period, was the "second major developing-country investor in Africa, outnumbering even China by the number of projects".[139] Indian transnational corporations are becoming global players investing in Southern countries, specifically in Africa and many less developed countries. India's ideologically inclined stand has given way to the realities of global practices.

VII. INDIRECT EXPROPRIATION

The modern addition to the debate on expropriation is the Hull plus standard, now found in BITs, which covers circumstances where the acts of the states can be construed as meeting the conditions of expropriation. These practices, often known as 'creeping' or 'indirect' expropriation, have the effect of diminishing property rights, impacting ownership and enjoyment.[140] Measures tantamount to expropriation or regulatory takings, are much broader in scope, and may be interpreted to include all government measures, taxation, policies and state laws that interfere with the full enjoyment of foreign investment. In *Metalclad Corp v. Mexico*, a case where Mexican authorities had stopped construction because of perceived adverse effect on the environment, the NAFTA Tribunal stated that:

> "… expropriation [...] includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or

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138 Background Paper, *Id* at 16; *see also* UNCTAD, South-South Cooperation in International Investment Arrangements, U.N. Doc. UNCTAD/ITE/IIT/2005/3 (2005); Piet Konings, *China and Africa: Building a Strategic Partnership*, 23 (3) J. DEVELOPING SOC. 343 (2007); *Elephants and Tigers: Chinese businessmen in Africa get the attention, but Indians are not far behind*, ECONOMIST, Oct. 26, 2013, *available at* http://www.economist.com/news/middle-east-and-africa/21588378-chinese-businessmen-africa-get-attention-indians-are-not-far. CII/WTO; *India Africa: South South: Trade and Investment For Development*, Confederation of Indian Industries and WTO Study 2013, *available at* http://www.wto.org/english/tratop_e/devel_e/a4t_e/global_review13prog_e/india_africa_report.pdf.

139 Background Paper, *supra* note 140 at 21.

140 The term 'creeping expropriation' is defined as state action, which seeks 'to achieve the same result by taxation and regulatory measures, designed to make continued operation of a project uneconomical, so that it is abandoned'. See RESTATEMENT, *supra* note 44, § 712; *see also* W. M. Reisman & R. D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. (2004); R. Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U ENVTL. L. J. (2002); SORNARAJAH, *supra* note 16, at 294; Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment*, 15(1) J. INT'L ECON. L. 66-68 (2012).

> obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property, which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property, even if not necessarily to the obvious benefit of the host State."[141]

Indirect expropriation and measures tantamount to expropriation, has now become a regular feature of all BITs and RTAs such as the NAFTA and ECT.[142]

Indian BITs explicitly cover "measures having effect equivalent to nationalization or expropriation".[143] Often it is left to the arbitration tribunal to define the scope of indirect expropriation. In at least one occasion, the tribunals have found the undue delay in the Indian judicial process has resulted in the breach of an obligation to provide "effective means" of asserting claims and enforcing rights, and awarded damages. In *White Industries Australia Ltd. v. India*, the Tribunal held that the inordinate delay by the Indian judicial system for 10 years, suffered in enforcing the ICC commercial arbitral award against Coal India; though would not tantamount to denial of justice, denied White an effective means of enforcing rights and asserting claims, resulting in a breach of India's investment protection obligations under the Australia–India BIT.[144] Accordingly, India was held in breach of Article 4(2) of the BIT and was asked to pay a monetary compensation of Rs.

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[141] Metalclad Corp.*, supra* note 11, at 33; see also*, TECMED* case where the Tribunal noted that the term expropriation also "covers a number of situations defined as de facto expropriation, where such actions or laws transfer assets to third parties, different from the expropriating State or where such laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the Government". Tecnicas Medioambientales TECMED S.A (TECMED) v. Mexico, ICSID Case no. ARB (AF)/00/2 2003, Award, ¶ 113.

[142] L. Yves Fortier, *Caveat Investor: The Meaning of 'expropriation' and the protection afforded investors under NAFTA in* Shihata, *supra* note 21, at 242; *see also* G. Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection in* 269 RECUEIL DES COURS 255, 385-386 (1997).

[143] Indian Model Text of Bilateral Investment Promotion & Protection Agreement art 5 (1), *available at* http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp?pageid=3 ;greement; *see* U.K.-India BIT, *supra* note 126, art. 5(1); Germany-India BIT, *supra* note 21, art. 5 (1); India-Australia BIT, *supra* note 134, art. 7 (1); India-Switzerland BIT, *supra* note 21, art. 5 (1); *India-Singapore* BITs (Article 6.5).

[144] White Industries Australia Ltd v. The Republic of India (UNCITRAL), Final Award (Nov. 30, 2011), para. 11.4.19 *available at* http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf; Ashutosh Ray, *White Industries Australia Limited .v Republic of India* 29 J. INT'L ARB. 623 (2012); Sumeet Kachwaha, *The White Industries Australia Limited - Indian BIT Award - A Critical Assessment* 29 ARB. INT'L 275 (2013).

258 million. Though the expropriation claim in the case was unfounded, it has been observed that the Tribunal considered foreign arbitral award is an 'investment' under the BIT and that the setting aside of such valid foreign awards could constitute expropriation under the BIT.[145] In addition to this case, India is currently facing potential investment disputes following the Indian Supreme Court's verdict (February 2, 2012) to cancel 122 telecom licenses and spectrum allocated to nine companies in January 2008, following the 2G spectrum allocation scandal.[146]

In the recent past, India has attempted to define the scope of indirect expropriation at least in agreements with the developing countries. For instance, in the *India-Slovak Republic* BIT (2006), indirect expropriation has been defined as "a measure or series of measures of a Contracting Party that have an effect equivalent to direct expropriation, without formal transfer of title or outright seizure".[147] The explanatory note annexed to the BIT, notes that the determination of whether a measure constitutes an indirect expropriation "requires a case-by-case, fact-based inquiry that considers, among other factors:

> (a) the economic impact of the measure…, although the sole fact that a measure or series of measures of a Party have an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
> (b) the extent to which the measure or series of measures interfere with distinct, reasonable, investment-backed expectations; and
> (c) the character of the measure or series of measures, including their purpose and rationale."[148]

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[145] Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program* IISG (April 13, 2012) available at http://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/.

[146] In October 2013, Khaitan Holdings Mauritius Ltd (KHML); a Mauritius-registered company, owning 26 per cent equity in Loop Telecom, has invoked the *India-Mauritius* BITs, and has sought $1.4 billion compensation against the Indian Government over the cancellation of its 21 telecom licenses.
Kavaljit Singh, Fixing India's Bilateral Investment Treaty Framework LI MAINSTREAM 51 (Dec. 7, 2013).

[147] Annex on the *Clarification on Indirect Expropriation in Article 5 (Expropriation)*, Agreement for the Promotion & Reciprocal Protection of Investsments, India-Slovk., Sept. 25, 2006, *available at* http://finmin.nic.in/bipa/Slovak%20Republic.pdf.

[148] *Id.*; *see also* India's BITs with Jordan 1996, Trinidad and Tobago 2007, Syria 2008, Mozambique 2009.

Even severe measures if applied in good faith, and on a non-discriminatory basis, designed and applied to protect legitimate public welfare objectives cannot be construed as constituting indirect expropriation. Some BITs further clarify that "actions and awards by judicial bodies of a Party that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns do not constitute expropriation or nationalization".[149] Some BITs exclude compensation for issuances of compulsory licenses granted in relation to Intellectual Property Rights ("IPRs") or a revocation consistent with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs").[150]

The practice of limiting the scope of indirect expropriation is a trend developed in advanced economies. The 2004 US Model BIT, for instance, states that "except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations".[151] The arbitration tribunals also seem to move towards increased government regulatory space.[152] In *Feldman v. Mexico*, the Tribunal stated that:

> "In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions…Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this."[153]

This trend reversal among developed countries, could be attributed to the change in circumstances, where the one way flow of capital - traditionally from North to

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[149] *Id.; see also India-Singapore* FTA, which allows adopting measures that are 'necessary' to protect public morals... or 'necessary' to protect to human, animal or plant life or health. Article 6.11 (a) and (b), *India-Singapore* FTA.

[150] *See* Agreements with Singapore (Article 6.5.6); Japan; Malaysia; Korea and the ASEAN Comprehensive Investment Agreement (Article 14); *see* Prabhash Ranjan, *International Investment Agreements and Regulatory Discretion: Case Study of India*, 9 (2) J. WORLD INV. & TRADE, 235, 239 (2008).

[151] Annex B to the 2004 US Model BIT; *see also*RESTATEMENT, *supra* note 44, § 712.

[152] Supnik, *supra* note 96, at. 373-374.

[153] Marvin Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award , ¶ 105 (Dec. 16, 2002), 18 ICSID 488 (2003) . For a contracting opinion, see, Santa Elena v. Costa Rica, ICSID Case No. ARB/96/1, Award (Feb. 17, 2000), 5 ICSID 153, 192.

South - is no longer the reality.[154] As seen earlier, larger developing countries, specifically Brazil, China,[155] South Africa, India, etc., have been emerging as capital exporters to the traditional capital exporting countries. To practice what has been preached may put the developed countries in a precarious position vis-à-vis the domestic realities.

VIII. COMPENSATION AND INTERNATIONAL LAW: THE WAY-FORWARD

It is clear from the above discussion that the protagonists of 'appropriate' compensation, specifically the larger developing countries, seem to have abandoned their official position and the developing countries' cause. India's Model BITs are a clear indication towards this trend. Indeed, this phenomenon could be explained by the economic and political realities of attracting FDI and development on the one hand, and the increase in south-south investments on the other. From a broader perspective, it is evident that the debate is neither about the Calvo clause nor the Hull standard, or about the superficial semantic difference between the Calvo and the Hull. Rather, it is more about the preference of the richer and more powerful party in a bilateral engagement, who would prefer the Hull standard when it's the guest, as it would generally be the one concerned about protection of investment. The instance of the AUSFTA, an agreement between two equal partners, explains to a large extent the role of power in the expropriation debate and the choice they might make. In short, whether a particular stand will be in line with the Hull or the Calvo shall depend on whether a party is the external investor - presumably powerful - or whether it is the host.

This does not suggest that the *raison d'état* of the opposition against the universal recognition of the Hull standard has disappeared altogether. Neither does this indicate that the utility and rational of 'appropriate' compensation or the Calvo clause in the contemporary debate has become inconsequential. Only the players have changed, and the larger developing countries have started repositioning themselves in the debate, vis-à-vis their traditionally espoused positions. The problem and the arguments remain valid for a large section of developing countries, specifically from Africa and other less developed economies - the new Third World in the expropriation discourse. The resistance should continue and countries like China and India, with their aggressive investment policy abroad, would be at the receiving end on this round. This is unfortunate for India, a country which had historically championed the developing countries' cause. In addition, there exists a trust deficit with the current system of investor-state

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[154] Supnik, *supra* note 96.

[155] See generally Cai Congyan, Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice, 7 J. WORLD INV. &TRADE 639 (2006).

arbitration.[156] Several developing countries, including India, are reluctant to refer their disputes to ICSID, and the recent withdrawal of Argentina, Bolivia, Ecuador and Venezuela from ICSID is telling.[157]

Indeed, to build investor confidence, investments must be ensured protection and compensated appropriately. A more pragmatic approach for the African and less doveloped countries would be to push for an international consensus on the standard of compensation, rather than leaving the matter to the power imbalance, inherent in a bilateral setup or at the discretion of the tribunals, which are eager to please the investor. Only a universally recognized international compensation standard would, at the least, bring in more clarity in an otherwise murkier international investment framework and preserve the political legitimacy of future investment arbitration.[158] Indeed, this may happen only in the context of a multilateral treaty on investment, which could be a herculean task in the current political scenario. It has been observed in arbitration awards; though fact-driven and differing from treaty to treaty, cautious reliance on certain principles developed in a number of those cases, may advance the body of law, which in turn may serve predictability in the interest of both, the investors and the host States.[159]

VIII. CONCLUSION

In short, there is a growing acceptance among States and the arbitration tribunals, towards awarding compensation which is 'prompt, adequate and effective', irrespective of whether the Hull standard has been directly referred to or not. The NAFTA, ECT, the World Bank Guidelines and the numerous BITs, specifically India's recent BITs show a clear indication of such growing acceptance of the Hull standard while dealing with expropriation of alien property.[160] Keeping with the objective of BITs, i.e., investor protection, the provisions are framed and the interpretation is tilted more towards safeguarding the rights of the investors. Irrespective of the minor variations in the language used in the BITs, the tribunals have considerable leeway in deciding the quantum of compensation, the valuation of which is rarely considered as less than full value of the property expropriated. In addition, the BITs and Foreign Trade Agreements ("FTAs") with investment

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156 *See* Waibel, *supra* note 3; Trakman, *supra* note 111, at 157.

157 Nicolas Boeglin, ICSID and Latin America: Criticisms, Withdrawals and Regional Alternatives (June 14, 2014), available at cadtm.org/ICSID-and-Latin-America-criticisms.

158 T.W. Walde & Borzu Sabahi, *Compensation, Damages and Valuation in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1049 (Peter M. Linski et al. eds., Oxford Univ. Press 2008).

159 ADC Affiliate*, supra* note 11, ¶ 293.

160 B.S. Chimni, Prolegomena to a Class Approach to International Law, 21 EUR. J. INT'L L. 71 (2010).

chapters, have gone beyond direct expropriation to include indirect expropriation or measures tantamount to expropriation, a concept which is largely undefined, providing additional leeway for the tribunals to broaden the instances of granting compensation.

Today's international investment law is erected on the foundation of adhocism and adhoc interpretations. As mentioned earlier, the problem is not with semantics, but the lack of clear understanding about the content that lays behind the semantic - the power play associated with it. The need is to bring clarity to the field that has been intentionally left ambiguous. The attempt must be to create a more stable and reliable international framework, which is mutually advantageous for both, capital exporting and capital importing countries. Without this, the existing mistrust would continue to dictate the international investment policy space.