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Scope of Protection of Foreign Investor against Expropriation in Customary International Law Vis-À-Vis Host States' Regulatory Autonomy

A Thesis Submitted to Jimma University School of Law for the Partial Fulfillment of the Requirements for Obtaining Master of Law (LL.M.) in Commercial and Investment Law

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DEDICATION

This work is dedicated to my late sister Kasu Girmaye, who did everything she could to keep my family strong, and who taught me what it means to selflessly love someone. May her soul rest in peace!

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Acronyms and abbreviations

OECD	Organization for Economic Cooperation and Development
MAI	Multilateral Agreement on Investment
IIA	International Investment Agreement
CIL	Customary International Law
NAFTA	North American Free Trade Agreement
FDI	Foreign Direct Investment
MFN	Most favored nations
NT	National Treatment
BITs	Bilateral Investment Treaties
ICSID	International Convention on Settlement of Investment Dispute
MNC	Multinational Company
PCIJ	Permanent Court of International Justice
ICJ	International Court of Justice
AID	Agency for International Development
MIGA	Multilateral Investment Guarantee Agency
OPIC	Overseas Private Investment Corporation
WTO	world trade organization
UNCTAD	United Nation Conference on Trade and Development
GATT	General Agreement on Tariffs and Trade
RJA	Revere Jamaica Alumina
TBT	Technical Barriers to Trade Agreement

SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
ECT	Energy Charter Treaty
ECHR	European Court of Human Right's
CAFTA	Central American Free Trade Agreement
FTA	Free Trade Agreement
TRIMs	Trade-Related Investment Measures
ICC	International Chamber of Commerce

CHAPTER ONE

Introduction

1.1. Background of the Study

In contemporary world, there is huge flow of trade and investment between states in order to attain some objectives such as acquiring foreign currency, creation of job opportunity and transfer of technology. To benefit more, states enter into bilateral, regional and multilateral arrangements through which the interaction between them is facilitated as predictable and possible. States liberalize trade and investment regulation ceding some of their sovereignty and regulatory authority over national economies. This concern was evident in the concerted opposition by numerous non-governmental organizations to the negotiation of the Multilateral Agreement on Investment (MAI) at the Organization for Economic Co-operation and Development (OECD). Investment protection obligations in bilateral investment agreements and customary international law provide that states must pay compensation for measures tantamount to expropriation. The scope of this obligation is controversial because international law has failed to develop clear rules for determining when a government measure is expropriatory. Critics of the MAI and trade investment liberalization point that the liberalization of trade and investment is a threat to national sovereignty and results in reduced protection for the environment and public health.[1]

These days, jurisprudence of regulatory expropriation in international law have been influenced by numerous bilateral investment treaties (BITs) between capital-exporting and capital-importing countries and also detailed in the many awards issued by arbitral tribunals.[2]

Momentous investment liberalization has occurred in the 1990's resulting in a numerous bilateral treaties with investment protection provisions, including the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT). The bulk of the BITs mostly signed between 1990 and 1997. The world's first BIT was signed on November 25, 1959

[1] M. Sornarajah, the International Law of Foreign Investment, (3rd ed.), Cambridge University Press, Cambridge (2010), at p. 261 and The Multilateral Agreement on Investment was negotiated in the framework of the OECD between 1995 and 1998. After the first draft triggered widespread criticism from civil society groups and developing countries, in October 1998 France announced the withdrawal of its support which effectively condemned the project under the OECD's consensus requirement.

[2] Ibid

between Pakistan and Germany. According to Action Plan of United Nation Conference on Trade and Development (UNCTAD) world investment report of 2014, currently there are more than 3,236 treaties; of which 2,902 are BITs and 334 are other multilateral investment treaties.[3] Influential capital exporting states usually negotiate BITs on the basis of their own "model" texts (such as the US model BIT).[4] The number and scope of treaties governing foreign direct investment continues to increase. All most in all BITs, there are investor-state arbitration provisions so that this will cause the measure taken by state claimable before international tribunal as breach of international investment obligations.[5]

In this research paper the controversial aspect of international investment protection against state regulatory autonomy, in light of the meaning and scope given by BITs and plurilateral treaty as well as International Convention on Settlement of Investment Dispute (ICSID) via the tribunal will be assessed. The area will be important as investors continue to bring claims under customary international investment law under similar provisions in BITs. CIL and BITs most of the time provides that states may expropriate or take measures tantamount to expropriation only if the measure is for a public purpose, is non-discriminatory and the state party pays the required compensation.[6]

Expropriation cases in international law have traditionally involved confiscations or seizures of property, the nationalization of key industries held by foreign national or the cancellation of state-granted natural resource concessions. Nonetheless, the modern investment claims are based on a conception of expropriation that is doctrinally similar to regulatory takings. A regulatory taking, arises where government legislation or a regulatory measure deprives a property owner of the use or benefit of property, limits or prohibits the transfer or disposition of property or has the effect of destroying the value of property, but where the state does not acquire title to the

[3] UN Conference on Trade and Development, Press Releases TAD/INF/2786, available at http://wwww.unctad.org/en/press/ and World Investment Report, 2014, UNCTAD/WIR/2014, available at http://wwww.unctad.org/en/press/, (both accessed on 31, March, 2015).

[4] Ibid

[5] See Canada, Third Report of the Standing Committee on Foreign Affairs and International Trade and First Report of the Sub-Committee on International Trade, Trade Disputes and Investment

[6] M. Sornarajah, supra note 1 at p. 294.

property in question. Regulatory expropriations, therefore, differ from typical cases of expropriation, such as the taking of property for a hospital or other public projects.[7]

Under World Trade Organization (WTO) initiation; there was an attempt for multilateral framework on foreign investment which is Trade Related Investment Measures (TRIMs) though it was limited in scope and the OECD initiation attempt for multilateral framework which was also failed.[8] The existing customary international law and BITs did not clearly and exhaustively provide the extent of state responsibility for economic injuries to a foreign investor when it exercises sovereign powers that affect the investor's property. Hence, it is important to provide in international treaties; detailed rules on police power regulation to protect the environmental and health, on one hand and protection of foreign investment against regulatory expropriation on the other hand.

1.2. Statement of the Problem

This paper examines the level of protection which is conferred on foreign owned property by international investment law against uncompensated expropriation, and the extent to which this level of protection limits a host state's regulatory freedom. Customary international law requires a state to compensate a foreigner for any expropriation of the foreigner's property.[9] This customary rule is codified and often elaborated in more than 3,236 treaties.[10]

Foreign direct investment (FDI) involves more than two states which are at least Capital exporting and capital importing countries. Due to the theoretical significance of transfer of technology, market creation, job opportunity, transfer of foreign currency and the like states of the world concludes BITs and develop in due course Customary International investment law which accord to the investments of foreign investors' high protection at the expense of their sovereign right of regulatory power. In principle, Sovereign states have the police power to enact the laws and regulations to govern their internal matters and to achieve certain social objectives. In doing so, a state may impair economic gain of foreign investor who invested in its' country.

[7] Id

[8] S. P Subedi, International Investment Law: Reconciling Policy and Principle, Hart Publishing, North America (US and Canada), (2008) at pp. 37-38

[9] G. Christie, "What Constitutes a Taking of Property under International Law?" [1962] 38 Brit Y.B. Int'l Law 307 at p. 225.

[10] World investment report, supra note 3

For this reason, multinational companies (MNC) which are owned by foreign investor brought their claims against host states before international tribunal based on CIL and existing BITs.

In addition to the OECD's work on the proposed MAI,[11] the WTO and the United Nations Conference on Trade and Development (UNCTAD) are analyzing investment issues.[12] The controversy over the proposed MAI and claims of expropriation under the CIL reinforce the need for analysis of international investment protection rules. BITs typically require that a state pay compensation where the state directly or indirectly expropriates property or takes measures tantamount to expropriation, but they fail to define when a regulatory measure is expropriatory.

This lack of clarity is a serious defect in international investment agreements. A broad interpretation of expropriation potentially conflicts with a state's autonomy to regulate the economy and to adopt social regulations for the protection of the public health and the environment, while a narrow interpretation may expose investors to abusive and opportunistic state conduct.[13] In addition, since many investment agreements provide for binding investor-state arbitration, there is significant uncertainty about how the vague expropriation standard will be interpreted by arbitrators and the appropriateness of allowing foreign investors to use such a process to challenge social regulation.[14]

The main problem that will be addressed in this paper is therefore, the scope and meaning accorded to expropriation as protectional framework, to protect investment of an investor under CIL on one hand and the host state sovereign power to take regulatory measure in order to achieve social objectives on the other hand. Customary international law has failed to develop clear rules to determine what government measures amount to expropriation. Rather than clarifying the scope of expropriation, international investment instruments incorporate vague standards to be applied by investor-state arbitration tribunals. While the scope of expropriation under international law remains vague, there is considerable authority to suggest that

[11] The Multilateral Agreement on Investment was negotiated in the framework of the OECD between 1995 and 1998. After the first draft triggered widespread criticism from civil society groups and developing countries, in October 1998 France announced the withdrawal of its support which effectively doomed the project under the OECD's consensus requirement

[12] UNCTAD's Commission on Investment, Technology, and Related Finance Issues studies the impact of international investment regulation on developing countries.

[13] G. Christie, supra note 9 at p. 209

[14] Ibid

international law generally requires compensation where the state has either directly or indirectly acquired property from a foreign national and there is no justification under the state's police power for the acquisition.

In this paper, I do not presume to provide a comprehensive answer to the question of when a state is justified in depriving an investor of property without compensation. Rather, my focus is on the primacy of what I refer to regulatory expropriation in customary international law under the influence of numerous bilateral investment treaties and contribution of arbitral tribunal decision to defining the scope of expropriation under international law.

Thus this research analyzes the scope of expropriation under CIL and the effect of international investment obligations on domestic regulatory authority. Also the decisions of international tribunal on related claim will be analyzed.

1.3. Objectives of the Study

1.3.1. General Objective

The general objective of this research paper is:

To evaluate the scope of expropriation protection accorded to FDI under customary internal investment law on one hand and the regulatory autonomy of sovereign state on internal matters on the other hand.

1.3.2. Specific Objectives

The specific objectives are:

- To examine the magnitude of bilateral investment treaty towards providing clear rules on police power regulation and regulatory expropriation.
- To make analysis and review of arbitral tribunal decision towards defining the scope of expropriation under international law.
- To examine the classical police power of the state to issue regulatory measure to avert social harm on one hand and the level of foreign investors' investment protection against expropriation on the other hand.

1.4. Research Questions

The questions that are going to be answered in this research are:

- What acts of state amounts to expropriation?
- Can state invoke police power while taking regulatory measure?
- Is there a clear rule under customary international law to take social regulatory acts?
- Are there clear provisions and precedents under international law on expropriation protection and regulatory autonomy?

1.5. Significance of the Study

Above all significance of this paper is to show the extent of protection of FDI against expropriotory acts and state sovereign autonym to take regulatory measure using its police power. Furthermore, this research can be used as reference on analysis of bargaining position and legislative process for every country in concluding BITs and also perhaps serve as an input for the move to having comprehensive multilateral investment agreement. Also it may serve as reference for pupil and an input for further research in this area.

1.6. Research Methodology

The research will be conducted based on Literature review which aims to critically assess relevant theoretical matters. It includes literature on international trade law, international investment law and decided cases of ICSID. Besides, analysis of customary international investment law principle and relevant legislation of some BITs was used as a method. Moreover, decision on regulatory expropriation which were claimed before ICSID tribunal was reviewed and analyzed.

1.7. Literature Review

Customary international law (CIL) prescribes certain minimum standards of treatment of foreign investment. CIL protection of foreign investment was developed from the traditional notion of diplomatic protection and the treatment of aliens. FDI involves the physical movement of investor and his property so that the home country needs protection of its citizens and their property that gave rise to the modern rules of foreign investment law. The host state which admitted the investor into the country was required to extend the international minimum standard of protection to both aliens and their property under international law has been the bedrock of

traditional foreign investment law.[15] Hence CIL was developed with intention, to protect investment of investors from mistreatment at the hands of governments and thus to accelerate investment among states, presumably for the benefit of all.

But the protection extended for investment has given rise to a number of high-profile challenges brought by corporations against environmental, health and safety measures taken by the three governments, providing fuel for the anger of numerous civil society organizations opposed to trade and investment liberalization.[16]

The scope of expropriation has been addressed as an issue in a number of studies. Most writers have been under take study on international investment protection and regulation. Among them Friedman, concluded that indirect expropriation can be easily identified from point of international law. Christie wrote about taking of property and come up with a conclusion that expropriation can involve subsidiary rights even if there is no intention to expropriate those rights. Subedi under gone his study on the protection available under international foreign investment law by analyzing those principles which gave protection for investment of investor. Also Zarsky analyzed problems with the procedural and substantive provisions in Chapter 11 of NAFTA for the protection of foreign investors. In doing so they come up with some finding which were lack of transparency, accountability, and legitimacy in the investor–state dispute settlement process; the broad definition of 'investors'; and the overly broad interpretations of host state obligations in areas such as expropriation, non-discrimination, and minimum standards of treatment.

However, some of those researches were only focus on how CIL was developed, what kind of principles it embrace but neglect the scope of those investment protection and its impact on the police power of host state to handle its internal social affair.

Moreover, as far as my knowledge is concerned, these studies did not provide specific guidance on how to distinguish between expropriation and regulation in CIL. In addition they did not clearly address the contemporary types of regulatory expropriation claims being made in cases such as Ethyl and Methanex in line of customary international law. Some other researches were

[15] Lyuba Zarsky, International Investment for Sustainable Development, Balancing Rights and Rewards, (ed.) Earthscan publishing, UK and USA, (2005) at pp. 152-170
[16] Id

also focused and analyzed the scope of NAFTA interpretation which only targets the affair and jurisprudence of United States, Canada and Mexico.

Thus, this paper will show the disparity between the scopes of investment protection against expropriation from the angle of sovereign principle of the host state to take regulatory measure in order to up hold social affair of its citizen.

1.8. Scope of Coverage and Limitation of the Study

The paper is limited to CIL protection of investment against expropriation and its effect on regulatory autonomy of host state police power. Most of the time multinational companies raised Expropriation claims before ICSID tribunal. From the reading of those decisions one can understand the uncertainty and the vagueness of the tribunal strategic interpretation and meaning accorded for protection against expropriation and state regulatory autonym.

Hence the study concentrated only on protection of investment against expropriation under CIL by raising the compatibility of the principle with police power of state to regulate internal affair but it is difficult to address all principles of investment protection within a given time.

Correspondingly, time and finance were the possible limitations or constraints of studying this research.

1.9. Organization of the Study

The research is going to be organized into five chapters.

The first chapter deals with the introductory part. It contains, background of the study, some literature review, problem in study, objectives of the study, research question, methodology used, scope of the study and constraints.

Chapter two provides the critical analysis of development of CIL principles which deals with source of Regulatory Expropriation under customary international law. The objective of the chapter is to assess the meaning of regulatory expropriation and circumstance of obliged compensation. The Chapter begins with background of regulatory expropriation under customary international law, the general meaning of expropriation and its' sources. Also the source was seen from BITs, from settled dispute and multilateral investment guaranty agency (MIGA).

The third chapter stated the notion of compensation and regulatory expropriation via state police power. Under the fourth chapter International regulatory expropriation claims before arbitral tribunal is reviewed and analyzed. Finally under chapter five the paper ends up with conclusion and possible recommendation.

CHAPTER TWO

Concept and Source of Regulatory Expropriation under Customary International Law

The principle of respect for property rights forms part of generally accepted international law.[17] International decisions make specific reference to respect for private property as a principle of international law. International law supports the principle of respect for private property in a number of areas other than expropriation: state recognition of pre-existing private property claims in territory that no state has previously claimed (*terra nullius*); the principle that acquired rights survive state succession and must be respected by the successor state.[18] Under international law, a state must pay compensation to foreign nationals for expropriations of property. However, the range of economic interests protected by international law, what government measures amount to expropriation and compensable and non-compensable expropriation issues are not yet well settled.[19] Recent bilateral investment treaties and the investment provisions in plurilateral agreements such as the North American Free Trade Agreement ("NAFTA") and the Energy Charter Treaty[20] clarify the first and third issues by defining "investment" broadly and through detailed provisions on the payment of compensation.[21] This chapter focuses on the crucial and controversial issue of what amounts to an expropriation since it determines whether a state is responsible under international law for expropriation and controversial because of its implications for national sovereignty.

2.1. The Concept of Expropriation

Most of the time investor alleged before ICSID tribunal Expropriation claims which is resulted from host state act without compensation.[22] In more than 3,226 international investment

[17] F.V. García-Amador et al., Recent Codification of the Law of State Responsibility for Injuries to Aliens, Oceana Publications Inc., New York, (1974) at p.73

[18] Ibid

[19] R. Dolzer, "Indirect Expropriation of Alien Property" (1988) 1 ISCID Rev. 41 at p. 41.

[20] The treaty covers trade liberalization and investment promotion and protection in the energy sector and is reprinted at (1995) 34 I.L.M. 360.

[21] See Article 1139, NAFTA on the definition of investment and Article 1110 on compensation.

[22] R. Dolzer, supra note 19.

treaties,[23] there do not appear in any of the treaties that define expropriation as an appropriation or unjust enrichment by the state. Then again, investment treaties typically do not define the meaning of expropriation and often simply refer to government measures that are the "same" or "equivalent" to expropriation or are "tantamount to expropriation."[24]

Expropriation may involve direct or indirect government measure. Direct expropriations are measures that involve an outright or express taking of the assets of investors by a government decision or decree which is now relatively rare.[25] Conversely, in more recent times, foreign investors' concerns have focused on indirect or consequential or creeping' expropriation which undermine the value of their investments.[26]

Reflecting this shift, the non-discrimination and fair and equitable treatment standards of protection have become increasingly important avenues of recourse against host states. That said the basic concept of indirect expropriation continues to attract widespread support among investors, tribunals and scholars on the ground that a host state can easily expropriate other than by formal decree.[27]

Tribunals have recognized that regulatory activity is not outside the scope of the indirect expropriation concept a blanket exception for regulatory measures would create ambiguity in international protection against expropriation.[28] Frequently, the same regulatory conduct has given rise to investor claims for breach of the non-discrimination, fair and equitable treatment, and expropriation standards. The considerations applied by tribunals under each of the different standards have sometimes overlapped.[29]

The NAFTA treaty based claim as per article 1110 by Pope &Talbot v. Canada and S.D. Myers v. Canada tribunals have held that the phrase "measure tantamount to nationalization or

[23] See World Investment Report, 2014, supra note 3.

[24] For example see Article 5, Ethiopia/Israel (2003), Article 5, Ethiopia/UK BIT (2009), Article IV Indonesia/ China BIT (1994)), Article 5, Barbados/Cuba BIT (1996), Article 5, Netherlands/India BIT (1995) and Article 1110 NAFTA (1995. BIT texts are available through the United Nations Conference on Trade and Development's online investment treaty database: <http://www.unctadxi.org/templates/DocSearch____779.aspx>.

[25] S. P Subedi, supra note 8, at p. 120

[26] Ibid

[27] Id

[28] R. Dolzer, supra note 19

[29] Id

expropriation" does not broaden the ordinary concept of expropriation; hence, tantamount is "equivalent" and does not expand the meaning of expropriation.[30]

The tribunal in Waste Management v. Mexico also define in its' decision the meaning of a measure tantamount to nationalization or expropriation as:

> Evidently the phrase "take a measure tantamount to nationalization or expropriation of such an investment" in Article 1110(1) was intended to add to the meaning of the prohibition, over and above the reference to indirect expropriation. Indeed there is some indication that it was intended to have a broad meaning, otherwise it is difficult to see why Article 1110(8) was necessary. As a matter of international law a "non-discriminatory measure of general application" in relation to a debt security or loan which imposed costs on the debtor causing it to default would not be considered expropriatory or even potentially so. It is true that paragraph (8) is stated to be "for greater certainty", but if it was necessary even for certainty's sake to deal with such a case this suggests that the drafters entertained a broad view of what might be "tantamount to an expropriation."[31]

Hence, this tribunal in defining expropriation had concluded that the drafters entertained a broad view of what might be tantamount to an expropriation.

Scholars have also tried to define what expropriation does mean. Friedman suggested in his 1953 treatise, Expropriation in International Law by saying that:

> Indirect expropriation resulting from the normal functioning of public services would not appear to give rise to any great difficulty from the point of view of international law.[32]

The growth of the welfare state and new forms of social regulation have increased the number of government measures that affect property rights. As a result, claims of regulatory expropriation may arise in many areas not envisioned by Friedman and where older arbitral authorities involving seizures and confiscation do not address whether state responsibility arises.

The existing international law principles delimiting the scope of expropriatory measures are only slightly clearer than in 1963 when Christie wrote in his seminal article "What Constitutes a Taking of Property under International Law" he stated that:

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[30] Pope& Talbot v. Canada, Interim Award, 26 June 2000 at Para. 104. And S.D. Myers Inc. v. Canada (1st Partial Award, 13 November 2000), 40 I.L.M. 1408 at Para. 286, the tribunal in S.D. Myers agreed with pope interpretation

[31] Waste Management v. Mexico, Award dated 30 April 2004 (Case No. ARB(AF)/00/3) 10 ICSID Reports at Para. 144

[32] S. Friedman, Expropriation in International Law, Stevens & Sons Limited, London, (1953) at p.1. .

> Such cases as there are recognize the principle laid down by the commentators that interference with an alien's property may amount to expropriation even when no explicit attempt is made to affect the legal title to the property, and even though the respondent State may specifically disclaim any such intention.[33]

According to Christie expropriation could result from any interference which is may be direct or indirect without requirement of transfer of title deed and regardless of existence of mental state to do so.

Moreover, subedi noted about the meaning of expropriation as:

> Expropriation means the taking of the assets of foreign companies or investors by a host state against the wishes or without the consent of the company or investor concerned. It includes deprivation of the right to property owned by foreign companies.[34]

In general terms expropriation involves a host state measure that has the effect of depriving the investor of the use and benefit of its property.[35] It is compulsory act taken towards foreign nationals' property which amounts to expropriation or nationalization, and gives rise to compensation.

2.2. Development of the Customary International Law on Expropriation

The jurisprudence of regulatory expropriation in customary international law have been influenced by a various BITs, plurilateral agreements and awards issued by arbitral tribunals.[36] Prior to the development of modern public international law political communities denied legal capacity and rights to aliens.[37] Often the alien's legal status existed at the pleasure of the sovereign.

As concepts of natural law became more influential in the 16th and 17th centuries, international law developed more detailed standards for the legal treatment of aliens and acquired rights.[38] The expansion of trade and investment in the 19th century led to increased attention on the status of foreign nationals abroad.[39] From 1840-1940 over sixty arbitral commissions were established

[33] G. Christie, supra note 9, at p.309
[34] S. P. Subedi, supra note 8, at p. 120
[35] R. Dolzer, supra note 19, at pp. 91-95
[36] K.L. Vandevelde, "The Political Economy of a Bilateral Investment Treaty" (1998) 92 A.J.I.L. 622.
[37] I. Brownlie, Principles of Public International Law, 5th ed., Clarendon Press, Oxford, (1998) at pp. 524-528
[38] Ibid
[39] Id

by various sets of states to deal with disputes arising from injuries to foreign nationals.[40] Political and economic ties led to commercial treaties which included national treatment provisions for foreign nationals.[41] International law also developed a requirement for states to respect certain fundamental norms, especially with respect to standards of humane treatment, the protection of life and liberty and standards for judicial proceedings.[42] For persons, international minimum standards were embodied in the concept of denial of justice[43] and, in the mid-20th century, were codified in international human rights.

The development of an international minimum standard for the treatment of the property of foreigners has been contentious throughout the twentieth century.[44] Intense debates arose between capital importing states and capital exporting states during the 1960s and 1970s on whether compensation was always payable, regardless of the state's purpose for the expropriation, in the context of developing countries' efforts regain control over their economies post-decolonization. [45]

Several Latin American jurists argued that foreign nationals are only entitled to equality of treatment under local law (national treatment).[46] The US was an early proponent of an international minimum standard for the treatment of the property of foreigners and opposed the Calvo Doctrine supported primarily by Latin American countries.[47] The Calvo Doctrine, named after the Argentinean jurist and diplomat Carlos Calvo, provides that aliens are only entitled to national treatment and, therefore, does not recognize an international minimum standard of treatment for alien property.[48] It also denies the right of foreign nationals to seek diplomatic protection from their national state by requiring that the foreign national submit to the jurisdiction of domestic courts.[49] The US insisted on the Hull Rule, named after US Secretary of State Hull, who, in response to the expropriation of American-held oil interests by Mexico in the

[40] Id
[41] S. Verosta, "Denial of Justice", R. Bernhardt ed., Encyclopedia of Public International Law, (1992) Volume I, at p. 1007
[42] Ibid
[43] Ibid
[44] Ibid
[45] Ibid at p. 956
[46] D. Shea, The Calvo Clause (1955)
[47] Id
[48] Id
[49] Id

1930's, argued that "prompt, adequate and effective compensation" was required under international law.[50]

In the post-war era, the issue of treatment of foreign investment, control over natural resources and sovereignty was the subject of much controversy at the United Nations and in international law.[51] Developing countries and some Western countries exercised their sovereignty by nationalizing foreign-owned industries, through land reform and by pursuing policies of economic nationalism.[52]

In 1962 the United Nations General Assembly passed Resolution 1803 "General Assembly Resolution on Permanent Sovereignty Over Natural Resources"[53] ("Resolution 1803"). The Resolution declares in paragraph 4 that:

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.

The disagreement on international expropriation law continued in the United Nations in the 1970's at the same time as developing countries advocated a fundamental restructuring of the international economic system. These aspirations are reflected in the "General Assembly Resolution on Permanent Sovereignty over Natural Resources,"[54] the "Declaration on the Establishment of a New International Economic Order"[55] and the "Charter of Economic Rights and Duties of States."[56]

The Charter provides that compensation for expropriation is to be determined based on state law and omits any reference to international law or a minimum international standard in determining compensation.[57] International arbitral decisions on international law suggest that paragraph 4 of

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[50] Id
[51] N. Schrijver, Sovereignty Over Natural Resources, Cambridge University Press, Cambridge, (1997) at p. 9
[52] M. Sornarajah, The Pursuitof Nationalized Property, Martinus Nijhoff Publishers, Dordrecht, (1986) at p. 213
[53] GA Res 1803, UN GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5344 (1962), (1963) 2 I.L.M. 223
[54] GA Res 3171, UN GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9559 (1974), (1974) 13 I.L.M. 238
[55] GA Res 3201, UN GAOR, 29th Sess., Supp. No. 1, U.N. Doc. A/9559 (1974), (1974) 13 I.L.M. 715
[56] GA Res 3281, UN GAOR, 29th Sess., Supp. No. 1, U.N. Doc. A/9631 (1974), (1975) 14 I.L.M. 251
[57] Ibid

Resolution 1803 represents customary international law and argue that later UN instruments do not reflect customary international law.[58] But there continues to be substantial controversy regarding the customary international law standard for calculating compensation and much of the recent literature on international expropriation law focuses on this topic.[59] However, it is well accepted in international law that states must compensate foreign nationals for the most blatant forms of nationalization, expropriation, confiscation, physical takeover or seizure of property.[60]

The continued disagreement over the proper standard for measuring compensation serves to highlight and affirm the principle that states must pay compensation if they expropriate property and that clearer legal principles are required to determine what government measures amount to expropriation.[61]

Under private international law the existence of property rights, their nature and scope, and who is entitled to exercise them is determined by the *lex situs.*[62] Public international law looks to the *lex situs* and the rules of private international law to determine whether property rights have been acquired. Once the *lex situs* recognizes property as a bundle of intangible rights, an expropriation can occur through interference with the whole bundle of rights or any part.[63] International law recognizes that property comprises tangible property such as land and goods and intangible property such as contract rights and patents.[64]

There is no authoritative codification of international expropriation law. At national level American Law Institute has codified the international law governing expropriation in §712 of the Third Restatement[65] and this paragraph are often referred to as an authoritative statement of international law. The Third Restatement refers to state responsibility arising for a "taking" of property. Since state regulatory action often only prohibits certain uses of property or the exercise of certain rights, it is crucial to determine if state responsibility arises for negative

[58] M. Sornarajah, supra note 1, at p. 83.
[59] Ibid at p. 443
[60] Id at p. 209
[61] Id
[62] Dicey and Morris, The Conflict of Laws, 11th ed., Stevens & Sons publishing, London (1987) at p. 20.
[63] M. Sornarajah, supra note 1, at p.294
[64] Ibid
[65] American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, American Law Institute Publishers, Washington, (1987), at p. 210

regulatory prohibitions that deprive an owner of property rights. The Third Restatement provides, in part, that:

> A state is responsible under international law for injury resulting from:
>
> (1) A taking by the state of the property of a national of another state that:
>
> (a) is not for a public purpose, or
>
> (b) is discriminatory, or
>
> (c) is not accompanied by provision for just compensation;
>
> (3) Other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.[66]

According to the Third Restatement, a state is not responsible for loss of property or other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture from crime, or other action of the kind that is commonly considered as within the police powers of states.[67]

Customary international law requires a state to compensate a foreigner for any expropriation of the foreigner's property by that state.[68] This customary rule is codified and often elaborated upon in more than 3,236 bilateral and multilateral investment treaties and in investment chapters in numerous other free trade agreements currently in force.[69]

Customary law rules such as the obligation of fair and equitable treatment have developed alongside the rule against uncompensated expropriation to facilitate foreign investment and protect foreign investors against the more extreme forms of political risk associated with investing in another country.[70] The development of rules protecting foreign investors at the international law level reflects the belief which has been widely held amongst capital exporting states that investors are not always able to rely on the municipal laws and national courts of host states to provide adequate security to their investments.[71]

The precise content of the customary rule against uncompensated expropriation, however, has always been somewhat unclear and controversial. For example, in some cases, questions have

[66] Ibid at §712 (g)
[67] Id
[68] G Christie, supra note 9
[69] World investment report 2014, Supra note 3
[70] S. Verosta, supra note 41.
[71] Ibid

arisen as to whether intangible interests, such as contractual rights, are entitled to protection under the rule.[72]

2.3. Sources of International Expropriation Law

The source of international law is listed under article 38 of Statute of the International Court of Justice (ICJ). This provision the sets out what are commonly referred to as the sources of international law. Article 38 (1) provides:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply;
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) Subject to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Accordingly, as per article 38(1, a) of the statute, treaties are the most authoritative source of international law. Since expropriation is subject of international investment law, there is no comprehensive international investment law to regulate foreign investment generally and expropriation specifically.[73]

However, at the end of 2nd World War, there was an attempt to create comprehensive international investment treaty under international trade organization, but it was unsuccessful.[74] Moreover, there were a negotiation under the auspices of the OECD on a Multilateral Agreement on Investment which was the early attempts at codifying international instruments on expropriation.[75]

The 1959 draft of the Convention on Investments Abroad by individual attempt i.e. the Abs-Shawcross Draft Convention, with the support of the International Chamber of Commerce, sought to formulate such a code on foreign investment.[76] This code was drafted by a committee

[72] Norway v. US (1922), 1 U.N.R.I.A.A. 307
[73] M. Sornarajah, supra note 1 at p. 79
[74] Ibid
[75] See Supra note 3
[76] M. Sornarajah, supra note 1 at p. 80

under the direction of Dr. Abs, Director-General of the Deutsche Bank, and Lord Shawcross. It was the first postwar attempt to develop an international investment code.[77] Article III of the Abs-Shawcross Draft Convention provides, in part, that:

> No Party shall take any measures against nationals of another Party to deprive them directly or indirectly of their property except under due process of law and provided that such measures are not discriminatory or contrary to undertakings given by that Party and are accompanied by the payment of just and effective compensation...[78]

The draft convention prohibits any measure direct or indirect government act, which deprive property right of foreign investor. However, it allow the measure taken under due process of law non-discriminatory and with effective compensation. The content of this draft is similar with the cotemporary BITs yet the draft code did not provide a room for state police power clearly.

In 1961 Convention on the International Responsibility of States for Injuries to Aliens[79] i.e. Harvard Draft, was prepared by rapporteurs L.B. Sohn and R.R. Baxter at Harvard Law School in an attempt to codify the international law on state responsibility. The Harvard Draft provides in Article 10 that all takings are to be compensated and defines a taking in Article 10(3) (a) as:

> A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

This draft provision is better in defining the meaning of expropriation, i.e. taking of property. It embrace direct and indirect state act interference without requirement of transfer of title deed. To be proved the act should last for reasonable period though that period is not fixed.

According to the commentary accompanying the Harvard Draft, a state can employ a wide variety of measures for the purpose of making it impossible for an investor to use or enjoy its property. For example, a state may make it impossible for an investor to operate a factory by blocking the factory gates on the grounds of maintaining public order; through labor legislation it

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[77] G. Schwarzenegger, Foreign Investments and International Law, Frederick A. Praeger, New York, (1969), at p. 116.
[78] Ibid at 117
[79] The Harvard Draft (1961) 55 A.J.I.L.

may set wages at a prohibitively high level; or it may deny visas for required technical staff.[80] Also the Harvard Draft under article 10(5) provides the distinction between compensable taking and uncompensated takings done under the state police power stating as not wrongful. It says:

> An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided:
>
> (a) it is not a clear and discriminatory violation of the law of the State concerned;
>
> (b) it is not the result of a violation of any provisions of Articles 6 to 8 of this Convention[81]
>
> (c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and
>
> (d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

Hence, under article 10(5) of Harvard draft the police power of the sovereign state is respected in clear way. In my view this draft is the best provision in adopting interpretive provision to uphold state regulatory autonomy.

In the early 1960's, a number of the OECD countries prepared a draft Convention on the Protection of Foreign Investment[82] which was revised and approved by the OECD in 1967 (the OECD Draft). Article 3 of the OECD Draft provides in part:

> No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with:
>
> (i) The measures are taken in the public interest and under due process of law;
>
> (ii) The measures are not discriminatory or contrary to any undertaking which the former Party may have given; and
>
> (iii) The measures are accompanied by provisions for the payment of just compensation....

[80] G. Schwarzenegger, Supra note 77, at p. 125
[81] These Articles provide procedural protection.
[82] (1968) 7 ILM 117.

This article is also similar with article III of the draft code of Abs-Shawcross Draft Convention. It did not provide state regulatory autonomy in clear and exhaustive way.

The commentary to the OECD Draft remarks that measures that are otherwise lawful can be applied in such as a way as to deprive the investor of its property. It suggests that excessive or arbitrary taxation, prohibition of dividend redistribution coupled with compulsory loans, or the denial of essential export or import licenses may amount to a taking.[83] The OECD Draft failed to gain sufficient support among OECD countries for adoption but it served as a model for later BITS.[84]

Generally, in spite of the efforts so far made; formulating comprehensive framework on international investment law was failed. Unlike the failure regarding substantive rule, there was the only successful convention to regulate procedural matter of international investment which is the ICSID Convention.[85] The ICSID is international investment treaty which set up machinery for the settlement of investment disputes through arbitration.[86]

Although the international investment convention was not successful, there are BITs among two states and regional investment treaties between more than two states such as NAFTA, CAFTA and FTA. The uncertainty in international law and the desire by investment-exporting countries for more complete codes of protection for foreign investment led many developed countries to pursue bilateral and plurilateral investment treaties.[87]

Furthermore, as per article 38(1, b) of ICJ though custom is stated as a source of international law, yet there are few customs in the field of foreign investment.[88] However, there is developed custom over payment of compensation though there is lingering debate about its' extent of calculation.[89]

Under article 38(1, c), the general principle of law are accepted as a source of law, though the weight accorded to this source of law is limited in scope; which means not authoritative as treaty

[83]Ibid. at 126.
[84] R. Dolzer, supra note 19 at 2.
[85] M. Surnaraja, supra note 1 at p. 80
[86] Ibid
[87] Id
[88] Id at p. 82 and V.D. Degan, Sources of International Law (The Hague: Kluwer Law International, 1997) at 58. Also see south-north contention about extent of compensation the discussion under 2.2 above.
[89] M. Surnaraja, supra note 1 at p. 80

and custom.[90] Most of the time international investment law, claims are based on general principles of law inter alia payment of full compensation upon expropriation of foreign property, is based on arguments relating to notions of unjust enrichment and acquired rights.[91]

What is more, article 38(1) (d) stated decisions of international tribunals as subsidiary means for the determination of rules of law. No matter how tribunals' decisions are stated as subsidiary source, the decisions of the ICJ and its predecessor have had an immense influence in shaping the principles of international law. As a result, a number of cases involving claims international investment adjudicated before ICJ. As one part of international investment claim; expropriation claims have been argued before the ICJ but have been decided on grounds that do not provide any particular guidance on what types of regulatory measures amounts to expropriation.[92]

In Barcelona Traction case,[93] Belgium alleged that the acts and omissions of the Spanish courts in placing Barcelona Traction into bankruptcy constituted a denial of justice and an expropriation of Barcelona Traction shares held by Belgian nationals. While the case is best known for the principle that only the state in which a company is incorporated may make an international claim on behalf of the company, in the course of their reasoning indicated that the acts complained of appeared to be a form of disguised regulatory expropriation.

Also in Norwegian Ship-owners Claims,[94] ICJ recognized subsidiary rights. It stated that even if there is no intention to expropriate property rights an expropriation can involve. As a result of World War I, the US, through the United States Shipping Board Emergency Fleet Corporation, requisitioned privately held ships in the US including ships under construction for a number of Norwegian ship-owners. The ship-owners contended that the US requisition included not only the partly-completed ships but also the contract rights for the ships. These rights were very valuable given the high demand for ships as a result of the war. The US took the position that it had only requisitioned the partly-completed ships. The international tribunal established by the US and Norway to hear the matter held that the contract rights for the ships had been taken and that the ship-owners were entitled to the market value of the contracts. The tribunal analyzed the

[90] Id
[91] Id
[92] S. Friedman, supra note 32.
[93] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), [1970] I.C.J. Rep. 4
[94] Norway v. US (1922), supra note 72.

question of expropriation primarily in terms of US constitutional principles and held that the loss of use of the contracts was equivalent to a taking of property under the US Constitution's Fifth Amendment. The Tribunal held that compensation was due to the ship-owners under US law and under international law based on the respect for private property. The US agreed to pay the award but stated, at the time, that it did not accept the decision as a precedent. The decision has subsequently been cited by numerous international tribunals to confirm the principle that an intention to expropriate is not necessary for a finding of expropriation and that states are responsible for expropriations that occur indirectly.[95]

In Case concerning Elettronica Sicula S.p.A, [96] the ICJ considered whether certain actions by Italy prevented ELSI from liquidating its assets and resulted in a taking of property. Elettronica Sicula S.p.A. (ELSI) produced electronic components in Italy and was a subsidiary of two American corporations. As a result of continuing financial problems, ELSI's board of directors decided to shut-down operations and liquidates ELSI to minimize ongoing losses. In order to protect local employment, the local mayor issued a requisition order under which the town took temporary control of ELSI's factory. ELSI appealed this order and later made a bankruptcy petition. The requisition order was later annulled and the trustee in bankruptcy brought a suit for damages resulting from the requisition order arguing that the requisition order had caused the bankruptcy. Among other things, the US claimed that the requisition and the delay in overturning the requisition interfered with the American corporations' management and control of ELSI and their interests in ELSI.

The ICJ found that ELSI's bankruptcy was not caused by the requisition order, but rather by ELSI's precarious financial situation. The ICJ denied the US's claim that Italy's actions were a taking under the Treaty of Friendship, Commerce and Navigation between the two countries as the mayor's order did not cause or trigger the bankruptcy. It also denied the US's claim that ELSI was deprived of its rights to dispose of property, holding again that the mayor's action was not the cause of the property loss.

Summing up, the ICJ made in the ELSI case two points which has relevance for the scope of the paper. First, in submissions on the treaty there was argument over the scope of expropriation.

[95] Ibid

[96] Case concerning Elettronica Sicula S.p.A. (US v. Italy), [1989] I.C.J. Rep. 15 (The ELSI Case).

The Court held that the word taking is wider and looser than expropriation.[97] Second, the Court held that the requisition could not amount to a taking under the treaty unless it constituted a significant deprivation of the American corporations' interest in ELSI's plant.[98]

2.3.1. The Role of Dispute Settlement

The International Centre for Settlement of Investment Disputes (ICSID) was created by the convention on the settlement of investment disputes between states and nationals of other states. ICSID was established to provide a neutral forum for the resolution of investment disputes and in an attempt to depoliticize the settlement of investment disputes.[99]

The exercise of diplomatic protection, including recovering compensation for expropriated property, is generally viewed as the right of the injured investor's state, and the decision whether to exercise the right has often been influenced by political considerations.[100] Many investment treaties such as BITs and regional agreements; therefore create jurisdiction for arbitration of disputes between investors and host states, to enable investors themselves to bring proceedings against host states for breach of investor protections without needing to involve their governments.[101]

In addition, there are several other international law and quasi international law settings in which the protection against uncompensated expropriation of foreign owned property arises. The European Court of Human Rights, the Iran- United States Claims Tribunal, and the United States Overseas Private Investment Corporation are among international law and quasi international law settings.[102]

By end of 2013, 98 States have been respondents in a total of 568 known treaty-based cases before ICSID tribunal.[103] The overall number of concluded cases reached 274. Of these,

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[97] Ibid, at para. 113

[98] Id, at para. 119

[99] I.F.I. Shihata, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, International Centre for Settlement of Investment Disputes, Washington, (1993) at p. 52.

[100] Ibid

[101] Jurisdiction is established by each state party to the treaty providing its standing consent to submit disputes with investors of the other state party to arbitration.

[102] World investment report, supra note 3

[103] List of Concluded Cases" and "List of Pending Cases" online: ICSID Homepage <http://wwww.unctad.org/en/press/> (last accessed: 08 may 2015).

approximately 43 per cent were decided in favor of the State and 31 per cent in favor of the investor. Approximately 26 per cent of cases were settled. In 2013, investors initiated at least 57 known investor-State dispute settlement (ISDS) cases pursuant to international investment agreements (IIAs).[104]

Most of the time investor-state arbitration involves expropriation claim, inter alia the decisions deals with regulatory expropriation. The prevalence of recent practice through dispute settlement under investment treaties, provides a richer source of material for clarifying the law of expropriation.[105] This practice raises many important questions, including whether international law should protect economic interests as property, require compensation for regulatory takings, and/or include human rights and environmental considerations in the assessment of host state liability. The issue which is common to these questions concerns a host state's ability to attract foreign capital consistently with its overall public policy and development goals.[106]

Generally, looking at the ICSID decisions can lead to categorization of cases in which government measures have been found to be expropriatory, but the decisions constitute little guidance on the distinction between expropriatory compensable takings and regulatory non-compensable takings exercised within state police power.[107] Hence claims raised from government measure were alleged before ICSID tribunal but the decision delivered by the tribunal was vague, inconsistent and not predictable in defining the scope of expropriation and state sovereign recourse (state autonomy) to defend social welfare such as health and environment.

2.3.2. Bilateral and Other International Investment Instruments

The importance of BITs in the development of the law of regulatory expropriation cannot be exaggerated, as BITs have served both to capture the essence of expropriation doctrine under customary international law and in some instances to modify its terms.[108]

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[104] Ibid
[105] Awards of investor state arbitral tribunals need to be analyzed with reference to the text of the particular treaty in dispute.
[106] C McLachlan et al, "International Investment Arbitration: Substantive Principles" (OUP, 2008), Para [8.02].
[107] M. Sornarajah, supra note 52, at p. 301
[108] K.L. Vandevelde, supra note 36 at 56

Since the late 1950s, capital exporting states have focused on bilateral [109] and multilateral[110] investment treaties as the primary means of protecting their nationals investing in other countries. More recently, investor protections have been included in investment chapters forming part of wider bilateral and regional free trade agreements, including free trade agreements where both parties are developed states. States have accepted treaty obligations to protect foreign investors, sometimes reluctantly, in order to compete for foreign capital, and as a trade-off for the capital necessary to sustain their economic development.[111]

The general purpose of BITs is to safeguard investments made in the territory of the signatory countries. The desire to have clearer rules governing foreign investment and the recognition of the importance of foreign investment for economic growth has led many countries to conclude bilateral treaties on foreign investment.

Germany and Pakistan signed the first BIT in 1959 and Germany continued to sign investment treaties with many developing countries throughout the 1960's.[112] There has been an exponential growth of BITs in the 1990's onwards. The year 2013 saw the conclusion of 44 international investment agreements (30 BITs, and 14 other IIAs), bringing the total number of agreements to 3,236 of which 2,902 BITs and 334 IIA by the end of the year. In the same year, several BITs were also terminated.[113] South Africa, for example, gave notice of the termination of its BITs with Germany, the Netherlands, Spain and Switzerland in 2013; and Indonesia gave notice of the termination of its BIT with the Netherlands in 2014. Once taking effect, the terminated BITs that were not replaced by new ones will reduce the total number of BITs, only marginally by 43, or less than 2 per cent. By virtue of "survival clauses", however, investments made before the termination of these BITs will remain protected for periods ranging from 10 to 20 years, depending on the relevant provisions of the terminated BITs.[114] The importance of foreign direct investment for developing countries is highlighted by the increasing number of BITs between

[109] The first bilateral investment treaty was entered into between Germany and Pakistan in 1959.

[110] While the majority of investment treaties have been entered into on a bilateral basis, there are some notable multilateral treaty obligations in the investment arena, such as Chapter 11 of the North American Free Trade Agreement between Canada, the United States and Mexico (NAFTA, 1992), and the Energy Charter Treaty (1994).

[111] K.L. Vandevelde, supra note 36

[112] R. Dolzes, supra note 19, at p. 267

[113] World investment report 2014, Supra note 3

[114] ibid

developing countries and other developing countries. Hence at the UNCTAD meeting new BITS are negotiated.

If we take Ethiopia, since it's part of developing country, most of the time it refers to its BITs as "investment promotion and reciprocal protection"[115], and sometimes as Investment encouragement and reciprocal protection[116] and also as "Investment Protection and Promotion Agreements."[117] Currently in order to promote FDI and prosper the country, the government of Ethiopia has signed BITs with more than 29 countries of the world.[118]

Within all of the signed BITs, a number of common provisions have been converged. BITs typically provide that a State may expropriate property provided that the expropriation is non-discriminatory, is for a public purpose, is performed in accordance with due process of law and compensation is paid.[119] BITs have extensive provisions on the definition of investment and the standard of compensation for expropriated property.[120] In addition, BITs typically have provisions on fair and equitable treatment, national treatment, most-favored nation status and the prohibition of performance requirements.[121]

However, BITs offer little guidance on what government measures amount to expropriation and typically state that the matter is to be determined in accordance with international law. Recent BITs typically do not define expropriation and often simply refer to "measures tantamount to expropriation" or "measures having the effect of expropriation". Current American treaties have given up defining "taking" so as not to restrict the potential scope of investment protection.[122] Failure of the treaty texts to define the intended coverage of the expropriation protection resulted for continuous uncertainty about the content of the protection under the investment treaty regime. Where guidance is lacking, the perimeters of the protection are contested, both in terms of the

[115] Ethiopia-Denmark BIT, Agreement between the Kingdom of Denmark and the Federal Democratic Republic of Ethiopia concerning the Promotion and reciprocal Protection of Investments, (24 April, 2001)

[116] Ethiopia- China BIT, Agreement between the Federal Democratic Republic of Ethiopia and the Government of the People's Republic of China concerning the encouragement and the reciprocal Protection of Investments (11 May, 1998).

[117] Austria-Ethiopia BIT, Agreement between the Republic of Austria and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments (12 November, 2004).

[118] "List of Ethiopia's Bilateral Investment Agreements concluded, 1 June, 2013.

[119] S. P Subedi, supra note 8 at 84-87

[120] Ibid

[121] Id

[122] M. Sornarajah, supra note 1 at 297.

scope of property entitled to protection and the factors relevant to determining whether host state conduct is expropriatory.[123]

Thus, while the expropriation provisions have the virtue of simplicity and open-endedness, they are circular and rely on the rules of international law to determine when an expropriation has occurred. Table 1 below reproduces a representative sample of expropriation provisions in recent BITs.[124]

Table 1: Expropriation Provisions in Recent Bilateral Investments Treaties

Country	**Expropriation Provisions**
Austria- Ethiopia BIT	"A Contracting Party shall not expropriate or nationalize directly or indirectly an investment of an investor of the other Contracting Party or take any measures having equivalent effect (hereinafter referred to as "expropriation…")"[125]
Ethiopia - Israel BIT	"Investments ... shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation..."[126]
China-Indonesia BIT	"Investment ... shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation..."[127]

[123] International Institute for Sustainable Development report "Investment Treaty News: 2006 – A Year in Review," (2007) at p. 11-12

[124] The texts of all BITs are available in ICSID, Investment Protection Treaties at <http://www.unctadxi.org/templates/DocSearch____779.aspx>.

[125] Austria-Ethiopia BIT, Supra note 117, Article 5.

[126] Article 5, Agreement between the Federal Democratic Republic of Ethiopia and the Government of the state of Israel for the Promotion and Protection of Investments (26 November, 2003). This treaty provide for binding investor-state arbitration.

[127] Article IV, Agreement between the Government of the Republic of Indonesia and the Government of the People's Republic of China on the Promotion and Protection of Investments (18 November, 1994).

Cuba-Barbados BIT	"Investments ... shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation..."[128]
India- Netherlands BIT	"measures having effect equivalent to nationalization or expropriation"[129]
US- Model BIT	"Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except…"[130]
Sweden-Argentina BIT	"Investments ….. shall not be expropriated, nationalized or subjected to measures tantamount to expropriation or nationalization".[131]
United Kingdom Model BIT	"measures "having effect equivalent to nationalization or expropriation"[132]
Canada- Ecuador BIT	"Investments or returns shall not be expropriated, nationalized or subjected to measures having an effect equivalent to expropriation or nationalization"[133]

[128] Article 5, Agreement between the Government of Barbados and the Republic of Cuba for the Promotion and Protection of Investments (19 February, 1996)

[129] Article 5, Agreement between the Kingdom of the Netherlands and the Republic of India for the promotion and protection of investments (6 November, 1995)

[130] United States Of America Model Bilateral Investment Treaty (2012)

[131] Article 4, Agreement between the Federal Democratic Republic of Ethiopia and the Government of the Russian Federation on the Promotion and Protection of Investments (10 February, 1999).

[132] United Kingdom Model Bilateral Investment Treaty.

[133] Article VIII, Agreement between the Government of Canada and the Government of Republic of Ecuador for the Promotion and reciprocal Protection of Investments, (29 April, 1996)

Regarding BITs which are signed between states as international treaty, Dolzer come up with conclusion that most BITs refer to expropriation and nationalization, some BITs refer to dispossession, taking, or deprivation of property in which the latter terms are wide in scope.[134].

These terms (i.e. dispossession, taking, or deprivation) are generally not frequently used in BITs even though they were in the draft codifications such as the Harvard Draft and the OECD Draft. The Harvard Draft refers to a "taking of property" and the OECD Draft refers to "any measures depriving, directly or indirectly ... property right". While in *ELSI*, the ICJ held that the scope of word "taking" is wider and looser than "expropriation".[135] It remains unclear whether the scope of a taking of property is wider than a measure tantamount (or having the effect) of expropriation.

The Belgium/Burundi BIT provides that the state may not take "any deprivative or restrictive measure or any other measure having a similar effect".[136] Measures that are restrictive of investment are clearly broader than those that are expropriatory under customary international law. The formulation in the Belgium/Burundi BIT is arguably provides broad protection.[137] By definition, almost any government regulation restricts property rights. The treaty provides no guidance on the type of restrictions that should be compensated and those that would be seen as legitimate and good faith regulatory activities.[138]

Contrary to Belgium/Burundi BIT, the New Zealand China Free Trade Agreement, under Annex 13 provides that a measure taken in the exercise of the state's regulatory powers which can be justified in the protection of the public welfare is not constitute an indirect expropriation, unless the measure is discriminatory, or breaches a binding and written commitment by the host state to the investor.[139] In this treaty public welfare is defined to include public health and safety, and the environment. From this treaty one can thought that regulatory takings are not prima facie compensable expropriations.

[134] R. Dolzer, supra note 19 at p. 98.
[135] ELSI case, supra note 96, at Para. 113.
[136] See Article 4 of Belgium/Burundi BIT
[137] R. Dolzer, supra note 19 at p. 108.
[138] Ibid
[139] Id

Besides BITs, there are a growing number of regional and sector specific investment protection and promotion frameworks and other investment related initiatives. Other instruments include the Energy Charter Treaty, the Asian Plan of Action on Cooperation and Promotion of Foreign Investment and Intra-Asian Investment, the Colonia and Buenos Aires Investment Protocols of Mercosur and the Statement on Investment Protection Principles adopted by the Council of the European Communities to elaborate the Lomé IV Convention.[140]

Article 13 of the ECT provides that investments "shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation." These international agreements generally do not clarify the distinction between regulation and expropriation.[141]

In order to create a comprehensive set of rules for foreign investment and to liberalize investment measures, in the 1995 Ministerial meeting; the OECD ministers established a negotiating group to begin negotiating the MAI.[142] In response to opposition from citizens groups and concerns by negotiating countries,[143] the negotiations were suspended in April 1998. On December 3, 1998 the OECD announced that negotiations on the MAI were no longer taking place.[144]

The expropriation and compensation provisions of Article IV.2.1 of the MAI Negotiating Text and Commentary[145] provide:

> 2.1. A Contracting Party shall not expropriate or nationalize [directly or indirectly][146] an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation") except:
>
> a) for a purpose which is in the public interest,

[140] See World Investment Report 1998: Trends and Determinants - Overview (New York and Geneva: United Nations, 1998) at 59-74

[141] The survey of multilateral and bilateral instruments in World Bank, Legal Framework for the Treatment of Foreign Investment (Washington D.C.: The World Bank, 1992)

[142] E.M. Burt, "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization" (1997) 12 Am. U. J. Int'l L & Polly

[143] Symposium: International Regulation of Foreign Direct Investment: Obstacles & Evolution, (1998) 31 Cornell Int'l L.J.

[144] OECD homepage <http://www.oecd.org/daf/cmis/mai/maindex.htm> (date accessed: 25 march, 2015).

[145] Ibid

[146] Id

b) on a non-discriminatory basis,

c) in accordance with due process of law, and

d) accompanied by payment of prompt, adequate and effective compensation.

Accordingly, the MAI have contained provisions similar with those in BITs in stating expropriation. Unlike, the Harvard draft, the MAI and many BITS did not provide guidance about issues of state autonomy to take regulatory measure in order to defend public health and safety and environment. It sided for expropriation protection by providing undefined and vague standard of protection provisions.

Hence, one can conclude that for the purposes of determining what government measures amount to expropriation, recent BITs and other international investment agreements and initiatives provide little guidance in stating the scope of expropriation and respecting state regulatory autonomy.

2.3.3. Foreign Investment Insurance Mechanisms

The Multilateral Investment Guarantee Agency (MIGA) was established in 1985 under the auspices of the World Bank to encourage investment flows, particularly to less-developed countries.[147] The MIGA provides protection for private foreign investment and technical assistance and policy advice on investment issues.[148] Capital exporting countries, i.e. most of the time developed states, have domestic system of investment guarantee for their nations while investing abroad specially in developing countries. Moreover investment risks are also covered through private insurance. Other than those means of guarantees, developed countries worried the desirability to have an international system of investment guarantee against noncommercial risks, such as expropriation, nationalization and other political risks, in order to promote foreign investment in general and private foreign investment in particular in developing countries.[149] As a result they agreed to establish MIGA under the control of the World Bank.

Business wise, it is common and natural to forecast risks when investing in foreign countries. Under the MIGA system, various types of insurance are offered which are export insurance, political risk insurance and insurance against expropriation. Under most systems the investor

[147] MIGA homepage <http://www.miga.org/welcome.htm> (date accessed: 4 may, 2015).
[148] Ibid
[149] S. P Subedi, supra note 8 at p.35

pays a premium for insurance against certain specified risks, including expropriation. If the investor's property is expropriated it claims under the insurance contract and the insurer (typically a state corporation or enterprise) is subrogated to the claim of the claimant against the foreign state.[150]

This arrangement reflects a solution to the practical problem for foreign investors that under traditional international law principles only states have standing to bring international claims against other states. NAFTA, the Energy Charter and BITs now address this problem through investor-state arbitration provisions.[151]

Pursuant to Article 2 of the MIGA,[152] the organization may issue guarantees against non-commercial risks in respect of an investment in a member country made by the national of another member country. It may guarantee eligible investments from a number of risks including expropriation. Expropriation is defined in Article 11(a) (ii) of the Convention as:

> any legislative or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories.

Article 8 of the General Conditions of Guarantee for Equity Investments for MIGA Contracts of Guarantee[153] has a broad definition of expropriation that including government measures that (i) deprive assets of the project; (ii) deprive the investor of the right to receive dividends; (iii) prevent the exercise of voting rights with respect to shares; (iv) prevent the exercise of material rights; and (v) impose financial obligations that make it impossible for an otherwise viable project to continue operating without losses. In order to make a claim any deprivation must continue in effect for one year. Article 8.4 specifies that:

> No measure shall be deemed to be expropriatory if it constitutes a bona fide nondiscriminatory measure of general application of a kind that governments normally take in the public interest for such purposes as ensuring public safety, raising revenue,

[150] S. P Subedi, supra note 8 at p.35
[151] Ibid
[152] (1985) 24 I.L.M. 1605
[153] (1989) 28 I.L.M. 1233

> protecting the environment, or regulating economic activities, unless the measure is designed by the Host Government to have a confiscatory effect such as causing the Guarantee Holder to abandon the Guaranteed Investment or sell it at a distressed price.

In my view the definition given for expropriation under the MIGA convention is comprehensive. Because it clearly states regulatory autonomy of the state to take measure in order to defend public interest for with objective of ensuring public safety, raising revenue, protecting the environment, or regulating economic activities as long as the measure is bona fide.

There was expropriation decisions which made their basis on this convention. Claims on US foreign investment insurance contracts have been the subject of a number of arbitrations.[154] The Revere Copper Arbitral Award[155] involved a claim by Revere Copper and Brass Incorporated on an investment insurance contract with the US Agency for International Development (AID). AID's obligations were later taken over by the Overseas Private Investment Corporation (OPIC).

Revere Copper had developed a bauxite mining and processing operation in Jamaica through a wholly owned subsidiary, Revere Jamaica Alumina, Limited (RJA under a 25-year agreement made in 1967 with the Government of Jamaica (the Agreement). The Agreement governed the payments of taxes and royalties to Jamaica for 25 years. In 1972, the newly elected government of Michael Manley initiated a review of the bauxite industry. As a result of this review, in 1974 the Jamaican government imposed new requirements on RJA including increases in royalties and levies, extraction quotas, exchange controls and export controls.

In settling the dispute, the majority of arbitration tribunal found that that the Government of Jamaica repudiated the Agreement in contravention of international law and that by repudiating its long term commitments and directly prevented RJA from exercising effective control over the use and disposition of its property. [156] OPIC argued that RJA still had the rights and property it had before 1974 - the facility, the mining lease and an ability to operate. The majority regarded RJA's control of the facility as no longer effective in view of the destruction of RJA's contract rights. It reasoned that the control of a large industrial enterprise is exercised by a continuous stream of decisions and without the stability of the Agreement such decisions simply became

[154] M. Sornarajah, supra note 1 at 391

[155] Revere Copper and Brass Inc. v. OPIC (1978) 56 ILR 258

[156] V.R. Koven, Expropriation and the Jurisprudence of OPIC (1981) 22 Harv. Int'l L.J.

gambles. The freedom to make rational management decisions is at the heart of effective control. The majority therefore concluded OPIC was liable under the Contract.

The minority opinion held that Jamaica's actions did not amount to 'Expropriatory Action' within the meaning of the Contract as RJA remained in control of its business and the plant and it was not prevented from managing its plant, operating its business or exporting alumina. The new taxes breached the terms of the Agreement but did not cause a loss of effective control. The minority found that the bauxite levy amounted to approximately 20% of RJA's gross receipts for alumina and that this was not a confiscatory measure.

This case let the certain principle that government action amounts to interference and expropriatory if it deprive management or control of a business enterprise. However, the applicability of the decision is limited because the case focused on the interpretation of the insurance contract and a clear breach of a long-term concession agreement with a stabilization clause (a contractual provision intended to freeze the state of domestic laws with respect to the investment).

CHAPTER THREE

State Regulatory Autonomy and Compensation

Generally, "regulatory expropriation," "creeping expropriation," and "regulatory takings" all refer to the same legal concept.[157] Regulatory expropriation is a term describing any scenario in which a capital-importing state uses its regulatory powers to deprive foreign investors of their property or the effective enjoyment thereof.[158] In the past, states were frequently open about seizing property held by foreign investors. Indeed, states have often passed laws which, on their face, forced a transfer of property rights out of the hands of foreign nationals.[159]

While customary international law recognized early on that governments engaging in expropriation had a duty to compensate foreign investors for their losses, there were few limits on how government expropriation of foreign investments might take place or even a clear notion of what expropriation constituted. However, in the interest of attracting capital from abroad, many countries over the last two decades have begun participating in BITs, as well as multilateral investment treaties such as the NAFTA and the ECT.[160]

These treaties work to attract capital to the treaty parties by limiting the potential for host government interference with foreign investments.

The proliferation of treaties like NAFTA, the ECT, and numerous BITs has also shaped the development of the customary international law of expropriation.[161] As a result, it has become more difficult for governments who are not parties to such investment treaties to engage in open takings without paying significant compensation.

NAFTA, the ECT, and almost all BITs are united in requiring governments to pay compensation to foreign investors when direct governmental expropriation occurs which resembles a physical taking.[162] Article 1110 of NAFTA, Article 13 of the ECT, and Article 6 of the U.S. Model BIT all use similar language in requiring compensation for actions constituting expropriation or

[157] Rainer Geiger, Regulatory Expropriations in International Law: Lessons from the Multilateral Agreement on Investment, 11 N.Y.U. ENVTL. L.J. 94, 96 (2002)
[158] Third restatement § 712, supra note 65.
[159] Rainer Geiger, supra note 157 at 83-87
[160] Ibid
[161] Id
[162] Id

measures equivalent to expropriation.[163] Yet besides *de jure* expropriation of a direct nature approximating a physical taking, there continues to be considerable controversy over which behavior constitutes expropriatory action (much less measures "equivalent to" expropriatory action) under international law.[164] This is particularly true in the realm of government regulation, when a government, often through subsidiary agencies, asserts its sovereign right to limit how industry located within its borders carries on business.[165] By regulating in this manner, these government controls can have the effect of diminishing the value of a foreign-owned investment without the government necessarily taking ownership of the investment. It is important to determine the point at which the normal exercise of government regulatory powers becomes expropriatory and justifiable under state regulatory autonomy.

3.1. Police Power vis-à-vis Regulatory Expropriation

Police powers are an old international law term for what we would now call regulatory measures by a state to protect or enhance the public welfare.[166] The full scope of police powers has, arguably, never been firmly established in international law. From each and every corner of the world all states regulate property rights and, by entering into a state, a foreign national accepts the benefits and burdens of domestic regulation. In principle, when a foreign national acquires or creates property, the state's regulatory framework will limit property rights.[167] Under international law, a substantial inference with property rights is required to justify a claim of expropriation. Typical regulatory measures, such as zoning regulation, requiring building setbacks and setting height restrictions, restrict property rights but are within the sovereign power of the state to regulate the use of property.[168]

The term "police powers" causes significant confusion. The meaning and scope/boundary of regulatory expropriation is a tricky issue to resolve. Exercise of police powers allows the state to protect essential public interests from certain types of harms. For example, the state might ban use of a pesticide that scientific studies have demonstrated is hazardous. Assuming this pesticide was an investor's only investment, the ban could result in the complete destruction of the

[163] Id
[164] Id
[165] Id
[166] J.L. Sax, "Takings and the Police Power" (1964-5) 74 Yale L.J. at p. 34.
[167] Ibid
[168] Id

investment and no compensation would be due. Because, state should left with such power in order to shield public interest such as public health and safety and environment as long as the measure taken is non-discriminatory, not intended to confiscate the investors' property rights and done in good faith.

In other cases, however, the state may regulate but compensation is due if the regulation results in a deprivation or appropriation. For example, a state may prohibit access to a park in which there were previously granted mineral rights. Prohibiting mineral extraction may be a perfectly reasonable and legitimate way to protect the environment, but the prohibition on access would likely be found to be an expropriation.[169] The mere fact that a measure protects the environment does not provide a justification for non-compensation. Because, such measure has no worth to demonstrate non confiscatoryness of property right and to shield public interest at stake.

The general rationale for non-compensation is that property rights have inherent limitations.[170] They are never absolute. Property is a social institution that serves social functions. Property cannot be used in a way that results in serious harms to public order and morals, human health or the environment.[171] When foreign nationals invest in a state, they acquire rights subject to the existing domestic regulatory framework.[172] International law looks to domestic law to determine the scope of acquired rights. If there is a taking, there must be compensation.

Defining a certain core of police power regulation based on the "normal operation of the law" or "measures that governments commonly take"[173] does not eliminate uncertainty because these categories depend on conceptions of the proper scope of government regulation that may not be shared universally.

While various forms of regulation may have an adverse economic impact on investment and its uses, adverse impact is not per se expropriatory because it does not result in a substantial deprivation of investment rights.

International law authorities have regularly concluded that no right to compensation arises for reasonably necessary regulations passed for the "protection of public health, safety, morals or

[169] Id at pp. 36-38
[170] Id
[171] Id
[172] Id
[173] Id

welfare"[174] or for government regulations that are "non-discriminatory and …within the commonly accepted taxation and police powers of states."[175] This view is reflected in international investment instruments such as the MIGA Convention,[176] investment treaty practice[177] and codifications such as the US Third Restatement[178] and the Harvard Draft.[179]

Moreover, arbitral tribunals also share this view and have held that parties are "not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State. The Pope and Talbot[180] tribunal rejected Canada's argument that non-discriminatory regulations cannot be expropriatory, holding that a blanket exception for regulatory measures would create an ambiguity in international protections against expropriation.[181]

There is overwhelming authority for the proposition that general non-discriminatory regulation of investment is usually not expropriatory. Besides Pope & Talbot Inc., claims by Ethyl Corporation[182] and S.D. Myers Inc.[183] illustrate the potential conflict between state's investment protection obligations and domestic regulatory measures. To the extent that international law provides greater property rights protection than state, foreign investors may be in a unique position to challenge domestic regulation. The foreign investor is also uniquely entitled to challenge government measures using a binding investor-state arbitration process which bypasses domestic courts and is governed by the arbitration rules set out in the CIL and BITs.

The sources of international law considered in chapter two suggests that measures such as fiscal legislation (unless confiscatory), land use planning, currency restrictions and measures for the protection of the environment, public health, safety and morality will normally justify severe interference and even destruction of an alien's property rights.[184] In addition, confiscation as a

[174] Id
[175] Id
[176] Id at pp. 39-41
[177] Id
[178] Third Restatement, supra note 65.
[179] Harvard Draft, supra note 79.
[180] Pope & Talbot v. Canada, supra note 30
[181] Ibid
[182] See for detail infra note under chapter four Ethyl claim case
[183] S.D. Myers Inc v. Canada, supra note 30
[184] G. Christie, supra note 9 at pp. 331- 332.

penalty for crimes is recognized as a valid use of the police power.[185] However, a state's justification that a measure is based on its police powers does not preclude an international tribunal from making an independent determination of the issue. Hence, a state has to furnish the existence of bona fide measure which is done in non-discriminatory and non-arbitrary manner to defend public interest without confiscating property right.

3.1.1. The Scope of Police Power Regulation

Since protections for expropriation under customary international law fall under the more general phrase of international minimum standards, states can only rely on a police powers justification for non-compensation if the exercise of the police powers is otherwise consistent with the international minimum standard.[186] A complete prohibition on a business activity does not meet the international minimum standard if it is arbitrary or discriminatory.

As it can be inferred from the tribunal's decision on West Management II,[187] the jurisprudence of CIL shows that customary international standard of treatment of foreign investment is infringed by conduct that is:

> attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which was reasonably relied on by the claimant.[188]

The extent of vulnerability of regulation to expropriation compensation has not been definitively resolved by tribunals presiding over investor-state arbitrations. Instead, tribunals have adopted different, and sometimes contradictory, approaches to many high profile cases on the key issues regarding the scope of property entitled to protection and the kinds of host state conduct deemed expropriatory.[189] That said, certain principles have emerged from some recent decisions, namely

[185] I Brownlie, supra note 37, at p. 538.
[186] Ibid
[187] Waste Management II, supra note 31
[188] Ibid, at Para. 98
[189] G Christie, supra note 9 at p. 259

consideration of purpose, proportionality, and reasonableness of investor expectations, which respond to concerns about undue limitations on host state regulatory freedoms. In addition, some states have revised their template expropriation provisions for their investment treaties so as to expressly exclude regulatory takings except in limited circumstances.[190]

In order to maintain a conceptual distinction between expropriations and police power regulation, reference cannot be made solely to public utility or benefit to justify non compensation. Since all lawful expropriations must be for a public purpose, the general public utility of a measure does not justify taking property from a property owner without compensation.[191] In US takings jurisprudence, police power regulation of the use of property is justified by the prevention of harm or protection of the public.

It would be preferable to specify core areas of police power regulation which could be used to justify interference with property rights.[192] These areas would include measures for public order, safety, health and the protection of the environment. A common element of these categories of measures is that property rights are restricted based on a determination of the harm caused by the uses of property.[193]

Also, an express exemption is required for fiscal legislation. In order to maintain the integrity of the police power, general economic measures or regulation could not be used to justify an expropriation of property rights.[194] While a state may legitimately take the view that foreign domination of a specific industry is harmful to national interests, expropriations motivated by economic nationalism require compensation. For example, the creation of a state monopoly for life insurance would not seem to be a justifiable exercise of state police powers by which obligation to pay compensation may be avoided.[195]

To end with, the scope of the police power in areas of public morality is particularly difficult to define. Gambling and alcohol are often prohibited under the police power on the basis of public

[190] Ibid
[191] G. Christie, supra note 9 pp. 327-334
[192] Id
[193] Id
[194] Id
[195] Id p. 335

morality.[196] But in a world of divergent moral philosophies it is tricky to think standardized morality to delineate scope of the police power in order to deliver judgments. It is unlikely that it can extend to the suppression of rich foreign property owners on the basis that the idle rich are detrimental to public morality.[197]

3.1.2. State Responsibility for Regulatory Expropriation

Mental status to expropriate is not a necessary element of state responsibility.[198] In cases of direct expropriation, nationalization or requisition, there is necessarily a convergence of intent and result. The government intends to expropriate and the measure in question carries out the government policy. By contrast, in cases of indirect expropriation, there may be no discernable intention to expropriate, even though expropriation is an inevitable result of the government measure.[199]

The fact that intention is unnecessary does not make it irrelevant to the determination of whether or not a government measure is expropriatory.[200] A tribunal is more likely to find an expropriation where there is clear evidence of intent to expropriate.[201] Where there is evidence of intention to expropriate, it is unlikely that a state could rely on the good faith exercise of its police powers as justification for non-compensation. Hence intention is not a necessary element of expropriation simply means that a government cannot use lack of intention as a defense to a claim of expropriation.[202] As discussed above, where the government relies upon its police powers regulations to justify a deprivation, its regulatory intention and purpose will be vitally important.

Unlike the contemporary analysis; traditional international law analysis of state responsibility for expropriation focuses on whether there has been a deprivation of property, but then provides a defense or exception based on the police power. This is the framework set out in the proposed

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[196] J.F. Williams, "International Law and the Property of Aliens" (1928) 9 B.Y.I.L. 1

[197] Ibid

[198] In Waste Management II, supra note 31 at Para. 79, the Tribunal notes that there is no general requirement of mens-rea or intent in Section A of Chapter 11 of NAFTA (the substantive investment protections) that include national treatment, expropriation and the minimum standard.

[199] K. Byrne, "Regulatory Expropriation and State Intent" (2000) Can. Y.B. Int'l L. 89.

[200] Ibid

[201] Id

[202] Id

multilateral frameworks for investment, in foreign investment insurance mechanisms and that supported by most international legal authorities.

A review of the sources of international law, including general principles of law, may suggest a different framework of responsibility for expropriation. The legal foundation for the duty to compensate for expropriation is found in the doctrine of unjust enrichment.[203] Unjust enrichment not only serves as the guiding principle for determining the quantum of compensation, it could also serve as a general theory for determining when state responsibility arises for expropriation.[204] State responsibility for unjust enrichment would require that the state pay compensation only where it acquires the use or benefit of property. Total suppression of a detrimental or inconvenient industrial or commercial activity for reasons of general policy is not subject to compensation. [205]A review of national frameworks for compensation for expropriation gives some credence to unjust enrichment as a general principle of law. In some Commonwealth countries, compensation is only required for expropriation when there is a deprivation of property rights and a corresponding appropriation of economic value.[206]

Protocol 1 of the European Court of Human Rights (ECHR) and US regulatory takings jurisprudence use a proportionality analysis based on a number of factors to decide claims of regulatory expropriation.[207] This approach has been explicitly adopted by the Tecmed[208] tribunal and has also been adopted in recent US investment treaty[209] practice by explicitly mandating tribunals to consider three factors in the expropriation analysis: US model treaty state:

(i) the character of the government action;

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[203] E. J. de Aréchaga, "State Responsibility for the Nationalization of Foreign Owned Property" (1978) 11 N.Y.U. J. Int'l L. & Pol. 179

[204] Ibid at p. 180

[205] Id. at p. 182

[206] T. Allen, "Commonwealth Constitutions and the Right Not to Be Deprived of Property" (1993) 42 I.C.L.Q.523.

[207] Protocol No. 1, Convention for the Protection of Human Rights and Fundamental Freedoms provides:
Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[208] Tecmed S.A. v. Mexico (2003) (ICSID Case No. ARB(AF)/00/2) at Para. 115

[209] Ibid

(ii) the economic impact of the government action; and

(iii) distinct, reasonable investment-backed expectations.[210]

Therefore, based on the principle of respect for acquired rights; the majority of international authorities on expropriation focus on the deprivation of property rights as the basis for state responsibility.[211] The international minimum standard is a standard designed to protect foreign nationals and focuses on the effect of state action. The significant weakness of the appropriation framework is its failure to consider the effect of government measures on the property owner.[212] Government measures that are not an appropriation of property (even under a broad and flexible conception of appropriation) may deprive an investor of the effective control of an investment or from being physically able to operate its business. For example, a state may make it impossible for an investor to operate a factory by blocking the gates on the grounds of maintaining public order; through labor legislation it may set wages at a prohibitively high level; it may deny visas for required technical staff; or it may not allow the import of materials or equipment. Where one or a series of these measures continue for period of time, the interference may be so great that a deprivation could be deemed to have occurred even though there was no appropriation.[213]

3.2. Justifications for non-compensation

International law recognizes two broad categories of police power regulation that might justify non-compensation where there is a deprivation: (i) public order and morality; and (ii) protection of human health and the environment.[214] In addition, state taxation is another well recognized form of non-compensable appropriation.

3.2.1. Public order and morality

In order to enforce its laws, a state may take property without compensation. Property might be seized and subject to forfeiture if it arises from criminal activities such as smuggling or drug

[210]See Annex B, 2004 US Model BIT, available online at: http://www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html which provides that the definition of expropriation "is intended to reflect customary international law concerning the obligation of States with respect to expropriation."

[211] E. J. de Aréchaga, supra note 203, at pp.199-202

[212] Ibid

[213] Id

[214] J.F. Williams, supra note 196.

trafficking. In many states it is illegal to possess certain types of goods, such as pornography, drugs, or weapons and no compensation would be due if a state seizes such goods to enforce local laws. Indeed, it is unlikely that most municipal legal systems would even recognize that a person can hold an enforceable property right in illegal goods.[215]

Property might also be seized for non-payment of taxes, fines or duties.[216] Further, it may be destroyed or subject to restrictions in times of civil unrest or war.[217] Not all confiscations or destructions of property can be justified.

The fact that the seizure was not justifiable on the basis of local law and the clear appropriation of the arms by the government when a reasonable alternative measure was available to it (by simply barring entry) meant there was no police power justification for non-compensation.

The destruction in question was effectively a way to acquire a public good: a view of the port. As in the case of environmental expropriations, the police power cannot be used to excuse non compensation where the state is essentially acquiring or using property for public purposes.

While there is likely to be widespread state practice and opinio juris with respect to the use of police powers in core areas of criminal law, the scope of police powers in the area of public morality and order are particularly difficult to define. The types of property restrictions that could be supported on the basis of public morality may substantially diverge. Many states restrict ownership, possession or use of certain forms of property that are contrary to public order and morals. But in a world of divergent moral and political philosophies, how are judgments to be made about the scope of "legitimate" police powers with respect to morality?

The boundary is by no means easy to determine (and there is a scarcity of cases in this area), in many situations reference to international standards will be of assistance. If a state attempted to confiscate a foreign investor's publishing equipment on the basis that it was being used to publish seditious material, international human rights protections with respect to freedom of expression would be relevant. Police powers justification for non-compensation must be consistent with international minimum standards. A deprivation could not be justified if the measure in question were inconsistent with the state's international human rights obligations.

[215] Ibid
[216] Id
[217] Id

3.2.2. Protection of human health and the environment

There are no international expropriation law cases that provide explicit guidance on when measures protecting human health or the environment might justify non-compensation. Given the lacunae in the jurisprudence, this area is one of the more controversial issues in investment treaty arbitration.[218]

The international law jurisprudence in this area consists of a few old cases that do not provide guidance on how to address harms to the environment and human health in a modern regulatory context. International legal authorities recognize that governments may need to prohibit and severely regulate certain types of property in order to protect the environment.[219] Property may be confiscated during an epidemic of an infectious disease[220] and presumably destroyed if the situation so requires. For example, in 1894 Brazilian authorities destroyed several lots of watermelons due to an outbreak of cholera. The watermelon producers appealed to Brazilian authorities for compensation. When this claim was dismissed, several of the American producers requested the US government make a claim on their behalf. The US Department of State held that the measures were justified in the circumstances and that compensation could not be demanded.[221]

In the trade context, the concern that health or environmental risks might be used for protectionist purposes has been a long-standing concern and has been addressed through specific agreements such as the WTO Agreement on the Application of Sanitary and Phytosanitary Measures,[222] which applies to measures relating to food, animal or plant borne pests and diseases that may cause health risks to humans, animals or plants. Article 2(2) of the SPS Agreement requires WTO members to apply SPS measures only to the extent necessary to protect life and health, to base them on scientific principles and not to maintain them without sufficient scientific evidence.

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[218] J. M. Wagner, "International Investment, Expropriation and Environmental Protection" 29 Golden Gate U. L. Rev. 465 (1999)
[219] Ibid
[220] Id
[221] Id at 107
[222] Id

The sophisticated science-based risk assessment and risk management approach adopted by the SPS Agreement may be a useful model for future international investment treaties; it does not reflect the existing international minimum standard.[223] States may have agreed to this level of heightened review within the context of the WTO (which it should be noted does not award monetary damages or allow private parties to bring claims), but there is insufficient state practice and opinio juris to suggest that this level of review of state measures is the applicable standard under international expropriation law.[224]

The requirement for science-based risk assessments; the rational connection between an identified risk and the measure taken; and an assessment of the regulatory options available to a state to address the risk, are likely to be useful factors in determining whether non-compensation can be justified under the police powers.[225]

3.2.3. Taxation

Taxation is the most noticeable instance of a regulatory taking.[226] Treaties demand separate procedure for issues involving taxation which direct towards consultative procedure between the state parties.[227] As long as consultative procedure become fruitful; recourse to arbitration is not permitted. There is now a build-up of awards which justify the differential treatment of tax measures.[228] Unless the tax measure is exorbitant and is clearly a disguise for an expropriation or it is discriminatory, it would not considered as as a compensable taking.[229] International authorities are clear that a significant tax burden may be imposed on an investment. Taxes of 50% to 60% are common in some countries. However, international authorities are also clear that taxation can amount to an expropriation if it is exorbitant, arbitrary and imposed in discriminatory manner.[230]

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[223] Id
[224] Id
[225] J. Soloway, "Environmental Regulation as Expropriation" (1999) 33 Can. Bus. L.J. 92
[226] M. Sornaraj, supra note, 1 at p. 399
[227] Ibid
[228] Id
[229] Id
[230] J. M. Wagner, supra note 218

CHAPTER FOUR

Regulatory Expropriation Claims under Customary International Law

There are a lot of claims brought before tribunal by Multinational Companies basing their ground on customary international law, via BITs and plurilateral agreement such as Free Trade Agreement (FTA), Central American Free Trade Agreement (CAFTA) and North American Free Trade Agreement (NAFTA) which have been extremely controversial.[231] The controversy emanate from raised allegation issue such as environmental regulation.

4.1. Overview of Customary International Law on Expropriation

Foreign investment protection against Expropriation is aged principle.[232] As discussed under chapter two each state have sovereign right over its natural resource which can be extended up to justifiable expropriation. However the meaning and scope of these conditions have attracted much attention in both jurisprudence and in the foreign investment law literature.[233]

If we see Ethiopia – UK BIT[234] it provide expropriation principle, to protect the property of an investor. It says foreign-owned property may not be expropriated or subjected to a measure tantamount to expropriation unless four conditions are met. They are as follows:

a) an expropriation must be for a public purpose;
b) under domestic legal procedure
c) it should be non-discriminatory; and
d) against prompt, adequate and effective compensation

Even though this principle is provided in this BIT and other international agreements yet, issue such as what amounts to expropriation; the meaning of public purpose;[235] what constitutes discrimination; and what is meant by full compensation have been the matter of acute controversy in both jurisprudence and the literature for a long time and most international law

[231] J. Soloway, "Environmental Trade Barriers under NAFTA: The MMT Fuel Additives Controversy" (1999) 8 Minnesota J. of Global Trade at 55.
[232] S. P Subedi, supra note 8 at 55
[233] Ibid
[234] Ethiopia-Denmark BIT, Agreement between the government of the united kingdom of great Britain and northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments, (19 November, 2009), article 5
[235] Ibid

scholars have made their own contribution.[236] Moreover, this BIT did not incorporate non compensable regulatory expropriation which gave for the state an autonomy to exercise police power in advent of social harm such as public health and safety and environment as states in Harvard Draft convention and MIGA expropriation provision.

BITs, CAFTA, NAFTA, FTA and other plurilateral agreements which are crafted from notion of customary international law are developed to protect alien's property in abroad and comprises of three principal sections. The first principle establishes a framework of investment obligations that broadens the coverage of the investment protection. This part sets out the investment obligations and includes provisions on national treatment, most-favored nation treatment, and minimum standard of treatment, performance requirements, senior management and boards of directors, transfers of assets and expropriation and compensation.[237]

Most of the time the second part comprises of Disputes Settlement[238] means between investor and other party by establishes a binding arbitration process which can be invoked by private party investors. The final part lay down about investment definition. It broadly define investment which includes:

> every kind of asset and in particular, though not exclusively, includes: Movable and immovable property and any other property rights such as mortgages, liens or pledges; Shares in stock and debentures of a company and any other form of participation in a company; Claims to money or to any performance under contract having a financial value; Intellectual property rights, goodwill, technical processes and Know-how; Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.[239]

The definition of expropriation in Article 5 of Ethiopia - UK is almost identical to Article 1605 of the FTA and Article 1110 of the NAFTA.[240] However, it does not settle what amounts to expropriation, compensable and non-compensable expropriation, to what extent the sovereign

[236] S. P Subedi, supra note 8 at 57.
[237] Ethiopia-UK BIT, supra note 262, article 2-7
[238] Ibid, article 8.
[239] Id, article 1
[240] Article 1605 of the FTA provides, in part, that "[n]either Party shall directly or indirectly nationalize or expropriate an investment in its territory by an investor of the other Party or take any measure or series of measures tantamount to an expropriation of such an investment..."

state is autonomous to take regulatory measure to safeguard public health and safety and environment, is not comprehensively embodied in BITs and existing Customary International Law jurisprudence is not clear and vague.

4.2. Claims under Customary international law

Multinational companies brought investment claims before international tribunal by raising customary international law principle such as violation of national treatment, most favored nation, fair and equitable treatment, full protection and security and expropriation. Among which, because of the scope of the paper I only focus on claims which involved regulatory expropriation. In most of the claims; compensation was claimed for expropriation (including contract cancellations). These claims are described below.

4.2.1. Glamis Gold v United States

The details of Glamis claim was well documented and analyzed by Nathalie Bernasconi-Osterwalder and Lise Johnson[241] so that I will only outline some issues related with my paper. Glamis Gold, Ltd.[242] is corporation established under Canadian law in order to undertake exploration and extraction of precious metals in North and Central America. The giant company which situated its' head office in place of incorporation, i.e. Canada, also sketched to extend its' investment in US via subsidiaries, and eligible to acquire claims for mining on U.S. federal lands free of cost and can then mine the land for profit without paying any royalties to the U.S. government or any other government under the 1872 Mining Law of US. In 1994, Glamis acquired mining rights in a proposed open-pit, cyanide heap-leach gold mine to be located in the Imperial Valley in the California dessert.

Among mining exploration and extraction; cyanide heap-leach gold open-pit is non-environmental friendly and hazardous. Hence many nations including the U.S. state of Montana have banned cyanide heap-leach mining altogether. Giant discarded loads of contaminated earth can swell as much as 40 percent and poison water resources in the area. Backfilling requirements

[241] The background facts are taken from Nathalie Bernasconi-Osterwalder and Lise Johnson, International Investment Law and Sustainable Development, (Key cases from 2000–2010) at pp. 59-61

[242] Glamis Gold Ltd v United States, Award (8 June 2009), available at http://www.state.gov/s/l/c10986.htm (Glamis v. United States) (date accessed: 18 April, 2015).

are expensive, but so is the clean-up and rehabilitation that often falls upon taxpayers once the mine is exploited and abandoned without remediation.

In order to advance the proposed mine, Glamis first needed permission from federal and state entities which reviewed the mine's impact on the environment and on the rights of the indigenous people of the area, the Quechan Indians. In 2001, after six years of study, the Interior Department formally denied the project on the basis that it was within a Native American spiritual pathway that extended 130 miles and that the proposed mining activities would impair the ability of the Native Americans to travel this pathway. In 2001, new officials took over the Interior Department without reviewing briefly which lasted a few short months; the new Interior Solicitor removed the prior Solicitor's legal opinion by cancelling the prior officials' denial of Glamis' Imperial Valley Project of undertaking gold mining investment permit.

In response to the sudden federal government reversal in 2002, the California State Mining and Geology Board (CMGB) adopted an emergency regulation requiring the backfilling of *all* future open-pit mines in the state to achieve the approximate original contours of the land prior to mining. The emergency regulation also required that all mined material that is not used to backfill the pit must be removed so that no material would lay more than 25 feet above the original topography.

In order to address the specific need to preserve the land related to the Glamis claim for the cultural and religious practices of the Quechan Indians, the government anticipated and restructured the environmental damage of large-scale mines.

In 2003, California signed Senate Bill 22 which formalized the emergency regulation, with the caveat that such requirements would be limited to projects that are located within one mile of any Native American sacred site. Following the passage of the bill, CMGB adopted the emergency regulations as final and made them applicable to any project that had been pending as of December 12, 2002.

Then after, Glamis brought its' claim before NAFTA tribunal rather than pursuing a regulatory takings before local court against the California mining regulation in U.S. Consequently, on December 9, 2003, Glamis Gold Ltd. filed a Notice of Arbitration 4 for a NAFTA investor-state case in a United Nations arbitration body authorized by NAFTA to hear such cases raising

claims using NAFTA Chapter 11 foreign investor protections to attack California's new mining law and the Interior Department's earlier decision.

Glamis as claimant alleged that measure taken by the federal and state government violated fair and equitable treatment enshrined under Article 1105 NAFTA. It also argued that the California backfilling requirement is a measure taken to violate expropriation protection of Article 1110 since the measure made its mining operation as costly as to be "uneconomical', thereby "expropriating" the investment and initially demanded $50 million as compensation.

The US government as a respondent argued that Glamis had no property right to engage in mining free from backfilling requirements.[243] Also it argued in the alternative that the challenged measures did not expropriate the right, since the regulations have a legitimate governmental character, their impact was minimal, and because Glamis should have expected them given the history of mining regulation.[244]

Glamis argued unsuccessfully that the backfilling requirement made the mine uneconomic. Further it noted its mining claims must include a property right to extract minerals, as they were acquired for value. Its submissions also argued that environmental protection principles in existing mining regulation did not justify backfilling requirements as a mere implementation of them, pointed to a lack of relevant ethnographic information at the time it acquired its claims, and argued the measures were discriminatory (other established mining companies would not be affected) and disproportionate to the objectives they allege to achieve (as only a small part of an already heavily damaged cultural site would be protected). [245]

The tribunal noted that the alleged taking is indirect; so that the test would require an inquiry into the degree of interference with the property right claimed to be impaired, based upon the "severity of the economic impact and the duration of that impact".[246] Based on this test; a state would not be responsible for "economic disadvantage resulting from bona fide… regulation".[247] On the facts of the dispute, it found that the challenged environmental regulations caused insufficient harm to the claimant's investment to pass the threshold test of radical deprivation of

[243] Glamis Gold v United States, Counter-Memorial of Respondent United States (19 September 2006), pp.119-120
[244] Id at pp 159-160; 180-181,
[245] Glamis Gold v United States, Investor's Reply Memorial (15 December 2006)
[246] Glamis Gold v United States, Award (8 June 2009), at Para. 356
[247] Ibid at Para. 354

value[248] since the measure taken by federal and state government was constituted mere restrictions on the property rights of Glamis; it do not amount regulatory takings which is expropriatory.[249]

Hence, the dispute between the Canadian mining company and the United States precisely illustrates the potential conflict between investor rights on the one hand and environmental regulatory autonomy on the other. This, tribunal respected state regulatory autonomy to take regulatory measure in order to defend social harm so that it preserved state police power.

4.2.2. Lauder v. Czech Republic

Similar to Glamis claim, the details of Lauder claim was well documented and analyzed by Nathalie Bernasconi-Osterwalder and Lise Johnson[250] so that I will only outline some issues related with my paper. CME and the companion case, Lauder v. Czech Republic,[251] arose out of an investment in TV Nova, a Czech television station. The original investment structure contemplated that the foreign investors would acquire shares in CET 21, a Czech company, which would hold the broadcasting license and operate the television station. After the Czech Media Council decided to award the broadcasting license to CET 21, strong domestic political opposition arose regarding foreign ownership of television broadcasting. This led the parties to propose a revised structure for TV Nova, through a joint venture company, CNTS. Under this arrangement, CET 21 would grant the exclusive use of the broadcasting license to CNTS and the foreign investors would provide capital to CNTS for the operation of the network, each party receiving shares in CNTS in proportion to their contribution. This arrangement was meant to avert the sensitive issue of foreign ownership in broadcasting licenses. The Czech Media Council subsequently approved the structure of this business agreement and issued CET 21 a broadcasting license. The license conditions provided that CET 21 was to observe the business

[248] Id, at Para. 536
[249] Id at Para. 357
[250] Nathalie Bernasconi-Osterwalder and Lise Johnson, supra note 241, at pp. 33-40
[251] Lauder v. Czech Republic, UNCITRAL Final Award, 3 September 2001, [here in after Lauder] and CME v. Czech Republic, UNICTRAL Final Award, 13 September 2001 [hereinafter CME] available at http://ita.law.uvic.ca/alphabetical_list_content.htm

agreement under which CNTS had exclusive use of the license. According to the Media Council, the business agreement was "an integral part of the license terms."[252]

The success of TV Nova led to problems. Against the backdrop of increasing domestic resentment over foreign control of the Czech media and the support of Dr. Vladimir Železný who controlled CET 21, a newly appointed Media Council began reviewing the split structure exclusivity arrangements. Shortly thereafter, the Media Council began administrative proceedings against CET 21. As a result, in 1996, CNTS and CET 21 revamped their business agreement and the license conditions incorporating the exclusivity arrangements were dropped. Železný and CET 21 then began asserting that the license was not subject to exclusivity and that CET 21 should have much greater control over the choice of service providers and, not surprisingly, advertising revenues. This dispute played out until 1999 when CET 21 terminated its contract with CNTS on the basis of an alleged contractual breach by CNTS.

The TV Nova dispute gave rise to two investment treaty arbitrations. The first arbitration was begun by CME, the prime shareholder in CNTS, under the Dutch/Czech bilateral investment treaty (BIT). The second arbitration, under the US/Czech BIT, was commenced by Ronald Lauder, CME's controlling shareholder. At issue in both CME and Lauder was the characterization of the Media Council's actions in 1996 with respect to the business arrangements between CNTS and CET 21. While the CME tribunal found that such actions did amount to expropriation, the Lauder tribunal found they did not.

The CME tribunal found that the 1996 changes to the business relationship resulted from Media Council coercion and that the changes caused the destruction of CNTS's commercial value.[253] The tribunal found that "the Media Council deprived the Claimant of its investment's security by requiring CME in 1996 to enter into a new MOA and thereby giving up the exclusive right to use the License and further, in 1999, by actively supporting the license-holder CET 21, when it breached the exclusive Service Agreement with CNTS."[254]

It went on to state that "the object of the Media Council in 1996 was to amend the 1993 split structure by removing the exclusive use of the license from CNTS to CET 21, the only company

[252] Ibid. Lauder, at Para. 70
[253] Id, CME partial award, at Para. 599
[254] Id

which under the new Media Law in force as of January 1, 1996 was under control of the Council. This deprivation of CNTS' "exclusive use of the License" was compounded by the Media Council's actions and inactions of 1999. This qualifies the Media Council's actions in 1996 and actions and inactions in 1999 as expropriation under the Treaty."[255]

The CME tribunal essentially held that there were two particularly damming results from the Media Council action. First, CNTS was deprived of a business arrangement under which it was to have the exclusive use of the broadcasting license. Second, CET 21 was enriched or benefited by the removal of exclusivity as a condition of the use of its broadcasting license. In other words, prior to 1996 CET 21 held a license subject to a condition of exclusivity. After the amendments to the business agreement and waiver of license conditions in 1996, CET 21 had an unencumbered license. In the view of the CME tribunal, the Media Council forced the changes to the relationship between CNTS and CET 21 and these changes were to the sole benefit of CET 21. This was seen to be a reversal of the Media Council's blessing of the "split structure" in 1993. The CME award could thus be seen as holding that there was an indirect state appropriation in favor of CET 21, a domestic third party.

In contrast, the tribunal in Lauder held on the same facts that there had been no expropriation.[256] It noted that "All property rights of the Claimant were actually fully maintained until the contractual relationship between CET 21 and CNTS was terminated by the former. It is at that time, and at that time only, that Mr. Lauder's property rights, i.e. the use of the benefits of the License by CNTS, were affected."[257] With respect to the actions of the Media Council in 1996, the Lauder tribunal found that the Media Council was actually acting in its regulatory capacity in seeking clarification of the respective roles of CET 21, the license holder, and CNTS. The tribunal appears to have put significant weight on the fact that CNTS did not protest or object at the time and that it fully collaborated with CET 21 in making the changes.[258]

Therefore, from this decision one can conclude the scope of expropriation uncertainties, and vagueness. The same claim resulted in divergent decision and multi locus-standi initiated against Czech Republic which is exorbitant.

[255] Id, at Para. 609
[256] Id, Lauder, Final Award at Para. 202
[257] Id
[258] Id at Para. 302

4.2.3. Ethyl Corp. - MMT Fuel Additives

This claim is the most controversial claim materialized from measure taken by the government of Canada to ban import and export of MMT, a fuel additive that increases the level of octane in unleaded gasoline. The Canadian government justified the ban as necessary to protect the health of Canadians, to allow harmonization of fuel standards in North America and to protect jobs and consumers from adverse economic impacts resulting from increased engineering costs for auto companies.[259]

Due to Canadian government measure which would ban import and export of MMT gasoline additive, in 1997 Ethyl Corporation claimed $250 million in damages from Canada based on NAFTA treaty.

The claimant alleged that the measure taken by the respondent violated the treaty obligation under Chapter Eleven which obliged the host state to respect and ensure national treatment, performance requirements and expropriation protection to be accorded for investment of investor. Up on initiation of the claim the Government of Canada chose to settle with Ethyl Corporation rather than to proceed with investor-state arbitration under Chapter Eleven of the NAFTA. The dispute settlement undertaken between the corporation and the government of Canada out of investor-state arbitration come up with three core results in July 1998.

Accordingly the Canadian government agreed to pay Ethyl $US 13 million, to lift the ban and issued a statement that current scientific information fails to demonstrate that MMT harms emissions systems and that there is no new scientific evidence to suggest that MMT is a health hazard.[260]

As part of the Canadian government's Clear Air Agenda and consistent with an election promise, the Canadian government proposed again to ban MMT from unleaded gasoline. The banning of gasoline additive was cancelled and the claim was settled with the corporation due to the government of Alberta's challenge to the ban on the inter-provincial trade of MMT under the Canadian Agreement on Internal Trade (AIT).[261] While the successful challenge under the AIT

[259] J. Soloway, supra note 231, at 73 where I took the background facts.
[260] Id
[261] Id

explains the repeal of the ban, it does not explain the monetary settlement with Ethyl and the public statements made regarding MMT.

As a result, Ethyl proceeded with its claim before investor- state tribunal by raising violation of national treatment pursuant to article 1102 of NAFTA, performance requirement as per article 1106 of NAFTA and regulatory expropriation as per article of NAFTA.[262]

The first issue was violation of National Treatment. In its claim, Ethyl argued that a national treatment provision of Article 1102 was violated since the ban targeted on the imported MMT. The act was taken without reasonable explanation of allowing sale of domestically produced MMT in Canada while imported MMT was banned.

Ethyl argued that the government measure only targeted on the sale of foreign-made MMT in Canada, but not domestic Canadian producers of ethanol a substitute for MMT, which made them better off from the ban was; discriminatory. It also argued that not only discriminatory the ban was arbitrary because it did not prevent Ethyl from building plants within each province to supply MMT. It alleged that since MMT competes with other octane enhancers, such as ethanol, and that the ban benefited those producers by discriminating against Ethyl.[263]

Canada as a respondent argued that the ban was not discriminatory, because it applied equally to domestic and foreign investors and that the measure was neither focused at foreign investors nor favor Canadian investors.[264]

The second issue was Performance Requirements. The company argued that the ban on the import of MMT, but not its domestic production, breached prohibitions on performance requirements. Because, the ban entailed Ethyl MMT to have 100% Canadian content, imposed on MMT to build a facility in every province of Canada to undertake operation and it imposes a *de facto* requirement to use domestic supply and labor to complete construction of the MMT

[262] Statement of Claim, Ethyl Corporation (Claimant/Investor) v. Government of Canada (Respondent/Party), Statement of Defense, dated 2 October, 1997, at Para. 43

[263] Notice of Arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement Between Ethyl Corporation (Claimant/Investor) v. Government of Canada (Respondent/Party) dated April 14, 1997, at Para. 14-24.

[264] Statement of Defense, In the Matter of an Arbitration under Chapter Eleven of North American Free Trade Agreement Between Ethyl Corporation (Claimant/Investor) v. Government of Canada (Respondent/Party), dated 27 November, 1997, at Para. 77 - 83.

manufacturing facilities.[265] Canada argued that the Act does not impose requirements, commitments or undertakings within the meaning of Article 1106, that no level of domestic production is required and that the prohibition does not accord a preference to Canadian goods. In addition it argued the act was targeted on effective way of removing MMT from all gasoline and therefore no question of future production arises. Finally, Canada argued that even if the ban was found to be a performance requirement, it was justified under the environmental exceptions for performance requirements in Article 1106(6).[266]

More over Expropriation claim was raised as third issue. Ethyl argued there was an intent known by Canadian government to cause significant loss of investor business via banning MMT. The government act unreasonably interfered with the effective enjoyment of Ethyl Canada's[267] property and that, under international law, an expropriation exists where there is a substantial and unreasonable interference with the enjoyment of a property right.[268] In addition, the measure hampered enjoyment of Ethyl's goodwill since it removes Ethyl Canada from the octane enhancement market and deprives it of the substantial benefit of its investment.[269] The company addressed that the goodwill of Ethyl got in to danger by "defamatory and reckless statements of Canadian officials which constitute a measure tantamount to expropriation."[270]

Canada argued that Article 1110 of NAFTA deals with the taking of property and not its regulation so that the government measure was not constitute taking of property. In addition, it argued that the act does not constitute expropriation because it involves the exercise of regulatory powers and the exercise of health and environmental measures under Article 1114(1) of NAFTA. It further argued that Ethyl's claim of expropriation of intellectual property, reputation and goodwill throughout the world is not within the scope of NAFTA.[271]

Having disputant parties' argument; the tribunal established under Chapter Eleven to hear Ethyl's claim noted in its Award on Jurisdiction that Ethyl's claim was that an expropriation occurred inside Canada, but that the investor's resulting losses were suffered both inside and

[265] Statement of Claim, supra note 262
[266] Statement of defense, supra note 264, at Para. 80
[267]Statement of Claim, supra note 262, at Para. 49.
[268] Notice of Arbitration, supra note 263, at Para. 32.
[269] Statement of Claim, supra note 262 at Para. 27.
[270] Notice of Arbitration, supra note 263, at Para. 59-60.
[271] Statement of Defense, supra note 264, at Para. 20 - 23. .

outside of Canada.[272] In the Award on Jurisdiction, the Tribunal held this was a matter to be determined on the merits.

Customary international law, BITs and the Energy Charter Treaty have rejected a police power justification for some property deprivations. As discussed in Chapter Two, international law recognizes vague police power defense for certain regulatory measures. Not recognizing some police power defense would mean that bona fide confiscation of property for the commission of penal offences could be tantamount to expropriation.

In Ethyl the issue was whether a Canadian federal government ban on the inter-provincial trade and export of MMT, a fuel additive produced by Ethyl, had the effect of expropriating Ethyl's MMT business. Ethyl claimed that they had been deprived of the substantial benefit of their investments and had suffered significant economic losses as a result of the regulations; so that the regulations in question were tantamount to expropriation.

Under a state's police powers, it may take property and property owners may suffer significant economic losses without giving rise to state responsibility. Property may be forfeited under a state's criminal law. Property might be destroyed for reasons of public health. General taxation is not expropriation. In all these cases, a state does not incur responsibility for the legitimate and bona fide exercise of certain types of sovereign police powers.

However, the tricky issue is the extent and meaning of a legitimate and bona fide exercise of state police powers that justifies a complete deprivation of property with no corresponding obligation to pay compensation. Ethyl claim did not addressed specific guidance on how to distinguish between expropriation and regulation.

Unlike international trade law where measures that are trade-restrictive are typically subject to a stringent least-trade restrictive test, customary international law is deferential to state sovereignty.

The Canadian government measure is primarily aimed at a legitimate government objective to prevent harms to health, the environment, safety, public order and there is a rational basis for the

[272] Award on Jurisdiction in the NAFTA/UNCITRAL Case between Ethyl Corporation (Claimant) and the Government of Canada (Respondent), 24 June 199, at Para. 72

measure, a requirement to compensate would not arise for Ethyl's claim. Because, Ethyl claim would not give rise to a claim of regulatory expropriation for two reasons.

First, the ban on the import of MMT was primarily a trade in goods related measure and should have been reviewed as a potential breach of Canada's trade obligations under the WTO. Second, the ban was not an appropriation of property since it is done within police power regulatory measure to shied public interest and would not give rise to a claim of expropriation.

For this reason, the Ethyl claim illustrates the potential overlap between the investment and trade regimes and how measures relating to trade in goods can have investment effects. Wide interpretation of customary international law to protect investment against domestic policies (such as agricultural supply-side management) can be viewed as performance requirements, since they effectively require the purchase of domestic products.[273]

Generally, the Ethyl case shows that the absence of comprehensive substantive framework which define scope and extent of expropriation resulted for amalgamation of trade measure with investment. Under WTO framework, specific and elaborate international trade obligations have been created to discipline measures relating to trade in goods. Investors should not be able to challenge measures relating to trade in goods under an investor-state arbitration process. Because, allowing private investors to challenge trade-restrictive measures through investor-state arbitration establishes a second parallel process for disciplining trade-restrictive measures that has less well-defined rules. The overlap may result up on review of trade-restrictive measures by investment tribunals which privileges investors over traders by establishing a right of action to claim compensation for trade-restrictive measures that have investment effects.[274]

4.2.4. Methanex Corp. v. United States of America

Similar to Glamis and Lauder claim, the details of Lauder claim was well documented and analyzed by Nathalie Bernasconi-Osterwalder and Lise Johnson[275] so that I will only outline

[273] Trebilock, M. and R. Howse, "Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics" (1998) 6 Eur. J. L. & Eco. 5,at p. 6
[274] Ibid
[275] Nathalie Bernasconi-Osterwalder and Lise Johnson, supra note 241, at pp. 80-89

some issues related with my paper. Methanex corp.[276] is corporation established under Canadian law in order to produce methanol, a key component of MTBE (methyl tertiary butyl ether), which is used to increase oxygen content and act as an octane enhancer in unleaded gasoline.The case is an investment dispute between Canadian-based Methanex Corporation and the United States, arising from the provisions in the North American Free Trade Agreement's (NAFTA) Chapter 11 on investment. In United States, the state of California enacted regulation to ban MTBE in March 1999 to enforce at the end of 2002. In order to avert the state act, Methanex launched its international arbitration against United States of America.

The state tried to justify the measure in line of its' importance to defend risk on human health and safety, and the environment for the reason that the additive is contaminating drinking water supplies. Methanex argued in its original submission that the ineffective regulation and non-enforcement of domestic environmental laws, including the U.S. Clean Water Act, is responsible for the presence of MTBE in California water supplies.

The company argued that the ban is tantamount to an expropriation of the company's investment and thus a violation of NAFTA's Article 1110; was enacted in breach of the national treatment obligation in Article 1102 of NAFTA; and was also in breach of the minimum international standards of treatment obligations in Article 1105 of NAFTA. It was seeking almost $1 billion in compensation from the United States.

Among claimed legal issues I limit myself on the scope of the paper which is the expropriation ruling.[277] The tribunal made important decision on the alleged expropriation from public interest perspective. Methanex claimed that the regulatory measure to ban MTBE by Californian state was tantamount to expropriation of taking that required compensation. It also argued that the measure had economic impact on the company. Methanex relied on the approach to expropriation in the Metalclad v. Mexico[278], which since that tribunal adopted economic impact as the test for regulatory measure.

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[276] Methanex Corp. v.United States of America (Methanex v. United States), UNCITRAL Arbitration Rules, Final Award: (3 August 2005), available at http://ita.law.uvic.ca/alphabetical_list_respondant.htm (date accessed: 18 April, 2015).

[277] Id, at Part IV, Chapter D.

[278] Metalclad Corp. v. United Mexican States, ICSID Case No. ARB/(AF)/97/1, Award of the Tribunal, 40 I.L.M. 36 (2001)

The Methanex Tribunal rejected Metalclad tribunal approach and it took police powers[279] approach under international law. It determined that the international law on expropriation included the police powers doctrine, and relied on the doctrine to exempt environmental regulations from the obligation to compensate.[280]

The Tribunal notes carefully the type of measure this is: not a direct expropriation or a creeping expropriation, and that there was no transfer of title or other transfer of assets from Methanex to the state or anyone else. Thus, for analytical purposes, this measure fell into the category of a measure tantamount to expropriation. The Tribunal then held that:

> But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investor or investment is not deemed expropriatory and compensatory.*[281]*

The tribunal said also "*From the standpoint of international law, the California ban was a lawful regulation and not an expropriation."*[282]

Therefore the Tribunal tested regulatory measures for a public purpose, in line of non-discrimination and due process of law is not, subject to any compensation.

The Tribunal found that regulations are not expropriations *"…unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."*[283]

One can doubt again about the certainty of the future tribunal decision because the decision in one case does not bind other Tribunals. In this case the tribunal define tests for non compensory expropriation. If a state measure emanated from bona fine non-discriminatory act and through due process of law to defend public interest, the compensation has not due. The Methanex decision is the best jurisprudence in upholding state regulatory autonomy and serve as gap-filling in the absence of comprehensive treaty. However, in the absence of compelling substatntive

[279] See the discussion about police power under chapter three.
[280] Methanex, supra note 276, Para. 7
[281] Ibid
[282] Id, Para. 15
[283] Id, para.7

framework, just as the Methanex Tribunal rejected the Metalclad approach, the future tribunals perhaps reject the Methanex approach so that the situation is still unpredictable and uncertain.

Moreover, not only shielding public interest as a justification of regulatory measure; Methanex tribunal made demarcation between trade in goods and investment issue which was not in Ethyl claim. In Pope& Talbot[284] and ethyl cases the tribunal have suggested that market share is an investment in itself. Loss of market share, could give locus standi for investor-state arbitration under this approach. The Methanex tribunal rightly questions this broad approach, applying a more limited and appropriate view that market share may be part of the assets of an investment and may have an impact in calculations of damages for a breach of an obligation, but does not itself form an investment.[285]

Summing up, the content of Customary international embodied and elaborated under BITs I tried to see under chapter two did not clearly and exhaustively define scope of expropriation. Besides, it also does not left room for non-compensable expropriatory act within state regulatory autonomy in order to defend public interest such as public health and safety and environment which is done in non- discriminatory, due process of law, and bona-fide non confiscatory manner. Likewise, the ICSID decision can demonstrate that rather than serving as gab filling for absence of comprehensive substantive framework; it exacerbate the uncertainty and vagueness' of state regulatory measure aimed at public interest scenario which could result in non-compensory expropriation. Therefore, regulatory expropriation case adjudicated by arbitral tribunal constitutes a complex, uncertain, inconsistent and contradictory finding. The above cases I tried to review have probative weight to show what the tribunal accorded for the public purpose justification for government regulation. The tribunal in *Methanex*, seems to suggest that a regulation enacted in good faith for a public purpose is almost never expropriatory.[286] To the contrary, the Ethyl and Metalclad, awards indicate that a public purpose justification is not even relevant in determining whether an expropriation has taken place.[287]

[284] Pope & Talbot v. Canada, supra note 30
[285] Methanex case, supra note 276, para. 17
[286] Ibid, Para. 7
[287] Metalclad case, supra note 278, at Para. 99

CHAPTER FIVE

Conclusion and recommendation

5.1. Conclusion

Customary international law requires a state to compensate a foreigner for any expropriation of the foreigner's property by that state.[288] This paper examines the development of CIL regulatory expropriation protection and its' rival; regulatory autonym to determine domestic matter via taking regulatory measure. The police power doctrine enables state to take regulatory measure in order to safeguard public health and environment which perhaps result in impairing economic interest of foreign investor. The paper addressed the level regulatory expropriation conferred on foreign owned property by international investment law against uncompensated expropriation, and the extent to which this level of protection limits a host state's regulatory freedom.

Customary international law as a customary rule is codified and elaborated in more than 3,226 BITs and in investment chapters in numerous other free trade agreements currently in force.[289] Any obligation to compensate for regulatory expropriations resulted from police power measure under CIL will hamper national regulatory autonomy by increasing the cost of regulation. Limiting the scope of investment protection against regulatory expropriation is important to determine the regulatory options available to states to respond to the environmental, development and human rights impacts of expanding international capital flows and the activities of multinational enterprises.

Despite dated adjudication, not only in international law but also in domestic legal systems a clear theory or rule did not developed to determine the line between expropriation and regulation.[290] The existing authorities on international law only provide some general principles for determining when interference with property rights should be compensated. The various sources of international law on the treatment of foreign-held property showed existence of the broad principles which made the state responsible for claims of regulatory expropriation.

[288] R. Dolzer, supra note 19 at 44
[289] Ibid
[290] M. Sornarajah, supra note 1 at 283

On one hand state is responsible for expropriation if a government measures substantially deprives the foreign national of the use, enjoyment, management and control of property, whether or not the state has obtained anything of value. On the other hand State responsibility does not arise for bona fide, non-discriminatory measures that are commonly accepted within the taxation and police powers of the state. An uncompensated deprivation of property rights can be justified under the state's police power to maintain the environment, public health, safety and morality and to enforce penal law.

In principle property owner cannot be indefinitely deprived of property rights and if that is the case liability of the state is undeniable for acts that damage foreign property that are an abuse of rights under international law. However some deprivations should be justifiable under the police power for compelling reasons of state.

The justification to provide protection in customary international is to deter a state from directly or indirectly acquiring a foreign investor's property against unjust enrichment and ensures that where a public benefit is obtained the burden of obtaining that benefit is born by the general public. The other side justification is to ensure and give discretionary right to a state to take measure is reasonably necessary to protect an essential public interest recognized under the narrow police powers exception.

Foreign property is protected by customary international law, BITs and plurilateral agreements and on the advent of violation of that justice can be set in motion via an investor-state arbitration tribunal. FDI statistics suggest that FDI has continued to increase notwithstanding uncertainty in the meaning of expropriation under customary international law or investment agreements. Given the determinants of foreign investment, it is unlikely that clearer global rules on investment protection will have a significant effect on levels of FDI. Clearer rules on investment protection allow foreign investor to allocate the risks of foreign investment more effectively, to discipline exploitative conduct by states and to allow states the flexibility to adopt welfare-maximizing regulation. In addition, clarifying the limits of state responsibility for treatment of foreign investment allows for a principled debate on the appropriate level of investment protection in a global economy.

The lack of clear precedents and comprehensive treaty are the cause of for an investment tribunal to adopt a wider interpretation of the customary rule. The existing uncertainty perhaps make host

state to pay foreign investor a compensation in order to effectively regulate the environment or protect public health regardless of having scientifically proved and non-discriminatory measure or it may deter the host state to issue regulatory measure at the expense of public interest at stake; fearing international responsibility in investor-state adjudication.

Therefore in order to resolve ambiguity and uncertainly interpretative is needed regarding the scope and interpretation investment in general and expropriation protection specifically. An interpretative statement could provide restrictive interpretation in determining scope of expropriation and provide that investment does not cover trade-restrictive measures that have an incidental effect on investment under CIL which is embodied in BITS and MIA.

In addition restrictive interpretation of international investment treaty is binding on an investor-state arbitration tribunal. The current trend is that the extent of the tribunal's power to interpret treaty provision emanates from BITs and plurilateral agreements which are not unlimited so that the tribunals are arriving at vague and uncertain finding of investment claim.

Therefore, an interpretative statement could recognize a police power defense to claims of expropriation. This would eliminate the most significant uncertainties. While an interpretive statement that limits claims to appropriations of property is most desirable, this may amount to development of police power exception jurisprudence. As a result, interpretative statement would reduce uncertainties over the scope and to restore certainty and predictability for government regulatory activities.

5.2. Recommendation

- Developing countries should bargain for amendment of existing BITs to add restrictive terminology in BITs to preserve regulatory freedom, which permits certain degree of autonomy.
- In concluding BITs, countries especially developing countries should strive for inclusion of clear and well developed police power exception which enable them to protect their safe environment, cultural heritages and public at large from being snatched by multinational companies of developed country to avail themselves in none—compensable expropriation justification in the occurrence of responsibility claim.

- There should be an interpretative statement in order to remedy the vagueness and uncertainty of the scope of expropriation in customary international law via embodiment of BITS. Because, states should have significant autonomy to determine regulatory policy even where regulation affects the value of a foreign investment.
- Subject to compliance with the international minimum standard, Countries of the world should exert lobby in their part, even individually, for comprehensive multilateral investment framework in order to articulate principled distinction between expropriation and justifiable deprivations.
- Since international minimum standard provide compensation matter as a domestic matter; states should negotiate to maintain flexibility which enable host state to use police power as welfare-maximizing regulation and where police powers regulation perhaps significantly affect a foreign investment, foreign investors should be expected to use appropriate risk allocation mechanisms such as insurance to investment protection that balances protection for investment with regulatory flexibility.

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