



**THE IMPLEMENTATION OF THE
INTERNATIONAL LAW
BOUNDARIES OF REGULATORY
EXPROPRIATION :
A LEGAL ANALYSIS**

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ABSTRACT

Over the past years, particularly the most recent twenty years, expropriation around the world has become a much-discussed issue. The paradox underlying in the process of expropriation is not the process itself but the regulations and the extent of the regulations of expropriation. While national expropriation is on one side, international expropriation is where the entire paradox resides. This international expropriation can be seen in different kinds and with different situations ranging directly or indirectly, affecting international investment vastly. While Appropriation does not give an answer for settling Regulatory Expropriation claims, it fills in as a helpful standard for recognizing Expropriation and state quantifies that do not offer ascent to one side to remuneration. Expropriation should be done for the betterment of public at large by taking away private property in public interest or by not causing any harm to public lives.

Many regulations, though conflicted, have resulted in the loss or deprivation of wealth of some kind to foreign investors. The expropriation claims made under NAFTA especially with the Ethyl and Methanex cases have bought controversial limelight on the challenges of regulatory expropriation. A

balance is necessary in this uncertain concept of regulatory expropriation as past cases from various instances in the world point so as well as for investor protection. But the legitimacy and bona fide intent of the state policy powers is what should be legitimately questioned whilst seeking such a balance.

This paper seeks to analyse and find not only the balance but also the impact of implementation of the existing regulatory expropriation and the extent of its boundary power.

Keywords: Regulatory expropriation, direct and indirect expropriation, NAFTA, foreign investment, state policy powers.

CHAPTER 1: Introduction

INTRODUCTION

It is a very much perceived guideline in international law that the property of outsiders cannot be taken, regardless of whether for public purposes or not, without satisfactory remuneration. Twenty years prior, the questions under the watchful eye of the Courts and the conversations in scholarly writing zeroed in chiefly on the norm of remuneration and estimating of Expropriated esteem. The dissimilar perspectives on the created and creating nations raised issues with respect to the arrangement and development of Customary Law. Today, the more uplifting disposition of nations around the globe toward unfamiliar speculation and the multiplication of Bilateral Treaties and other venture arrangements requiring instant, sufficient and successful remuneration for Expropriation of unfamiliar speculations have generally denied that discussion of pragmatic centrality for unfamiliar speculators. Questions on direct Expropriation – basically identified with



Nationalization that denoted the 70s and 80s – have been supplanted by debates identified with unfamiliar speculation guidelines and "Indirect Expropriation". Incited by the principal cases brought under NAFTA, there is expanding worry that ideas, for example, indirect expropriation might be relevant to administrative measures pointed toward securing nature, wellbeing, and other government assistance interests of society. The inquiry that emerges is how much a legislature may influence the estimation of property by guideline, either broad in nature or by explicit activities with regards to general guidelines, for a real open reason without affecting a "taking" and making up for this action.

RESEARCH BACKGROUND

Many regulations, though conflicted, have resulted in the loss or deprivation of wealth of some kind to foreign investors. The expropriation claims made under NAFTA especially with the Ethyl and Methanex cases have bought controversial limelight on the challenges of regulatory expropriation. A balance is necessary in this uncertain concept of regulatory expropriation as past cases from various instances in the world point so as well as for investor protection. But the legitimacy and bonafide intent of the state policy powers is what should be the legitimately questioned whilst seeking such a balance. With regulatory framework of expropriation is in place, the question besides balance lies in the implementation of such framework. Along with this, impact of such framework is also questionable. The major issue with implementation lies with conflict of laws and the feasibility of actual implementation.

SCOPE OF THE STUDY

This study explores regulatory expropriation through not only treaties and agreements and the laws present in various countries but also the cases seen by various courts over the years.

LITERATURE REVIEW

Mark Kantor, 'Fair and Equitable Treatment: Echoes of FDR's Court-Packing Plan in the International Law Approach towards Regulatory Expropriation' (2006) 5 LAW & PRAC INT'L CTS & TRIBUNALS 231.

This article mainly speaks about the U.S Constitutional law and the "International Law" aspects relating to regulatory expropriation and the changes that came up from each phase of the amendment and various treaties. This articles also discusses regarding the Fair and Equitable Treatment and NAFTA. It also talks about negotiating with various countries and getting Free Trade Agreements done and also try to give policies which will protect the interest of the Investors.

J Martin Wagner, 'International Investment, Expropriation and Environmental Protection' (1999) 29 GOLDEN GATE UL REV 465.

This article talks about the Regulatory expropriation done for the public good at large, and mostly regarding Environmental Protection related issues. The NAFTA claims described in this Article demonstrate the need for clarification of the NAFTA expropriation provision as it applies to environmental measures. International law has long supported the right of governments to implement legitimate measures in the exercise of their police powers without incurring an obligation to compensate if such measures diminish the value of foreign investments. General principles of environmental law and



protection, as well as the specific emphasis that NAFTA places on environmental protection, make clear that this right applies with force with respect to legitimate regulations protecting the environment. For these reasons, the parties to NAFTA and negotiators of other regional or global investment agreements should make explicitly clear that protection against expropriation does not include a right to compensation for diminished value resulting from the effects of legitimate environmental regulations. The NAFTA claims described in this Article demonstrate the need for clarification of the NAFTA expropriation provision as it applies to environmental measures. International law has long supported the right of governments to implement legitimate measures in the exercise of their police powers without incurring an obligation to compensate if such measures diminish the value of foreign investments. General principles of environmental law and protection, as well as the specific emphasis that NAFTA places on environmental protection, make clear that this right applies with particular force with respect to legitimate regulations protecting the environment. For these reasons, the parties to NAFTA and negotiators of other regional or global investment agreements should make explicitly clear that protection against expropriation does not include a right to compensation for diminished value resulting from the effects of legitimate environmental regulations. The NAFTA claims described in this Article demonstrate the need for clarification of the NAFTA expropriation provision as it applies to environmental measures. International law has long supported the right of governments to implement legitimate measures in the exercise of their police powers without incurring an obligation to compensate if such measures

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Tony C. Lee, 'The Boundaries of Most Favoured Nation Treatment in International Investment Law' (2012) 33 MICH J INT'L L 537.

An analysis of the boundaries of MFN clauses in international investment law is not worth pursuing solely for academic curiosity. A full understanding of MFN clauses makes clear that they are enormously powerful instruments that can impede significantly a state's otherwise legitimate regulatory activities. Nonetheless, despite the power of MFN clauses, they are almost routinely incorporated into contemporary BITs, as though they constitute little more than a political statement of friendship with no legal consequences. The hope underlying this Article is that once the operation of MFN clauses in international investment agreements is more clearly understood, they will be used more circumspectly.

Srishti Jha, 'Expropriation: A Crisis in International Law' (2001) 13 Student Advoc 123.

The article speaks about, international law remains in crisis: a contested assortment of ad hoc tribunal awards, of commercial bilateral



treaties that lack the essential opinio juris element, and of the contested Resolution 1803 and the 1974 Charter, enmeshed as they are in the irresolvable conflict between developing/capital-importing countries, traditionally the expropriating states, and developed/capital-exporting countries.

Joel P Trachtman, 'Foreign Investment, Regulation and Expropriation: A Debtor's Jubilee' (1995) 89 Am Soc'y Int'l L Proc 103.

This article talks about Investors have memories of different lengths; but markets are somewhat impersonal and evaluate each situation anew. Therefore, today's investors cannot rely on the threat of future memory or retaliation as a credible threat. Emerging markets can lure investors with stability, efficiency, cross-border continuity and homogeneity. Investment contests do not necessarily engender a race to the bottom but may require trade-offs of local regulatory preferences. International investment in emerging markets may be a natural redistributive process. Perhaps individual investors can win if they protect themselves against both the problems that we learn about from history, through inductive analysis, and the problems that we have to anticipate through deductive analysis.

Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2014) 36 U Pa J Int'l L 1.

This article looks into the degree of the administrative space that can be seen between states and World Trade Organization ("WTO") members in the worldwide trading and global investment systems. It does as such by looking at the law of speculation courts with respect to Regulatory Expropriations and the statute of

the WTO contest settlement organs in cases concerning human, creature or vegetation or wellbeing, just as cases concerning specialized hindrances to exchange. Furthermore, this article proposes that global trade and Investment Law can offer significant experiences for each other, notwithstanding the contrasts between the two systems. While International Trade Law has been more skilled at joining wellbeing or ecological worries as a countervailing power to the predominant worldview of exchange advancement, changes in global speculation law may before long close the hole. International Investment law is as of now going through a talk like the one that has formed global exchange law since the initiation of the WTO in 1995. Hence International Investment Law might be moulded along these lines, as there are developing signs that the administrative space managed in worldwide exchange and speculation Law are joining, notwithstanding the way that the global exchange Law conversation was completed in an alternate setting, through an alternate arrangement of establishments, and inside various epistemic networks.

RESEARCH PROBLEM

With regulatory framework of expropriation, the implementation of such framework can be questionable. Along with this, impact of such framework is also something that can differ from jurisdiction to jurisdiction. When the laws are vague and each nation views such laws and regulations differently, the major issue with implementation lies with conflict of laws and the feasibility of actual implementation.

RESEARCH QUESTIONS



1. Can implementation of regulatory expropriation have similar effects across nations?
2. Would nations be willing to enforce regulatory expropriation laws of other nations when there exists a lacuna between them?

HYPOTHESIS

Regulatory expropriation cannot be implemented similarly across nations and nor will nations enforce such judgments wherein a lacuna exists between the nations and their laws relating to regulatory expropriation.

RESEARCH METHODOLOGY

The research is conducted in a doctrinal and in an analytical manner. A comparative approach is also utilised. The primary sources used for this study include case laws and legal statutes. The secondary sources are the journal articles and other doctrinal research works.

CHAPTER 2: PREFACE TO THE KEY CONCEPTS

2.1. What is expropriation of property?

"Expropriation" by host countries has become a growing concern in the current context of large-scale foreign investment due to the globalisation and liberalisation trends, especially in many developing economies. In a much wider sense, expropriation (or "taking") means the right of the state to affect private property by varied means and for equally different reasons and objects. Acts of expropriation take place through nationalisation, confiscation, or requisition. The 1961 Harvard Draft understands this expression to mean: "any such reasonable 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."¹²

Under international law, not all deprivations of property are expropriatory. Under a State's police powers, it might take property and landowners may endure huge financial misfortunes without offering ascend to State obligation regarding Expropriation. Property might be relinquished under a state's criminal law. Property may be crushed for reasons of general wellbeing. General tax collection is not Expropriation. In every one of these cases, a state does not acquire duty regarding the genuine and true-blue exercise of specific kinds of sovereign police powers. The bent inquiry is: what is a real and true-blue exercise of state police controls that legitimizes a total hardship of property with no comparing commitment to pay? Global Law does not give an unmistakable response to this inquiry. Regulatory expropriation is a paradox that runs deep in investment law regarding investor protection. There exists a fine line between expropriation and the deprivation of property.

2.2. Regulations that deal with indirect expropriation and compensation

Bilateral Investment Treaties contain brief and general indirect expropriation provisions which focus on the effect of the government action and do not address the distinction between compensable and non-compensable regulatory actions.

The 1992 World Bank Guidelines on Foreign Investment section IV (1) on

¹ Srishti Jha, 'Expropriation: A Crisis in International Law' (2001) 13 Student Advoc 123

² Explanatory Note to Article 10 of the 1961 Harvard Draft Convention, Article 10



“Expropriation and Unilateral Alterations or Termination of Contracts”, state that:

*“A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is one in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on a basis of nationality and against the payment of appropriate compensation.”*³

The 1994 Energy Charter Treaty in its Article 13 provides that:

“(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “Expropriation”) except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation. Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the “Valuation Date”). Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include

interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

(2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).

*(3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an investor of any other Contracting Party has an Investment, including through the ownership of shares.”*⁴

Article 1110 of NAFTA protects against the expropriation of foreign investments as stated below:

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:

- (a) for a public purpose;*
- (b) on a non-discriminatory basis;*
- (c) in accordance with due process of law and Article 1105(1); and*
- (d) on payment of compensation in accordance with paragraphs 2 through 6.*

2. Compensation shall be equivalent to the fair market value of the expropriated

³World Bank Guidelines on the Treatment of Foreign Direct Investment, reprinted in Shihata, Legal Treatment of Foreign Investment: “The World Bank Guidelines”, Dordrecht, Boston, London 1993

⁴ The Energy Charter Treaty: a description of its provisions 1994 (The Energy Charter Treaty: a description of its provisions)



investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6. On payment, compensation shall be freely transferable as provided in Article 1109.

7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).

8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.⁵

From the above regulations, it is well seen on how nations agree to and frame regulations for expropriation and compensation. There doesn't seem to be much clarity on the direct and indirect compensation to investors but at the same time it neither provide the nation with the power of unregulated expropriation.

CHAPTER 3: ENFORCEMENT SEEN THROUGH THE ETHYL AND METHANEX CASES

3.1. ETHYL CORPORATION V. CANADA⁶

U.S.- based Ethyl Corporation recorded a Notice of Arbitration in April 1997 and afterward caught up with a Statement of Claim in October 1997. It claimed that a Canadian government law restricting the import or exchange between territories of methylcyclopentadienyl manganese tricarbonyl (MMT), a fuel added substance, dispossessed its Canadian interest in the creation and offer of MMT. Ethyl battled that the boycott was a prejudicial measure intended to ensure homegrown industry as opposed to a real ecological or health security measure. The Canadian government guaranteed that MMT presented wellbeing hazards. Ethyl sought U.S. \$250 million in remuneration, remembering sums for lost deals and benefits for Canada and sums spent

⁵ North American Free Trade Agreement signed between Canada, Mexico, and the United States, 1994 (NAFTA) Article 1110

⁶ [1999] 38 ILM 708



on campaigning to crush the boycott. In July 1998, after a decision by a Canadian homegrown court that the MMT exchange denial abused Canada's Agreement on Internal Trade, the Canadian government settled Ethyl's case. Under the particulars of the settlement the Canadian government paid Ethyl roughly U.S. \$13 million and gave a letter to Ethyl expressing that there is no logical proof demonstrating that MMT represents a health hazard.

NAFTA requires its individuals to remunerate speculators when their property is dispossessed or when governments take gauges that outcome to comparative circumstances to confiscation. Ethyl asserted that the MMT boycott establishes such a confiscation. The company contended that the boycott would diminish the value of Ethyl's MMT plant, harmed its future deals and damage its corporate notoriety. The case is a significant trial of how expropriation is to be characterized in NAFTA and future arrangements.

3.2. METHANEX CORPORATION V UNITED STATES⁷

This case is important in many respects: for many, its relevance rests with its influence in establishing a trend towards greater transparency (it was the first Tribunal to allow open hearings) and participation by non-disputing parties (by submission of amici curiae briefs made by several environmental NGOs). But for the purpose of this study, it is interesting for its treatment of the claim of regulatory expropriation.

The Tribunal distanced itself from the approach taken by the Metalclad Tribunal,

which had favoured a strict application of the sole effect doctrine. Instead, in rejecting the claim, the Tribunal appealed to the 'effect and purpose' approach, defining indirect expropriation in the following terms:

"In the Tribunal's view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. 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 alia, a foreign investor or investment is not deemed expropriatory and compensable 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."

There are two important elements to this statement: the first is the inclusion of purpose in the analysis, the second is the categorical distinction between expropriation and regulation: what the Tribunal seems to say is that the measures taken by California do not attract compensation because they are not expropriatory measures, not because a public purpose exception precludes compensation with one important caveat, that is, specific commitments given to the foreign investors, therefore relying on the well-established principles of police powers for the categorical exclusion, and of legitimate expectations for the caveat.

CHAPTER 4: US CASE STUDY ON REGULATORY EXPROPRIATION⁸

⁸ Mark Kantor, 'Fair and Equitable Treatment: Echoes of FDR's Court-Packing Plan in the International Law

⁷ [2005] 44 ILM 1345



The Fifth Amendment to the U.S. Constitution prohibits the Government from uncompensated expropriations; "nor shall private property be taken for public use, without just compensation." Thus, this "Takings Clause" is comparable to international expropriation law, which requires a host State to compensate foreign investors for an expropriation of private property. The Fifth Amendment, of course, also contains a Due Process Clause prohibiting the deprivation of "life, liberty or property without due process of law," not just the Takings Clause. In connection with the U.S. Civil War, Constitutional due process protections were expressly extended to cover the conduct of constituent states of the U.S. with the adoption of the Fourteenth Amendment to the U.S. Constitution. The U.S. Supreme Court has considered on several occasions when regulatory conduct of the Government has such an adverse impact on private property that the regulatory action crosses the line established by the Takings Clause into a taking - whether a "regulatory taking" has occurred. If a regulatory taking has occurred, that conclusion then triggers the Constitutional obligation of the Government to compensate the injured property owner for the deprivation of property. International arbitral tribunals, of course, are increasingly addressing analogous "regulatory expropriation" issues under international investment law cases arising out of bilateral investment treaties (BITs), multilateral investment agreements and free trade agreements (FTAs).

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- the economic impact of the regulatory action.
- whether the regulatory action undermined the property owner's "distinct and reasonable investment-backed expectations".
- the character of the government action, such as whether "it amounts to a physical invasion or merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good."

In its 2005 term, the U.S. Supreme Court reaffirmed the applicability of the Penn

Approach towards Regulatory Expropriation' (2006) 5 LAW & PRAC INT'L CTS & TRIBUNALS 231



Central balancing test in the case of *Lingle v. Chevron USA, Inc.*⁹ In *Lingle*, the Court stated that the aim of the Penn Central test was to determine whether the impact of the Government's regulatory action is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, [Penn Central] focuses directly upon the severity of the burden that government imposes upon private property rights." As the *Lingle* case makes clear, American practice under the Takings Clause may treat regulatory conduct as expropriatory if that conduct "ousts the owner from his domain," even if the Government does not then appropriate the affected property for public ownership or use. The U.S. has imported the Penn Central factors directly into the description of "indirect expropriation" in its recent free trade agreements and bilateral investment treaties. For example, Annex C to Chapter 10 (the Investment Chapter) of the DR-CAFTA Free Trade Agreement discusses that agreement's expropriation provision (Article 10.7.1). It states as follows (emphasis added):

"Expropriation

The parties confirm their shared understanding that:

- 1. Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.*
- 2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.*
- 3. Article 10.7.1 addresses two situations. The first is direct expropriation, where an*

investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

a. The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

b. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

In addition to extant agreements, the U.S. has announced that it is negotiating further FTAs and BITs with numerous other countries. The U.S. Government is actively engaged in investment or free trade agreement negotiations with at least another seven countries, including South Korea, Pakistan, Thailand, Colombia, Malaysia, Panama, and the United Arab Emirates.

⁹ [2005] 544 USA 528



It is, of course, unclear whether this U.S. effort to harmonize international regulatory expropriation law with the Penn Central approach towards domestic "takings" law will continue to spread. The U.S. approach embodied in these agreements has not yet been employed by any tribunal to analyse the regulatory conduct of a State outside the context of a U.S. treaty. However, the U.S. seems to have made a strong start in its evangelical efforts to harmonize international law in this area. The prospects for harmonizing international law and U.S. Constitutional practice are far less clear when we turn from claims of indirect expropriation to the developing body of international arbitral decisions construing the international investment law obligation of a State to afford foreign investors "fair and equitable treatment". The great majority of bilateral and multilateral investment agreements contain an F&ET commitment protecting foreign investors.

Currently, aggrieved foreign investors regularly assert both expropriation and F&ET claims at the same time for the same allegedly unlawful government conduct under a variety of investment treaties. The two causes of action were simultaneously asserted by foreign investors in, for example, the CME and Lauder, Methanex, Waste Management, Eureko, Maffezini, Noble, ADF, Pope & Talbot, S.D. Meyers, Loewen, Metalclad, Tecmed, MTD, Gemin, Mondev, Middle East Cement, Thunderbird, CMS and Occidental arbitral awards. And it is clear from the awards in Middle East Cement v. Egypt¹⁰ and CMS v. Argentina¹¹ that a claimant may succeed in proving a breach of

the F&ET obligation resulting from the challenged State conduct despite failing to prove expropriation on the same facts. These arbitral awards do not demonstrate a consistent approach towards the scope of the F&ET obligation. Moreover, many of these awards do not even evidence agreement on the elements that must be demonstrated to establish a breach of that obligation. It is, of course, important to remember that investment treaty arbitration covers less than 20 years of arbitral awards, with the great majority of awards being issued only in the past few years. U.S. Takings Clause and Due Process jurisprudence, by comparison, has developed over more than 200 years and thousands of Supreme Court and lower court decisions. Nevertheless, as discussed further within this article, the absence of a consistent methodology to determine F&ET claims stands in contrast to generally accepted legal standards for the comparable body of U.S. Constitutional law.

CHAPTER 5: CONCLUSION AND SUGGESTIONS

It is to be noted that from the above discussion regulatory expropriation especially on indirect expropriation of property is done to protect the interest of the host nation but it should also be kept in the mind of the host state that the investors interest also needs to be protected and taken into consideration while expropriation the property. A thing to be noted is that although regulatory treaties do not address compensation issues directly, they are construed to also protect the interests of the investors by nations to uphold not only investor protection of foreigners but also of its own investors in foreign nations. It is for

¹⁰ [2005] 7 ICSID Rep 173

¹¹ [2000] 7 ICSID Rep 492



the growth of the product, brand value or to earn profits the investor invests in another nation and tries to make an image at the public of that country or state. It needs a lot of effort from the investor to set up a workplace, buy assets so it is important that he does not undergo a loss because that would also lead to loss of other interested investors to the country and create issues to the economic growth and employment to the host country. It will also lead to instability to many other investors and they would back out from investing to this country and invest in a country where they are given protection. The damages for the regulatory expropriation should be given at a decent time and not after ages.

Treaties and regulations can be made more specific and direct than a vague idea wherein the importance lies in the interpretation. The enforcement seen with different cases and the approach from a nation's perspective makes it clear to understand that enforcement or the implementation of regulation dealing with indirect expropriation takes the path depending on the circumstance and other laws. There is a dire need for literal translation of regulation wherein the regulations expressly mention on indirect expropriation and compensation. This way the implementation of such laws can have a better effect for the reason the regulation exists.

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