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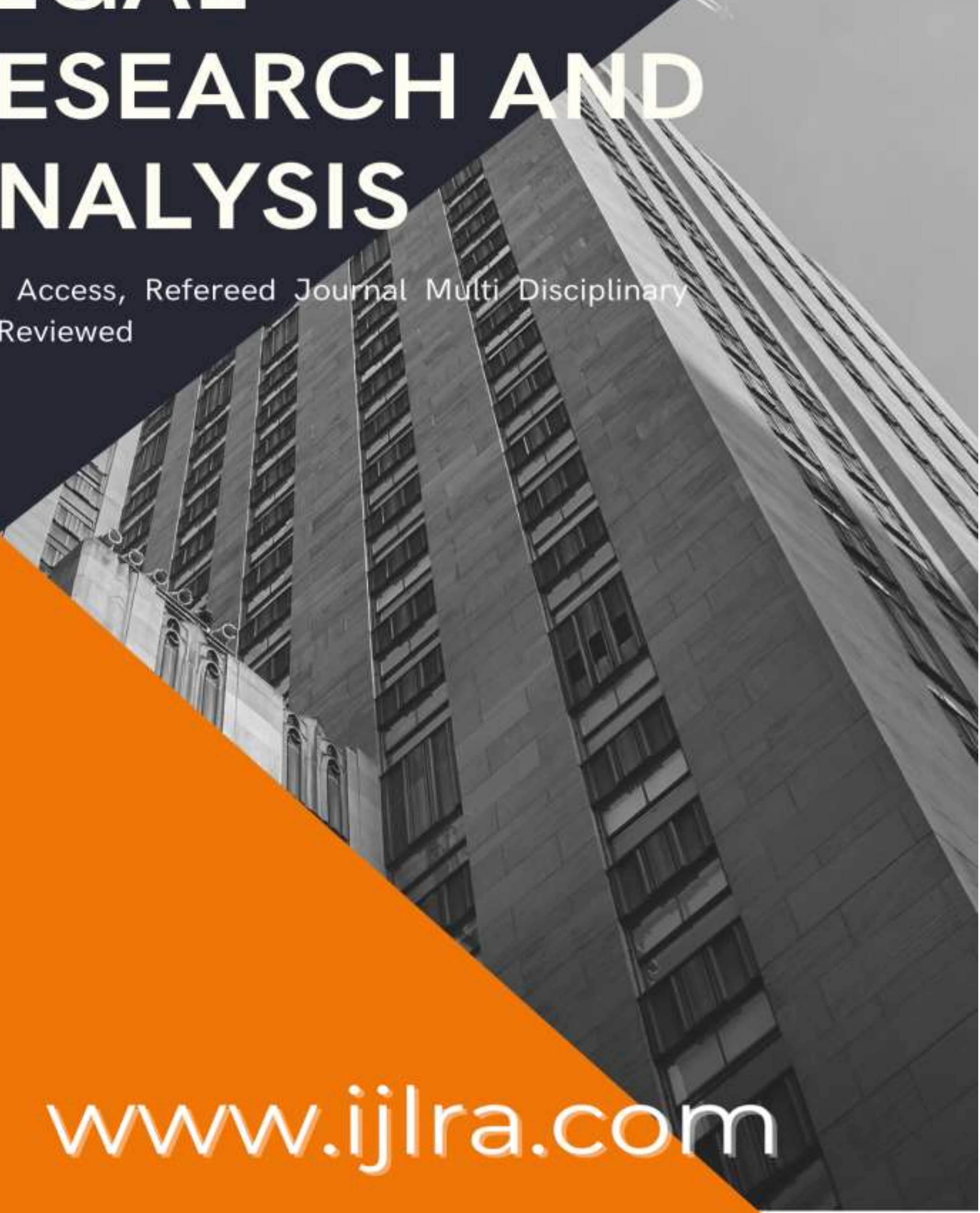

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EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW: A STUDY OF INDIRECT EXPROPRIATION

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ABSTRACT

Expropriation is a **fundamental concept in international investment law (IIL)** and serves as the foundation of investment protection mechanisms. It is deeply entrenched in customary international law, the concept has evolved through the interplay of diplomatic protection principles and the minimum standard of treatment accorded to foreign investors. Historically associated with the treatment of "aliens," expropriation refers to the state's act of taking private property for public purposes, typically accompanied by compensation. This practice underscores the delicate balance between state sovereignty and the protection of investor rights, rendering it a central issue in international investment disputes.

This paper examines the evolution of expropriation norms within International Investment Agreements (IIAs), tracing its development in customary international law and analysing its codification in key legal instruments, including International Investment Agreements (IIAs), Bilateral Investment Treaties (BITs), and multilateral frameworks such as the Energy Charter Treaty (ECT). It explores how these agreements influence expropriation law, particularly through compensation standards, with a critical focus on the Hull formula and the challenges posed by states in the Global South. Furthermore, the study investigates the shifting landscape of dispute resolution, highlighting the transition from international judicial and arbitral processes to domestic courts and administrative hearings. By examining the divergent legal approaches employed by state and international institutions, the research highlights the inherent tension between globalization and economic sovereignty in the development of expropriation jurisprudence. Through a comprehensive analysis of legal, historical, and policy dimensions, this study contributes to a deeper understanding of expropriation's role in the evolving framework of international investment law.

I. EVOLUTION OF EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW

The concept of expropriation in international investment law has evolved from customary international law principles, primarily governed by the minimum standard of treatment for foreign investors. Historically, states have always retained the sovereign right to expropriate foreign property, provided such actions adhere to fundamental legal principles. One of the earliest codifications of these principles is found in the **Energy Charter Treaty**[1] **(ECT), Article 13(1),** which explicitly prohibits expropriation unless it meets four key conditions:

- **Public Interest**: The measure must serve a legitimate public purpose.
- **Non-Discrimination**: The expropriation must not target foreign investors unfairly.
- **Due Process**: Investors must be afforded legal protections and procedural fairness.
- **Compensation**: Affected investors should receive fair compensation for their losses.

These conditions have been widely adopted in modern IIAs and BITs, reflecting a consistent international legal approach to expropriation.

The legal basis for compensation in expropriation matters stems from the **"Hull formula"**[2], proposed by U.S. Secretary of State Cordell Hull in 1938 during a diplomatic dispute with Mexico involving land reforms affecting U.S. nationals. Hull argued that expropriation must entail "prompt, adequate, and effective" compensation, a standard that became the paradigm for investment protection in the 20th century, though it was resisted by developing countries, who advocated a more liberal consideration of compensation

The United Nations General Assembly contributed to the evolving discourse, through a series of resolutions on permanent sovereignty over natural resources, beginning in the 1950s. The 1962 Resolution on Permanent Sovereignty over Natural Resources[3] provided additional respect for the right of states to expropriate foreign property, if compensation was "appropriate" and given in accordance with the rules of domestic and international law. The Resolution ultimately recognized the necessity of international law around compensation, while asserting the right of states over their economic resources.

[1] *Energy Charter Treaty* (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95, art 13(1).
[2] A number of developed countries endorsed the "Hull formula", first articulated by the United States Secretary of State Cordell Hull in response to Mexico's nationalization of American petroleum companies in 1936.
[3] UNGA Res 1803 (XVII) (14 December 1962)

With the adoption of the 1974 Charter of Economic Rights and Duties of States[4], an important development in law defining expropriation occurred. In the 1974 Charter, the notion of national control over expropriations and compensation was expressly stated. The Charter articulated its expectation that compensation would be based on domestic laws and resolved in national courts unless otherwise agreed upon by the parties, brushing aside some of the norms of previous international adjudication, as articulated by newly colonized nation states. In contemporary law related to international investment, expropriation continues to be a complicated subject matter, specifically related to investor-state dispute settlement (ISDS), which attempts to balance protection of investment with state sovereignty. Both law and practice on this issue developing in response to arbitral precedent, judicial interpretations, as well as geopolitical changes.

II. CONCEPT AND LEGAL FRAMEWORK OF EXPROPRIATION

Expropriation is when government takes private property for public use or benefit. Often occurs with compensation to property owner. Expropriation is the action of taking property, expropriation is usually done forcefully and violently. But, the law of international investment limits its arbitrary use by the states, especially against the foreign investors. Expropriation can be direct and/or indirect. Generally, expropriation happens in the natural resources, infrastructural and energy sectors whereby the government may take control of private assets to serve national interests. Even though expropriation is often justified on grounds of public welfare, disputes arise when investors think otherwise. This can include exhilarating compensation, discrimination and other issues. In international investment law, expropriation is primarily classified as:-

a. Direct Expropriation
b. Indirect Expropriation

a. DIRECT EXPROPRIATION

Direct expropriation happens when a government takes ownership of an investor's property in a direct manner. This usually occurs through nationalization or eminent domain. This generally involves the legal transfer of a title and physical possession of the asset(s) with compensation as mandated under international ICT agreements. If it complies with domestic and international law, including due process and negative compensation, such expropriation is generally lawful.

[4] UNGA Res 3281 (XXIX) (12 December 1974)

Direct expropriation is when the government takes physical control of an investment. It involves taking the investment and compensating the owner. **E.g. - Libya's Nationalization of Oil Assets (1977)**[5] – Libya expropriated oil concessions held by foreign companies, including Texaco and BP, without immediate compensation. The companies challenged the takings in international arbitration.

b. INDIRECT EXPROPRIATION

Indirect expropriation does not involve a transfer of title, but leads to significant deprivation of an investor's rights. Expropriation takes place through government measures, heavy taxes, or regulatory changes that deprive an investor of the value of an investment. The courts and arbitration tribunals determine whether indirect expropriation occurred based on the effect of a government measure and the duration and proportionality of that measure. **E.g. - Metalclad v. Mexico (2000)**[6] – Mexico denied a U.S. waste management company the necessary permit to operate a landfill, despite prior assurances. The ICSID tribunal ruled that this regulatory interference amounted to indirect expropriation.

CREEPING EXPROPRIATION AS A FORM OF INDIRECT EXPROPRIATION

Creeping expropriation is a type of indirect expropriation, which occurs when a series of actions by the state, taken over time, effectively expropriates the investor's property. Creeping expropriation takes effect gradually through a series of legal, regulatory, or administrative actions rather than an immediate seizure that affects an investment's economic viability. This type of expropriation is particularly contentious as it often lacks a single decisive act, making it harder to establish a legal claim. While states retain their sovereign right to regulate, they must ensure that **cumulative regulatory measures do not effectively deprive investors of their investments** without fair compensation. **E.g. -** Gradual increases in tax rates or import duties that render an investment unprofitable.

➢ Legal Framework Governing Expropriation

a. Bilateral Investment Treaties (BITs) and Their Expropriation Clauses

Bilateral Investment Treaties (BITs) are fundamental instruments in defining investor protections against expropriation by host state. BITs are essential instruments in protecting

[5] *Texaco Overseas Petroleum Co v Libyan Arab Republic* (1977) 53 ILR 389.
[6] *Metalclad Corporation v United Mexican States* (2000) 5 ICSID Rep 209.

foreign investors against expropriation by host states. They provide a legal framework outlining the conditions under which expropriation is considered lawful.

Most BITs specify that expropriation is only permissible when it meets four key requirements: it must serve a **public purpose**, be **non-discriminatory**, comply with **due process**, and be accompanied by **prompt, adequate, and effective compensation**. Despite these general principles, BITs often lack precise definitions of indirect expropriation, leading to varied interpretations by investment tribunals. Some treaties, such as the Energy Charter Treaty (ECT) and French BITs, include language prohibiting measures that have an effect **equivalent to expropriation,** yet they do not provide clear criteria to determine what constitutes such an effect. This ambiguity has led to the development of different doctrinal approaches, including the **sole effects doctrine**, which focuses solely on the investor's loss, and the **police powers doctrine**, which allows states to regulate in the public interest without compensation, provided the measures are non-discriminatory and proportionate.

b. International Centre for Settlement of Investment Disputes (ICSID) Convention

The ICSID Convention provides a specialized forum for resolving investment disputes, including expropriation claims, through arbitration.[7] ICSID tribunals have played a critical role in defining indirect expropriation. A key principle applied by ICSID tribunals is the **proportionality test**, which balances the state's right to regulate against the economic harm suffered by investors. If a measure is deemed excessive relative to its stated objective, it may be classified as indirect expropriation.

This principle ensures that investors are protected against disproportionate state actions while allowing governments to implement legitimate policies in areas such as public health and environmental protection.

c. **NAFTA/USMCA and Other Regional Treaties**

Regional trade agreements, such as the **North American Free Trade Agreement (NAFTA)** and its successor, the **United States-Mexico-Canada Agreement (USMCA)**, have played a significant role in shaping international investment law concerning expropriation. **NAFTA's Article 1110** explicitly prohibits expropriation unless it meets the standard conditions of

[7] *Metalclad Corporation v United Mexican States*, ICSID Case No ARB (AF)/97/1, Award (30 August 2000).

public purpose, non-discrimination, due process, and compensation.[8] NAFTA has significantly influenced indirect expropriation jurisprudence, particularly through **investor-state dispute settlement (ISDS) cases** that examined the balance between investor rights and regulatory autonomy. One landmark case, **Methanex v. United States**[9], in which the tribunal ruled that general regulatory measures enacted in **good faith for public welfare objectives, such as environmental protection, do not amount to expropriation.**

With the transition to **USMCA in 2020**, the agreement retained similar investor protections but introduced key reforms to **limit frivolous expropriation claims** and enhance state sovereignty over regulatory matters. While USMCA upholds protections against direct and indirect expropriation, it imposes **stricter requirements for investors** seeking to challenge state regulations. **Other regional investment treaties,** such as the **ASEAN Comprehensive Investment Agreement (ACIA)** and the **Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),** adopt similar approaches. These treaties recognize **the host state's right to regulate** while still ensuring that investors are protected against arbitrary or discriminatory state actions.

<u>Role of Customary International Law in Expropriation</u>

Customary international law has long recognized expropriation as a legitimate state action, provided it adheres to international legal standards. The **Hull Doctrine**, asserts that expropriation must be accompanied by **"prompt, adequate, and effective compensation."** This principle became a cornerstone of international investment law and is widely reflected in modern bilateral and multilateral treaties. While developed nations largely support this principle, developing countries have favoured more flexible compensation standards, as reflected in **UN General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources (1962).** The principle of **state sovereignty over natural resources** allows nations to regulate foreign investments, but when expropriation occurs, customary law generally requires fair market compensation. Disputes often arise over compensation calculations, with some states arguing for deductions based on prior "excessive profits" earned

[8] North American Free Trade Agreement (1992) art 1110.
[9] *Methanex Corporation v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) (2005) 44 ILM 1345

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by investors, as seen in cases like **Texaco v. Libya**[10] and **Aminoil v. Kuwait**[11]. The legal framework governing expropriation in international investment law is complex and evolving.

III. INDIRECT EXPROPRIATION

Indirect expropriation occurs when a state's actions or measures do not directly transfer ownership but severely diminish an investor's rights to property to the point where the investment loses its value. Indirect expropriation is based on the premise that not only formal or physical expropriation, but also measures with equivalent effect expropriate. For instance, a state may introduce new rules that make an investment unprofitable or take away vital licenses the investment needs to run. The most important feature of indirect expropriation is that the investor is significantly deprived of rights, even if the state does not take ownership of the property. To decide whether indirect expropriation took place, tribunals often look at the level of interference caused by action taken by the state, the purpose of such action, and investment as a whole.

Effects of Indirect Expropriation

Indirect expropriation can have various effects. Investors having indirect expropriation claims may suffer huge losses, disruption of business and loss of faith in the legal and regulatory system of the host state. The investor may sometimes be forced to leave the investment entirely. When the state is indirectly blamed for controlling foreign investment, it leads to expensive arbitration cases. Tribunals often take action against such states. Moreover, this can spoil the reputation of such states. Besides, liability may also result in compensation. When seeking future foreign investment, host states may face deterring claims of indirect expropriation. States may instead become viewed as unstable and unpredictable, for example. Getting the balance between protecting investor rights and the state's regulatory power right is a delicate exercise which can have serious consequences for both sides if it goes wrong.

Factors in Determining Indirect Expropriation

Tribunals examine various factors to determine whether state measures amounts to indirect expropriation. They help determine whether the measures made by the state are legitimate or they do amount to them.

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[10] **Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic** (1978) 53 ILR 389.
[11] Kuw**ait v American Independent Oil Company (Aminoil)** (1982) 21 ILM 976

Substantial Deprivation

A key consideration in assessing whether or not there has been an indirect expropriation is whether the state measures have caused a substantial deprivation of the investor's property. To substantially deprive an investor means to significantly reduce the economic value, use, or enjoyment of the investment. Tribunals look at how much the investor's rights have been interfered with, for how long and whether the investor still has meaningful control over the investment. If for example a state imposes regulation that makes an investment economically unviable or withdraws a license vital for its operation, it may lead to substantial deprivation. Yet, not every interference is expropriatory. Only a deprivation that is sufficiently severe to negate the investment's value rises to the level of expropriation.

.**Regulatory Measures vs. Indirect Expropriation**

A critical difference in international investment law is between bona fide regulatory measures and those that can be interpreted as indirect expropriations. Not all regulatory measures that impact investments amount to expropriation. All states have the right to regulate in the public sphere. Tribunals look into whether the measure is proportional, non-discriminatory and taken in good faith. The purpose and context of the measure are also important; for instance, regulations aimed at protecting public health, safety, or the environment are often given deference. However, if a regulatory measure is excessive, arbitrary, or discriminatory, it may cross the line into indirect expropriation. The challenge is how to balance the state's right to regulate and the investor's right to protection from expropriation.

Legitimate Expectations of the Investor

The concept of legitimate expectations plays a central role in determining whether indirect expropriation has occurred. Investors are entitled to rely on the legal and regulatory framework in place at the time of their investment. If a state subsequently changes the rules in a way that undermines the investor's reasonable expectations, this may constitute indirect expropriation. Tribunals assess whether the investor's expectations were reasonable, whether they were based on specific assurances or representations from the state, and whether the state's actions were foreseeable. For example, if a state promises stable tax incentives to attract investment but later imposes significant tax increases, this may violate the investor's legitimate expectations. However, the expectations must be reasonable and grounded in specific commitments; general expectations of stability are not sufficient.

Indirect expropriation is a complex and evolving area of international investment law that requires a careful balancing of competing interests. On one hand, investors must be protected from state measures that effectively nullify their investments. On the other hand, states must retain the ability to regulate in the public interest without fear of excessive liability. The concepts of substantial deprivation, the distinction between regulatory measures and expropriation, and the legitimate expectations of investors are central to this balancing act. As international investment law continues to develop, the principles and precedents surrounding indirect expropriation will remain a focal point for arbitrators, practitioners, and scholars.

IV. CASE STUDIES ON INDIRECT EXPROPRIATION

Indirect expropriation has been a central issue in international investment law, with numerous cases brought before arbitral tribunals under various bilateral and multilateral investment treaties. These cases often involve state measures that, while not explicitly confiscatory, have the effect of depriving investors of the value or use of their investments. This chapter examines five landmark cases that have shaped the jurisprudence on indirect expropriation. Each case provides unique insights into how tribunals assess whether state measures amount to indirect expropriation, balancing the rights of investors against the regulatory powers of states.

1. Metalclad v. Mexico (2000)[12] – NAFTA Case

The *Metalclad* case is one of the most cited cases in the context of indirect expropriation under the North American Free Trade Agreement (NAFTA). Metalclad, a U.S. company, had obtained permits from the Mexican federal government to construct and operate a hazardous waste landfill in the municipality of Guadalcázar. However, local authorities refused to grant the necessary construction permit, and the governor of the state issued an ecological decree declaring the area a protected zone, effectively preventing the landfill's operation.

The tribunal found that Mexico had indirectly expropriated Metalclad’s investment by rendering it "completely useless." The tribunal emphasized that expropriation under NAFTA includes not only direct takings but also measures that have the effect of depriving the investor of the use or economic benefit of their property. The tribunal’s decision was heavily criticized for its broad interpretation of expropriation, as it focused solely on the economic impact of the measures without considering the state’s intent or the public purpose behind the ecological

[12] Metalclad Corp v Mexico (2000) 5 ICSID Rep 212.

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decree. This case is often associated with the "sole effects" doctrine, which prioritizes the economic impact of state measures over their regulatory purpose.

2. **Tecmed v. Mexico (2003)**[13]

The *Tecmed* case is another landmark decision involving indirect expropriation under a bilateral investment treaty (BIT) between Spain and Mexico. Tecmed, a Spanish company, operated a hazardous waste landfill in Mexico. After the Mexican environmental authority refused to renew the landfill's operating permit, Tecmed claimed that the refusal amounted to indirect expropriation.

The tribunal applied a proportionality test, balancing the investor's rights against the state's regulatory interests. It held that the measure was disproportionate because the environmental concerns cited by Mexico were not sufficient to justify the complete deprivation of Tecmed's investment. The tribunal emphasized that while states have the right to regulate, such regulations must be reasonable and proportionate to their objectives. The *Tecmed* case is significant for introducing the concept of proportionality into the analysis of indirect expropriation, moving away from the strict "sole effects" approach seen in *Metalclad*.

3. **SD Myers v. Canada (2000)[14] – NAFTA Case**

In *SD Myers v. Canada*, a U.S. company challenged Canada's temporary ban on the export of hazardous waste, which prevented SD Myers from operating its waste treatment business in Canada. The company argued that the ban amounted to indirect expropriation under NAFTA.
The tribunal rejected the expropriation claim, holding that the ban did not result in a substantial deprivation of the investment. It emphasized that the measure was temporary and did not permanently deprive SD Myers of its business. The tribunal also considered the regulatory purpose of the ban, noting that it was aimed at protecting public health and the environment. This case is notable for its recognition of the state's right to regulate in the public interest, even if such regulations have adverse effects on foreign investors. The tribunal's approach in *SD Myers* reflects a more balanced view of indirect expropriation, taking into account both the economic impact of the measure and its regulatory purpose.

[13] T*ecnicas Medioambientales Tecmed SA v Mexico* (2003) ICSID Case No ARB(AF)/00/2, Award.
[14] *SD Myers Inc v Canada* (2000) UNCITRAL

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4. **LG&E v. Argentina[15] (2006)**

The *LG&E* case arose in the context of Argentina's economic crisis in the early 2000s. LG&E, a U.S. energy company, claimed that Argentina's emergency measures, which froze utility tariffs and devalued the peso, amounted to indirect expropriation under the U.S.-Argentina BIT. The measures severely impacted LG&E's investment in the Argentine gas sector.

The tribunal rejected the expropriation claim, finding that the measures did not result in a permanent or substantial deprivation of the investment. It noted that LG&E retained control over its investment and that the economic impact of the measures was not severe enough to constitute expropriation. The tribunal also recognized Argentina's right to take emergency measures to address the economic crisis, emphasizing the state's regulatory powers in times of public emergency. The *LG&E* case highlights the importance of considering the duration and severity of state measures when assessing indirect expropriation claims.

5. Philip Morris v. Uruguay[16] (2016)

The *Philip Morris* case is a more recent example of indirect expropriation under a BIT. Philip Morris, a tobacco company, challenged Uruguay's stringent tobacco control measures, including requirements for health warnings on cigarette packages and a ban on certain product variants. The company argued that these measures amounted to indirect expropriation under the Switzerland-Uruguay BIT.

The tribunal rejected Philip Morris's claim, holding that the measures were legitimate public health regulations and did not constitute expropriation. It emphasized that states have the right to regulate in the public interest, particularly in areas such as public health, and that such regulations are not compensable unless they are manifestly excessive or disproportionate. The tribunal's decision in *Philip Morris* reaffirms the principle that states retain broad regulatory powers to protect public welfare, even if such measures negatively affect foreign investors.

V. INDIA'S 2016 MODEL BIT AND ITS APPROACH TO EXPROPRIATION

India's 2016 Model BIT was introduced as a response to the growing number of investor-state dispute settlement (ISDS) cases against India, particularly those involving claims of indirect

[15] *LG&E Energy Corp v Argentina* (2006) ICSID Case No ARB/02/1
[16] *Philip Morris Brands Sàrl v Uruguay* (2016) ICSID Case No ARB/10/7

expropriation. The Model BIT aims to provide greater clarity and predictability in the interpretation of expropriation provisions, while also safeguarding India's regulatory autonomy. It reflects India's desire to recalibrate the balance between investor protection and the state's right to regulate in the public interest. The Model BIT includes detailed provisions on expropriation, distinguishing between direct and indirect expropriation. It also provides guidance on the factors to be considered in determining whether a state measure constitutes indirect expropriation. These provisions are designed to address the ambiguities and uncertainties that have often plagued expropriation claims in international investment arbitration.

Expropriation under the 2016 Model BIT

Article 5 of the 2016 Model BIT deals with expropriation and sets out the conditions under which expropriation is considered lawful. According to Article 5.1, expropriation, whether direct or indirect, is prohibited unless it is carried out for a public purpose, in accordance with due process of law, on a non-discriminatory basis, and accompanied by payment of compensation. This provision aligns with the traditional requirements for lawful expropriation under customary international law.

The Model BIT explicitly recognizes both direct and indirect expropriation. Direct expropriation is defined as the formal transfer of title or outright seizure of an investment, while indirect expropriation occurs when a state measure or series of measures has an effect equivalent to direct expropriation, even if there is no formal transfer of title or outright seizure. This definition is consistent with the approach taken in many other BITs and international investment agreements (IIAs).

Indirect Expropriation under the 2016 Model BIT

The 2016 Model BIT provides a detailed framework for determining whether a state measure constitutes indirect expropriation[17]. Article 5.3(a) (ii) states that indirect expropriation occurs when a state measure or series of measures substantially or permanently deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy, and dispose of the investment, without formal transfer of title or outright seizure. This provision reflects the "sole effects" doctrine, which focuses on the economic impact of the

[17] India Model BIT (2016) art 5.

measure on the investment. However, the Model BIT goes beyond the sole effects doctrine by requiring a case-by-case, fact-based inquiry to determine whether a measure constitutes indirect expropriation. Article 5.3(b)[18] sets out the factors to be considered in this inquiry, including:

1. Economic Impact: The economic impact of the measure or series of measures, although the mere fact that a measure has an adverse effect on the economic value of an investment does not establish that indirect expropriation has occurred.
2. Duration: The duration of the measure or series of measures.
3. Character of the Measure: The character of the measure, including its purpose, context, and intent.
4. Breach of Prior Commitments: The extent to which the measure breaches prior binding written commitments made by the state to the investor.

This approach reflects a more nuanced understanding of indirect expropriation, taking into account not only the economic impact of the measure but also its purpose and context. It allows tribunals to consider the broader regulatory context in which the measure was adopted, thereby providing greater flexibility for states to regulate in the public interest.

The Police Powers Doctrine and Regulatory Measures

One of the most significant features of the 2016 Model BIT is its incorporation of the police powers doctrine. Article 5.5[19] states that non-discriminatory regulatory measures or judicial decisions designed and applied to protect legitimate public welfare objectives, such as health, safety, and the environment, do not constitute expropriation. This provision reflects the growing recognition in international investment law that states have the right to regulate in the public interest, even if such regulation has an adverse impact on foreign investments.

The inclusion of the police powers doctrine in the Model BIT is a clear attempt to protect India's regulatory autonomy. It ensures that measures taken for legitimate public welfare purposes, such as environmental protection or public health, are not automatically classified as expropriatory, even if they have a significant economic impact on foreign investments. This approach is consistent with the jurisprudence of several investment tribunals, which have recognized that states have the right to adopt non-discriminatory regulations for public welfare purposes without incurring liability for expropriation.

[18] India Model BIT (2016) art 5.3(b).
[19] India Model BIT (2016) art 5.5.

The 2016 Model BIT represents a careful balancing act between protecting foreign investments and preserving the state's right to regulate. On the one hand, it provides clear protections against expropriation, including indirect expropriation, and sets out the conditions under which expropriation is considered lawful. On the other hand, it incorporates the police powers doctrine, which safeguards the state's ability to adopt non-discriminatory regulatory measures for public welfare purposes. By requiring a case-by-case, fact-based inquiry and considering factors such as the purpose and context of the measure, the Model BIT allows tribunals to take a more holistic view of expropriation claims. This approach recognizes that not all state measures that have an adverse economic impact on investments should be classified as expropriatory, particularly if they are taken for legitimate public welfare purposes.

Challenges and Criticisms

Despite its innovative approach, the 2016 Model BIT has faced criticism from both investors and host states. Some investors have argued that the Model BIT's provisions on indirect expropriation are too restrictive and may undermine the protection of foreign investments. They contend that the requirement to consider the purpose and context of the measure could make it more difficult for investors to succeed in expropriation claims, particularly in cases involving regulatory measures.

On the other hand, some host states have expressed concerns that the Model BIT's incorporation of the police powers doctrine may be too broad, potentially allowing states to adopt sweeping regulatory measures without adequate scrutiny. They argue that the lack of clear criteria for determining when a measure is "manifestly excessive" in light of its purpose could create uncertainty and lead to inconsistent decisions by tribunals.

VI. CONCLUSION AND RECOMMENDATIONS

The study of indirect expropriation in international investment law reveals several critical insights. First, indirect expropriation remains a complex and nuanced concept, often challenging to define due to its reliance on factors such as the economic impact on the investment, the duration of the state's measures, and the legitimate expectations of the investor.[20] Tribunals have increasingly emphasized the importance of balancing investor rights with the state's regulatory authority. This has led to a growing tension between the protection

[20] UNCTAD, *Expropriation: A Sequel* (UN 2012) 76.

of foreign investments and the preservation of state sovereignty, as states seek to regulate in the public interest without facing excessive claims of expropriation.

To address these challenges, several policy recommendations can be proposed. First, treaty language should be clarified to provide a more precise definition of indirect expropriation. This would help reduce ambiguity and ensure that both investors and states have a clearer understanding of what constitutes expropriatory measures, including specific criteria, such as the severity of economic deprivation, the permanence of the measures, and the proportionality of the state's actions, could provide a more balanced framework for tribunals to assess claims. Second, mediation should be encouraged as a preliminary step before resorting to arbitration. Mediation offers a more collaborative and less adversarial approach to resolving disputes, potentially preserving the investor-state relationship while avoiding the costs and delays associated with arbitration. This could be particularly effective in cases where the state's measures are aimed at legitimate public welfare objectives, as it allows for a more nuanced resolution that considers both parties' interests.

Finally, investor-state dispute settlement (ISDS) mechanisms should be strengthened to ensure a fair balance between investor protection and state regulatory authority. This could involve incorporating proportionality analysis into ISDS decisions, where tribunals weigh the public purpose of the state's measures against their impact on the investment. Additionally, ISDS tribunals should be guided by clear principles that prioritize non-discriminatory, good faith regulatory actions aimed at public welfare, while still providing adequate protection for investors against arbitrary or excessive state interference.

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