



The King's Student Law Review

Safeguarding Investor Interests via Multilateral Approach to Expropriations

Author: Harshit Rai and Madangi Ramakrishna

Source: *The King's Student Law Review*, Vol. 8, No. 1 (2017) pp. 142-161

Published by: [King's College London](#) on behalf of [The King's Student Law Review](#)

All rights reserved. No part of this publication may be reproduced, transmitted, in any form or by any means, electronic, mechanical, recording or otherwise, or stored in any retrieval system of any nature, without the prior, express written permission of the King's Student Law Review.

Within the UK, exceptions are allowed in respect of any fair dealing for the purpose of research of private study, or criticism or review, as permitted under the Copyrights, Designs and Patents Act 1988. Enquiries concerning reproducing outside these terms and in other countries should be sent to the Editor in Chief.

KSLR is an independent, not-for-profit, online academic publication managed by students of the [King's College London School of Law](#). The *Review* seeks to publish high-quality legal scholarship written by undergraduate and graduate students at King's and other leading law schools across the globe. For more information about KSLR, please contact info@kslr.org.uk



Safeguarding Investor Interests via Multilateral Approach to Expropriation

Harshit Rai* and Madangi Ramakrishna**

Abstract

Modern welfare states have been empowered with a right to take private property for the greater welfare of the people. However, it is pertinent to ensure that while the state is empowered enough to meet its obligations, it does not transgress those boundaries of individual liberty which are sacrosanct to the very existence of a democratic nation. An examination of the domestic and international arena leads to the conclusion that the practice of wrongfully acquiring property by the State in the name of 'Public Welfare', which is prominent within the territory of a State, has also invaded the rights of foreign investors. This paper explores the relation between right to acquire property of the State and expropriation with regard to international investment in a State. It throws light on the existing lacunae in the area of indirect expropriation causing injury and damage to the investors. It also brings to the forefront the means by which the host state exercises its powers to the disadvantage of the foreign investors by taking undue advantage of the absence of a well framed regulatory or dispute resolution mechanism. Finally, after carrying out a prognosis, the authors propose certain guidelines to streamline the methodology for improving the process of dispute resolution through the institution of a Multilateral Agreement on Investment, including the establishment of an International Investment Court.

Introduction

Evolution of State

Though there exist several theories to the origin of State, there seems to be general consensus in scholarly opinion that human beings could not live with peace and dignity in absence of a governing entity. Hence, the institution of state emerged in order to ensure that human beings could achieve what they strived for.¹ However, role of the state, initially was envisaged to be of limited character. Defence and security of the nation and its citizens was its primary concern. With the passage of time as people realised that it was important for the state to take greater

* Student, BALLB (Hons) Symbiosis Law School Pune, Symbiosis International University, India.

** Student, BBALLB (Hons) Symbiosis Law School Pune, Symbiosis International University, India.

¹ S Kuhnle, A Sander, 'The Emergence of the Welfare State' 2010 The Oxford Handbook of the Welfare State 61.

interest in the welfare of its citizens and reduce the gap between those blessed with resources and those who lacked them, gradually the modern institution of a welfare state came into being. The modern welfare state not only ensures the socio-economic development of every individual but also the overall progress of the nation.² Hence in the modern day state we see greater role of government in every sphere of life.³ From the cradle to the grave the modern state has encompassed each and every aspect of the life of its citizens. It focusses on measures like redistributionist taxation to reduce income disparities and bring in equitable wealth.

In order to meet the responsibilities bestowed upon on it, the state has thus been empowered in many aspects. One such power is to take private property for the greater welfare of the people. Infrastructural projects for industrialisation and other nation building activities involves acquisition of property in any form which might belong to private individuals. However, increased state regulation tends to militate against individual liberty. While increased state interference may not necessarily mean overall development it can surely curtail individual liberty and freedom.

Right to Property

The exclusive dominion of a person over his private property has been acknowledged universally. The common law doctrine of right over property has been followed for generations along with the tort law principle that the house of a person is his castle.⁴ However, government of a nation can rightfully take over the property belonging to a person on certain grounds of public benefit or in other words for the larger good. This taking away of private property has been recognised as expropriation. Contemporary law dictates that expropriation by a government is legal as long as it satisfies certain criteria. For instance, just and fair compensation should be provided to the person whose property has been expropriated.⁵

International law recognises the value of property rights of every individual. Article 1 of the Protocol 1 of The Convention for the Protection of Human Rights and Fundamental freedoms, guarantees every individual the peaceful rights to their possession and Article 1 further elucidates as the only way in which the peaceful enjoyment of the possessions can be violated is for public interest subject to the law and in consonance with the general principles of International Law.⁶ Several tests have been laid down to determine whether a particular dispossession by the government is lawful. Though an unlawful deprivation results in the *prima*

² R Agarwal, *Political Theory, Principles of Political Science* (8th ed, S Chand & Company, London 2014).

³ J Aidukaite, *The Emergence of the Post-Socialist Welfare State: The Case of the Baltic States: Estonia, Latvia and Lithuania* (Sodertorns Hogskola, 2004).

⁴ J Hafetz, “‘A Man’s Home is His Castle?’: Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries’ 2002 8 William & Mary Journal of Women and the Law 175.

⁵ Expropriation laws and review processes, <<http://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/expropriationlawsandreviewprocesses.htm>>.

⁶ Article 1, Protocol 1, European Convention on Human Rights.

facie violation of Article 1 a lawful deprivation can also violate the provision if it does not satisfy the test of public use.⁷

Before delving into property regulation under International Investment Law we examine its domestic aspect. There is almost universal agreement on the fact that individual property rights of people are subservient to the right of the state to take over the properties of private individuals for the general welfare of the public. However, the exception of public welfare should not grant a free license to the state to acquire property, *sub silentio*. The status quo in several countries allows government to take over property in a manner which violate the basic principles of the law. Let's see a few examples.

DOMESTIC

Eminent domain in United States

The doctrine of eminent domain prevalent in the United States authorises the government to take away private property for the purpose of public good. The federal government of the United States enjoys this authority by virtue of its sovereign powers.⁸ It has been held that the pre-eminent power of eminent domain exercised by the federal government is an attribute of sovereignty.⁹ Inherently available to every independent government, power of eminent domain is not granted but only limited by the US constitution.¹⁰ The Fifth Amendment to the US constitution puts a limitation on this pre-eminent right by providing that in no case can private property be taken for public use without just compensation.¹¹ So mighty is the sovereign authority of the federal government, and so exalted its powers that the US Supreme Court in plethora of its decision has recognised that government can condemn property whenever it deems necessary to exercise its constitutional powers.¹² With the ever expanding role of the government as a caretaker and welfare provider for the people takeover of private property for a variety of public uses has become more widespread. This encroachment of private space though justifiable in the name of public interest can lead to serious injustice.

The power of eminent domain which is essentially available for “public use” should not be used for giving benefit to private parties. Unjust arrangement between local governments and builders for erosion of property is an abuse of the discretion available to the government.¹³ Often, commercial entities propose plans to the government authorities which involve ‘public benefit’, and apply for public funding. Once the project is approved, government entities go on acquiring property through eminent domain, while the cost of acquisition is paid by the

⁷ Jeremy Greener, ‘Constructive Expropriation and the Framework of Deferential Progressivism’ (2003) 25 Loy LA Int'l & Comp L Rev 725.

⁸ History of the federal use of eminent domain <www.justice.gov> accessed on- 18th August 2016.

⁹ *Boom Co v Patterson* 98 US 403, 406 (1879).

¹⁰ *Penn Mut Life Ins Co v Heiss* 141 Ill 35, 31 NE 138 (1892).

¹¹ Joseph Y Whealdon <www.americanbar.org> 4th August 2016.

¹² *United States v Gettysburg Electric Ry* 160 US 668, 679 (1896); *Kohl v United States* 91 US 367, 371 (1875)

¹³ Dana Berlin, ‘Public Power, Private Gain: The Abuse of Eminent Domain’ (April 2003) <http://ij.org/wp-content/uploads/2015/03/ED_report.pdf> accessed 12 August 2016.

developer, private developers also gets the title to the property.¹⁴ This public power hence results in private gains for commercial entities. US government in the past five years has condemned more than 10,000 homes, businesses, churches and private land for private business development.¹⁵

The cause of eminent domain can largely be attributed to bureaucratic malfunctioning. The alliances between private developers and local bureaucrats and government entities leads to use of government discretion for private benefits.

In the well-known case of Supreme Court in *Kelo v New London*¹⁶ the question arose if taking of private property and selling it for private development violated the takings clause of the Fifth Amendment.¹⁷ The majority held that condemnation of property for private development would pass the test of the takings clause under the constitution and would come under the expression of “public use.”¹⁸

The dissenting judgement in our opinion provides the right guidance towards the approach that should be taken given the status quo of the eminent domain law. Justice Thomas in his separate opinion has held that the Public Use clause figuring in the text of the Fifth Amendment is an express limit on the power of the government and bars use of private property for any other purpose.¹⁹ The word public use as per his opinion should be strictly construed to mean that taking is permitted only when the government owns it or the public is entitled to use it and not for any public purpose or necessity whatsoever.²⁰

The learned judge has underscored the repercussions of allowing eminent domain for private development. He held that no compensation can afford the subjective value of the property of the people uprooted and the loss of dignity resulting from such cases is not rectifiable. The effect of the majority judgment on the poor and marginalised communities is going to be immense.

Constructive Expropriation under Italian Law

Another example is the Italian law, which permits the local government to take possession of private property without formally expropriating it under the issuance of an expedited expropriation order. The government is then required to formally expropriate the land so the affected party can gain adequate compensation. While formal expropriation is required by statute where land is taken via an expedited expropriation order, local governments may

¹⁴ Ibid

¹⁵ Ibid

¹⁶ 545 US 469 (2005) 268 Conn 1, 843 A 2d 500.

¹⁷ Ibid

¹⁸ *Kelo* (n 16)

¹⁹ Ibid

²⁰ *Kelo* (n 16)

nonetheless gain ownership of land taken pursuant to such an order through constructive expropriation.²¹

Under the law a suit for compensation can be filed within five years from the date the land has been irreversibly altered. It has been laid down in *Carbonara v Italy*²² that land is 'irreversibly altered, at such time as a local, governmental authority completes public works upon it.' Thus, through constructive expropriation, local governments could gain title to private land by illegally possessing such land and completing a public work on it.²³ They could also gain title to private land by continuing to possess it after the lawful period of possession had expired.

In *Carbonara*, the European Court of Human Rights examined the application of a common law constructive expropriation rule that deprived landowners (Applicants) of their land under Italian law.²⁴ Both the constructive expropriation and a retroactively-applied statute of limitations for expropriation damage claims failed to meet "the requirement of lawfulness" under the Convention. The Applicants' right to "peaceful enjoyment of... possessions" under Article 1 of Protocol No. 1 of the Convention (Article 1) had thus been violated

Land Acquisition in India

India is one of the fastest developing economies in the world.²⁵ With rapid industrialisation, urbanisation and infrastructural development the government is acquiring more and more land for nation building activities. To ensure that acquisition of land was done in fair just and transparent procedure by ensuring that the owners of the acquisitioned property are given just compensation the Land Acquisition Act of 1894 was enacted. However, it suffered from many drawbacks such as forced acquisitions, lack of safeguards, low rates of compensation and the most criticised urgency clause.²⁶

Realising the inherent difficulties under the act the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013. The provisions of this act apply when government acquires property for any public purpose. However, it is often seen that the interests of the disadvantaged and marginalised groups are overlooked in the interest of industrialisation and urbanisation and groups unaware of their rights remain uncompensated.²⁷

²¹ Greener, 'Constructive Expropriation and the Framework of Deferential Progressivism' (n 7) 725.

²² *Carbonara v Italy* ECHR Application no 24638/94.

²³ Similar facts arose in the case *D'asta v Italy* (Application no 26010/04).

²⁴ *Carbonara* (n 22).

²⁵ Mehreen Khan, 'Growth star India overtakes China as world's fastest growing major economy' (*The Telegraph*, 08 Feb 2016) <www.telegraph.co.uk/finance/economics/12146579/India-overtakes-China-as-worlds-fastest-growing-major-economy.html> accessed 20 August 2016.

²⁶ 'All you wanted to know about new Land Acquisition Bill' (*Livemint*, 30 August 2013) <www.livemint.com/Politics/FXZ9CrJApXRowyzLd8mb2O/All-you-wanted-to-know-about-new-land-acquisition-Bill.html> accessed 31 August 2016.

²⁷ MMK Sardana, 'Land Acquisition Issues' (*ISID*, August 2010) <<http://isid.org.in/pdf/DN1001.pdf>> accessed 17 November 2016.

This analysis of the domestic forum sets a standard as to how the state is not new to exercise its power to acquire property of private individuals. Although criticised, a State has a sovereign power to do so within its territory. However, the same cannot be said so in the case of foreign investors. In that respect, two entities of two different nations are involved. This raises the question of the extent of the exercise of such a power by the Host State, which is being dealt with in the next section.

INTERNATIONAL

Expropriation under international investment law has gained rapid importance in the recent years with respect to its definition, scope, legality and consequences. International tribunals have played an important role in shaping the meaning and definition of Expropriation. These decisions render a conclusion that a government action that deprives a property holder sufficiently is an expropriation.²⁸ The term expropriation means a “taking” by a government authority of a citizen or alien’s “property” with a view of transferring its ownership to another.²⁹ Expropriatory measures could be direct as well as indirect in nature, and hence, 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 interference that the owner thereof will not be able to use, enjoy, or dispose of the property would amount to expropriation³⁰

Direct expropriation has been widely understood as a taking which requires ‘legislative or administrative acts that transfer the title and physical possession’.³¹ However on the other hand, indirect expropriation remains largely undefined.

Indirect Expropriation

Expropriation under International law has been attributed different meanings. While there is widespread consensus on the definition of direct expropriation, indirect expropriation remains largely undefined. If an act is outrageous to any investor and not covered in the purview of indirect expropriation, this would nullify an investor’s entitlement to compensation under the law. The provisions of indirect expropriation are to protect investor’s property from the harmful effects of state behaviour which is disguised in the form of indirect and unobvious infringement.³² An action which might seem legitimate and fair *prima facie*, might be harmful

²⁸ Barry Appleton, ‘Regulatory Takings: The International Law Perspective’ (2002) NYU Environmental Law Journal 45; *Metalclad Corp v United Mexican States* 40 ILM (ICSID 2000); *Pope & Talbot, Inc v Canada* (NAFTA Ch 11 Arb Trib June 26, 2000).

²⁹ *SD Myers, Inc v Government of Canada* Partial Award (Nov 13, 2000) International Legal Materials 280.

³⁰ *Louis B Sohn & RR Baxter*, Responsibility of States for Injuries to the Economic Interests of Aliens II. Draft Convention on the International Responsibility of States for Injuries to Aliens, The American Journal of International Law, v55 n3 (19610701): 548-584.

³¹ United Nations Conference on Trade and Development, ‘Taking of Property’ (2000) UNCTAD Series on issues in international investment agreement <<http://unctad.org/en/docs/psiteitd15.en.pdf>> accessed 1 September 2016.

³² SH Nikièma, ‘Indirect Expropriation’ (2012) Best Practices Series IISD <www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf> accessed 12 August 2016.

for investors. Hence the current international investment treaties provide protection to foreign investors against such actions.

State actions though not directly targeted towards investors, and which do not affect the investor's legal title to the investment might have an adverse impact on the economic health of any investment. Clauses pertaining to indirect expropriation thus safeguard investor's interest. Investors might face adverse actions from host states which are still in their early phase of economic development. Thus, these countries though will favour an investor friendly climate they might lack the financial resources to compensate an investor.

Dispute related to expropriation

More often than not in the instances of Indirect Expropriation, the investor retains control of his enterprise but the investment loses its economic viability.³³ In such cases though the investment in its entirety is sustained, important rights that determine its profitability are extinguished.³⁴ Various arbitral awards have denied the existence of an expropriation where the investor has retained control over the overall investment though being deprived of specific rights.³⁵ General Regulatory measures call for speculation and can be used as a garb for abuse of power. Emphasis on the host state's sovereignty supports the argument that the investor should not expect compensation for a measure of general application.³⁶

In *Feldman v Mexico*³⁷ the tribunal held that there are several ways in which governmental authorities may force a company out of business or significantly reduce the economic benefits of the business. However, opinions of different tribunals on the issue of governmental regulation differ.

The decisions of arbitration tribunals in this regard have largely increased. In certain cases, the tribunals have given consideration to the fact that no specific commitments were not made to the investors, the measure was adopted for a public purpose and wasn't discriminatory.³⁸ However, it has also been held that regulatory actions of the government cannot be held as merely an exercise of its right under international law to regulate its domestic economic and legal affairs.³⁹

Criteria for Determination

³³ *Starret Housing Corp v Iran* 4 Iran-United States CI Trib Rep 122, 154 (1983).

³⁴ UNCTAD, 'Taking of Property' (n 31).

³⁵ *Marvin Feldman v Mexico* Award 16 December 2002 7 ICSID Reports 341, paras 142, 152; *Occidental Exploration and Production Co v Ecuador* Award 1 July 2004 para 89; *CMS Gas Transmission Co v Argentina* Award 12 May 2005 paras 263, 264; *Enron v Argentina* Award 22 May 2007 para 245; *PSEG v Turkey* Award 19 January 2007.

³⁶ *Telenor v Hungary* Award 13 September 2006 para 78.

³⁷ 16 December 2002 18 ICSID Review – FILJ (2003) 488.

³⁸ *Methanex v USA* Award 3 August 2005 44 ILM (2005) 1345.

³⁹ *ADC Affiliate Limited v Hungary* Award 2 October 2006.

For determining whether indirect expropriation has occurred several tests have been determined to examine whether the actions of the state have resulted in actual “taking”. A significant test laid down is the injurious effect test which has come to be known as the Tippets-Biloune – Metaclad line after the three landmark cases, Tippets v Iran, Biloune vs Ghana, Metaclad v Mexico. As per the criteria the damage suffered by the investor is the only criteria relevant for determining the presence of expropriation. It disregards any other criteria such as the intention of the host state or the public benefit served out of the act or the benefit received by the assets of the nation’s state from the taking for determining whether the state action has led to expropriation.

Discriminatory treatment

Most BITs impose obligations on host states to treat one investor at par with the other. Thus, if an investor is able to prove that he has been discriminated against other investors by the host state in form of excessive taxation, licensing requirements or regulation which is relatively milder or non-existent for the other investor then the actions of the host state are termed as expropriation.

There are several ways in which the large powers provided to the governments for acquisition of property have been misused. This has been done both in the international and the domestic arena. In the International arena investors face expropriatory action from the host states. This power of expropriation is very well recognised under International Law and as long as compensation is provided, there are no legal hurdles for a host state to expropriate foreign investment.⁴⁰

Indirect Expropriation and Government Regulations

International Investment law deals with the legal relationship between a foreign investor and the host country. The focus behind these instruments is the encouragement and protection of investment in the host state. Expropriation in certain cases, for the purpose of nationalisation or under an umbrella clause in the BIT, however does not promote the same. This paper aims to bring to the forefront the means by which the host state exercises its powers to the disadvantage of the foreign investors and aims to suggest guidelines for improving the process of dispute resolution between the host state and the investor through arbitration.

Property cannot be expropriated except for a public purpose, on a non-discriminatory basis, in accordance with due process of law and against compensation⁴¹.

There existed divergent views of the developed and the developing countries with respect to compensation payable on expropriation. The “Hull Formula” which required “prompt,

⁴⁰ OECD, “‘Indirect Expropriation’ and the ‘Right to Regulate’ in International Investment Law’ (2004) OECD Working Papers on International Investment 2004/04 <<http://dx.doi.org/10.1787/780155872321>> accessed 23 August 2016.

⁴¹ *ibid.*

adequate and effective” compensation for expropriation was endorsed by a number of developed countries⁴². This formula was first articulated by the United States Secretary of State Cordell Hull in response to Mexico’s nationalisation of American petroleum companies in 1936. The developing countries however have supported the *Calvo* Doctrine which provides for the jurisdiction of the host country to decide upon conflicting matters in international investment. The *Calvo* doctrine was reinforced by the UN General Assembly in adopting the Charter of Economic Rights and Duties of States. Furthermore, the UN General Assembly had adopted in its Resolution on Permanent Sovereignty over Natural Resources the right of a nation to nationalise foreign investment providing only for “appropriate compensation”.

BITs these days incorporate the ‘Hull Formula’ increasing the scope of the investor to receive prompt, adequate and effective compensation for expropriation. However, such clauses are not inserted as a stand-alone standard. A number of BITs state that compensation for the expropriated investment be fixed ‘to the fair market value’ of the investment.⁴³

Expropriation might take two broad form, direct or indirect. Direct expropriation is where the property is nationalized or there is formal transfer of title. Indirect expropriation, not being defined can take various forms such as the measures taken by the state that interfere with the use or enjoyment of the property.⁴⁴

However, not all state measures are considered expropriatory in nature. State regulations are a lawful exercise of powers of governments that may affect the interests of the foreign parties considerably without amounting to expropriation. Therefore, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation.⁴⁵ If those actions are non-discriminatory and are related to consumer protection, securities, environmental protection, they are non-compensable dealings, as they are essential for the effective functioning of the state.⁴⁶

The question that arises is that to what extend the government of the host country can apply regulatory measure, having an effect on the value of the property of the investor, for the purpose of public interest and welfare, without legitimately ‘expropriating’ and having to compensate for the same.⁴⁷ Regardless of a number of decisions by international tribunals, the distinction between indirect expropriation and government regulations not demanding compensation has not been well-defined.

⁴² Jeswald W Salacuse, *The Three Laws of International Investment* (1st ed, Oxford University Press 2013).

⁴³ Section 6.1 and 6.2 of the United States - Uruguay BIT; Section 1110.2 of the North American Free Trade Agreement (NAFTA).

⁴⁴ Rosalyn Higgins, ‘The Taking of Property by the State, Recent Developments in International Law’ (1982) 176 *Recueil des Cours* 321, 268.

⁴⁵ Ian Brownlie, *Public International Law* (6th ed, Oxford University Press 2003) 509.

⁴⁶ M Sornarajah, *The International Law on Foreign Investment* (1st ed, Cambridge University Press 1994) 283.

⁴⁷ *Marvin Feldman v United Mexican States* Case No ARB (AF)/99/1 (Dec 16, 2002) 42 ILM 625 (2003) para 100.

The first step towards determining a solution for the issue is understanding the scope of Indirect Expropriation. The *World Bank Guidelines*⁴⁸, 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 done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation”.

In spite of provisions in Bilateral Investment Treaties concerning Indirect expropriation by way of government regulations such as any direct or indirect measure or any other measure having the same nature or the same effect against investments; measures tantamount to expropriation or nationalization. However, it fails to draw a line between compensable and non-compensable regulations.

Furthermore, in the recent developments of International Investment Law, the terms ‘creeping expropriation’ and ‘*de facto* expropriation’ have come to exist as forms of indirect expropriation. Creeping expropriation does not necessarily take place gradually or stealthily — the term “creeping” refers only to a type of indirect expropriation — and may be carried out through a single action through a series of actions in a through a single action, through a series of actions in a short period of time or through simultaneous actions.⁴⁹ In the *Rumeli Telekom AS v Kazakhstan Kazakhstan*⁵⁰ case, the international tribunal held that it was a case of ‘creeping’ expropriation, instigated by the decision of the Investment Committee which was then collusively and improperly communicated to Telecom Invest and its shareholders before Claimants were made aware of it.

Since law related to expropriation largely exists in BITs and IITs it is important to study the provisions of these agreements to understand the various forms of expropriation laws existing 2004 Canadian Model BIT, Annex B 13(1) on the clarification of indirect expropriation.

Even so, such treaties and agreements provide for exceptions which do not amount to compensable regulation. A Convention defining *Expropriation and Similar Measures* states that: ‘any legislative action or administrative action or omission attributable to the host government 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 the governments normally take for the purpose of regulating economic activity in their territories;’⁵¹

These non-compensable government regulations include non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such

⁴⁸ 1992 World Bank Guidelines section IV (1) on ‘Expropriation and Unilateral Alterations or Termination of Contracts’ <www.italaw.com/documents/WorldBank.pdf> accessed 12 August 2016.

⁴⁹ *Tecmed v Mexico* 2003 ICSID 114.

⁵⁰ *Rumeli Telekom AS v Kazakhstan Kazakhstan* ICSID Case No ARB/05/16 Award 29 July 2008 708.

⁵¹ Article 11 Multilateral Investment Guarantee Agency (MIGA) Convention.

as public health, safety, and the environment do not constitute indirect expropriations.⁵² An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of 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 otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful.⁵³

While assumption of control over property by a state does not automatically render the conclusion that the property has been taken, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership.⁵⁴

Furthermore, the fact that the expropriation was not directly for the benefit of the State but for the benefit Investment does not affect this conclusion, since, expropriation can exist despite there being no obvious benefit to the State concerned.⁵⁵

Harmful effects of lawful regulation

One significant *lacunae* in International law is pertaining to the complete identification and definition of what regulations should be termed as permissible and thus being commonly accepted and non-compensable. There is yet to be drawn a clear line between non-compensable regulation and regulations leading to requirement for payment of compensation to the concerned party.⁵⁶

In *Methanex v USA*⁵⁷ it has been held that fair and non-discriminatory regulation in consonance with due process which affects a foreign investment is not deemed expropriatory and compensable unless the government undertook to refrain from any such actions. In *Saluka Investments BV (The Netherlands) v Czech Republic*⁵⁸ it has been held that it is an established position under International Investment law that the state can exercise its regulatory powers over investors in a non-discriminatory and *bona fide* without having to pay compensation to the affected party. It should be noted that though regulation even when non-discriminatory and *bona fide* may substantially affect the interest of investors they are not entitled to compensation. Since most regulations are termed to be as non-compensable and under International Investment law there is not set definition as to what will constitute as a regulation and can lead to injustice.

⁵² Annex B, Article 4(b) Draft US Model BIT (2004).

⁵³ Sohn and Baxter, The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 1961 Article 10(5).

⁵⁴ *Tippetts v TAMS-AFFA Iran-US Claims Trib* (1984).

⁵⁵ *Rumeli Telekom* (n 50) 707.

⁵⁶ *Saluka Investments BV (The Netherlands) v Czech Republic* UNCITRAL Partial Award 2006, para 263.

⁵⁷ NAFTA 2005, IV D para 7.

⁵⁸ *Saluka*, 2006, para. 255.

International investment law is full of instances in which state has used its power arbitrarily to harm investors and investments. In *Biloune and others v Ghana*⁵⁹, *Benvenuti & Bonfant v Congo*⁶⁰, the investors and other office holders were unlawfully arrested and expelled. In *Goetz and Others v Burundi*⁶¹, *Middle East Cement Shipping v Egypt*⁶², free zone permits were revoked. In *Metalclad v Mexico*⁶³, a construction permit was denied even after prior assurances.

In the 8th Annual juris investment treaty arbitration conference, George Kahale, renowned International lawyer, said ICSID is ‘seriously flawed’ with a ‘perceived bias against states’, that calls into question the legitimacy of the entire system.⁶⁴ ICSID and its decision-making process has been criticised over the years for several reasons. One of the most talked about flaws is that there is large scale inconsistency in the decisions made by the tribunal which leads to poor development of the law.

There is no distinction between non-compensable regulations and regulations amounting to expropriation against which compensation is paid. To understand the root cause of the problem we need to look into the dispute resolution system.

Dispute Resolution in International Investment Law

Disputes regarding expropriation are largely solved by the arbitration model of dispute settlement.⁶⁵ Dispute resolutions are mostly governed by treaties and agreements which provide binding arbitration as the mechanism to resolve any disputes that arise between the investors and the host state. However, the model has not become the part of Customary International Law for regulating relations between investors and host states.⁶⁶

The International Centre for Settlement of Investment Disputes is the primary centres for resolution of investment disputes. The International Centre for Settlement of Investment Disputes was established in 1966 by the Convention on the Settlement of investment Disputes (also known as the ICSID Convention) between States and Nationals of other states.⁶⁷ ICSID has served as the ideal centre for dispute resolution for a multitude of investors for years and has been chosen for arbitration and conciliation in a multitude of treaties. The treaty was essentially formulated by the executive directors of World Bank to further its objective to promote international investment.

⁵⁹ UNCITRAL ad hoc Tribunal, Award 1989.

⁶⁰ ICSID Case No ARB/77/2 Award 1980.

⁶¹ ICSID Award 1998.

⁶² ICSID Award 2002.

⁶³ ICSID Award 2000.

⁶⁴ ICSID problems in the spotlight

⁶⁵ Jan Wouters and Nicollas Hachez, ‘The institutionalisation of Investment Arbitration and Sustainable Development’ (2011) Kluwer Law International 616.

⁶⁶ Bernard Kishoyian, ‘The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law’ (1993-1994) 14 Nw J Int'l L & Bus 327.

⁶⁷ ‘About ICSID’ <www.icsid.worldbank.org> accessed 14 June 2016.

Investment arbitration in general and ICSID in particular have been criticised by several stakeholders for multiple reasons. One such allegation is that investment tribunal work almost exclusively in favour of the foreign investors. This criticism is highly misplaced.

At the outset, if this were to be true, why would more and more BITs and IITs incorporate arbitration as the method of dispute resolution? It can hardly be said that state parties entering into these arguments are unaware of their own actions. Investment arbitration prevents any investment dispute to become a diplomatic tussle between two nations. Investment arbitration not only helps parties avoid protracted litigation which saves time and money but also increases flow of foreign investment leading to economic growth. One of the other criticisms against international arbitration is that the system does not promote investment in the host country and hence is futile. This statement, in our view, is absurd as the criteria for judging a system of dispute resolution pertaining to investment should be its effectiveness and not quantity of investment it brings.⁶⁸ Investment arbitration has been favoured worldwide by investors. The recent South African law pertaining to investment does not provide for arbitration as a method of dispute resolution and it has been criticised by several investment houses and is being treated as a setback to international investment climate in South Africa.⁶⁹

The allegation of bias can hardly stand against arbitration tribunals. A close examination of the awards by most tribunals will reveal that most decisions have upheld the power of expropriation of the states and only awarded monetary compensation to investors. Most decisions are about payment of compensation to investors and not stopping public benefit activities to be taken by the state. Fair regulation of administrative procedure is encouraged for ensuring the rule of law and good governance. Arbitration tribunals do exactly that while adjudicating on disputes. Hence they should not be regarded as interference in state action.

Tribunals in a variety of cases have accepted jurisdiction over dispute claims filed by investors even if they have not waited for the mandatory cooling off period provided under the treaty⁷⁰. Provisions in the contract or under the domestic law providing for host states jurisdiction have largely been circumvented by the tribunals⁷¹. Ideally, any investor should approach the domestic courts of the host country for resolution of any disputes arising between them and the host country. However, investors in majority of cases prefer to approach tribunals even before exhausting any of the domestic remedies. Such recourse should not be frowned upon. Arbitration tribunals save the investors from the hassle of lengthy and expensive litigation. Any investor facing confiscatory actions from the host state should not be compelled to spend time

⁶⁸ Christoph Schreuer, Why Still ICSID <http://www.univie.ac.at/intlaw/wordpress/pdf/why_still_icsid.pdf> accessed on- 23rd August 2016.

⁶⁹ New Protection of Investment Act – The Implications for Foreign Investors< <http://www.caveatlegal.com/new-protection-of-investment-act-the-implications-for-foreign-investors/#sthash.D7wovBS1.dpuf>>.accessed on- 20th August 2016

⁷⁰ International investment law and sustainable development key cases from 2000–2010, Edited by Nathalie Bernasconi-Osterwalder and Lise Johnson, <http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf>accessed on- 19th August 2016

⁷¹ Vivendi v Argentina⁸and Occidental v Ecuador, Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina, ICSID Case No ARB/97/3, Award, 21st November 2000, and Decision on Annulment, 3 July 2002.

and resources in fighting litigation when an effective alternate remedy for dispute resolution exists.

The need for investment protection has been increasingly recognised all over the world and hence bilateral and multilateral treaties these days have clauses that protect investors from expropriators. Many problems faced by foreign investors cannot be solved through domestic remedies. Host states engage in actions like revoking licenses or imposing tough guidelines for procurement of licenses, arbitrary or discriminatory behaviour, lack of due process etc.⁷²

The state should not be given free rein to harm investments as it wishes and to justify such actions under the heading of “public interest”.⁷³

In *Pope and Talbot v Canada* the tribunal held that complete exception for regulatory measures would create a gaping loophole in international protection against expropriation.⁷⁴ They fear that any public interest measure detrimental to the investor may benefit from the exception of police power measures and not be compensable.

Rules regarding indirect expropriation are constructed in such a way that investors are protected against those state actions that do not get covered under the formal and obvious infringement of their rights. It has been ruled that arbitrators and judges are required to look at “the substance of the measure and not its form.”⁷⁵

Drawbacks

However, it would be incorrect to say that the Arbitration model is free from any disadvantages. The primary criticism against the arbitration model is that it fails to live up to the basic precepts of democracy and rule of law.⁷⁶ The fact that different arbitral tribunals do not have an organic link in the form of the rule of *Stare Decisis* rule, an appeals mechanism, and arbitration has produced a number of inconsistent decisions, reaching different outcomes in similar situations.⁷⁷

⁷² Investment Protection and Investor-to-State Dispute Settlement in EU Agreements, <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf>accessed on- 23rd August 2016.

⁷³ S Nikièma, ‘Best practice series’, IISD, <<http://www.iisd.org/sites/default/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf>>accessed on- 23rd August 2016.

⁷⁴ Interim Award (June 26, 2000), paras. 96-98.

⁷⁵ *Sporrong and Lonnroth v Sweden*.

⁷⁶ B Choudhury ‘Recapturing Public Power: Is Investment Arbitrations’s Engagement of the Public Interest Contributing to the Democratic Deficit?’, *Vanderbilt Journal of Transnational Law* 41 (2008), 775; G van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007)

⁷⁷ A Reinisch, ‘The Issues Raised by Parallel Proceedings and Possible Solutions’, (Lecture), Harvard Law School, USA April 2008.

There are several such instances in Investment regime. In *Lauder v Czech Republic* and *CME v Czech Republic* cases, in which two tribunals while judging the same parties and the same facts awarded different awards in both.⁷⁸

Any rule of law or democracy abiding dispute settlement system needs to comprise structural guarantees that it is going to work effectively and that interests will be weighed against each other in a balanced manner according to legal rules.⁷⁹

It is also important to ensure transparency into arbitral proceedings and to facilitate the participation of civil society in disputes engaging the public interest. Concerning the participation of the public in arbitral proceedings, rules have been relaxed to give more leeway to arbitral tribunals for admitting what are called ‘amicus curiae briefs’, which are submissions presented to the tribunal by a third party to the dispute to inform the latter of a particular interest or to present it with a particular legal position.⁸⁰

Fair Equitable Treatment

FET or fair and equitable treatment requirement is an internationally recognised principle under International Investment Law. Host states are required to render fair, just and equal treatment to all the investors coming from other countries. Bilateral Investment Treaties across the world comprise of The FET standard which every host country party of such agreements has to abide by. Any breach of this standard is not only a violation of the terms of the investment treaty but can also be brought under the definition of “measures having equivalent effect” and be termed as expropriation. The phrase fair and equitable treatment on examination turns out to be very broad and hence subject to interpretation. It is thus pertinent to set out set standards or guidelines which are able to guide the arbitration tribunals in determining whether the host country has breached the standard in dealing with the investment.

RECOMMENDATIONS

International Liability

State action under International law has been regulated by the universally recognised principles of *erga omnes* and *jus cogens*. The liability of a state for its actions does not arise from the wrongfulness of its acts but the injurious repercussions of it. Thus while the state action might not be wrong or could be capable of being justified under public welfare if the resulting injury to aliens is directly attributable to the act a liability is incurred.⁸¹

⁷⁸ *Lauder v Czech Republic*, UNCITRAL, Final Award , 3rd September 2001: and *CME Czech Republic BV v Czech Republic* , UNCITRAL , Partial Award , 13th September 2001 and Final Award , 14th March 2003.

⁷⁹ *Nicholas Hachez and Jan Wouters* Arbitration and Preservation of Public Interest < https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp81-90/wp-81-hachez-wouters-ii-arbitration-and-the.pdf>accessed on- 15th July 2016.

⁸⁰ *Ibid.*

⁸¹ Sompong Sucharitkul, State Responsibility and International Liability under International Law, 18 *Loy LA Int'l & Comp L Rev* 821 (1996).

International liability of a state stems from the fact that the state is liable to pay compensation not for the wrongfulness of its act but for the injurious consequences arising from the act. This liability arises from the fact that state is liable for the harmful effects of activities under its control or within its jurisdiction. This liability exists irrespective of whether the concerned activities are permitted or prohibited under International Law. A State also owes obligations to the whole world or to all alike, obligations *erga omnes*. The International Court of Justice has referred to obligations *erga omnes* as obligations of a State to afford protection of its laws to foreign investment or foreign nationals. These obligations, however, are neither absolute nor unqualified, but are of concern to all States⁸².

State Responsibility

The concept of state responsibility under customary international law stems from the idea that the obligations of a state to protect the interests of its nationals continues even when they are present in an alien territory. This was referred to as diplomatic protection under International law, which was marked by the obligation of a state to safeguard its nationals from any harm in another nation. Any harm to the alien thus was considered to be a breach of the minimum international standard for “treatment of aliens”. This power of diplomatic protection was thus used to demand compensation for personal injuries, including loss of life; economic or financial injuries, including loss of property or assets; and property damages, including loss of investments, expropriation, nationalization and requisition or confiscation of property belonging to foreigners. In the absence of specific treaty obligations, the power of a state to protect its citizens abroad is based on customary international law.⁸³ Since harm to property of aliens viewed in this context will essentially become a diplomatic dispute, International investment arbitration prevents it from becoming one and helps in effective resolution of disputes without it becoming an issue of national concern.

One of the main issues in international investment law during the last 20 years has been the question of identifying and delimiting compensable expropriation from delimiting compensable expropriation from lesser interferences.

In our opinion there should be a set of guidelines applicable to all the stakeholders in International Investment regime.

Multilateral Agreement on Investment

A multilateral Agreement Investment has been proposed amongst OECD countries which has not only created ripples in the academic pools but has become a divisive issue dividing the WTO countries into those who are “multi-lateralists” i.e. support the agreement and those who are against it. An MAI would provide the much needed transparency, predictability and legal

⁸² Barcelona Traction, Light and Power Company Limited (Belgium v Spain) 1 33, 1970 ICJ 3, 32 (Feb 5).

⁸³ *Hines v Davidowitz*, 312 US 52 (1941).

security in the investment regime. The world is facing what Jagdish Bhagwati⁸⁴ has termed a ‘spaghetti bowl’ of bilateral, sub-regional and regional agreements which is associated with a number of serious systemic dangers.⁸⁵ The existence of all these agreements and the initiative of a limited number of countries to negotiate an MAI are highly problematic.

Several treaties and agreement lead to confusion, uncertainty and conflicts. Several treaties also increase the cost of doing business which acts as an impediment to FDI. The need for rule and policy coherence is now well recognised among all major analysts who have been involved in the discussion. The absence of an international agreement can have serious consequences for FDI flows. It will provide the investors protection from risk of doing business in the absence of which, the risk of investment in a foreign country may be excessive thus discouraging investment. Policy liberalisation has affected fiscal, monetary, financial, infrastructural, trade and other policies. However, the legal provisions underlying this change are not enough.

Domestic laws are more often than not insufficient to provide adequate security to foreign investors. Provided the risks associated with doing business in foreign countries, investors will, *ceteris paribus*, choose those countries in which the legal protection of their investment is most secure.

International Investment Court – The Vision

The need for a shift from the private law conceptualization of investment law has been long called for with a “Public law approach” to investor-state dispute settlement (ISDS) promoting transparency and third-party participation.⁸⁶ Perhaps the proposal of the European Commission to the United States for the establishment of an “International Investment Court” (IIC) under the Transatlantic Trade and Investment Partnership (TTIP) is a step towards the same.⁸⁷

The proposal, submitted on November 12, 2015 provides for a two-tiered Tribunal to address investor-state disputes, consisting of a Tribunal of First Instance and an Appeal Tribunal staffed by a permanent roster of fifteen judges at the Tribunal of First Instance and six judges at the

⁸⁴ CFR's Jagdish Bhagwati Argues Against Preferential Trade Agreements in New Book; Recommends Completion of Multilateral Doha Round." Jul 2008. Council on Foreign Relations. Nov 2016., <<http://www.cfr.org/world/cfrs-jagdish-bhagwati-argues-against-preferential-trade-agreements-new-book-recommends-completion-multilateral-doha-round/p16798> >accessed on-28th July 2016>

Jagdish Bhagwati is a senior fellow for international economics at the Council on Foreign Relations and university professor of economics and law at Columbia University.

⁸⁵ Zdenek Drabek: A Multilateral Agreement on Investment: Convincing the Sceptics World Trade Organization Economic Research and Analysis Division, <https://www.wto.org/english/res_e/reser_e/pera9805.doc> accessed on-21st July 2016>.

⁸⁶Gus Van Harten, *Investment Treaty Arbitration and Public Law* (2007); Santiago Montt, *State Liability in Investment Treaty Arbitration* (2009); *International Investment Law and Comparative Public Law* (Stephan W Schill ed., 2010); Stephan W Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 *Va J Int'l Law* 57 (2011). For an example in the practice of investment arbitration see example, *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award, ¶ 576 (Sept. 22, 2014).

⁸⁷ Proposal of the European Union for Investment Protection and Resolution of Investment Disputes, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf<accessed on- 5th August 2016>.

Appeal Tribunal.⁸⁸ Under the TTIP, the Tribunal shall comprise of twenty-one members, who are appointed by the European Union and the U.S. rather than by the disputing parties (investor and host state) and are subject to stricter rules on independence and impartiality. The European Union's proposal also ensures the applicability of the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules, implying that many of the documents of the court's proceedings will be publicly available.⁸⁹ Furthermore, third-party funding of any dispute must be disclosed to the Tribunal and to the other disputing party.⁹⁰ In addition, the Court shall contain a time constraint for rendering decisions. They are thus expected to issue a provisional award within eighteen months of the date of submission of the claim, or account for the delay, while the Appeal Tribunal is expected to render its decision within six months of the date of appeal.⁹¹

This proposed Investment Court system, if included in the TTIP may become a successful model for a global investor-state dispute resolution system. However, there are certain aspects of the system that do not support its vision.

The major structural weakness of the proposed system in its Bilateral nature. Till date the disputes arising out of International Investment Agreements, are resolved through arbitration, mostly under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) or the UNCITRAL Arbitration Rules. This decentralized and scattered arrangement of arbitration tribunals in the global level had led to a significant number of inconsistent and incoherent decisions with regard to interpretations of similar provisions across multiple IIAs and also provisions of the same agreement in relation to virtually identical facts. This renders the field of International Investment law unpredictable resulting in a legitimacy crisis.⁹²

The creation of a permanent investment court, with respect to a single agreement, in this case the TTIP, does help in standardizing the interpretations of its provisions. However, it is not much different from the arbitration tribunals as it still does not have the capability of removing irregularities in the application of corresponding provisions of different treaties, failing to bring homogeneity in the international forum. Due to the Commission's approach, the permanent investment court shall work on a bilateral basis, which will be the cause for the existence of inconsistencies in the decisions of various investment courts irrespective of their permanent nature.

The primary solution for this issue is the creation of a multilateral investment court to ensure cross-treaty uniformity and certainty in the international investment arena. Furthermore, such a structure shall stimulate and encourage investors worldwide facilitating better trade among

⁸⁸ Trans-Pacific Partnership, Arts. 9(2), 10(2), <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> accessed on-20th July 2016.

⁸⁹ *Id.* Art 18.

⁹⁰ *Id.* Art 8.

⁹¹ *Id.* Arts 26(6), 29(3).

⁹² S Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', 73 *Fordham Law Rev* 1521 (2005).

countries. A more centralized, i.e. a multilateral investment court system can be achieved in the future by negotiations on a multilateral level or the reform of an existing structure such as the International Centre for the Settlement of Investment Disputes (ICSID) system. Although, the ambition of the Commission's proposal is the subsequent creation of a multilateral investment court⁹³ it is speculated that the creation of the International Investment Court under the TTIP shall reduce the chances of multilateral system coming up.

The investment court rather than promoting the process of multilateralization further supports the bilateral structure of international investment law by providing for European as well as US judges. The more effective this system functions the more difficult it would be to replace it on a later stage. This lacuna could be removed if the investment court system provides for the appointment of the judges not only by the EU and the US as parties to the treaty but a body representing the international community, such as the UN General Assembly and the UN Security Council as is done with the International Court of Justice.⁹⁴ This would also reduce the power of the parties to influence the interpretation and application of the provisions of the treaty which would ensure a more impartial system.

The proposal further handles the issue of apparent bias towards the foreign investors by not providing them a double opportunity to approach the domestic courts as well as the international investment court. It allows direct access to the investment court without prior recourse to local remedies. At the same time, it restricts the jurisdiction of the court while proceedings in domestic courts are pending or if domestic remedies have been exhausted.⁹⁵ It should be noted that an option of arbitration as dispute resolution should exist for recourse by international investors. It is often realized that litigation in domestic courts is protracted and exorbitant. Also, there is no denying that domestic courts are bound to be tilted towards the cause of the host states and are more inclined to give a judgment favouring the host state.

Nevertheless, the proposal of a standing court structure and an introduction an appellate mechanism and transforming the current system of ad-hoc practice afflicted by inconsistent decisions and the appearance of bias to an institute which endorses legitimacy and reinstates public trust in the resolution of investment disputes. Moreover, since the EU-Vietnam Free Trade Agreement has recently accepted the International Investment Court system,⁹⁶ the IIC is the major reform that has the ability, if adopted to change the whole landscape of dispute resolution in the international forum.

⁹³ Proposal of the European Union for Investment Protection and Resolution of Investment Disputes, Art 12, (Nov 12, 2015), http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf<accessed on-17th August 2016.

⁹⁴ Statute of the International Court of Justice Art 4.

⁹⁵ Proposal of the European Union for Investment Protection and Resolution of Investment Disputes, Art 14, (Nov 12, 2015), <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf>accessed on- 14th August 2016.

⁹⁶ Press Release, European Commission, The EU and Vietnam Finalise Landmark Trade Deal (Dec 2, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409>>accessed on-11 September.

Over 3200 international investment agreements govern legal disputes which are solved by specialised arbitral tribunals which are set up on a case to case basis.⁹⁷ The new approach of the European Union in settling investment disputes can serve as a model approach. Under this system the disputes are first looked at by a tribunal of permanent judges. An appellate tribunal has been setup in case either side believes that there are errors in the judgement. This system allows case-law to develop, bringing more consistency and predictability over time.

CONCLUSION

International investment law is one of the fastest growing fields under international law. With the tremendous growth in global economic development aided by domestic and international investment the law has to expand its horizons to bring in new perspectives and developments under its arena. This is hampered by the constant disagreement of the Host State and the Foreign Investors with regard to various facets of investment.

This paper brings forth several issues that arise in the arena of international investment law when state authorities interact with foreign investment agencies. Therefore, it becomes imperative to do away with the existing state centric approach and ensure that legitimate investor interests are not imperilled in the name of national interest.

This can be resolved by laying down distinctive provisions to govern investments in a nation. For the same, the authors propose a Multilateral Agreement on Investment. Such an agreement would provide for the required uniformity and consistency in the field. Furthermore, the machinery for dispute resolution under International Investment Law demands an upgradation. The establishment of an International Investment Court, as proposed, would further the formation of principles under International Investment Law, resulting in its holistic development.

⁹⁷ Nicolas Hachez and Jan Wouters, Arbitration and Preservation of Public Interest, <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp81-90/wp-81-hachez-wouters-ii-arbitration-and-the.pdf> accessed on-13th August 2016.