

THE PRACTICAL CHALLENGES FACING EXPROPRIATION OR TAKING OF INVESTORS PROPERTY BY THE HOSTING STATES. HOW SHOULD IT BE?

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ABSTRACT

The study explains the challenge that faces foreign investors when investing in the foreign land. The study deals with practical experience which happens in different jurisdiction and decided cases. It covers in detail the concept of expropriation or taking of investors property. That, expropriation or taking is something done by hosting states but the issue is how should it be done? Should it be lawful or unlawful; law, agreements and treaties governing expropriation and protecting investors property requires expropriation to be done according to the law otherwise it will be unjust. The paper discusses the forms of expropriation such as nationalization, political ideologies, change of government regime, variation of the original contract or agreement. The study proposes that expropriation should be fair and just and the principle of equal treatment of investors should be respected at the time of taking foreign investors property. Local and foreign investors should be treated equally and the compensation must be according to market value and the taking of the investors property must be the last option. The data and all information contained in this paper were collected through a review of available literature including journal, articles, decided cases, reports, papers, textbooks and thesis.

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INTRODUCTION

There are various risks which an investor may face when investing in the State and these risks most of the time face to foreign investors rather than local investors which in one way or another may be favoured by the situation in particular State. Despite of various protections provisions in various treaties which tend to protect the rights of investors and their properties, there are still, presence of some acts which tend to infringe investors rights and taking their properties in unjust manner. Despite of various risks such as nationalization, political ideologies, change of government regime, variation of the original contract or agreement, this paper will focus on discussing the dimension pertaining to expropriation or taking. Expropriation or taking the words appeared deferent in both pronunciation and form but they are same in semantic. The paper attempt to discuss the form of expropriation, type of expropriation, the instance which amount to expropriation and whether they are qualifying for compensations and in addition, the State responsibility on issue of expropriation done by insurgency. The paper provides for practical approach that is to say decided cases by tribunals which lead to deeply understanding of how expropriation works.

CONCEPT OF EXPROPRIATION

Generally, expropriation is not illegal under international law. The state has a right to expropriate the property of nationals and of foreigners. But under investment, legal expropriation of foreign owned property is subject to certain conditions such as public interest, absence of discrimination, due process of the law and compensation that is prompt, adequate and effective. An expropriation may take place under perfectly legal circumstances rather than arbitrariness, bad faith, lack of proportionalities and other improprieties of which are not constitutive elements of expropriation. Most of tribunals faces some questions about expropriation. To establish whether there is expropriation is not a challenge in most tribunal, however the determination become difficult when the question is whether the expropriation is legal or not.

The State obligations with regard to the property and the use of property are well established in international law. Article 10 of the Draft Convention on the International responsibility of States for injuries for Aliens by Professor Sohn and Baxter:

“Taking of property includes not only an outright taking of property, but also any such unreasonable interference with the

use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.”

The rights which can be expropriated are all relevant rights, interest and assets which fall within the definition of an investment and attached thereto. Investment refers to a scope of assets whose expropriation can be challenged under an investment treaty, depends on how broad or narrow the definition of an investment is in particular treaty.

Elements of lawful expropriation

The first question which the tribunal should determine is to ascertain whether there is expropriation on the face of the claims. This is not a difficult question to determine but the complex issue is determination on whether the expropriation is lawful or not. There are various Bilateral Investment Treaties (BIT's) which provides for lawful expropriation such as Article VI of the Canada-Slovakia BIT (2010), article 4 of the Netherland-Oman BIT (2009) and other many which pointed out the elements of lawful expropriation. The elements also are used to determine the presence of unlawful expropriation where the taking does not meet these elements.

Public Purpose(s)

The taking must be pursuant of a legitimate welfare objective as opposed to a purely private gain or an illicit end. Various treaties term this in different words such as ‘public benefits’ (Germany-Pakistan BIT 2009), ‘public interest’ (China-Peru FTA 2009), ‘public purpose related to internal needs’ (Angola-United Kingdom BIT 2000), whereby all these formulations however narrow or broader they are, stick on the same point and meaning of public purpose. The public interest is determined at the time when the expropriation measures takes place. It will not be lawful expropriation if such taking intends to serve the public purpose at later stage and not immediately public purpose.

As illustrated in the case of *Siag and Vecchi v. Egypt* there was taking of claimant land on ground of delays in the constructions of tourist project. Six years later the land was transferred to public gas company for the constructions of pipeline. The tribunal reject the taking to be for the public purpose because an investment was eventually put to public use, the expropriation of that investment must necessarily be said to have been for a public purpose. It is important to draw a line between direct and indirect expropriation. Where there is direct expropriation in order to be lawful it must accompanied by compensation while in regard to indirect expropriation it need the assessment of the measures in order to distinguish an indirect expropriation from ordinary and legitimate regulatory conduct of the State which is non-compensable. The State and its entity have autonomy to make judgment in determining the legitimate

purpose but the judgment must be reasonable. Taking should not be associated with political wills and pressure for instance, the taking of foreign oil company as an act of political retaliation was not held to qualify as a public purpose and the taking was regarded as discriminatory in character.

In *Siemens v. Argentina* it was stated that “there’s no evidence of a public purpose in the measures prior to the issuance of the decree 669/01. It was an exercise of public authority to reduce the costs to Argentina of the contract recently awarded through public competitive bidding and as part of the change of policy by a new administration eager to distance itself from its predecessors...while the public purpose of the 2000 Emergency Law is evident, its application through decree 669/01 to the specific case of Siemens investment and the public purpose are questionable”

Non-discrimination

The distinction between different types and classes of investors does not always amount to discrimination. Arbitral tribunals have found this requirement to have been violated when a State has discriminated against foreign nationals on the basis of their nationality. Expropriation that targets a foreign investor is not discriminatory rather it must be based on, linked to or taken for reason of, the investor nationality.

In *ADC v. Hungary* the claimants raise the claim that they were treated discriminatorily as they were the only parties involved in the operation of the airport. It was agreed that by the tribunal “the claim of discrimination to stand in respect of expropriation, there must be different treatment to different parties.” (At para 442). Further the tribunal found that, although the claimants are not only the foreign parties affected by the measures, the treatment received by the operator appointed by Hungary and that received by foreign investors as a whole was different and thus discriminatory. Further, in the case of *Eureko v. Poland* the claimant had purchased 30% of the shares and later acquired a right to purchase a further 21% equity through an addendum to the initial agreement. The tribunal held that in relation to the discrimination “the measures taken by Poland in refusing to conduct the IPO (Initial Public Offering) to purchase shares are clearly discriminatory... That discriminatory conduct by the Polish government is a blunt violation of the expectations of the parties in conducting Share Purchase Agreement (SPA) and the first addendum” At para 242. The claimants found to be treated discriminatorily based on their origin. Therefore the issue of discrimination may be perceived by looking on the treatment among investors.

Due process of law

The expropriation act must follow the law, that is to say, the expropriation must comply with the procedures established in local laws as well as international recognized rules and whenever it involves court proceedings

or declaration or involve administration body, the principles of independent and impartiality must be adhered to. The law and procedures should not be arbitrary to mean willful disregard of due process of law, an act which shocks or at least surprise a sense of juridical property. Most of the treaties (BITs) pointed out the due process of the law requirement for lawful expropriation but does not expand what is required to prove that the requirement have been followed. The requirement of due process of law has been more discussed in the case laws decided by arbitral tribunal.

Middle East Cement v. Egypt a vessel used by the investor to conduct its business operations has been seized and later auctioned by the post authorities. The tribunal held that, the means of notification to the claimant on seizure and auctioning of a ship of a claimant does not meet the requirement of due process since there was indirect communication to that effect. (At para 143). In *ADC v. Hungary (Supra)* the tribunal found that there is violation of the requirement of due process of law in the sense that some basic legal mechanism such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute are not available and therefore missing. Likewise, lack of reasonable chance within a reasonable time to claim its legitimate rights and the claims to be heard. Therefore, the procedures must be followed and rights of those who invest must be observed. However, the question of fairness of the law come into play. The due process of the law may be followed but the law itself may be harsh, from this, the procedures also may be harsh following the provision of the laws.

Payment of compensation

In order for expropriation to be lawful there must be prompt compensation and adequate one. Adequate means that the compensation must reflect the market value or real economic value. There are various BITs which uses different formulations for the compensation for instance, 'just and equitable compensation' in the Mozambique-Netherlands BIT (2001), 'fair and equitable compensation in the India-UK BIT (1994), 'just compensation in the Chile-Tunisia BIT (1998) and many other BITs. The tribunal can award compensation as a remedy in case of dispute. However, in respect of indirect expropriation the tribunal must access first on regulatory measure and characterize the measure before looking into the existence of a duty to pay compensation. It may happen that the expropriation is unlawful because it lacks payment of compensation and when compensation paid it become lawful, the position was shown in the case of *Santa Elena v. Costa Rica* and *SPP v. Egypt*, the cases pointed out that where legitimate takings only lacking compensation were at stake, the tribunal never referred to the expropriation as unlawful.

The European Court practices try to distinguish between inherently illegal takings, taking that is not in the public interest and illegal taking due to the non-payment of compensation. Inherently illegal expropriation triggers automatic application of higher compensation standard while on other hand despite non-payment of compensation is wrongful act, it does

not trigger the same consequences that follow from an inherently illegal taking. If a State failed to pay compensation the expropriation is considered to be unlawful but in respect to indirect expropriation if the measure is found by the tribunal as to constitute expropriation, the obligation to pay compensation should arise after the findings relate to determination of regulatory measures.

The compensation may include appropriate interest as provided under the treaties, for instance, article 95 of Japan-Philippine Economic Partnership agreement (2006), article 20 of the agreement of COMESA Common Investment Area (2007) etc. The compensation must be paid without delay as illustrated in article 12(3) of the Japan-Lao People's Democratic Republic BIT (2008) and other various treaties. The discussion was on lawful compensation which may regard the standard of estimation as agreed by parties in their treaties and related agreements.

Compensation for unlawful expropriation

The injured party in the action of expropriation of taking is entitled for full reparation. In *Chorzow factory case* establishes the principle of full reparation. The reparation must as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which could in all probability, have existed if that act had not been committed. *Goetz and Others v. Republic of Burundi*, Award, 2 September 1998, 6 ICSID Reports 5. The standard of compensation for wrongful acts under customary international law entails the principle of full reparation. Further in *Chorzow factory* adds

“..... restitution in kind or if this is not possible, payment of sum corresponding to the value which a restitution in kind would bear the award, if need be of damages for loss sustained which would not be covered by restitution in kind or payment in place of it- such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”

The rationale behind the principle of standard reparation in that the means of reparation in international law is restitution in kind but if this is not possible, the indemnification come into play. The indemnification must be equivalent to the restitution in kind. The second reason is, the deterrent effect of indemnification in case of unlawful expropriation which is necessary for distinguishing the consequential of lawful and unlawful State's conduct and eliminate any percentage advantage or incentive for the expropriating State to act lawful.

The principle of full reparation also is reflected in the ILC's Draft Articles on Responsibility of States for International Wrongful acts, Article 31-36. It may be considered that lawful expropriation amount to payment of standard compensation. However, in the case of *Phillips Petroleum v. Iran* the view was disregarded as the tribunal held that whether lawful or unlawful the single standard of compensation is apply to all kind of expropriation provided that the property is taken.

Also in *AAPL v. Republic of Sri-Lanka* it was stated that where there is destruction of property under circumstances which are not justified by combat action or necessities of the situation an event expressly provided under UK-Sri-Lanka BIT in this situation, different standard of compensation applied. Further in *Goetz v. Burundi* there were no discussion in respect whether the taken was lawful or unlawful since the time allow, the tribunal concluded that respondent still had the opportunity to pay such compensation. In *S.D Myers v. Canada* the case was not about expropriation but the tribunal tries to draw distinction between lawful and unlawful expropriation in regard to compensation.

“...expropriation that are conducted for a public purpose, on a non-discriminatory basis and in accordance with due process of the law are lawful...provided that compensation is paid in accordance the fair market value of the asset...the standard of compensation that arbitral tribunal should apply may, in some cases be influenced by the distinction between compensation for lawful as opposed to unlawful. Fixing the fair market value of an asset that is diminished in value may not fairly address the harm done to investor.”

The BIT standard of compensation applied only to lawful expropriation and in *Hungary case* the expropriation was held to be unlawful. The tribunal apply *Chorzow Factory case (supra)* principle ordered payment of sum corresponding to the value which restitution in kind would bear. The date of valuation for the compensation be the date of award while all unpaid dividends and management fees should be valued from the date of expropriation until the date of an award. Different approaches have been advanced in regarding to the payment of compensation as shown above however in the case of *Vivend v. Argentina* whereby the tribunal stated that disregard all criteria for the determining the amount of compensation and pointed out that what is important is the payment of compensation must be sufficient to compensate the affected party fully and to eliminate the consequences of State's action regardless of the type of investment and nature of the illegitimate measure.

Therefore, it may be argued that the State failure to pay compensation without justifying its position would be considered in bad faith and render the expropriation unlawful while the payment of compensation based on State substantiated evolution of the property, even if the amount is less than investor's claims would render the expropriation lawful (as long as other condition of lawful expropriation are satisfied).

Compensation for destruction during wars and national emergencies
This also depends on the wording of the BITs to provide for the compensation in the event of damages as a result of war, civil unrest or other national emergencies. The treaties also provide for situation where the foreign investor property is taken by armed forces however no

compensation will be paid in relation to the situation where property was taken during combat action. The position was illustrated in the case of *AAPL v. Sri-Lanka (supra)* AAPL shrimp culture farm was destroyed by military action. Basing on the wording of the treaty (BIT), the tribunal held that the action taken by the Sri-Lankan armed forces leading to the destruction of foreign investor's property was directed against Tamil guerrillas and qualified as combat action which attracted the application of the exception to liberty rule.

Under BITs, there are provisions which tends to confer protection to foreign investors during civil conflicts and when the State failed to provide the required protection to foreign investors, it should compensate to any loss suffered. Protection commitments- these are provisions in the BITs which tend to assure the protection to the investors. The provisions may refer more specifically to the contractual commitments that a State or Public entity like investment board screening the application of the investor prior to entry may have made in the course of initial contracts with the foreign investors. Since that contract is made direct not by the State the question is how the State will be liable to pay compensation. In this regard, taking into account the State responsibility, the State is responsible for the action of its entities due to control which a State has over these entities despite of their independent personality. From the contractual (protection clause), it should be asserted that unilateral guarantees to a protection by a host State not to nationalize except on payment of full compensation by the provision in the investment treaty.

FORMS OF EXPROPRIATION

Direct Expropriation

It is the expropriation which direct affect the title and possession. Also can be referred as mandatory transfer of the title to the property or its outright physical seizure. Expropriation may be done by the State itself or a State mandate third party and the benefit of expropriation is for the State itself or State mandated third party. There is open, deliberate and unequivocal intent as reflected in a formal law or decree or physical act to deprive the owner of his or her property through the transfer of title or outright seizure. A good example should be taken from the case of Zimbabwe where the settlers and veterans of 1980 war for independence through the orders taken by the Government of Zimbabwe under Land Acquisition Act of 1992 invade the investors' commercial farms. In the case the tribunal held the government liable and required to pay compensation to those Dutch investors for the 'taking' action. Direct and overt expropriations have become rare. The typical form in which expropriations take place nowadays is indirect expropriations or measures having an equivalent effect. The concept of indirect expropriation has been known for some time and is reflected in contemporary treaties for the protection of investments. The concept of indirect expropriation is also well established in international judicial practice.

Indirect expropriation

This may refer to action(s) of the State which can take place after a corporal of years and not immediately. The recognition of the concept of indirect expropriation, de fact expropriation, measures equivalent to expropriation or acts tantamount to expropriation is well established in the judicial practices. International courts and tribunals have treated indirect expropriation and equivalent measures in the same way as direct expropriation. In *Chorzow Factory case (supra)* Permanent Court of Justice held that the expropriation of the Chorzow factory also constituted an indirect expropriation of the patents and contracts of a different Companies 'Beyerische'. The later company merely had rights of management in the expropriated factory and the Polish authorities never purported to expropriate it.

Revere Copper v. OPIC the agreement was between the government of Jamaica and claimant subsidiary (RJA) with respect of the tax and other financial burdens. In 1974 the government in violation of the agreement drastically increased the tax and royalties. The claimant claim under insurance contract cover which provide for expropriation action. The insurer rejected claim on the ground that there was no deprivation of effective control. The tribunal held that the government action amount to indirect expropriation as it have substantially the same impacts on effective control over use and operation as if the properties were themselves by a concession contract that was reputed and no effective control in regard to RJA (subsidiary company) as it did before.

Even if the property rights and interest are remain with original owner and no transfer of title, the State interference render those rights and interest useless and the action must be deemed expropriation. The deprivation or taking of property may occur under international La through interference by a State in the use of property or with the enjoyment of its benefits even where legal title to the property is not affected. However not all action which affect the rights and interest of the investor may amount to indirect expropriation. In the case of *Waste management Inc. v. United Mexican State* failure of the City of Acapulco to pay amount due under the concession contract was held by the tribunal as not amount to indirect expropriation. Likewise, in the case of *Occidental Exploration and Production Co. v. Ecuador* where inconsistency practices of the respondent's authorities in reimbursing value added tax paid on purchases in connection with the claimant's exploration and exploitation activities and the ultimate exportation of the oil produced was held not constitute expropriation despite of it be violation of fair practice and equitable treatment standard of investors. Therefore, to determine the existence of indirect expropriation depend on the circumstances of each case as shown above. There are also various forms of indirect expropriation as discussed below.

Creeping expropriation

It is a form of indirect expropriation that taken place incrementally or step by step through a series of actions. It has its counterpart in the law of state responsibility in the concept of a breach consist of composite act. There may be a series of action of which they do not constitute expropriate but the aggregate of the outcome of these actions is the one which constitute expropriation. It involves an incremental but cumulative encroachment on one or more of the range of recognized ownership rights until the measures involved lead to the effective negation of owner's interest in the property. There are various case laws which explain this form.

Also, UNCTAD Series on issues in International Investment Agreements, Taking of Property 11/12(2000). expropriation, as it involves the series of action for instance issuance of stop work order, the demolish, the summons, the arrest, the detention, the requirement of filing assets declaration forms and deportation without the possibility of re-entry on aggregate of these actions they have the effects of causing cessation of work on the project and was held to be expropriation. However, this form of indirect expropriation does not necessarily take place gradually or stealthily, the term creeping refers only to a type of indirect expropriation but may be carried out through a single action, through a series of action in a short period of time or through simultaneous actions. The concept of creeping also reflected in ILC Draft Articles on Responsibility of States for International Wrongful acts adopted by the International Law Commission in 2001, Article 15(1) as it states:

“The breach of an international obligation by a State through a series of actions or omission defined in aggregate as wrongful, occurs when the action or omission is sufficient to constitute the wrongful act.”

The creeping expropriation as a form of indirect expropriation with the distinctive temporal quality in the sense that it encapsulates the situation where a series of acts attributable to the State over period of time culminate in the taking of such property. Although the form includes the series of action it does not mean that it happen gradually rather it may occur rapidly.

OTHER INCIDENCES WHICH AMOUNT TO EXPROPRIATION

Expropriation of Intangible property

The expropriation of investors' properties does not entail only on physical assets or properties which belong to the investors but also a broad range of rights which attached to the properties or rights that are economically significant to the investor. Currently, most of BITs and agreement on investment contain the provisions which are not only refer not only to expropriation of tangible property but also intangible property. They may

be claims to money, performance pursuant to contract, intellectual property and generally any right conferred by law or contractual among protected investment. There is a number of case laws which support or affirm the position. In the case of *Starrett housing (supra)* the tribunal decision seems to recognize expropriation of intangible rights as stated that

“...rely on precedents in international law in which cases measures of expropriation or taking, primarily aimed physical property, have been deemed to comprise also rights of a contractual nature closely related to the physical property.”

Further in the case of *Amoco International Finance Corp. v. Iran* where it was stated that expropriation can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transactions. The same position in the case of *SPP v. Egypt (supra)* the tribunal stated that expropriation applies not only to jus in rem but also rights and interest arose from contract. The modern position was not as it was before whereby at this modern times taking property not only relate to physical property but also enjoyment of the property as well as incorporeal property. Taking away or destruction of the rights acquired, transmitted and defined by a contract it is to be considered not far apart from taking of property and it entitled the sufferer to redress.

Breach of contract and expropriation

The breach of contract may result into deprivation of investors' wealth. Expropriation may be indirect and its object may be a contract. But not every failure by the government to perform a contract amount to an expropriation even if violation leads to a loss of rights under the contract. A mere breach as well as contractual breach does not in principle amount to an expropriation. For a State to be considered breaching the contract it must develop a behaviour in a contract which must be beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract it is the use of State of its sovereign powers that gives rise to treaty breaches, while actions as a contracting party merely gives rise to contract claims not ordinarily covered by an investment.

There is limitation in relation to breach of contract which amount to expropriation. For instance non-performance of the contractual obligations does not necessarily amount to an expropriation. As stated in the case of *Waste Management case (supra)* that non-performance of the contractual obligation is not equated with taking of property, it may be expropriation if government counterparty took the matter to the court for remedy action of breach of contract and find the access of that right is legally or practically fore closed lead to definitive denial of the right. The *Waste management case (supra)* pointed out three groups of incident in which an expropriation would be present first, where the whole enterprises is terminated or frustrated because its function is simply halted by decree or

executive act, usually accompanied by other conduct, secondly, where there has been acknowledged taking of property and associated contractual rights are effected in consequences, thirdly, where the only right affected is incorporeal, mere non-performance of the contractual obligation is not amount to taking of property unless accompanied by other elements or conducts. A private party can fail to perform its contracts whereas nationalization and expropriation are inherently government acts. Taking into account the above discussion on the breach of contract, investor must first seek justice in the courts of the host state and then if no provision allows to access for the remedy in local court, he can raise the claim for expropriation. There must be a definite denial of the investor's contractual rights.

Regulatory measures and expropriation

This is concerned with various measures taken by State in their exercise of their public orders. There may occur adverse effects as a result of those State measures but it cannot be said that the government is at liberty to pay compensation for every adverse effect which would happen as a result those measure which may direct or indirect affect the private property rights include those held by investors. The difficulties arise on the time of distinguishing normal regulation which is for legitimate purpose hence attract no compensation and regulatory expropriation which is also for legitimate purpose but attract compensation. Non-discriminatory measures which are designed and applied to protect legitimate public welfare objectives including the protection of health, safety and environment do not constitute expropriation or nationalization except where those actions are so severe that they cannot be reasonable viewed as having been adopted and applied in good faith for achieving their objectives. There are two test which can be used as a criterion for establishing normal regulation and regulatory expropriation. First, quantitative test that looks at the severity of the measure's effect on the investment and secondly, is motive or purpose oriented test that looks for the existence of an intention to expropriate. Arbitral tribunals have consistently looked at the degree and duration of deprivation to determine whether an expropriation has occurred as a survey of the case laws illustrated below.

In *Metalclad v. Mexico* where the refusal of a construction permit by the municipality had completely destroyed the investor's ability to pursue its previously approved project and the tribunal found that there had been an indirect expropriation. Also in the *Tippetts case* the appointment of Iranian manager by the Iran government was not seen as an expropriation but the degree of interference by that manager with the owner's property rights thazuriat constituted a taking of property. There are also various cases which stand in the same position shown. The measure by a State must have the effect of deprive the control and ownership of the investment and in addition, stand as obstacle to the enjoyment of the property. If for example, the government did not manage the day to day

operations of the company and the investor had full ownership and control of the investment, no claim of expropriation can be entertained.

The other aspect is on intention of the government to expropriation. The difficulties arise when a claimant is required to prove the intent of the government to expropriate. The mere post event statement of the government that a taking was not intended cannot in itself carry the weight in the relevant analysis. Where all circumstance point toward a plan to deprive the investor of its investment, an underlying motive to expropriate can be construed.

Another approach is that; the expropriation may take place without or regardless of any intention to expropriate on the part of the host State. In international practice it may be termed 'sole effect doctrine' or 'consequential expropriation'. The intention of the government to expropriate is not essential as summarized by *Prof. Christie* when briefing the issue of intent to expropriate in the *Chorzow factory case (supra)* and *Norwegian Ship owner's claim case* state that:

“State may expropriate property where it interferes with it, even though the State expressly disclaims any such intention ...the two cases together illustrate that even though a state may not purport to interfere with the rights to property it may, by its actions render those rights so useless that it will be deemed to have expropriated them.”

An exception to the doctrine and seems to point out to the relevance of interest is illustrated in the case of *Olguin v. Republic of Paraguay* where claimant purchased an investment bonds upon which the State had defaulted. The tribunal found that there was no expropriation but merely a business loss due to a financial crisis. Expropriation requires a teleological driven action for it to occur, omission however egregious they may be, are not sufficient for it to take place. It should be noted that when a State exercise the normal regulator powers, measures imposed may not give rise to compensation. State are not liable to pay compensation to a foreign investor or investment is not deemed expropriated and compensable unless specific commitments had been given by the regulating government to the putative foreign investor contemplating investment that the government would refrain from such regulation.

CONCLUSION

The study revealed that investors have been facing expropriation of their property by the hosting state where, states uses their sovereignty power to expropriate investors property sometimes unlawfully. The reviewed literature has shown that expropriation is allowed but it must be in accordance to the law. In most cases the State is direct involved in the expropriation acts but in some cases the State indirectly involved for instance in cases where the expropriation acts are taken by insurgency or

other groups within the State whereby the act attribute to the state in certain circumstances. Also measures which are taken by the State may direct affect the properties of the investors and may not only be the properties but also rights and interests of which it will require to pay compensation as a general rule.

The issue of compensation has long discussion since the controversial come on whether the lawful and unlawful expropriation carries equal amount of paying compensation and whether compensation for unlawful expropriation can be evaluated in the normal evaluation methods as those applied in lawful expropriation. This study establishes that the issue is whether the investor has the rights in the property in terms of acquisition and investment? Expropriation whether lawful or unlawful, this question has been answered by decided cases discussed in the paper. Therefore, it should be known that hosting state has to exercise expropriation of investors property for fair reasons and grounds and any form of expropriation must be followed by fair and just compensation.

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