"Compensatory Standards for Expropriated Property in International Dispute Resolution"

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Abstract

The debate surrounding the proper standard of compensation for expropriated property has changed significantly over the past decades. While the main debate continues to be one of "appropriate" compensation versus "full" compensation, recent case law has shown that this is a debate in name only. Practically speaking, the doctrine of full compensation is the authoritative standard in present-day investment disputes.

Countries favouring a less-than-full standard of compensation need to accept the full compensation standard for expropriated property as a *fait accompli*. Full compensation as state practice has been entrenched to such a degree through Bilateral Investment Treaties and investment dispute decisions that it can be considered *de facto* customary international law. While the respective bargaining positions of developed and developing states remains inequitable, and will likely remain so in the near future, continuing uncertainty cannot possibly redress this problem. The inherent political risk involved with foreign investment would be reduced by unanimity in compensation standards for expropriated property. This would benefit developing states by increasing economic prosperity through greater foreign direct investment[1] (FDI) in states which need capital investment in infrastructure, resource extraction and labour markets the most.[2]

[1] The International Monetary Fund defines FDI as an "investment that reflects the objective of obtaining a lasting interest by a resident entity in one economy in an enterprise resident in another economy".

[2] See Linwood T. Geiger, "Expropriation and External Capital Flows" (1989) 37 Economic Development and Cultural Change at pg. 550: "It is interesting that, when uncompensated expropriations were settled, capital flows increased substantially, frequently at higher levels than before expropriations. The large increase in capital flows upon settlement of an expropriation occurred as frequently for direct foreign investment as for the other categories of capital flows. Apparently, multinational executives believe that

Background

In the turbulent aftermath of de-colonization, many newly independent states expropriated property which was owned by foreign investors. These states did not prescribe to the customary international law of the time which was instituted by their former colonizers and lacked their input. The willingness to expropriate or nationalize also arose out of the unequal economic concessions granted by the newly independent states to their former colonial masters.[3] The foreign investors sought compensation for their loss; the newly independent states lacked the necessary capital to compensate. The deadlock further intensified in 1962 when the United Nations General Assembly voted for Resolution 1803,[4] *Permanent Sovereignty over Natural Resources*, which stated that expropriation was the inherent right of a state and that compensation would be "appropriate", expressly avoiding the "full" standard favoured by capital exporting states.[5] While not binding, Resolution 1803 was supported by 87 states, with two votes against and twelve abstentions.[6] The ambiguous nature of "appropriate" compensation led to what some commentators have termed the "Great Debate": a high stakes dialogue between international actors seeking to determine the correct level of compensation for nationals suffering a loss resulting from expropriated property.

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the potential risk-adjusted return on investment for future investments is attractive in countries where expropriations are adequately settled."

[3] John Currie, Craig Forcese & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory* (Toronto: Irwin law, 2007) at pg 45.

[4] GA Res. 1803 (XVII), 17 UN GAOR Supp. (No. 17) at 15, UN Doc. A/5217 (1962), reprinted in 57 AJIL 710 (1963), 2 ILM 223 (1963).

[5] *Ibid*., article 4.

[6] Jonathan Thomas & Tim Worral, "Foreign Direct Investment and the Risk of Expropriation" (1994) 61 The Review of Economic Studies, pg 89.

The sides were divided along fairly predictable lines. The industrialized Capital Exporting States (CES) favour the Hull Formula, coined after former American Secretary of State, Cordell Hull. This approach states that full compensation that is "prompt, adequate and effective" should be paid for property which was subject to a governmental taking.[7] Less developed Capital Importing States (CIS) clamoured for an 'appropriate' compensation standard, which takes into account the domestic laws in place at the time of expropriation and any other factor which the host state deems relevant. Today, the Great Debate continues. However, it is clear that in recent times the principle of full compensation has been gaining momentum. Indeed, much has changed since the initial wave of de-colonization concluded. The global economic environment has witnessed a significant shift away from the protectionism which characterized the post World War Two era. Developing states increasingly realize that foreign investment is a catalyst to development, not an inhibitor. Bilateral investment treaties (BITs) are central to this rapprochement, enabling greater investor confidence by reducing the political risk associated with investing abroad.

Before proceeding, it must first be noted that the terms expropriation and nationalization are not interchangeable. This paper will adopt the definition used by J. Frederick Truitt:

> "Expropriation is defined as the forced divestment of equity ownership of a foreign direct investor. The divestment must be involuntary, against the will of owners and/or managers of the enterprise, and must involve the divestment of ownership. By contrast, nationalization is when a government decree targets a broad class of property or resources, such as a natural resource. This would

[7] For the purposes of this paper, a 'taking' may refer to an expropriation, nationalization or both.

affect all foreign actors who have invested in that industry."[8]

To adequately understand the breadth of this issue, the state of the law regarding expropriations and nationalization must first be canvassed. This analysis will take into account precedents and guidelines established by international bodies and tribunals in order to arrive at a conclusion that the full compensation standard is approaching recognition as customary international law.

Compensatory Valuation: In Theory and Practice

A fundamental problem in reaching consensus between competing state interests has been the ambiguity surrounding the terms "full" and "appropriate" compensation. Both standards have been evoked by arbitrators and courts through the decades; however none have been conclusively defined. This problem is exacerbated by the inconsistencies found in academic writings, with different authors offering different definitions of full and appropriate compensation. The language used in BITs and other primary sources must be examined. BITs which state a preference for full compensation say no more than the prompt, adequate and effective terminology already in use. This paralleling of terms has been widely used throughout the case law.[9] Full compensation will rarely, if ever, mean less than the market value of the seized property or assets.[10] Such valuation does not take into account any diminished value which may have occurred as a result of an

[8] J. Frederick Truitt, "Expropriation of Foreign Investment: Summary of the Post World War II Experience of American and British Investors in the Less Developed Countries" (1970) Journal of International Business Studies at page 57.

[9] Paul E. Comeaux & Stephan Kinsella, *Protecting Foreign Investment Under International Law: Legal aspects of Political Risk* (Dobbs Ferry, N.Y.: Oceana Publications, 1997) at 24.

[10] Paul E. Comeaux & Stephan Kinsella, *Protecting Foreign Investment Under International Law: Legal aspects of Political Risk* (Dobbs Ferry, N.Y.: Oceana Publications, 1997) at 32.

expropriation or the possibility of expropriation. Generally, the only circumstance which could lead to a less than full compensation standard for foreign investors is where, as arbitrator Lagergren noted in the *INA* decision, seized property was taken as part of 'large scale nationalizations'.[11] In essence, there are clearly defined minimum standards of full compensation: for it to be prompt, adequate and effective and that the value not be less than the market is willing to pay, notwithstanding any decrease in value as a result of expropriation or the possibility of expropriation. Beyond the minimum standard, much uncertainty remains. This was reflected by Comeaux and Kinsella:

> "Full compensation has been arrived at by a variety of methods, depending on a variety of factors... No preference has been shown for a particular method… It would seem that the assessment of full compensation is at the present time filled with variables and is certainly not a very scientific process."[12]

On the other side of the compensation debate is that of "appropriate" or fair compensation. The use of "appropriate" has itself been problematic for developing states because of its ambiguous wording. Such terminology inhibits easy qualification. Consequently, arbitrators have looked to the more easily defined "full" compensation standard.[13] It is arguable that the choice of terminology between full and appropriate has had little impact on the compensation standard. Today, as in the past, the type of compensation offered has as much to do with the circumstances surrounding a taking as it does the terminology used in investment agreements. To illustrate this point, it is an accepted fact that investment contracts preferring "appropriate" compensation have been

[11] Paul E. Comeaux & Stephan Kinsella, *Protecting Foreign Investment Under International Law: Legal aspects of Political Risk* (Dobbs Ferry, N.Y.: Oceana Publications, 1997) at 499.
[12] *Ibid.*
[13] *Ibid.*

tantamount to the Hull formula in practice, depending on the severity of the taking.[14] Of course this may also imply that appropriate may amount to no compensation at all, if the circumstances so warrant. However, the terminology used for compensation standards are more properly viewed as a range of possibilities rather than a formula written in stone.[15] The lack of certainty on the part of courts and tribunals in determining what is meant by "full" and "appropriate" is indeed a product of ambiguous language. However, the overarching contextual factors may prove more pertinent than the actual phraseology used in any document reached by two high contracting parties.

Rights of Expropriating States at International Law

As stated above, the issue of expropriation and nationalization arose primarily as a result of the process of de-colonization. While it has long been settled that sovereign states have the right to expropriate or nationalize property, many of the newly independent states were rightfully hostile to a preponderance of foreign capital in their domestic markets, as they saw it as a less formalized mode of subjugation by former colonial masters.[16] Hostility towards former colonial powers manifested itself on the floor of the United Nations General Assembly in 1973. The General Assembly, its ranks swollen with the addition of recently de-colonized states, passed Resolution 3171 which became known as the *Charter of Economic Rights and Duties of States*[17] (CERDS).

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[14] M. Sornarajah, *The International Law on Foreign Investment*, 2d. ed. (Cambridge, UK: Cambridge University Press, 2004), pg 230.

[15] *Ibid.*

[16] *Supra* note 6 at pg 91.

[17] GA Res. 3171 (XXVII), Permanent Sovereignty over Natural Resources, 28 UN GAOR Supp. (No. 30) at 52, UN Doc. A/9030 (1973), reprinted in 13 ILM 238 (1974).

CERDS declared that states had the right to expropriate or nationalize foreign property, and should any dispute arise, the applicable laws would be those of the host state. CERDS expressed that appropriate compensation should be paid to foreign investors, taking into account circumstances which the host state deems relevant.[18] Although pronouncements made by the General Assembly have no legal force, unlike those of the United Nations Security Council, CERDS nonetheless laid out the position of many developing states in regards to compensation standards in investment disputes. Unsurprisingly, the most developed states did not approve of the language used by CERDS and continue to do so today. The industrialized states viewed CERDS and Resolution 1803 as a threat to the 'stability of expectations'[19] their investors were entitled to expect in their dealings abroad. Nonetheless, developing states have looked to CERDS as an authoritative affirmation of their position since 1973. However, it will be evidenced that in recent times the position of developing states regarding CERDS has been undermined over the years by the considerable increase in BITs.

Duties of Expropriating States at International Law

The World Bank's *Guidelines on the Treatment of Foreign Direct Investment* and the United Nations Conference on Trade and Development (UNCTAD) both assert that states may not expropriate unless the taking is for a public purpose, the taking is in accordance with applicable laws and due process, it is non-discriminatory, and full

[18] *Supra* note 10, s. 2(c).
[19] Emily Carasco, "Foreign Investment: CERDS and Nationalization of Natural Resources Industries" (Cambridge, MA: Harvard University Press, 1979) at pg 11.

compensation is paid.[20] Case law affirmed this principle well before the United Nations of today came into existence. The 1926 decision of the now defunct Permanent Court of International Justice in the *Case Concerning Certain German Interests in Polish Upper Silesia*[21] has served as a basis for many subsequent decisions concerning expropriation. The court unequivocally stated that the rights of foreign investors have to be respected and that takings must be for a public purpose and non-discriminatory. Beyond this, the guidelines found in multilateral organizations such as the WTO may also be taken as authoritative, due to the large amount of states which have attained membership in such groupings and which presumably subscribe to such *dicta*. Having established the contextual factors which are pertinent to this issue, the criteria for customary international law will be analyzed to make the case that full compensation is indeed a custom of international law.

Full Compensation as Custom: The Widespread Practice of States

The language found in present day BITs regarding governmental takings, which by and large affirm the standard of full compensation, reflects a growing consensus among states that full compensation is customary international law. Customary international law is seen as a balance to the doctrine of absolute state sovereignty. The sources of customary international law are many and can be derived from international conventions, through widespread practice of states, general principles of law and the

[20] UNCTAD, *Investor-State Disputes Arising From Investment Treaties: A Review*, UNCTAD Series on International Investment Policies for Development, UN ITE/IIT/2005/4, New York and Geneva, 2005.

[21] *Case Concerning Certain German Interests in Polish Upper Silesia*, PCIJ, Ser. A., No. 7, 1926.

writings of respected legal authors.[22] The full compensation standard is increasingly a widespread practice amongst states and is legitimized by tribunals and other dispute settlement mechanisms. This leads to a compliance pull on states which continue to reject full compensation as an authoritative standard. To effectively gauge how BITs are contributing to an increasing widespread practice among states, it is important to first understand their characteristics.

Bilateral Investment Treaties and Full Compensation: The New Standard?

A BIT is an agreement establishing the terms and conditions for investment by the nationals or companies of two states seeking closer economic integration. Generally, BITs offer a set of guarantees to the investors of one contracting state in the territory of the other signatory state.[23] Such guarantees often include provisions for protection from expropriation, free transfer of capital and national treatment. A distinctive feature of many BITs is that they allow for alternative dispute resolution mechanisms, whereby an investor whose rights under the BIT have been violated could have recourse to international arbitration.[24]

Initially, BITs[25] were between developed and developing states. The developed states sought to conclude BITs with developing states in order to guarantee higher legal

[22] Paul E. Comeaux & Stephan Kinsella, *Protecting Foreign Investment Under International Law: Legal aspects of Political Risk* (Dobbs Ferry, N.Y.: Oceana Publications, 1997) at 24.

[23] Oscar Schachter, **"**Compensation for Expropriation" (1984) 78 The American Journal of International Law at 123.

[24] Jarrod Wong, "Umbrella Clauses In Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries In Foreign Investment Disputes" (2007) 14 George Mason Law Review at 135.

[25] For an alternate definition of a BIT, the United Nations Conference on Trade and Development (UNCTAD) defines a Bilateral Investment Treaty as: "…agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in their country."

standards and protections for their nationals investing abroad. Typically, developing states would sign a BIT in order to provide a more favourable climate for foreign investment. This pattern has changed significantly since the 1980s. Since then, BITs are increasingly between developing states. Presently, BITs have been concluded by more developing states than developed states.[26] Thus it is indisputable that the use of BITs is increasingly a widespread state practice, especially so in the developing world. It is also undeniable that the ascendancy of BITs has paralleled the significant decrease in expropriations worldwide.[27] This fact can be attributed to the decreased political risk which BITs give foreign investors.[28] What remains unclear is the extent to which this trend influences the debate over the standard of compensation for governmental takings.

Recent Bilateral Investment Treaties: Towards Harmonization

Out of the many BITs which have come into force, the vast majority of them contain provisions on the compensation standard for governmental takings of property owned by foreign investors. The analysis of BITs will look at two different perspectives: that of the CES, as epitomized by the United States, and the perspectives of the developing world. It will be shown that the developing world, historically an ardent opponent of the full compensation standard, has begun to realign its position to reflect the practical exigencies of a world economy largely dependant on capital flows.

The United States-Slovakia BIT,[29] which entered into force in 2004, was one of the most recent trade investment treaties ratified by the United States. The other

[26] Refer to Appendix A, Tables 2 and 4.
[27] Refer To Appendix A, Table 1.
[28] *Supra* note 15.
[29] U.S., Congress, *US-Slovakia Bilateral Investment Treaty*, 108th Congress, 2nd Session, Treaty Doc 108-19.

signatory, Slovakia, is presently a member of the European Union and has a quickly developing economy, largely a result of new foreign direct investment arising out of its accession to the European Union.[30] The text of the treaty, like the ones that follow, involve a clause on compensation should an expropriation take place. The United States-Slovakia BIT mandates that expropriation can only occur in accordance with the standards of international law. Qualifying this further, takings for a public purpose, without discrimination and under due process of law are the only circumstances which give rise to a 'legal'[31] taking. The treaty further states that compensation for such takings shall be prompt, adequate, and effective.[32] Furthermore, the US-Slovakia BIT delineates the respective states' position on the meaning of prompt, adequate and effective compensation:

> "Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable."[33]

As such, the US-Slovakia BIT clearly states a preference for the Hull formula. While it may be said that Slovakia, as a quickly developing market economy within the European Union, has an interest to promote the Hull formula in order to protect its own investors abroad, the same cannot be said for the following two states which signed BITs with the United States. Mozambique and Ecuador, respectively, cannot be said to be industrialized

[30] Helena Tang, *Winners and Losers in EU Integration: Policy Issues for Central and Eastern Europe*. (Washington, D.C.: World Bank Publications, 2000).
[31] It is important to note that takings which are legal still require compensation.
[32] *Ibid.*, Article 3(1).
[33] *Ibid.*, Article 6.

societies. Both states are riddled with extreme poverty[34] and have no significant investors who operate abroad.[35] It cannot be said that either state has an interest in the Hull formula for the protection of investors who operate abroad. Yet both states have signed BITs with the United States, with Ecuador signing in 1997[36] and Mozambique in 1995.[37] In both treaties it is affirmatively stated that prompt, adequate and effective compensation is the norm to be followed. Similarly, the method of valuating a loss of property is the same formula as used in the US-Slovakia treaty. While the investment treaties of two less developed states cannot be said to be representative of the whole developing world, it is nonetheless indicative of the role BITs are having in overcoming the developing world's traditional opposition to full compensation. Although the United States, as the world's leading economic power, can certainly dictate to impoverished states the wording of bilateral treaties, this unfortunate reality nonetheless confirms that developing countries are increasingly reliant on capital flows from industrialized states. Presently, the United States has 40 BITs[38] with developing countries, with six more which have yet to be ratified.[39] All of these BITs affirm the Hull formula as the standard for compensation, with similar valuation methods. It is important to note that in 1973, the vast majority of these states voted for CERDS.[40]

Apart from BITs concluded between an advanced industrialized state and a developing state, where questions of inequality and economic coercion invariably arise,

[34] CIA World Factbook 2007 - https://www.cia.gov/library/publications/the-world-factbook/index.html
[35] *Ibid.*
[36] U.S., *US–Ecuador Bilateral Investment Treaty*, 1997, 103rd Congress 1st Session, Senate Treaty Doc. 103-15.
[37] Dinah Shelton, "Righting Wrongs: reparations in the Articles on State Responsibility" (2002) 96 The American Journal of International Law, pg 836.
[38] *Supra* note 17. For a complete list of states which have signed BITs with the United States, refer to Table 5 of Appendix A.
[39] *Supra* note 17 at 144.
[40] *Supra* note 10.

there exists a substantial amount of investment treaties concluded exclusively between developing states. For example, the Cameroon-Guinea BIT states that compensation in the event of expropriation shall "be prompt compensation of an effective and adequate remedy".[41] The BIT between Costa Rica and Venezuela, a country whose president Hugo Chavez is vocally against globalization and neo-colonialism, states that compensation shall be "mediante pronta, adecuada y efectiva indemnización."[42] Even BITs which do not call for prompt, adequate and effective compensation, such as the Uzbekistan-Bangladesh BIT[43] or the EU-China BIT,[44] contain valuation methods for losses suffered by foreign investors which are substantively the same as the method used by the United States or any other industrialized state.[45]

Though this paper cannot possibly comment on every BIT concluded between states, so as to conclusively affirm a new customary international law, it is undeniable that a trend has emerged amongst developing states favouring full compensation, which is prompt, adequate and effective[46], or barring the use of Hull terminology, the inclusion of valuation methods which are substantively similar. The vast array of BITs concluded between high contracting parties in different economic circumstances leads to a conclusion that developing states are increasingly receptive to a standard of full compensation. Developing states have realized that their immediate post-colonial

[41] Accord Entre Le Gouvernement De La Republique Du Cameroun et Le Gouvernement de la Republique de Guinee Relatif a la Promotion et la Protection Reciproques des Investissements, (Cameroon - Guinea BIT), Article 6(1), UNCTAD Publications.
[42] Aprobacion del Acuerdo para la Promocion y Protection Reciproca de Inversiones Entre la Rrepublica de Costa Rica y La Republica de Venezuela (Costa Rica – Venezuela BIT), 1997, UNCTAD Publications.
[43] Agreement between the Government of the People's Republic of Bangladesh and the Government of the Republic of Uzbekistan on reciprocal protection and promotion of investments, (Uzbekistan – Bangladesh BIT), 2000, UNCTAD Publications.
[44] EU-China Bilateral Investment Treaty.
[45] *Ibid*, article 2(3)(c).
[46] *Supra* note 15 at 5. The Iran Claims Tribunal has several times equated full compensation with 'prompt, adequate and effective' compensation.

economic restructuring, largely based on protectionism and hostility to foreign investment, has all but failed. The failure became more pronounced with the conclusion of the Cold War, when various client states which had relied on the financial assistance of both the United States and Soviet Union, stopped receiving subsidies. Developing states realize today that prosperity cannot come without the participation of foreign expertise and capital. Thus, the full compensation standard has proven beneficial to both developed and developing states. By strengthening the stability of expectations, developing states have been able to attract more foreign investment. The level of entrenchment that the full compensation standard has received is indicative in UNCTAD's annual report which expressly omits the debate over compensation for expropriated foreign property on the list of 'uncertainties' surrounding expropriation. Rather, the biggest issues in the present day are the scope of regulatory deprivations which may amount to expropriation and the acceptable standard for national treatment.[47] As such, it clear that BITs are increasing in scope and scale. However, to establish a link between the undeniable increase in BIT signings and the author's contention of a growing consensus on the full compensation standard, or Hull formula, the textual meaning of such BITs needs to be analyzed by referring to case law which has given compensation terminology a practical meaning.

Dispute Settlement at International Law: The Case for Opinio Juris

Investor-state disputes have grown over the years, with almost fifty disputes arising in 2005 alone.[48] At time of writing, there are over 230 cases currently before

[47] *Supra* note 13.
[48] *Supra* note 13.

various investment dispute settlement tribunals.[49] Of this amount, over half are heard before the International Centre for the Settlement of Investment Disputes[50] (ICSID), an independent entity, albeit with close links to the World Bank. Currently, ICSID has over 144 member states.[51] The World Trade Organization also has its own dispute settlement mechanism called the Dispute Settlement Body. The usefulness of these bodies is that their decisions are binding and that judgments rendered need to be adhered to strictly and in a timely manner.[52] The importance of such dispute settlement entities has grown due to market liberalizations undertaken by developing states since the mid 1980s.[53] Developing states have increasingly enacted domestic investment laws which allow greater certainty to foreign investors, thereby reducing the political risk[54] associated with investing abroad. Furthermore, the proliferation of BITs signed by developing states has been interpreted by dispute resolution panels as "strong evidence that a State intended (at least at the time of the execution of the treaty) to treat FDI fairly".[55] Even more 'traditional' dispute resolution bodies, where individuals generally have no standing,[56] such as the International Court of Justice, have relied heavily on precedent and not the general principles of law as enumerated in the Statute of the International Court of

[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*
[52] *Supra* note 3 at 47.
[53] *Supra* note 15 at 27.
[54] *Ibid.* Comeaux and Kinsella define Political Risk as "the risk that the laws of a country will change to investors' detriment after they have invested capital in the country, thus reducing the value of their investment."
[55] *Ibid.*
[56] This is the general rule. Exceptions are made in situations of gross human rights violations such as war crimes or crimes against humanity, for example.

Justice.[57] What's more, these institutional tribunals openly state that full compensation is a basic principle of customary international law.[58]

ICSID and other similar dispute resolution bodies are a significant break from the past as they allow individuals and corporations to have standing, unlike the traditional *fora* of international law. The decisions issued by these tribunals are binding and are generally not subject to appeal in domestic courts.[59] Tribunal decisions will be examined to conclude that a fairly clear and substantive body of case law in recent times has awarded full compensation in various circumstances, amounting to *opinio juris* in support of full compensation as customary international law.

The importance of determining what type of substantive law is applicable to an investment dispute cannot be understated. Such a determination is relevant to the stakeholders as it determines the consequences of the breach. For the purposes the author's argument, the realm of possibilities is limited to recent[60] cases where there are no choice-of-law clauses. To better understand this limitation, a choice-of-law clause is a condition in an investment contract between two high contracting parties to settle a dispute, should one arise, in a pre-determined way. More often than not, a choice-of-law clause will include a specific body or set of laws to use, such as the domestic law of a host state. As such, cases lacking a choice-of-law clause go more to customary international law, as more contextual factors are used by arbitrators or courts in reaching

[57] Patrick M Norton, "A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation" (1991) 85 The American Journal of International Law, pg 504.
[58] *Supra* note 13.
[59] *Supra* note 3 at 39.
[60] Older cases such as *Chorzow Factory* were important in laying the groundwork for the debate surrounding a compensation standard. However, recent cases have all but overruled the reasoning in *Chorzow* which called for 'the payment of fair compensation'.

a decision on the standard of compensation. Indeed, the recent *Antoine Getz v. Burundi*[61] case showed that in the absence of a choice-of-law clause, the relevant law can be implied by the method of dispute resolution. In *Antoine Getz*, it was ruled that an agreement between two states to bring disputes to international arbitration brings with it a strong inference of international law as the applicable law. In the Iran-United States Claim Tribunal[62], international law has consistently been invoked even in the presence of choice-of-law clauses. Arbitrators on the tribunal justify this by pointing to the international character of the panel and dispute. As such, international law can be said to supersede domestic law where disputes are settled through international arbitration, even in the presence of a choice-of-law clause to the contrary. Consequently, it can be surmised that the decisions of these tribunals are based on the customary international law regarding the compensation of expropriated or nationalized property.

Equity at International Arbitration

Expropriation activity fell from an average of twenty-five per year in the mid 1970s, to less than five a decade later[63] and an average of zero in the mid 1990s. The strong protection afforded to investors through international dispute resolution is primarily responsible. For example, an expropriation deemed an "unlawful taking" has been widely treated as discriminatory by adjudicators, warranting full compensation. The consistency in reasoning showed by arbitrators in cases such as *LIAMCO*[64], *INA*[65] and

[61] *Antoine Getz v. Burundi* (1999), 15 ICSID Review – FILJ 457 (2000).
[62] For more on the Iran-United States Claim Tribunal, refer to Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution", (1990) 84 AJIL 104.
[63] Refer to Table 1 of Appendix A.
[64] *LIAMCO v. Libya* (1981), 20 ILM 1.
[65] *INA Corp. v. Iran* (1985), 8 Iran-U.S. C.T.R. 373.

Libyan Oil[66] has demonstrably reduced expropriations of the unlawful variety. This case law has arisen due to an increase of BITs which assert full compensation as the method of valuation. More compelling is that roughly sixty claims tribunals were created to resolve compensation disputes before the beginning of World War Two. Of these, none held that the appropriate measure of compensation was less than "the full value of the property".[67] A survey of available tribunal decisions and case law from a broad variety of *fora* makes clear that the "appropriate" standard of compensation has not been given positive treatment. Judge Allison in the *Shahin Shane Ebrahimi v. Government of the Islamic Republic of Iran*[68] stated that Resolution 1803 was

> "…far from being declarative of customary international law, represented the design of certain countries to use the forum of the General Assembly to alter - not reflect the existing international regime in an attempt to create a new international economic order… In the 1970s, when the influence of these forces reached the peak of their influence, it is clear that such a repudiation [of the full compensation standard] did not occur."[69]

Ad hoc tribunals, and more recently institutional bodies such as ICSID, have exhibited tendencies to closely follow past decisions for a sense of cohesiveness and clarity. An example of this trend can be found in the *Libyan Oil* case, where Judge Lagergren of Sweden recognized the heavy reliance which international arbiters must place on the past "case law of international tribunals."[70]

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[66] *British Petroleum Exploration Co. v. Libyan Arab Republic* (1973), 53 ILR 297.
[67] *Supra* note 46 at 476.
[68] *Shahin Shane Ebrahimi v. Government of the Islamic Republic of Iran* Iran-US Claims Tribunal, 1994.
[69] David P. Stewart, "The UN Convention on Jurisdictional Immunities of States and Their Property" (2005) 99 The American Journal of International Law, pg. 194.
[70] *Ibid.* page 466.

More recently, decisions have consistently affirmed the principle of full compensation. The 1982 case of *Benvenuti et Bonfant v. People's Republic of Congo*[71] concluded that the overriding concern was equity in investment disputes, and further stated that full compensation is a principle of international law and was in keeping with the fundamental principle of equity.[72] The *AGIP*[73] case produced a similar result, with the court placing high emphasis on equity and likening the equity principle to that of full compensation. Similar reasoning has been attributed to various *ad hoc* international dispute settlement mechanisms.[74] The message is unmistakeable: states which expropriate the property of foreigners are will compensate pursuant to the customary international law of valuation which requires the payment of full value measured where possible by current market prices.[75] As Patrick Norton notes, "Although no tribunal has expressly invoked the Hull formula, the result has been the same"[76].

The only aberrations from this norm have come from dissents in arbitration decisions. Ameli, an arbitrator the *INA Corp. v. Iran* decision[77] stated that "appropriate" compensation was required, using the language of CERDS and interpreting "appropriate" as less than full value. Ameli also complained of a 'common law bias' for an over-reliance on precedent in reaching judgments. However, the reliance on precedent may be equally attributable to the resistance exhibited by developing states. The lack of coherence and unanimity has made it essential for arbitrators to find commonality in their decisions. The long list of case law espousing full compensation is certainly the most

[71] *Benvenuti et Bonfant v. Congo* (1982) 21 ILM 740, 430, 461.
[72] *Supra* note 46 at pg 489.
[73] *AGIP v. Congo* (1982) 21 ILM 726, 461.
[74] *Supra* note 46 at pg 490.
[75] *Ibid.* at page 490.
[76] *Ibid.* page 491.
[77] *Supra* note 54.

potent way for decisions to be justified in favour of the Hull formula.[78] Indeed, *stare decisis* as a guiding principle is inherent in all judicial reasoning.[79]

Full compensation as a universal standard is increasingly accepted at international law. More importantly, binding arbitral bodies have all but formalized the Hull formula by consistently judging in favour of, at a minimum, the making whole of losses suffered by an investor. It can be reasonably stated that full compensation is now near formalization as customary international law. Widespread practice between both developing and developed states, espousing full compensation which is prompt, adequate and effective makes this clear. Considerable jurisprudence has entrenched the Hull formula as the standard in investment disputes. Having established this, it is necessary to determine the actual meaning of 'full compensation', in order to adequately understand its interpretation in practice and whether this constitutes a significant break from the past.

Conclusion

This paper has shown that full compensation at international law is an increasingly accepted norm for the resolution of investment disputes. The large number of bilateral investment treaties between both developing and developed states, in addition to the authoritative body of case law as evidenced by past and recent arbitration decisions attest to this fact. The 'Great Debate' is no longer a substantive divide between the states of the world. Indeed, the adoption of full compensation as a global standard has had the effect of integrating developing states in the global economic system. This has allowed massive capital inflows to struggling economies that need investment the most.

[78] *Supra* note 16.
[79] *Supra* note 46 at pg 499.

Admittedly, the adoption of full compensation as customary international law has not been universally recognized. However, in practice, states realize that their own interests are not served by continuing division. In the 1960s, developing states had the right to expect a compensation standard which was detrimental to a foreign investor; as such grievances often arose out of concessions which were unequal and severely prejudicial to the host state. In part, this was the result of a lack of expertise on the part of policy makers representing developing states. Expropriations in the immediate aftermath of de-colonization were, to a significant extent, based on ideological considerations.[80] Today, this is no longer the case. Developing states have access to expert advice and benefit from a multilateral economic system which incorporates the majority of trading states and subjects them to similar standards. The significant decrease in expropriation activity has further made a compensation standard nearly moot. While this author readily admits that BITs are not inherently equal, with investors from developed states still receiving more than their fair share of the spoils, the growing consensus arising out of the dissemination of BITs can only be a positive force, all things considered. As such, this paper recommends that the policy makers of developing states recognize full compensation as a *fait accompli*. The next great debate should not dwell on an already entrenched international standard but rather on how to make BITs more equitable. The only effective way to eliminate the political risk associated with foreign investment altogether is for the terms of investment to be more conducive to sustainable growth in developing states. This can be done by limiting the availability of profit repatriation and by mandating tough sanctions for corporations which do not follow labour regulations. Such an

[80] Michael S. Minor, "The Demise of Expropriation as an Instrument of LDC Policy, 1980-1992" (1994) 25 *Journal of International Business Studies*, pg. 179.

endeavour will require a shared sense of purpose and conviction between developing states, something which has not been witnessed since CERDS over thirty years ago. With perseverance, such a new endeavour will end on a more positive note.

Appendix A

Table 1

TABLE 1
Expropriation Acts by Year

Year	Number of Acts	Percentage of Total	Number of Countries Expropriating
1960	6	1.0	5
1961	8	1.4	5
1962	8	1.4	5
1963	11	1.9	7
1964	22	3.8	10
1965	14	2.4	11
1966	5	.9	3
1967	25	4.3	8
1968	13	2.3	8
1969	24	4.2	14
1970	48	8.3	18
1971	51	8.9	20
1972	56	9.7	30
1973	30	5.2	20
1974	68	11.8	29
1975	83	14.4	28
1976	40	6.9	14
1977	15	2.6	13
1978	15	2.6	8
1979	17	2.9	13
1980	5	.9	5
1981	4	.7	2
1982	1	.2	1
1983	3	.5	3
1984	1	.2	1
1985	1	.2	1
1986	1	.2	1
1987	0	.0	0
1988	0	.0	0
1989	0	.0	0
1990	0	.0	0
1991	0	.0	0
1992	0	.0	0
	575*	99.8**	

Source: 1960-1979 data are from Kobrin [1984: 333]. 1980-1992 data compiled by the author (see Note 1).

*date is missing for four acts

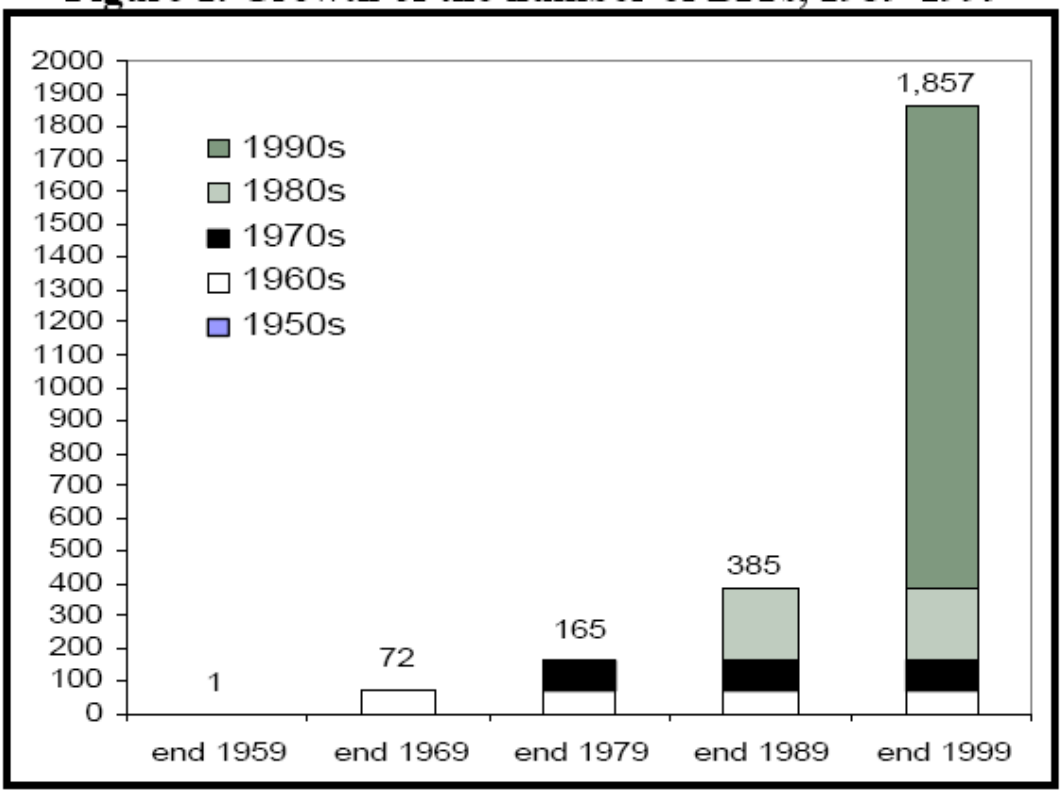
Table 2: Share of BITs per country by region, as of 2002

Region	Number of BITs	Economy	Average BITs /Economy
Developed countries	1170	26	45
Developing countries	1745	150	12
Africa	533	53	10
Latin America and the Caribbean	413	40	10
Asia and the Pacific	1003	57	18
CEE	716	19	38

(Source: UNCTAD, BIT database)

Table 3. Growth in the number of BITs, 1959-1999

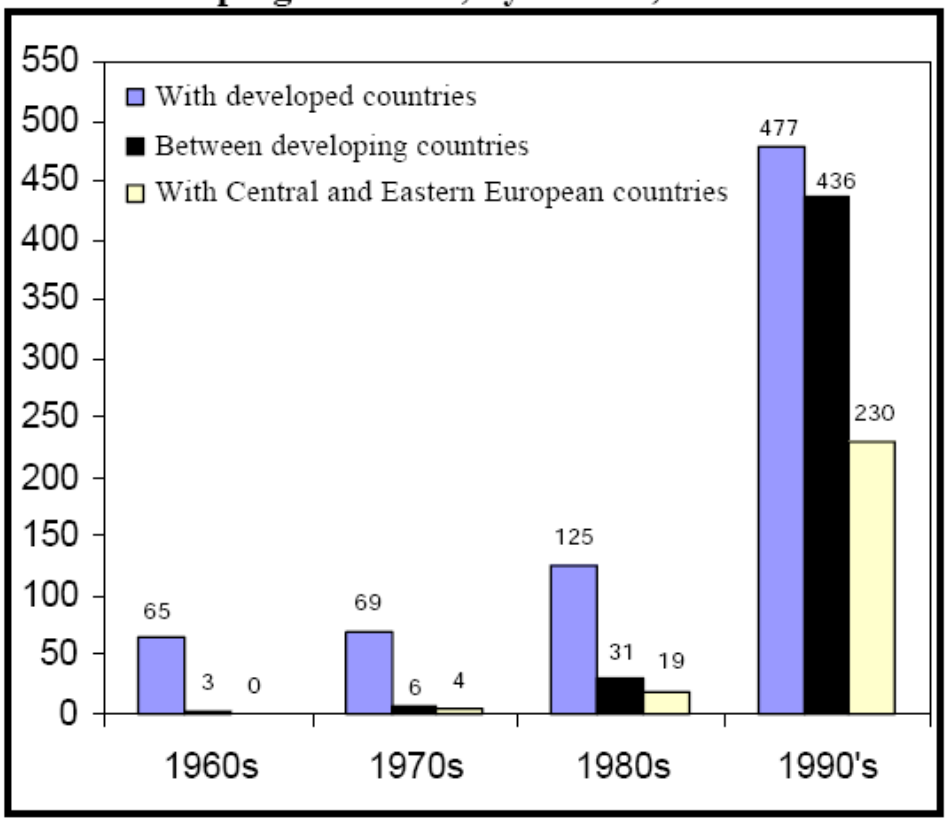
Figure 1. Growth of the number of BITs, 1959-1999



Source: UNCTAD database on BITs.

Table 4

Figure 2. Number of BITs concluded by developing countries, by decade, 1960-1999



Source: UNCTAD database on BITs.

Table 5: Bilateral Investment Treaties entered into by the United States of America

Up to date as of November 1, 2006

In force

1. Albania: signed January 11, 1995, entered into force January 4, 1998
2. Argentina: signed November 14, 1991, entered into force October 20, 1994
3. Armenia: signed September 23, 1992, entered into force March 29, 1996
4. Azerbaijan: signed August 1, 1997, entered into force August 2, 2001
5. Bahrain: signed September 29, 1999, entered into force May 30, 2001
6. Bangladesh: signed March 12, 1986, entered into force July 25, 1989
7. Bolivia: signed April 17, 1998, entered into force June 6, 2001
8. Bulgaria: signed September 23, 1992, entered into force June 2, 1994
9. Cameroon: signed February 26, 1986, entered into force April 6, 1989
10. Democratic Republic of the Congo (Kinshasa): signed August 3, 1984, entered into force July 28, 1989
11. Republic of the Congo (Brazzaville): signed February 12, 1990, entered into force August 13, 1994
12. Croatia: signed July 13, 1996, entered into force June 20, 2001
13. Czech Republic: signed October 22, 1991, entered into force December 19, 1992
14. Ecuador: signed August 27, 1993, entered into force May 11, 1997
15. Egypt: signed March 11, 1986, entered into force June 27, 1992
16. Estonia: signed April 19, 1994, entered into force February 16, 1997
17. Georgia: signed March 7, 1994, entered into force August 17, 1997
18. Grenada: signed May 2, 1986, entered into force March 3, 1989
19. Honduras: signed July 1, 1995, entered into force July 11, 2001
20. Jamaica: signed February 4, 1994, entered into force March 7, 1997
21. Jordan: signed July 2, 1997, entered into force June 12, 2003
22. Kazakhstan: signed May 19, 1992, entered into force January 12, 1994
23. Kyrgyzstan: signed January 19, 1993, entered into force January 12, 1994
24. Latvia: signed January 13, 1995, entered into force December 26, 1996
25. Lithuania: signed January 14, 1998, entered into force November 22, 2001
26. Moldova: signed April 21, 1993, entered into force November 25, 1994
27. Mongolia: signed October 6, 1994, entered into force January 1, 1997
28. Morocco: signed July 22, 1985, entered into force May 29, 1991
29. Mozambique: signed December 1, 1998, entered into force March 3, 2005
30. Panama: signed October 27, 1982, entered into force May 30, 1991. Amendment: signed June 1, 2000, entered into force May 14, 2001
31. Poland: signed March 21, 1990, entered into force August 6, 1994
32. Romania: signed May 28, 1992, entered into force January 15, 1994
33. Senegal: signed December 6, 1983, entered into force October 25, 1990
34. Slovakia: signed October 22, 1991, entered into force December 19, 1992
35. Sri Lanka: signed September 20, 1991, entered into force May 1, 1993

36. Trinidad and Tobago: signed September 26, 1994, entered into force December 26, 1996
37. Tunisia: signed May 15, 1990, entered into force February 7, 1993
38. Turkey: signed December 3, 1985, entered into force May 18, 1990
39. Ukraine: signed March 4, 1994, entered into force November 16, 1996
40. Uruguay: signed November 4, 2005, entered into force November 1, 2006

Not yet ratified

1. Belarus: signed January 15, 1994, not yet ratified
2. El Salvador: signed March 10, 1999, not yet ratified
3. Haiti: signed December 13, 1983, not yet ratified by Haiti or the U.S.
4. Nicaragua: signed July 1, 1995, not yet ratified by the U.S.
5. Russia: signed June 17, 1992, not yet ratified by Russia
6. Uzbekistan: signed December 16, 1994, not yet ratified
7. Pakistan: negotiations announced September 28, 2004, began February 7, 2005

Source: UNCTAD database on BITs