BILATERAL INVESTMENT TREATIES AND ARBITRAL AWARDS: A COMPARATIVE ANALYSIS OF THE IMPACT ON DOMESTIC REGULATORY STRUCTURES

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DECLARATION

I Abhijeet Dwivedi, declare that this dissertation titled "**BILATERAL INVESTMENT TREATIES AND ARBITRAL AWARDS: A COMPARATIVE ANALYSIS OF THE IMPACT ON DOMESTIC REGULATORY STRUCTURES**" submitted for the award of degree of Master of Philosophy (M. Phil.) from the Centre for Study of Law and Governance, Jawaharlal Nehru University is a faithful record of my research work carried out by me under the guidance of my Supervisor. This work is original and has not been submitted for the award of any other degree or diploma in this University or any other University. The assistance received from various sources during the course of the study has been duly acknowledged.

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CERTIFICATE

We recommend that this dissertation be placed before the examiner for evaluation.

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Chapter 1

Introduction

Brief Overview of the BIT structure

There are more than 3268[1] International Investment Agreements (2923 BITs and 345 other IIAs) existing. The BITs forms one of the frameworks of International Investment.[2] Three parallel systems of investment protection met and revived during the post-World War II era. The first was the system of diplomatic protection and state responsibility for injuries to aliens which allegedly existed as a part of customary international law. The second was the privates system of protection through the theory of internalization of foreign investment contracts. This was a system dependent on the existence of appropriate clauses in the contract, enabling it to be lifted out of the control of the host state's laws and subjected to a system of transnational law for its' protection. The third was the system of protection through investment treaties. These treaties have existed since 1959. But, during the ascendancy of neo-liberal thinking, there was a new spurt in such treaty making. The treaties also contained devices which enabled unilateral recourse to arbitration by the foreign investor to protect treaty rights. This privatization of the treaty mechanism enabled a fusion of ideas that had been constructed in the area of internationalization of foreign investment contracts to seep into area of treaty based arbitration.[3]

The ascendancy of 'neo-liberalism'[4] in the 1990[5] ensured that the movement of the developing world towards sovereign control over foreign investment and the

[1] UNCTAD, IIA Updates, February 2015.
[2] Salacuse, Jeswald W. 2013. *The Three Laws of International investment: National, Contractual and International frameworks for foreign capital.* Oxford: Oxford University Press.
[3] Wenhua Shan, Penelope Simons and Dalvinder Singh, *Redefining Sovereignty in International Economic Law* 202(Hart Publishing, Oregon, 1st ed. 2008).
[4]Suzanne A. Spears, 'The Quest for Policy Space in a New generation of International Investment agreements' in Journal of International Economic Law 13(4), 1037–1075. He writes it thus:
The neoliberals believe that government intervention is needed only for the establishment of the institutions andlegal structures needed to make markets work, and the economic development and prosperity that markets are meant to produce will follow naturally from the establishment and protection of property rights. Any intervention beyond this is unnecessary.
[5] Sornarajah, M. 2011. "Mutations of Neo-Liberalism in International Investment Law." *Trade Law & Dev*.3: 212. He writes thus : "The reasons for the ascendancy are the fall of the Soviet Union, the

development of secure norms of investment protection through international law was halted on the ground that investment flows would be promoted through the existence of such norms. In this period, the fine balance that existed between the two sets of conflicting norms was heavily tilted towards the system favoured by the neo-liberal philosophy that came to dominate, at least for a short period, the economic thinking of many states of the world. The triumph of neo-liberalism can perhaps be dated to the dissolution of the Soviet Union, which signaled the end of communism and left democracy and its economic concomitant, the free market theory, as the prevailing philosophies at the end of the Cold War.[6]

To change the dynamics of struggle between the investor and host-state and protect the interests of the companies and investors, industrialized countries began a process of negotiating international investment treaties that, to the extent possible, would be: 1) complete, 2) clear and specific, 3) uncontestable, and 4) enforceable.[7] These treaty efforts took place at both the bilateral and multilateral levels, which, though separate, tended to inform and reinforce each other. The bilateral efforts particularly bore fruit. Beginning in 1959, individual industrialized countries, negotiating on the basis of predetermined models or prototypes, concluded bilateral investment treaties (BITs) with specific developing countries in order to protect their investors in those countries by: 1) subjecting host countries to a set of international legal rules that they had to respect in dealing with investors and 2) by giving investors themselves the right to bring a claim in international arbitration against host country governments who violated those rules.[8] The BITs' intent was to restrain host country action against the interests of investors- in other words, to enable the form of legal commitments made to investors to resist the forces of change often demanded by the political and economic life in host countries. By 2011, the nations of the world had concluded

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removal of the competing ideology of communism, the decline of aid from developed states, the espousal of the doctrine by the "Washington Consensus" (an alleged conspiracy between the White House, the IMF and the World Bank) and the election of neo-liberals like Thatcher, Reagan and Kohl as leaders of the developed world."

[6] Valentina Vadi, "Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration", 39 *Denv. J. Int'l l. & Pol'y* 67 (2010-2011)

[7] Jeswald W. Salacuse , "The Treatification Of International Investment Law", 13 *Law & Bus. Rev. Am*. 155 (2007).

[8] Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries", 24 *INT'L LAW*. 655 (1990)

nearly 3000 BITs[9] affecting 170 countries and several other important investment treaties containing similar provisions, such as NAFTA[10] and the Energy Charter Treaty.[11] In addition, various other bilateral international treaties, such as the Free Trade Agreements advanced by the United States and the Economic Partnership Agreements promoted by Japan, contained chapters on investment that replicated the provisions of the BITs.

These agreements typically include the following list of provisions:

a. the right of entry, with sectoral exceptions;
b. the fair and equitable treatment of investors by host governments;
c. the host government's obligation to provide investors with national treatment and most favored nation treatment;
d. the right of investors to transfer payments internationally, with limitations that can be imposed by host governments in some circumstances;
e. the right of investors to compensation for losses from armed conflict or internal disorder;
f. the right of host governments to expropriate foreign investors' property, with an obligation to provide compensation to investors;
g. the subrogation of compensated investors' claims to their home governments; and
h. the settlement of disputes through international arbitration.[12]

What makes these treaties truly unique is the fact that they are designed to function without the political involvement of either host- or home governments. Indeed, an overwhelming majority of BITs allow foreign investors to file damages actions directly against host states before international arbitral tribunals.[13] Foreign investors are entitled to claim that legislative, administrative or judicial measures have breached the substantive principles of these treaties, and they can do so without exhausting

[9] United Nations Conference on Trade and Development, World Investment Report 2011: FDI from Developing and Transition Economies: Implications for Development, 26 (2011), *available at* http://www.unctad.org/en/docs/wir2011_en.pdf (Visited on September 16, 2012).
[10] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).
[11] European Energy Charter Treaty, *opened for signature* Feb. 1, 1995, 34 1.L.M. 360 (1995).
[12] AthenaJ. Pappas, *References on Bilateral Investment Treaties*, 4 ICSID REV. FOREIGN INv. *LJ.* 189, 194 (1989).
[13] Laurence Shore, Matthew Weiniger and Campbell McLachlan QC, *International Investment Arbitration Substantive Principles*, 21 (Oxford Publication, London, 1st ed. 2007).

local remedies at host states' courts, and without securing authorization from or endorsement by their own home states.[14]

These BITs provide for multi-tiered arbitration mechanism when a dispute arises in respect of an investment and it fails to get resolved by the consensual mechanism of dispute resolution. The resulting number of investment arbitrations enlivened a dormant field, with hundreds of cases involving multi-million claims against developing states.[15] The investment treaty arbitration has changed its position from a matter of peripheral academic interest to a matter of vital international concern.[16]

Distinction between International Commercial Arbitration and Investment Arbitration

Notwithstanding evident similarities, it would be a mistake to confuse investment arbitration, pursuant to a treaty, with commercial arbitration. Commercial arbitration originates in an agreement between private parties to arbitrate disputes between themselves in a particular manner, and its authority derives from the autonomy of individuals to order their private affairs as they wish.[17] Investment arbitration, by contrast, originates in the authority of the state to use adjudication to resolve disputes arising from the exercise of public authority.[18] Investment arbitration is constituted by a sovereign act, as opposed to a private act, of the state and this, as we will show, makes investment arbitration more closely analogous to domestic juridical review of the regulatory conduct of the state.[19] International arbitration involving claims by private parties was thus conventionally limited to relations within the commercial sphere, and the extent to which it could be used to resolve disputes in the public sphere was controlled by domestic courts. The jurisdiction of a commercial arbitration tribunal did not normally extend to regulatory disputes arising from the state's exercise of public authority with respect to foreign nationals, including foreign investors. A key aspect of the investment treaty arbitration is that it transplants this

[14] Yuval Shany, "Contract Claims vs Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims", 99 *AM. J. INT'L L.* 835 (2005)
[15] *Supra* note 2.
[16] Susan D. Franck, Development and Outcomes of Investment Treaty Arbitration, 50 HARV. INT'L L.J. 435, 435 (2009).
[17] Fuller, "Consideration and Form", 41 *Colum L Rev* 799 (1941).
[18] Chayes. 1976. "The Role of the Judge in Public Law Litigation." *Harv LRev* 89:1281-94
[19] Leon E. Trakman, "Foreign Direct Investment: Hazard or Opportunity?", 41 *Geo. Wash. Int'l L. Rev.* 1 (2009-2010)

private adjudicative model from the commercial sphere into the realm of government, thereby giving privately-contracted arbitrators the authority to make what are in essence governmental decisions.[20] This is achieved because investment treaties incorporate arbitration treaties in order to provide an institutional forum and procedural framework for investment arbitration. Investment treaties also rely on arbitration treaties for the enforcement of arbitration awards by domestic courts.[21] Thus, when it came to the drafting of investment treaties, the previously established arrangements of arbitration treaties were simply incorporated as part of the architecture of investment arbitration. In the process, the procedural framework and enforcement structure of international commercial arbitration that provided the basis for the use of a private model of adjudication was extended to resolve regulatory disputes between individuals and the state.[22]

As both cater to different kind of audience, the perspective and philosophies differ. This affects their understanding about the role of State, law and how a dispute redressal system must function. In this light, the Investor-State Arbitration embodies the Public International Law lawyers and arbitrators whereas the lawyers at commercial arbitration focus upon the dispute settlement through the choice of law clause and agreements, if any, overlooking the larger questions involved.[23] The difference between the investment law and the commercial law decide the canvass of regulatory space in light of their institutional designs.[24] The investment arbitration has started to show deference to the larger public interest question and role of State than the mere recital of the contract which the international commercial arbitration does.[25]

[20] Stephan Wilske, Martin Raible & Lars Markert, "International Investment Treaty Arbitration and International Commercial Arbitration – Conceptual Difference or only a "Status Thing"?", 1 *Contemp. Asia Arb. J.* 213 (2008)
[21] Charles N. Brower and Stephan W. Schill, "Is Arbitration A Threat Or A Boon To The Legitimacy Of International Investment Law?", 9 *Chi. J. Int'l L.* 471, 473 (2009)
[22] *Supra* note 3 at 78.
[23] Stephan W. Schill, International Investment Law and Comparative Public Law - An Introduction, in *International Investment Law And Comparative Public Law*, 3, 10-17 (Stephan W. Schill ed., 2010. Oxford: Oxford University Press).
[24] Markus Wagner, Regulatory Space in International Trade Law and International Investment Law, *University of Pennsylvania Journal of International Law, Vol. 36, No. 1, 2014-2015.*
[25] Gabrielle Kaufmann-Kohler, Arbitral Precedent: Dream, Necessity or Excuse?, 23 ARB. INT'L 357 (2007).

1.2 Treaties Examined

There are more than 3268 International Investment Agreements (2923 BITs and 345 other IIAs) as has been already stated by me. I made an effort to find out whether there exist some pattern in the rather seemingly homogenous treaties which in its initial phase was mainly between capital-exporting country and capital-importing countries. In the initial phase of this regime, the treaties were mainly open-ended and they were tilted towards the capital-exporting countries as they were having an upper hand in this grand bargain. With 1990s when relatively stronger developing economies started signing these treaties and by end of 1990s when the earlier 'capital-exporting countries', especially the developed economies of US, Canada started becoming respondent, a process of reflection begin. European Countries still remained more immune from this process and this is why there Model BITs did not undergo this review. Similarly, there was a group of post-colonial countries who had for a very long period of time persisted with protectionist idea and did not open their economy. These countries underwent change in their approach towards foreign capital. They used BIT as a signal to attract investor. They did not care about the possible impact on their freedom to change their domestic regulatory structures. Their model BIT's are undergoing changes now.

A review of literature including BITs, arbitral practice and research article helped me to identify three broad sets to be compared. They are:

(a) American Model/NAFTA model/North American Model/ Restrictive Model.
(b) European Model/Open Ended Model/Non-Restrictive Model.
(c) India

Wolfgang Alschner asserts in his paper that we find two broad patterns in the homogenous network of BIT treaties.[26] As per him, 'European Model' is based on the Abs-Shawcross's International Convention for the Mutual Protection of Private Property in Foreign Countries (1957). This Model is a simple model of BIT which applies an open-ended language and has been signed by Capital-Exporting Countries

[26] Wolfgang Alschner, Investment treaty design, ideas and epistemic communities, *available at:* http://www.lse.ac.uk/collections/law/sociological/Alschner_Investment%20Treaty%20Design,%20Ideas%20and%20Epistemic%20Communities.pdf

to protect their foreign investment. They have short and simple treaties. They actually employ open-ended text. As per Lavrnos, there is a foreseeable incompleteness in the European BITs.[27] This keeps it open to variety of interpretations which opens possibility of results. This model increases the number of choices an arbitrator shall have.[28] These treaties are also more investor friendly as they do not contain necessary exceptions in favour of the State.[29] The right to regulate of the Host State has seen severely compromised in theses treaties.[30] Their overall structure forwards an unambiguously robust pro-investor protections regime.[31] In the study of European Model, I have taken following BIT as sample: Germany-Pakistan, 1959, Germany and Republic of Korea, 1963, Germany-India BIT, 1995, UK-Ethiopia BIT 2009, UK-Columbia BIT, 2010.

On the other hand, US which in beginning had a more open BITs than the European BITs changed their unambiguously investor protection stand changed its position in Model BIT 2004. US experience in NAFTA arbitration in the early 2000s compelled this change. [32]As an impact of this, it shifted to a treaty formulation which protects the State's sovereignty and secures the State's right to regulate.[33] The US experience has been imitated positively in Canada, Mexico, and Colombia etc. These countries do not employ an open-ended definition of obligations. This in turn restricted the sphere of activity for the arbitrators. It adopts a more compact and clearly drafted clause which in turn ensures that lesser number of claims reaches this tribunal. They also contain necessary exceptions in regard to taxation, environment, and labour reforms, emergency needs etc. It provides an inherent flexibility to the State while ensuring

[27] Nikos Lavranos, The New EU Investment Treaties: Convergence towards the NAFTA Model as the New Plurilateral Model BIT Text, available at: http://ssrn.com/abstract=2241455 (visited on March 12, 2015).
[28] Wolfgang Alschner, Investment treaty design, ideas and epistemic communities, page no .3, *available at:* http://www.lse.ac.uk/collections/law/sociological/Alschner_Investment%20Treaty%20Design,%20Ideas%20and%20Epistemic%20Communities.pdf (visited on May 30, 2015)
[29] Alvarez, José E. 2011. "The Return of the State." *Minnesota Journal Of Int'l Law,* 20:2.
[30] Ibid.
[31] Wolfgang Alschner, Investment treaty design, ideas and epistemic communities, *available at:* http://www.lse.ac.uk/collections/law/sociological/Alschner_Investment%20Treaty%20Design,%20Ideas%20and%20Epistemic%20Communities.pdf.
[32] J.E. Alvarez, The Evolving BIT, 7(1) TRANSNAT'L DISP. MGMT., Apr. 2010, at 8-9.
[33] David A. Gantz, The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement 679 AM. U. INT'L L. REV. 679, 685-91 (2004).

clear commitments towards the investor. [34] They have greater complexity and more complete in their structures. With regard to American Model, I have done a chronological development of US BIT practice which reveal how US practice has evolved over the period of time in consonance with its changing understanding of the their economic impact. The treaties I am studying are: USA- Rwanda, 2008(based on US Model BIT, 2004); Argentina, 1994 (based on Model BIT 1984); Turkey, 1985 (Model BIT 1984); Australia FET (chapter on investment); US-Bahrain, 1999.

I will paste a table as was formed by Alschner in his paper upon the comparative aspects of both the models.[35] It is thus:

European Model	**American Model**
Simple • Commitments only • Short (approx. 5-15 Articles)	*Complex* • Commitments and flexibilities • Long (approx. 20-50 Articles)
Investment protection in isolation • Focus on investor's protective interests	*Investment protection in context* • Focus on non-investment concerns • Account for state's right to regulate
Full delegation to arbitral tribunals • Arbitrators: Large discretion • States: No explicit means of control	*Limited delegation to arbitral tribunals* • Arbitrators: Confined mandate and little discretion • States: several means of control and interpretative interventions

India, on the other hand, is taken as one of the model for survey because of its transition from a closed economy to an open economy.[36] It is one of countries which opted for BITs since turning to Development Model II.[37] This involved a change of outlook towards the foreign investment.[38] Sornarajah writes that the BITs have a signaling function and India in the beginning adopted it to attract the investor.[39]

[34] Anne van Aaken, International Investment Law between Commitment and Flexibility: A Contract Theory Analysis, 12 J. INT'L ECON. L. 517 (2009)
[35] Page 5 Wolfgang Alschner, Investment treaty design, ideas and epistemic communities
[36] Salacuse, Jeswald W. 2013. *The Three Laws of International investment: National, Contractual and International frameworks for foreign capital.* Oxford: Oxford University Press 59.
[37] Salacuse, page 66.
[38] Salacuse,70.
[39] Sornarajah, 191.

Government of India also says that its intention then was to attract investment.[40]The Model BIPA, 2003 of India continued with the European type simple model BITs which employed open-ended language and did not make necessary exceptions to protect their regulatory space. Learning from the others experience, India started adopting an additional protocol on the expropriation to skip liability in case of every governmental action. This was an attempt to determine good regulation and bad regulation. It made a shift towards securing regulatory space. India, since the filling of the first case, has started converging towards the American Model and actually it has adopted a very exhaustive, broad and clear BIT about the arenas of regulations which shall not attract ISA and a narrower content to the substantive obligations emerging out of the BITs. It actually has started enacting clauses upon the investor's obligation which was mostly lacking in the BIT regime. I have taken treaties signed by India since beginning and how it has interacted with several countries in light of their relative position. I have also taken the Model BIPA, 2015 to divulge how India views BIT and how the process of asserting its regulatory space which started in 2006 reached it culmination. Indian BITs, which I am studying, are: India-Kuwait; India China; India-Lithunia; India-Mexico; Model BIPA 2015.

Overall, we find that there is an existence of ideational conviction about the content of these treaties which, among other factors, are governed by the possibility of their impact on domestic regulatory structure.[41]

1.3 Chapterisation

The research objective to study the impact of BIT on the domestic regulation guided my choice of substantive clause which I have studied. I must state at the very beginning that almost every clause of the BIT impact the domestic regulatory structure, but because of the limitation of time and scope as a dissertation topic, I have chosen three major clauses of BIT in this study. It must also be stated here that since

[40] Transforming the international Investment Agreement regime, Presentation by Department of Economic Affairs, available at: http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/India_side-event-Wednesday_model-agreements.pdf. (visited on May 29, 2015)

[41] UNCTAD IIA Issue Notes No. 5 July 2013, Towards a New Generation of International Investment Policies: UNCTAD'S Fresh Approach to Multilateral Investment Policy-Making, *available at*: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf

the BIT clauses are most effectively interpreted in conjunction with other clauses of the BIT. I have referred to them as and when required for the purpose of study.
The 'exception clauses' have been a regular repetition in this regard as they expand the regulatory space most effectively.

The three clauses of BIT which have been studied by me are 'definition clause on Investment', 'Fair and Equitable Treatment'; 'Expropriation clause'. The reasons for their choice are detailed in the basic overview of this chapter which follows now.

In **Chapter II,** I shall be dealing with the definition of investment and how the variety of assets included in this definition affects the regulatory space of the State. The definition of investment determines the inter-relation between the national policy making and investment's possibilities.[42] As per Dserito, the kind of assets covered under it affects the policy choices in front of the host state.[43] The pre-colonial era International Law developed around the concept of the protection of foreign property. However, the idea of 'property' at a certain point started appearing inefficient to protect the interest of foreign investor.[44] One major reason of the same is that the idea of property lies in the domestic law which might change very soon and the idea of property fails to cover a number of assets which the concept of investment is able to convey. In the *Enron* v. *Argentina* case, the tribunal observed that the idea of an investment is indeed a complex process including various arrangements, such as contracts, licenses and other agreements leading to the materialization of such investment.[45] Many of these interests did not form part of the property in the customary international law. Graham and Krugman define investment as 'ownership of assets by foreign residents for purposes of controlling the use of those assets.'[46] In *CSOB* v. *Slovakia,* the tribunal observed that Investment is a complex process which

[42] Urusula Kriebaum, 2013 'Are investment treaty standards flexible enough to meet the needs of developing countries?' in Freya Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives*, Cambridge University Press,
[43] Desrito, Development as an International Rights: Investment in new Trade-Based IIAs, 3 *Trade, Law and Development* (2011): 296-333.
[44] Dolzer, Rudolph and Schreur,Christophe. 2013. *Principles of International Investment Law.* Oxford: Oxford University Press.
[45] Enron v. Argentina, ICSID Case No. ARB/01/3.
[46] E. Graham and P. Krugman. Foreign Direct Investment in the United States (1991) 7

consists a number of smaller process and rights and could qualify as investment on them.[47]

The core purpose of the BIT is to protect investment and the presence of investment or denial of investment (if treaty allows pre-establishment right) is a necessary pre-condition for an investor-state dispute to start. [48] The rights and obligation of the State depends upon how the term 'investment' is being defined in the BIT. As per Schatz, the manner in which the clause on investment is defined determines the bargaining position of the State and also which category of assets should qualify as Investment. For example, the US BIT practice is a very interesting example.[49] US initial BIT program provided for the broader and better Investment protection regime as it protected the tangible as well as intangible property rights emerging from the investment. It adopted a very expansive definition of Investment as a result of which a larger range of assets qualified as investment. However, the Model BIT 2004 provided certain characteristics such as commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk which must exist in an asset to qualify as investment. It is patently clear that the purpose of this change was to narrow down the category of assets which should enjoy the protection of BIT. It also provided in regard to licenses etc. that if they do not create a right under the concerned state's domestic law, it shall not qualify as investment for the purpose of the BIT.[50] This means that the prospective investor must ensure at the time of entry as to whether the particular asset if belonged to these category must enjoy status of right. On the other hand, the European BITs cover a very broad range of assets as investment and does not add any particular qualification for them to qualify as investment. This goes well with the fact that they have not suffered as a host state. India, in its initial phase, has adopted a European type clause on what assets qualify as investment. It did not change it even in 2006 when it has started providing for additional protocol on indirect expropriation. It has gone ahead with a very interesting

[47] *CSOB* v. *Slovakia,* Decision on Jurisdiction, 24 May, 1999.
[48] *Supra* note 44.
[49] Schatz, Sylvia. 1988. "The Effect of the Annulment Decisions in *Amco* V. *Indonesia* and Klockner V. Cameroon on the Future of the International Centre for the Settlement of Investment Disputes." American University International Law Review 3 (2): 41581–b5.
[50]US Model BIT, 2004 reads thus: "….licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law."

definition of investment and has actually shifted from the asset based definition to enterprise based definition. They have clear inter-relation with domestic regulatory governance structure of the Host State.

In regard to the interpretation on the content of the investment, the arbitral practice has viewed investment in several ways. They reveal interesting aspects on its association with host state's regulatory structure as and in some instances reveal what kind of investment, it intends to allow. I have analyzed how the ideas of 'investment as property' and 'investment as expectation' impact the possibility of breach of substantive obligation under the BIT. I have also analyzed how the presence of idea of legitimate expectation forms part of the definition of 'investment' and how this in turn impacts the domestic regulatory structures. I have further analyzed in this chapter how the idea of investment contract, specific commitments in them or general expectations forms part of the investment. [51] I have further analyzed the Salini Test [52] and its requirement for an asset to qualify as investment. There has been an emergence of several tests which provide for certain number of elements to constitute investment. The requirement of these elements again involves an interplay with the domestic regulatory structures which is direct as well as indirect.

In **chapter III,** I have dealt with the FET clause. It is one of the most frequently invoked articles in the BITs. This, among, other reasons leads me to analyze it as a chapter in this dissertation. As per Rudolph Dolzer most no. of claims are based upon the FET Clause against the State.[53] He believes it to be the most important clause in regard to the non-discrimination. The content of this obligation is one of the most hotly contested questions in ISDS as well as in academic community.[54] It is like an over-arching principle which can be used even when the Host State has not violated or denied any particular right. Most of the BITs typically prescribe no further definition/explanation of this standard. There is insufficient clarity on its content. The sub-elements of FET are: predictability, consistency, transparency and non-

[51] *SGS* v. *Philippines*, ICSID Case No. ARB/02/6.
[52] *Salini Costruttori, S.P.A.* v. *Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001).
[53] *Supra* note 44 at 130.
[54]Benjamin K. Guthrie, 'Beyond Investment Protection: An Examination Of The Potential Influence Of Investment Treaties On Domestic Rule Of Law', 45 *International Law and Justice* 1150 (2013).

arbitrariness. [55] In the case of *CMS Gas Transmission Company* v. *Argentine Republic* [56] , the tribunal observed that the "[F]air and equitable treatment is inseparable from stability and predictability." Thereafter I have discussed with various kinds of FET formulations as found in BITs. These are (a) Unqualified FET obligations (FET Clause with no reference to international law) or FET linked to the international law; (b) FET linked to the minimum standard content of customary international law. I must state here that there may also be cases of No FET obligations (Turkey's BIT) and FET or FET with additional substantive content (denial of justice, unreasonable/discriminatory measures, breach of other treaty obligations, accounting for the level of development). But I have discussed as per (a) and (b) only. The former is found in the European BITs and is a open-ended/autonomous conception of FET, whereas the later is found in American FET which has existed since the pre-BIT era. This is seen as ceiling to the concept of FET and not as the floor. Both the ideas have different impact on domestic regulatory structure. The autonomous FET clause requires a higher standard of behaviour on part of the State whereas the FET as minimum standard of treatment linked to Customary International Law is a narrower concept and is more assistive to the host state. The arbitral practices on this clause though refer to the earlier precedents to determine their own content in a given case. Technically, the arbitration cases do not rely on the doctrine of precedence but being part of Public International Law, they rely upon them to discover the level of liability. There is one set of literature which finds this discussion irrelevant and believes that both the concepts have very thin content and for all practical purpose they are one and the same. The phrases used in this regard decide how much autonomy a State enjoys.

At the level of Treaty practice, we find that American Model of BIT in the 1984 Model BIT applied the FET linked to the international law , but as the impact and nuances of BIT became more clear, it shifted to the FCN Treaty like practice which guarantees only the Minimum Standard of treatment as per the customary international law. It provides that this clause does not promise any additional element than the one required as per the minimum standard treatment principle. The Model BIT 2004 is a break point in the International Investment law when the US, one of the

[55] Schill, Stephan W., 2010. "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law." in *International investment law and comparative public law* 151, 154–60 ()
[56] ICSID Case No. ARB/01/8, Award para. 276 (May 12, 2005).

most important capital-exporting countries decided to opt for the restrictive model which in turn means greater policy space. European Model adopts the autonomous idea of FET wherein the clause on FET is (a) unqualified FET (Germany, UK, Netherland); or (b) FET as per the principles of International Law (France follows this format). This kind of clause provides a higher degree of investment protection. The European BITs are free standing BITs which restrict host state power to change their regulatory structures. India, as already provided, adopted for the European type FET clause. India changed its position on the FET clause only in the Model BIPA, 2015. India has now gone for the Americanization of this clause and adopts a very restrictive clause on this. India (only in 2015) and US in their BITs now contain self-establishing escape clause under the title of 'exception/general exception'. This provides a broader arena for the domestic regulatory structure to flex their muscles only for positive regulations.

In the next section, I analyze the elements of FET clause and for this I borrow Rudolph Dolzer's idea of FET. Through the elaboration of these elements, I attempt to understand how this clause interacts with the domestic governance. I see them in light of the observation in *Saluka Investment case*[57],which provides that the FET clause must not be interpreted in a manner which tends to take an exaggerate position on Investor Protection as it dissuades the host state from admitting foreign investment. We must remember that it is not the sole aim of BIT. Procedural propriety and presence of due process; Good faith; Transparency; Legitimate Expectation are the elements which I have studied. By presenting diverging use, I have tried to analyze how this concept makes a remarkable impact upon the freedom enjoyed by the Host State in their domestic regulatory structure. The larger template hints at these clauses being tilted on the side of the investor. However, over a period of time, the public nature of this regime is leading to the *deference* to the State's sovereignty and its need for evolving new forms of regulations. Cases like *Parkerings Award, El Paso Case, Methanex Case* informs us about this.

The **Chapter IV** deals with the expropriation clause of BITs. One of the key drivers for the emergence of BIT regime is the investor protection. Investor's one of the basic

[57] Saluka Investment B.V. v. The Czech Republic (Partial award) (march 17, 2006).

interests in the foreign property is to ensure that he gets maximum profit and minimum risk. The post-colonial era as well as rise of Socialism led to the nationalization or expropriation of the investment by the Host State. Multilateral efforts in this direction have failed. It is in this background that the BIT took birth. BIT bargains involved the reciprocal promise between two States- usually one capital-exporting and the other capital importing. In this backdrop, the BITs usually provide that the investor's property shall not be expropriated without payment of compensation. What shall be the compensation? It is a debatable question but does not form part of this discussion.

I must clarify here that there are three patterns of interaction between the expropriation clause and right to regulation of the State. They are compensatory direct expropriation, compensatory indirect expropriation and non-compensatory regulatory expropriation.

In this chapter, I have studied the concept of ***Investment as property***. The concept of property which is found in the BITs and as revealed through the arbitral awards, involves unbundling of property. If we start viewing investment as a property consisting bundle of rights, some *in rem* and some *in personam*, the possibility of governmental regulations affecting the investment increases. Here the concept of takings has guided the BIT regime. Therefore, even if one of the several rights has been taken, the investor might proceed for compensation against expropriation. This in turn might lead to regulatory chill in Host State. This is an American understanding of property which overlooks the social function of property. However the European idea of property takes care of this function of property and allows the property to be taken for larger public good. In this light, there is a growing branch of awards as well as research articles which pay deference to this function of property. It works like a balancing act.

After this, I have dealt with the various forms of takings. Technically, an investment is considered as being expropriated only when there has been transfer of title or physical seizure of property/investment. However, there are several variants of *de facto expropriation* wherein though the property remains with the investor but governmental measures have led to the loss of the economic value of the property or

that it does not remain reasonably profitable. A large number of governmental actions are risks which might negatively affect the investment which in turn shall initiate litigation claiming expropriation. However, the non-compensatory government regulations are the ones which are justified on the basis of police power of the State to pursue legitimate public interest. In this backdrop, I have tried to deal with variants of expropriation which are: indirect, creeping, consequential, and partial. Through their basic understanding, I have examined their relation with State's right to regulate.

With regard to the treat practice, we find that the USA which in its domestic jurisdiction has recognised a very expansive understanding of takings with the definite exceptions in forms of *Penn Central Case* and other, adopts a model of expropriation which protects the regulatory space and provides enough flexibility to the State to avoid payment of compensation on non-discriminatory diminution of property. The US 1984 BIT had adopted the European model and thereby State enjoyed a legal right to expropriation on meeting a set of minimum element. This did not provide for the exception to the non-discriminatory regulatory takings. The US BITs took the restrictive trend in the Model BIT 2004. It introduced a model which finely balances needs of investor and host state. It provides that the expropriation clause must be understood only in light of the customary international law. The impact of this is clear with regard to NAFTA arbitrations wherein the tribunal has observed that the customary international law for the Parties adopt a very narrow understanding of expropriation.[58] As per this award, only in cases where investment as a whole suffered, it could amount to expropriation. It provided that in cases of indirect expropriation, a three-step test shall be applied which involves an analysis of the nature of governmental actions. It also provided that certain legitimate public interest shall not qualify be open to claims of expropriation. This represents the need of recognition of the police power of the State. European Model, on the other hand, adopts an expansive understanding of the expropriation. Herein we find that *sole effects* doctrine takes the front seat. This model does not make enough exceptions for the Host State to pursue its public interest governed obligation without payment of compensation if it leads to diminution of property. Deference to State interest in such cases could be only to assert that the property has not been expropriated at all.

[58] Grand River v. US, *available at:* http://www.italaw.com/sites/default/files/case-documents/ita0384.pdf (visited on March 19, 2015).

India, initially adopted the European Model or whatever the other Party suggested. Its Model BIPA, 2003 contained a similar clause. But BITs signed since 2006 contains protocol on the expropriation. Since then, India when ever signs a treaty with a country for which it might become Host State adopts this protocol. This protocol takes a turn towards American Model. It though differed from it in some ways. I have dealt it under the sub-section on India.

AS far as the arbitral practice is concerned, I have studied it through the lens of police power doctrine and sole effects doctrine. The former doctrine recognizes the need for the recognition of the regulatory powers of the state and thereby arbitral tribunals show deference to the regulatory power of the State. On the other hand, in cases where there has been application of *sole effects* doctrine does not recognise the need of State to regulate, thereby does not consider the evolutionary character of government. In this way, I try to derive the direction which the investment arbitration is taking.

Chapter 2

Investment

2.1 Thematic Introduction

The obsolescence of the customary international law in protecting the foreign property during the World Wars and afterwards led to the evolution of the BIT.[1] The post-colonial era witnessed a more welcoming attitude towards a more powerful regime of investment protection. They intended to attract foreign investment by providing more investment protection than the customary law via treaties. As per Schatz, in the post-colonial era, LDCs demands had changed from debt to foreign equity which shall attract the hard currency to their states and also stimulate the economic development in their country.[2] As per Salascue, the challenges to the Capital-Exporting State's position on investment law in form of Soviet challenge[3], the Latin American challenge[4], the post colonial challenge[5] and the failure of multilateral efforts[6] led to the Treatification of the International Investment Law in form of Bilateral Investment Treaties.[7] Sornarajah believes that the developing states as well as LDCs sign it as it serves as a signaling factor that they are open to investment and that the investment is safe.[8] Very recently, Zimbabwe which had a history of nationalization and expropriation signed 52 BIPAs to stimulate the economic growth

[1] Dolzer, Rudolph and Schreur, Christoph. 2013. *Principles of International Investment Law.* Oxford: Oxford University Press. p5

[2]Schatz, Sylvia. 1988. "The Effect of the Annulment Decisions in *Amco* V. *Indonesia* and Klockner V. Cameroon on the Future of the International Centre for the Settlement of Investment Disputes." American University International Law Review 3 (2): 41581–b5.

[3] The October revolution of 1917 and the confiscation of the foreign property represent the Soviet Challenge. Soviet Government even refused to restitution for the confiscated property.

[4] They tried to invoke the Calvo Doctrine. One of the popular method was to include 'Calvo Clause' in their constitutions. The question of its compatibility with the International law came up in the *North American Dredging Company of Texas* v. *United Mexican States,* 1926 reported in the 20 *American Journal of International Law*(1926) 800.

[5] 875 Nationalization and takeovers of foreign companies took place in the initial 10 years of the decolonization process. There were resolutions at the General Assembly by the decolonized states to get their position recognized towards the New International Economic Order like 1962 General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resource.

[6] *Supra* note1 at 6.

[7] Salacuse, Jeswald W. 2013. *The Three Laws of International investment: National, Contractual and International frameworks for foreign capital.* Oxford: Oxford University Press, pp. 320.

[8] Sornarajah M. 2010. *The International Law on Foreign Investment*. Cambridge: Cambridge University Press.p.185.

by baking upon the foreign investment in its mineral resource.[9] Beth A. Simmons believe the international investment law regime leads to 'tying of the hands' of the host states and mostly result in asymmetrical growth of the private investor's rights vis-à-vis the host state's right.[10]

In general, investment is essential to economic growth and it is necessary for every goods and services a society needs.[11] Investment has evolved as the primary method in the states' effort for stimulating economic development.[12] Investment is a tool used also in domestic legislations for the economic development.[13] In case of BIT, however, we are concerned with the investment which is cross-border in nature. Here the concept of Investment relates to foreign investment. IMF defines foreign investment as "a cross border investment by a resident entity in one economy (Direct investor or Multi-National Enterprise) with the objective of establishing a lasting interest in an enterprise resident in an economy other than that of direct investor".[14] As per Sornarajah, "Foreign investment involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets."[15] Dolzer believes that it consists of several inter-related economic activities and quotes the definition of investment in *CSOB* v. *Slovakia* in this regards. It reads thus:

> "An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all case qualify as an investment. Hence a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an Investment under the

[9] Zimbabwe: Govt Signs 54 Trade Pacts, *available at:* http://allafrica.com/stories/201506220664.html (visited on June 20, 2015).
[10] Simmons, B.A. 2014. "Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment." *World Politics* 1(12).
[11] *Supra* note 7 at 339.
[12] *Colen, Liesbet, Maertens Miet and Swinnen,Jo. 2013.* "Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence" in *Foreign Direct Investment and Human Development: The Law And Economics Of International Investment Agreements* edited by Olivier De Schutter, Johan Swinnen & Jan Wouters, New York: Routledge.
[13] In domestic parlance, PPP is an example of investment serving the purpose of the economic development. PPP though is not restricted to domestic investor only.
[14] IMF, *Balance of Payment Manual, Definition of Foreign Direct Investment*, page 78, 3rd edition, 1996.
[15] *Supra* note 8 at 8.

> Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment."[16]

The legal notion of the investment forms the entry point of Bilateral Investment Treaty. The qualification as investment decides the extent of the rights and liabilities under the BIT in any given case.[17] As per Guthrie, "the core purpose of BITs is to protect investments made by nationals of one signatory state in the territory of the other signatory state."[18] The protection and commercial viability of the investment on the non-discriminatory basis forms the core of the BIT regime. A dispute in regard to BIT breach presupposes the existence of Investment.[19]

The treaties being part of the larger regime of investment protection have broadly similarity in their order and content.[20] The clauses on investment' is no exception in this regard, though on a deeper study, these treaties have variegated versions. As the different variants of investment have varying impact on development and economy, the States do not intend to give same level of protection to all the investments same state. However as per Schatz, the definition of investment is very important as it tells us about the scope of the agreement and as per him it discloses to us the difference in the bargaining power of the two states.[21] The powerful country usually wishes to go for a vague definition which must be flexible enough to include newer countries within it. This dictates the nature of definition which a state adopts in BIT.[22] German definition of investment via-a-vis China and Pakistan tells us about this difference. The definition instructs the degree of BITs interaction with the domestic regulatory structures as they contain intangible property rights as well as the administrative law

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[16] *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May, 1999.
[17] OECD,2008. 'Definition of Investor and Investment' in *International Investment Law: Understanding Concepts and Tracking Innovations*, *available at:* http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf (visited on October 14, 2014).
[18] Guthrie, Bejnamin K. 2013. "Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law." *New York University Journal of International Law and Politics* 45: 1151.
[19] *Supre* note 1 at 62.
[20] Vandevelde, Kenneth J. 2010. *Bilateral Investment Treaties: History, Policy, and Interpretation*. USA: Oxford University Press, pp. 12.
[21] Golsong, A. 1984. "Guide to Procedural Issues in International Arbitration." *International Law* 18: 633.
[22] UNCTAD, *Bilateral Investment Treaties 1995–2006*: Trends In Investment Rulemaking, page 7, *available at*: http://unctad.org/en/Docs/iteiia20065_en.pdf pdf (visited on march 12, 2015).

property rights.[23] As per Kreibaum, the definition of investment affects the assets that are covered by the BIT and this impact the interrelationship between the national policy making and the investment atmosphere.[24] Dserito gives an example of recent development-oriented innovations definitions of investment in some IIAs as an example wherein the definition of investment has impacted the investment law-making and thereby the legitimate sphere of domestic regulatory actions.[25] This when seen in light of contribution to economic development of the host state as a precondition for an investment to qualify as investment as provided in *Salini Award*[26], open the gate of interesting questions in regards to domestic regulation. I have discussed it in detail in this chapter under arbitral practice. Generally speaking, the debate between the regulatory state function and investor protection is moving towards balance.[27] The definition of Investment when seen in light of the Preamble of the BIT plays an important role in determining the breach of treaty obligations through Treaty Interpretation under Article 31 of the Vienna Convention on Law of Treaties, 1969.[28] The content of the word 'investment' also depends upon the approach adopted by the Tribunal. One approach is where the interpretation of 'investment' is oriented in light of the definition in the BIT; the other is where the interpretation of investment is done in light of the understanding of investment in light of the economic literature.[29]

In this chapter as I have already told in the research plan would be studying the meaning of the term 'investment' via two lenses: (a) Bilateral Investment Treaties, (b) Arbitral awards. In regard to the BITs, there are multiple ways in which BITs usually define Investment.[30] One, they define it through the asset-based approach wherein

[23] *Supra* note 8 at 181.
[24] Urusula, Kriebaum. 2013. "Are Investment Treaty Standards Flexible Enough to Meet the Needs of Developing Countries?" In *Investment Law within International Law: Integrationist Perspectives*, edited by Freya Baetens. Cambridge: Cambridge University Press.
[25] Deserito, D.A. 2011. "Development as an International Right:Investment in the New Trade-Based IIAs." *Trade, Law and Development* 3: 296–333.
[26] *Salini Costruttori SpA and Italstrade SpA* v. *Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, para. 52.
[27] Kriebaum, Are investment
[28] *Siemens* v. *Argentina*, ICSID Case Number ARB/02/8 (Decision on Jurisdiction) (August 3, 2004) 137 Germany-Argentina BIT.
[29] *Supra* note 1 at 61.
[30] UNCTAD, *Bilateral Investment Treaties 1995–2006*: Trends In Investment Rulemaking, page 7, *available at*: http://unctad.org/en/Docs/iteiia20065_en.pdf pdf (visited on march 12, 2015).

they state definite assets as an investment and restrict it to them.[31] The benefit of such a definition of Investment is that it restricts the scope of investment to only the provided list of assets. Two, there is a set of treaties which do not exactly tell us what constitutes the term investment. These treaties only tell us about the basic characteristic feature of the term 'investment' and leave it on the future adjudication in case of a doubt. They adopt a *tautological approach* or a circular approach of defining investment.[32] Herein the definition provides the basic characteristics of the investment. It could be a definition wherein the closed list of assets which must fulfill a set of conditions.[33] This is an effort to limit the scope of the Treaty with regard to investment. It must be mentioned that this is a recent invention in BITs. For example the BIT entered by USA with Bangladesh (1989) does not contain this kind of definition of investment. It must be mentioned here that if the treaty uses the word 'characteristics of investment', it opens a Pandora box. As I would be detailing in the next part of this chapter, the idea of Investment has been a contentious issue after the *Salini Case* and in light of the Article 25 of the ICSID Convention of the unqualified usage of the term 'Investment'. Third approach gives an open-ended definition of the term 'investment.[34] This is the standard format found in the Draft Convention on Foreign Property of OECD. This format is the most popular format and is primarily found in the BITs signed by developed countries of the Europe. China and India in their Model BITs adhere to this format. Under this format a list of assets are mentioned and does not exclusively restrict it to them. In *Siemens v Argentina*, it was observed, "the specific categories of investment included in the definition are included as examples rather than with the purpose of excluding what is not included in the list."[35] I have discussed the specific aspects of these formats through the treaty practice of US, Western Europe and India under the title 'Treaty Practice'.

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[31] India-Mexico BIT, 2007.

[32] US-Rawanda, 2008

[33] US-Uruguay.2005 It reads thus :

> "has **the characteristics of an investment**, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk"

[34] Thomas Westcott, Legal Advisor, UNCTAD in **International investment agreements: key issues and features,** *available at :* vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/11twiias.ppt (visited on on February 18, 2015). IT reads thus:

> "The open ended definition covers following 5 categories of assets: movable and immovable property, interests in companies – including both portfolio and direct investment – contractual rights, intellectual property and business concessions."

[35] *Siemens v Argentina*, ICSID Case Number ARB/02/8 (Decision on Jurisdiction) (August 3, 2004) 137

The definition of investment also varies in regard to the content of the 'investment'. Some treaties use the term in the standard economics type definition which covers the capital involved. On the other, most of the treaties adopt an open-ended and broad definition wherein besides capital; they also cover the assets attached to the investment as investment. This set of definition has been become the universal practice more or less. They differ in regard to the assets which are specifically mentioned in the treaty ex. some treaties covers rights related to natural resources while some other specifically restrict to the oil or cultivation only. Similarly the manner in which rights derived from public law as well as contract between state and the investor at times also forms part of the Treaties in varying degree and terminology. I shall be studying through US, European and Indian BITS. Herein we shall also see whether they carry any exceptions are not and wherein theses exceptions could be claimed. My study would try to point out the differences if any in these treaties and how they impact the regulatory structure as such via arbitration clauses.

In the second section, I shall be trying to analyse the scope of the term 'investment' through the prism of the arbitral awards and will cull out the content and scope of the range of items covered by the term 'investment'.

2.2 Treaty practice

2.2.1. USA

US started its BIT program in 1981 with two intentions: one, to encourage investment and two, to protect such investment. [36] The BITs of US have adopted a similar pattern to the BITs signed by the other capital-exporting countries.[37] In the beginning, they

[36] US Treaty Program.

[37] Communications on behalf of US President to the Congress in regard to the US-Turkey BIT, 1985 illustrates that this was based on the pattern adopted by the other capital-exporting states like Germany. The relevant line reads thus:

> "Our BIT approach followed similar programs that had been undertaken with considerable success
> by a number of European counties, including the Federal Republic of Germany and the United Kingdom, since the early 1960s. Indeed, our industrialized partners already have nearly two
> hundred BITs in force, primarily with developing countries. Our treaties, which draw upon language used in the U.S. FCN treaties as well as European counterparts, are more comprehensive and far-reaching than European BITs."

contain a non-exclusive list of items as to what constitutes the investment for the purpose of the BIT.[38] This was to ensure that the treaty remains in sync with the needs of contemporary times. It was intended to cover the widest possible range of investments possible. The Model BIT of 1982 is an example of this fact. As per Pamela b. Gann, it contained a wide range of items: tangible and intangible property; companies and shares of stock in companies; contract rights and other claims to money or performance; copyrights, patents, industrial and other intellectual property; licenses, permits, concessions; and reinvested returns.[39] The inclusion of the investment contracts, inclusion of licenses, permits provided a broader sphere of the items which the BITs signed by capital exporting countries of Europe had not included.[40]

Sornarajah asserts that these additional features in the US BITs demonstrate to us that many of property rights which these investments had are actually obtained under the administrative law rights based permission and are actually in nature of permission to do business. He believes that the complete presence of these foreign investments is existence of the public rights. They would be stripped off of their value if such permissions would be removed.[41]The inclusion of the rights, concessions and licenses granted under the administrative law mechanism as investment under the BIT takes these rights normally resulting from the exercise of sovereign power to a next level. It makes them right derived from a source of international law which cannot be taken back. This has a long term impact upon the domestic regulatory structure as the chilling of the regulatory structure takes place in regard to these investments. They could be only relaxed further. This has long-term impact in regard to environment, human rights, public health to name a few. The wisdom which a State experiences over the period of time or obligations which a state agrees under International Law cannot modify the terms of bargain of the contract or concession which the private company had got in regard to the investment to the disadvantage of the investor. I believe this was a big reason why in starting the BIT efforts of the USA did not yield result in regard to relatively better off Third World Countries and developed countries. The irrevocability of the public law rights once granted was a main hurdle

[38] US- Egypt BIT, 1986.
[39] US Treaty Program.
[40] The BIT between Germany and Korea (1967) does not contain such a broad definition of investment.
[41] *Supra* note 8 at187.

in US BIT program. This was though not the only reason why the US BIT program is lesser successful. Here it must be noted that the BITs signed by the European Nations in 1990s[42] which contained these public rights as part of investment are still more successful in regard to the signing of BIT with countries.

As per Salascue, the inclusion of these categories as forms of investment, provide them the status of the property in an internationalized or 'delocalized' framework. These are important categories as they are not purely commercial transactions between two commercial parties. They are actually results of the transaction which have larger social and economic objectives to achieve. They are those categories of properties which impact the governance in country and are actually issues related to the public. The other capital exporting countries learnt it from USA and later started including it in their BITs as a separate category.[43] Salascue quoting Llewellyn writes that these contracts are not just transactions related to economic activities; they are infact social and economic arrangements.[44] These are actually a sort of cooperation to achieve a social purpose by the use of bargains.[45] The negotiated contract between the investor and the host state takes this agreement beyond the domestic legal system in relation to contract as well as other legal obligations which might arise in future. It makes them immune from the legislative and regulatory process of host state and at times the developing states fear that these transnational contracts would limit their regulatory sovereignty.[46] This causes a problem for the regulation of these activities in the sphere of governance focusing on the domestic interest. These contracts between the private investor and the State wherein it acts in purely commercial capacity and not as a subject of International Law are called as 'investment

[42] Germany-Korea BIT, 1967 does not contain investment contract and had just stated business concession under public law. On the other hand, its BIT with India(1995) and China(2003) has broader definition following the public law rights portion of the US treaties. Given below is the clause in the India-Germany BIT in Article 1(b)(v):

> 'business concessions conferred by law or under contract, including concessions for mining and oil exploration;

China-Germany BIT (2003) was even broader and clear in this regard . The clause reads thus under Article 1(a)(e):

> 'business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources;

[43] China-Germany BIT, Article 1(1)(e).

[44] *Supra* note 7 at 167.

[45] Farnsworth, E.A.1969. "The Past of Promise: An historical introduction to contract."*Columbia Law Review* 69:576, 578.

[46] Lalive.1986. "Some Threats to International Investment Arbitration*." ICSID REV. FOREIGN INV. L.J*. 26:34.

contracts'.[47] As per Maniruzzaman, these investment contracts are different from the ordinary contracts because of the fact that the state exercises special powers in entering into such contract and should be properly called State contracts.[48] As per Verdross, certain categories of the state contracts lead to birth of 'an independent legal order'.[49]

Incorporating congressional objectives, the 2004 Model BIT contains several additions, including a narrower definition of investment covered under the agreement, a narrower minimum standard of treatment, more detailed provisions on investor-state dispute settlement, and provisions to enhance the transparency of national laws and proceedings, as well as preambular language addressing environmental and labor standards[50]

The US BITs underwent modifications as a result of the development over 1990s and early 2000s in regard to the Treaty Practice as well as the arbitral practice. US Model BIT, 2004 had a narrower and restricted version of investment and other clauses as it has adopted the tautological approach wherein besides the specified assets, it provided additional qualification.[51] Some scholars believe that this was the result of the fact that US recognised that the BIT are actually bilateral and that it could be used by foreign investors against US.[52] This elemental change as per them came as a result of the 6 cases filed the Canadian Investors against USA under NAFTA. As per Sornarajah, the US and Canada took this turn in light of the fact that they are one of

[47] Salascue, 169. Some example of Investment contract are PPP in nature of BOT, Infrastructure Contracts, Economic Development Contracts.
[48] Manjuzzaman, A.F. 2001. "State Contracts in Contemporary International Law." *European Journal of International Law* 12: 309–28.
[49] Verdross, A Von. 1964. "Quasi International Agreement and International Economic Transactions." *Year-Book of World Affairs* 27: 230.
[50] Murphy, Sean D. "New U.S. Model Bilateral Investment Treaty." *United States Practice in International Law*, 2002–4.
[51] US Model BIT 2004 provided these additional qualifications which the EU BITs and Indian BITS did not contain. It reads thus:

> "every asset that an investor owns or controls, directly or indirectly, t**hat has the characteristics of an investment**, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."

[52] Schwebel, Stephen M., 'A critical assessment of the U.S. Model BIT', Key note Address at INVESTMENT TREATIES AT 50: HOST STATE PERSPECTIVES, 2009 *available at*: http://www.biicl.org/files/4253_schwebelbiicl15may2009speech_cor2.pdf (visited on March 21, 2015).

the largest recipient of Investment Capital and could be terribly exposed to investment arbitration.

USA in its treaty contain non-confirming clause.[53] The protocol mentions the specific sector of investment provided separately by both the States. These sectors shall not be accorded standard protection clauses like MFN, FET, Performance Requirement and Senior Management and Boards of Directors. For example, the US-Uruguay BIT contains Article 14 and Uruguay has specified in the additional protocol, a number of clauses wherein the BIT is inapplicable.[54] This clearly gives us an idea as to how the impact of BIT on domestic regulatory structures is managed. Sometimes a negative list is also provided. This list enumerates the sector wherein the investment liberalisation will take place. The negative list is a major bone of contention between the US-China BIT and is a major reason for it's non-signing. Before proceeding ahead, it is appropriate to mention here that the non-conforming clause also evolved over the period of time and it appears it has evolved as a result of reflection on part of the United States. In its earlier BITS like one with Cameroon and Bangladesh doesnot provide them separately and include it only as a part of the Article dealing with the 'Encouragement and Treatment of Investment' and always after the MFN and national treatment sub-clause[55]. The treaty along with this also specifically provided in these treaties a special position in regard to the 'mining activity'.[56]

The Model BIT, 2012 adopted an even narrower approach. It introduced changes in regard to State-Owned Enterprises[57], prohibiting the Performance Requirements[58], environment and labour interest[59], financial services[60], transparency[61] and standards.[62]

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[53] Example Article 14 in US-Uruguay Treaty

[54] US-Uruguay article 14 read with additional protocol.

[55] Article II. 2. (a) of the US-Bangladesh BIT, 1989 reads thus:

> Notwithstanding the preceding provisions of this Article, each Party reserves the right to maintain limited exceptions to the standard of treatment otherwise required if such exceptions fall within one of the sectors or matters listed in the Annex to this Treaty"

[56] Article II. 2. (a) of the US-Bangladesh BIT, 1989:

> "However, either Party may require that rights to engage in mining on the public domain shall be dependenton reciprocity"

[57] Article 2, footnote reads thus: "the standard for whether a Party has delegated governmental authority to an SOE or any other person or entity."

[58] Article 8 provides these conditions : "purchase, use, or accord a preference to, in its territory" domestically developed technology to provide an advantage to a Party's own investors, investments, or technology"

[59] It introduced exception in regard to environment(article 12) and labour(article 13).

Among the Congressmen and the stakeholders the reaction to the BIT is confusing. There is a discussion in regard to the efforts of Model BIT in achieving the balance between the rights of the regulatory authorities in regard to protection of public interest and the protection of investors interest.[63] This has a lot of relevance as it shall effect the negotiations which USA is doing with emerging economies like India, Pakistan, and China etc. I believe that there shall be a meeting of minds in principle as far as the rights of regulatory bodies is concerned because the movement of investment is both ways.

Given below is the table which illustrates how the US practice has evolved over a period of time. A rider necessary to be added here is that the real changes across these treaties could be understood only on the complete reading of the Treaties and especially the clauses on Standards, Environment, Labour, Preamble and sectors under the Non-Conforming Clause. The Turkey and Argentina BIT based on 1984 Model BIT contained the clause on 'associated activities'[64]. The clause is absent in the BITs signed as per Model BIT of 1994 and 2004. This was based on the realization that the scope of the term 'associated activities' opens the flood gate of litigations and shrinks the regulatory space of the host nation. Similarly the BITs signed on the 1984 Model does not contains reference to environment and labour rights. This was visible in the BITs signed on 1994 Model BIT.

On the expansive side though the BITs based on 1984 Model BIT thought covered the 'Investment agreements' and guaranteed standards protection under BIT, it was

[60] It provided in Article 20 which financial services could fall under the prudential exception with regard to addressing of payment problems.
[61] It strengthened it under Article 11 and provided that the transparency obligations in regard to developing and implementing laws, regulations, standards, and other measures.
[62] It provided under Article 11 that the foreign investor has to participate in the development of standards and technical regulations on non-discriminatory terms. It even required that the non-governmental standardizing bodies in its terror must also follow these requirements.
[63] U.S. International Investment Agreements: Issues for Congress
https://www.fas.org/sgp/crs/row/R43052.pdf
[64] Article 1(g) (g) "associated activities" include the organization, control, operation, maintenance and disposition
of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports;

not provided separately and was presumed to be covered by the clauses on "any right conferred by law or contract, and any licenses and permits pursuant to law" as in US-Argentina BIT or a even wider clause in US-Turkey BIT which reads thus: "any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products" . Learning from the contestation and varying interpretations the BITs signed on the Model BIT, 1994 contained a separate definition of 'investment agreement'[65].

The US FTAs which unlike other FTAs contains a chapter on investment. In the US-Australia FTA there is no mention of investment agreement, though the definition of investment remains same. This substantiates the argument that the US BIT program is lesser successful with the Developed and Developing Countries and is mostly restricted to States where the flow of capital is one way.[66] The interesting points are visible in the NAFTA's definition of Investment which provides a closed-list of investment and also explicitly provides what is not an investment. US which otherwise the President's message always assets that the investment may take any form and that the list of assets serves only as an asset adopts an approach an exclusive closed list definition.

The U.S. reflecting upon the implications of these BIT under the 2004 Model BIT started providing the definition of investment with additional qualification. These are commitment of capital or other resources, the expectation of gain or profit or assumption of risk. The US-Rwanda Treaty, 2008 as well the FTA with Australia has same definition.

USA- Rwanda 2008 (based on US Model BIT, 2004)	"investment" means every asset that an investor owns or controls, directly or indirectly, that has **the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of ris**k. Forms that an investment may take include: (a) an enterprise;'

[65] US-Bahrain BIT, 1999 has a definition of investment agreement which reads thus:

> "(h) "investment agreement" means a written agreement between the national authorities of a Party and a covered investment or a national or company of the other Party that (1) grants rights with respect to natural resources or other assets controlled by the national authorities and (2) the investment, national or company relies upon in establishing or acquiring a covered investment;"

[66] *Supra* note 20.

	(b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and **loans**[67]; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;[68] [69] and
Argentina, 1994 (based on Model BIT 1984)	"investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and **investment contracts**; and includes without limitation: (i) tangible and intangible property, including rights, such as mortgages, liens and pledges; (ii) a company or shares of stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value and directly related to an investment; (iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and (v) any right conferred by law or contract, and any licenses and permits pursuant to law;
Turkey,1985 (Model BIT 1984)	(c) "Investment" means every kind of investment owned or controlled directly or indirectly, including equity, debt; and service and **investment contracts**; and includes; (i) tangible and intangible property, including rights, such as mortgages, liens and pledges; (ii) a company or shares, stock, or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value, and associated with an investment; (iv) intellectual property, including rights with respect copyrights and related patents, trademarks and trade names, industrial designs, trade secrets and know-how, and goodwill. **(v) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and** **(vii) reinvestment of returns and of principal and interest payments arising under load agreements**

[67] Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

[68] Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

[69] The term "investment" does not include an order or judgment entered in a judicial or administrative action.

Australia FET(chapter on investment)	Article 11.17 (4) investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to the applicable domestic law; 11-7 ,11-8 An
US-Baharain, 1999 (based on US Model BIT, 1994)	Article 1(d) "investment" of a national or company means every kind of investment owned or controlled directly or indirectly by that national or company, and includes, but is not limited to, investment consisting or taking the form of: (1) a company; (2) shares, stock, and other forms of equity participation, and bonds, debentures, and other forms of debt interests, in a company; (3) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts; (4) moveable and immovable property; and intangible property, including, but not limited to, rights, such as leases, mortgages, liens and pledges; (5) intellectual property, including, but not limited to: - copyrights and related rights, - patents, - rights in plant varieties, - industrial designs, - rights in semiconductor layout designs, trade secrets, including, but not limited to, know-how and confidential business information, - trade and service marks, and trade names; and (6) rights conferred pursuant to law, such as licenses and permits;
NAFTA closed list definition with also explaining what is not investment	investment means: (a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise

	on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; **but investment does not mean,** (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h)

2.2.2 European BITs:

The process of BIT for the protection of foreign investment was started by the developed economies of the Western Europe in light of the decolonization process and was primarily adopted to protect their investment in foreign countries. As per Salascue notes, the first round of BITs were between the capital-exporting countries and the capital-importing countries[70]. Germany-Pakistan BIT, 1959 is the first BIT based on the Abs- Shawcross convention.[71] The Treaties were negotiated by the capital-exporting countries to provide for a (1) complete, (2) clear and specific, (3) uncontestable and (4) enforceable. The investment liberalisation was also secondary goal of these treaties. It started emerging only in the BITs of 1990s when the process reached its peak. The BITs negotiated by the European countries based on the Multilateral Initiatives is recognised as an important phase in the evolution of International Investment Law. These BITs were different from earlier Bilateral Commercial Treaties as they exclusively dealt only with the foreign investment and

[70] *Supra* note 7 at 331.
[71] Abs and Shawcross. 1960. "The Proposed Convention to Protect Private Foreign Investment: A Round Table Comments on the Draft Convention by Its Authors." *Journal of Public Law* 9: 119.

aimed to protect the property in the territory of the other state. Germany started this process as it had lost all its foreign investment because of the defeat in the World War II[72] and the other European Countries, who were liquidating their colonies, felt the need to protect the already established investment and facilitate further investment.[73]

We find a broad similarity in the BITs signed by the European BITS. They are more or less based on the fact that many of the European BITs followed the pattern of the German BITs. This similarity exists in case of the standards of treatment, expropriation clause, compensation clause and repatriation.[74]

We will basically focus on the BIT signed by Germany and UK in the given case as they are countries which are from continental law approach and the common law approach. Chester Brown writes that the process of BIT, the definition of investment underwent improvement over the period of time.[75] The EU BITs have mainly *liberal approach* wherein the legalized system exist whereas the US BIT has a more *restrictive approach* which gives flexibility to the regulatory state in regard to mention sectors and mentioned topics on environment, labour and health.[76] This liberal approach limits the host country's regulatory sphere of power to restrict national laws and regulations on investments. It has resulted in a more open and liberal investment regime.

The definition adopted by the EU BITs generally includes every kind of assets directly or indirectly in nature of conventional property rights in nature of movable and immovable property and related rights in nature of mortgage, lien, pledges etc.; capital assets in form of shares, debentures; claims related to money used to create

[72] Karl, J. 1996. "The Promotion and Protection of German Foreign Investment Abroad." *ICSID Rev-FILJ* 11: 1.
[73] Mann, F.A. 1981. "British Treaties for the Promotion and Protection of Investment." *British Year-Book of International Law* 52: 241. as quoted in Salascue, 342.
[74] Salascue, 342 refers to 'Reforming the International Legal Order: German Legal Comments," in Th Oppermann and E-U Petersman (eds.), *Tubinger Schriften Zum Internnaionallen und Europaishen Recht.*, Band 1 (1987) 37.
[75] Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties*, Oxford :Oxford University Press, 295.
[76] Axel Berger, 'China's new bilateral investment treaty programme: Substance, rational and implications for international investment law making' at Paper prepared for the American Society of International Law International Economic Law Interest Group (ASIL IELIG) 2008 biennial conference "The Politics of International Economic Law: The Next Four Years", Washington, D.C., November 14-15, 2008.

economic value; intangible property rights like IPRs which depend upon the Law of Land and actually impacts the regulatory structure; business concessions and rights under contract under public law, sometimes expressed in nature of cultivation rights, exploration and exploitation of natural resources[77], or expressed as mining rights or oil exploitation.[78]

The manner in which the definition of the investment extended over the period of time reflects clearly well when we see the its definition of the investment in the first BIT between Germany and Pakistan to later BITs for example, Germany-Korea, Germany-India.[79] On the base of this bare perusal read in conjunction with OECD Draft Convention of 1967, I find that there is a larger similarity in the manner in which the BIT as a process has focused. This has led some scholars to conclude that these BITs because of similarity have led to the emergence of a customary international law which Sornarajah and several other scholars object because of the difference they carry in themselves.

I would now elaborate on some of these dissimilarities. UK BITs which basically provide for investment protection and liberalisation for investment for pre-establishment rights does not provide for the same in the UK-China BIT which specifically excludes it.[80] In contrast to this, German BIT with China contains such a right. Even the Netherland BIT with China contains such a definition. The Model BIT of France adopt a different approach and its definition of Investment does not just use the term 'asset' but actually uses these words: "every kind of assets, such as goods, rights and interests of whatever nature…"[81] The French Model BIT and its trade practice creates an exception for regulations aimed at protecting and promoting cultural and linguistic diversity.[82] This kind of loose nexus clause in French Model

[77] Germany-Dominica Republic BIT, 1984.
[78] India-Germany BIT, 1995.
[79] Article 8(1)(a) under Germany-Pakistan BIT, 1959 defines it thus: "The term "investment" shall comprise capital
brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge. The term "investment" shall also include the returns derived from and ploughed back into such investment."
[80] UK-China BIT: "investment" includes investments existing at the date of entry into Agreement; and a change in the form in which assets are invested affect their character as investments
[81] Model French BIT,2006.
[82] Model French BIT, 2006 under Article 1(6) provides thus:

BIT illustrates to us that the BIT is not necessarily leading to the creation of the Customary International Law and thus each BIT serves only as *lex specialis.* India Model BIPA, 2003 also contained a similar exemption but was restricted to only public order. [83] On the other hand, the Germany Model BIT provides for a strict nexus and writes "the measures *that have to be taken for* protection of the public security and order."[84] We shall study this in next chapter.

The BIT practices of the State, we find a clear pattern of unequal bargain and how far a State continues with its Model BIT. For example, when Germany signs BIT with China, we find that the definition of 'investment' as found in Model BIT of China prevails, whereas when it signs BIT with Afghanistan, it follows its own Model BIT and actually goes beyond it. It actually ends the need for the investment to necessarily be invested by the investor of one country in another country. The Afghanistan BIT does away with this necessity and provides what investment compromises. [85] Similarly if you see the table, you will mark a clear difference in the BIT signed by UK with Ethopia(a Sub-Saharan Economy) where its Model BIT prevails and with Colombia(a growing economy which follows the North-American Model of restrictive approach in BIT). This clearly establishes what Sornarajah asserts as an unequal bargain.

Overall we find that the European BITs adopt an open-ended approach towards the definition of investment keeping in view the possibility of newer forms of investment in light of the endless creativity of the capital market and the need of liberal approach to allow movement of capital. They do not adopt any qualifying definition of the Investment as the North-American Investment Treaties are now doing.[86] They are open to indirectly controlled investment within definition of investment. This explains

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> "Nothing in this agreement shall be construed to prevent any contracting party from taking any measure to regulate investment of foreign companies and the conditions of activities of these companies in the framework of policies designed to preserve and promote cultural and linguistic diversity"

[83] Titi, Catharine, 2014. *The Right to Regulate in International Investment Law* Oxford: Hart Publishing.

[84] Article 3(2) of German Model BIT, 2009.

[85] Germany-Afghanistan BIT, 2007. It provides thus in Article 1(1): 'the term "investments" comprises every kind of asset, in Particular."

[86] Legum, Barton. 2005. "Defining Investment and Investor: Who Is Entitled to Claim." *available at:* http://www.oecd.org/investment/internationalinvestmentagreements/36370461.pdf (visited on March 14, 2015).

to us the recent phenomenon of BIT-Shopping as well as the growth of Multi-National enterprises.

Table of BITs by European Nations

Germany-Pakistan, 1959	The term "investment" shall comprise capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge. The term "investment" shall also include the returns derived from and ploughed back into such investment
Germany and Republic of Korea, 1963	(1) The terms "investment" shall comprise every kind of asset, and more particularly, though not exclusively, a) movable and immovable property as well as any other rights in rem such as mortgages, liens, pledges, usufructs, and similar rights; b) shares or other kinds of interest in companies; c) titles to money or to any performance having an economic value; d) copyrights, industrial property rights, technical processes,trade-names, and good will; e) business concessions under public law. Any alteration of the form in which assets are invested shall not affect their classification as investment.
Germany-India BIT, 1995	(b) "Investment" means every kind of asset invested in accordance **with the national laws of the Contracting Parr**y where the Investment is made and, in particular, though not exclusively, includes: (i) movable and immovable property as well as other rights such as mortgages, liens, or pledges; (ii) shares in, and stock and debentures of, a company, and any other forms of such interests in a company, (iii) right to money or to any performance under contract having a financial value; (iv) intellectual property rights, including patents, copyrights, registered designs, trademarks, trade names, technical processes, know-how and goodwill in accordance with the relevant laws of the respective contracting party;

	(v) business concessions conferred by law or under contract, including concessions for mining and oil exploration;
UK-Ethiopia BIT 2009[87]	a. "Investment" means every kind of asset and in particular, though not exclusively, includes: i. Movable and immovable property and any other property rights such as mortgages, liens or pledges; ii. Shares in stock and debentures of a company and any other form of participation in a company; iii. Claims to money or to any performance under contract having a financial value; iv. Intellectual property rights, goodwill, technical processes and Know-how; v. Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources. A change in the form in which assets are invested does not affect their character as investments and the term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement
UK-Columbia BIT, 2010[88]	Investment (a) Investment means every kind of economic asset, owned or controlled directly or indirectly, by investors of a Contracting Party in the territory of the other Contracting Party, in accordance with the law of the latter, including in particular, but not exclusively, the following: (i) movable and immovable property, as well as any other rights in rem, including property rights; (ii) shares in, and stocks and debentures of, a company and any other kind of economic participation in a company; (iii) claims to money or to any performance under contract having an economic value; (iv) intellectual property rights, including, among others, copyrights and related rights, and industrial property rights such as patents, technical processes, manufactures' brands and trademarks, trade names, industrial designs, know-how

[87] The UK has adopted almost a uniform practice in regard to the BITs. The exception clause though has enhanced over the period of time. It is visible on the bare perusal of the UK-Bangladesh BIT with UK-Ethiopia BIT. It now includes exception made in regard to the

[88] UK-Columbia BIT, 2010(not ratified) is an exception on part of UK as it differs from the usual UK BIT which it has signed with the other countries. It has a more restricted approach.

	and goodwill; (v) business concessions granted by law, administrative acts or contracts including concessions to explore, grow, extract or exploit natural resources. (b) **Investment does not include:** (i) public debt operations; (ii) claims to money arising solely from: a commercial contracts for the sale of goods and services by a national or legal entity in the territory of a Contracting Party to a national or a legal entity in the territory of the other Contracting Party; or b credits granted in relation to a commercial transaction. (c) A change in the manner in which assets have been invested or reinvested does not affect their status as investments under this Agreement, provided that the assets still fall within the definition contained in this Article and the investment is made in accordance with the law of the Contracting Party in whose territory the investment has been admitted. The term "investment" includes all investments, whether made before or after the entry into force of this Agreement. (d) In order to qualify as an investment under this Agreement, an asset must have the minimum characteristics of an investment, which are the commitment of capital or other resources and the assumption of risk.
France-India BIT	The term "investment" **means every kind of asset, such as goods, intellectual property rights and other tights and interest of whatever nature, invested in the area of the Contracting Party in accordance with the laws of that Contracting Party,** and in particular though not exclusively includes: a) Movable and immovable property as well as any other rights In rem such as mortgages, liens, usufructs and pledges, and similar rights; b) Shares and other kinds of interest including minority or indirect forms, in companies constituted in the territory of one Contracting Party; c) Debentures or rights to money, or to any legitimate performance having a financial value; d) Business concessions conferred by law or under contract, including concessions to search for, extract or exploit natural resources, which are located in the maritime area of the Contracting parties

2.2.3 India

India's BIT practice was never clearly articulate. It is one of the countries which shifted gears to Development Model II.[89] As per Sornarajah, BIT served as a signal by Third World Countries that the investment shall be protected and that the Investor-State Arbitration system shall be available. India did not have any specific model of BIT then. It actually went as the other Contracting Party provided. By this, I dare not say that India did not negotiate, but certainly I intend to say that a basic survey of definition clause in BITs signed by India, I find the pattern of contracting party got the upper hand. India's BIT with UK, France, Australia and Germany is an example of the same.

India's Model BIPA, 2003 is recognition of the fact that India adopted a definition based on the European Line. However, learning from its experience and the reflection, India has adopted a very rigid definition of investment.

The definition of investment refers to enterprise which is defined as a body registered in India and should be having 'its management and real and substantial business operations in the territory of the Host State'. The criteria of real and substantial business operation are:

> "1.2.1 For greater certainty, "real and substantial business operations" for the purposes of this definition requires an Enterprise to have, without exception, all the following elements
>
> (i) made a substantial and long term commitment of capital in the Host State;
>
> (ii) engaged a substantial number of employees in the territory of the Host State;
>
> (iii) assumed entrepreneurial risk;
>
> (iv) made a substantial contribution to the development of the Host State through its operations alongwith transfer of technological knowhow, where applicable; and
>
> (v) carried out all its operations in accordance with the Law of the Host State."

[89] *Supra* note 7 at, 59

A bare perusal of this clause explains to us that India recognising the flaw in the open-ended approach has actually adopted a very restrictive definition of investment. The objective criteria are actually a *'**Salini +'Standard.*** The approach adopted by India and its restrictive nature is altogether more clearly when we see what does not constitute 'real and substantial business operation'. It reads thus:

> "1.2.2 "Real and substantial business operations" do not include:
> (i) objectives/strategies/arrangements, the main purpose or one of the main purposes of which is to avoid tax liabilities;
> (ii) the passive holding of stock, securities, land, or other property; or
> (iii) the ownership or leasing of real or personal property used in a trade or business."

What does this stand of India signify becomes more clear when we see the preamble that the protection and regulatory chill could take place only for those category of assets which aligns the objective of sustainable development and inclusive growth of Parties. It will actually lead to exclusion of a range of enterprises for example fly-by-night kind of Foreign Portfolio investment. The investment protection claimed with regard to sham-companies, companies created in tax heavens for tax evasion.

When we look at the article 9(Obligation against Corruption); 10(Disclosures); 11(Taxation); 12(Compliance with Law of Host State), we find that India has made a sea change in its understanding of the Investment along with the BIT also. Article 12 requirements to comply with Host laws are wide ranging in nature and extend thus: human rights, labour law, laws related to exploitation of natural resources; consumer protection and fair competition. 12.2 is actually very interesting as it adopts the loose nexus pattern of the French BITs that the Investment and its management shall contribute to the development of the Host State which must be understood in relation to "rights, traditions and customs of local communities and indigenous peoples of the Host State and carry out their operations with respect and regard for such rights, traditions and customs." Seeing it with definition of investment, the provisions under the above mentioned article have to be observed at all times. This creates a high-standard of protection.

If some believes this is enough of restrain, the Model BIT actually goes on to tell what not investment under the BIT is under Article 1.7. This covers wide range of

conventional assets like pre-establishment expenditure, portfolio investment; 'claims to money that arise solely from commercial contracts for the sale of goods or services'; 'Goodwill, brand value, market share or similar intangible rights' etc. It will be interesting to see how far India would be successful in getting other countries on board.

The question of corruption and non-compliance of laws of host state will be an interesting question to understand how the 'clean hand' doctrine would emerge. The *Yukos Case* held the view that there is nothing to persuade that there existed nothing to deduce that an investor cannot file a claim if it has failed if it has done something illegal as per the host state's law which amounts to unclean hands.[90] On the other hand, tribunals like *Minnotte and Lewis* v. *Poland* gave the obiter that the well-established fraud or other defect on part of investor will deprive him from filling a claim.[91] Similarly *Al Warraq* v. *Indonesia* held that if the investor has not complied with the law, it shall be a fit case to deny jurisdiction by the 'clean hands doctrine.'[92] However this should be understood that the non-observance of any compliance would lead to denial of jurisdiction. In *Hochtief v. Argentina*, the tribunal held that non-observance of norms like registration is not a fit instance for application of clean hand doctrine.[93]

It shall be worth watching how India proceeds on it. The US-India Negotiations will tell us how far the circle of flow of capital decides in the grand bargain has changed.

India-Kuwait(covers associated activities too)	'investment" means every kind of asset, owned or controlled **directly or indirectly** by an investor of one Contracting State and invested in the territory of the other Contracting State in accordance with the laws of the Contracting State. This term shall include in particular. though not exclusively: (a) **tangible, intangible, movable and immovable property and any property rights such as leases, mortgages, liens, pledges, usufructs and other similar ri2hts**; (b) shares, stocks, bonds. debentures and any other similar forms of participation in a company and other debts and loans

[90] *Yukos Universal Limited (Isle of Man*) v. *The Russian Federation* (UNCITRAL, PCA Case No. AA 227), Final Award, 18 July 2014, para. 1358.
[91] *David Minnotte & Robert Lewis* v. *Republic of Poland* (ICSID Case No. ARB(AF)/10/1), Award, 16 May 2014, para. 131.
[92] *Hesham T.M. Al Warraq* v. *Republic of Indonesia* (UNCITRAL), Final Award, 15 December 2014, para. 645.
[93] *Hochtief AG* v. *The Argentine Republic* (ICSID Case No. ARB/07/31), Decision on Liability, 29 December 2014, para. 200.

	and securities issued by any investor of a Contracting State, and returns retained for the purpose of reinvestment and **associated activities** as these terms are defined hereinafter; (c) rights or claims to money or to any performance under **contract having a financial or economic value**; (d) intellectual property rights, goodwill, technical processes. know-how, copyrights, trademarks, trade names and patents in accordance with the relevant laws of the respective host Contracting State; (e) any right conferred by law, contract or by virtue of any licences or permits granted pursuant to law, including rights to prospect ,explore, extract, or utilise natural resources, and rights to manufacture, use and sell products. and rights to undertake other economic and commercial activities. Any change of the form in which assets are invested or reinvested does not affect their character as investment
India China	"investment" means every kind of asset established or acquired, including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes: (i) movable and immovable property as well as other rights such as mortgages, liens or pledges; (ii) shares in and stock and debentures of a company and any other similar forms of participation in a company; (iii) rights to money or to any performance under contract having a financial value; (iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party; (v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals;
India-Lithunia	The term "investment" means every kind of asset invested, established or acquired, **including changes in the form of such investment**, by an investor of one Contracting Party in the territory of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the other Contracting Party, and shall include in particular, though not exclusively: i) movable and immovable property, such as mortgages, liens, pledges and similar rights; ii) shares, bonds, debentures and other forms of participation in an entity; iii) claims to money or to any performance under a contract having an economic value; iv) intellectual property rights, goodwill, technical processes and know-how, in accordance with the relevant laws of the respective Contracting Party; v) **right to engage in economic and commercial activities conferred by law and by virtue of a contract, including concessions to search for and extract or exploit natural resources**;
India-Mexico(American model)(it gives an exclusive close-ended definition)	"investment" means the **following assets established or acquired by an investor of one Contracting Party** in accordance with the laws in force of the other Contracting Party in whose territory the investment is made, and involving the commitment of capital, expectation of gain or profit or an assumption of risk: (a) an enterprise having **substantial business operations** in the territory of the host Contracting Party;

	(b) shares, stocks and other forms of equity participation in an enterprise; (c) bonds, debentures and other debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) **where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a Contracting Party or of a State enterprise**; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a Contracting Party or to a State enterprise; (e) movable and immovable property as well as other rights such as mortgages, liens or pledges, **acquired in the expectation or used for the purpose of economic benefit or other business purposes**; (f) interests arising from the commitment of capital or other resources in the territory of a Contracting Party to **economic activity in such territory**, such as under (i) contracts involving the presence of an investor's property in the territory of the other Contracting Party, including turnkey or construction contracts, (ii) business concessions conferred by law or under contract, including concessions to search for and extract natural resources, or (iii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; (g) intellectual property rights; and (h) claims to money involving the kind of interest set out in (a) to (g) above but no claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of the other Contracting Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d) above;
Model BIPA 2015	"Investment" means an Enterprise in the Host State, constituted, organised and operated in compliance with the Law of the Host State and owned or controlled in good faith by an Investor: (i) in accordance with this Treaty; and (ii) that is at all times in compliance with the obligations in Articles 9, 10, 11 and 12 of Chapter III of this Treaty. 1.7 **For greater clarity, Investment does not include the following assets of an Enterprise**: (i) any interest in debt securities issued by a government or government- owned or controlled enterprise, or loans to a government or government owned or controlled enterprise; (ii) any pre-operational expenditure relating to admission, establishment, acquisition or expansion of the Enterprise that is incurred before the commencement of substantial and real business operations of the Enterprise in the Host State; (iii) portfolio investments; (iv) claims to money that arise solely from commercial contracts for the sale of goods or services; (v) Goodwill, brand value, market share or similar intangible rights; (vi) claims to money that arise solely from the extension of credit

	in connection with any commercial transaction referred to in (v) above; (vii) an order or judgment sought or entered in any judicial, regulatory, administrative, or arbitral proceeding; (viii) any other claims to money that do not involve the kind of interests or operations set out in the definition of Investment in this Treaty

2.3 Arbitral Practice

The arbitral awards signal to us a varying trend in regard to the investment and this is more particular with regard to investor-state arbitration (ISA) at ICSID. I shall try to see it in light of the interpretation of the word 'directly out of an investment' under Article 25(1) in the later part of this section.

Most of the BITs begin with the use of the word 'every kind of assets' or 'every kind of assets including good, rights' and thereafter mention a non-exclusive variety of assets. In regard to the interpretation of this the awards have mostly relied upon the specific categories in comparison to the open-ended phrase 'any/every kind of assets'.[94] However in the case of *Saipem SPA* v. *Bangladesh*[95] laid emphasis upon the clause 'any kind of asset' and held that the claimant's claim is investment for the purpose of the ISA. The reason for the evolution of this kind of definition came in light of the need of capital-exporting countries which wanted to create newer and more profitable forms of investment and to protect and promote it.

The concept of 'Investment' seen as a 'property' and seen as a 'value' provides us different result and this is clearly visible in the two ISA on the same issue. This relates to the contract of service which was accorded to CNTS with TV Nova in Czech Republic. The CNTS was owned by Mr. Lauder. He was the ultimate beneficiary in this company. He also had share in a Dutch Company CME which brought the case under the Netherland-Czech Republic BIT. The regulator's decision on a dispute between him and his local business partner for control over TV Nova and the local partner held majority share of the contract CET 21. The cases are *Lauder* v

[94] *Jan De Nul N.V.* v *Arab Republic of Egypt (Jurisdiction)* ICSID Case No. ARB/04/13 (ICSID 2006, Kaufmann-Kohler P, Mayer & Stern).
[95] Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, *Saipem S.P.A.* v. *The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07

Czech *Republic*[96] and *CME* v Czech *Republic.*[97] Mr. Lauder has made investment in the TV Nova as an individual situated in USA as well as through a corporate entity, registered in Netherland.

The *Lauder Award* treating investment as a property held that since the investment done by claimant resides in the property(CNTE Company where he holds 99% shares), it has not been transferred or deprived him of his right to use his property and has not even interfered with his property rights, the claims do not stand merit. This was based on the logic that Mr. Lauder still owns the property indirectly. On the other hand, *CME Award* relying upon the notion of investment as a value held that as the value of the shares of the CNTE company has fallen, it has led to lose to CME. The tribunal in this case accepted the claim that the Media regulator has not acted fairly and this has led to end of the exclusive contract of CME with CET 21. As a result of this CNTE have assets but no business. Further when the FET clause was discussed by the Tribunal it focused on the idea of 'investment as an expectation' by evisceration of the standing contract which has clearly impacted the foreign investor adversely.

As per Douglas, there is nothing wrong in the varying conceptions of the investment for varying purposes. He believes it is good as it results in the defining the boundary of various areas of application with regard to the substantive clauses under the BIT. This will help in elucidating the scope of the clauses and the effect of their breach.

The use of the term 'any other right in rem... .' in the treaties signify the existence of investment as a property regime. This results in the creation of right against the whole world and as per Hohfeld's logic it creates duties for others and identifiable right in a person. This is very relevant in light of the idea of taking in the creeping expropriation and indirect expropriation and shall be discussed under the title of expropriation and regulatory taking heading.

The concept of 'intellectual property rights' provides a category in the definition of investment which overlaps the above understanding of property with the

[96] Final Award, IIC 205 (2001).
[97] Partial Award on the Merits, IIC 61 (2001).

understanding of property as a legal relationship to a thing. This is Anglo-American understanding of property and serves the purpose of the exclusion of others from the enjoyment of the property. Douglas quoting Penner rights that in this theory, "the interest in exclusively using things is regarded as a justification which explains and dictates the contours of the right which protects it."[98]

The question of what constitutes investment in the sense of 'investment as a property' has to meet the requirement of the asset to exist as per the domestic law of the host state. The investment as contractual right is an important variant which is specifically mentioned in the definition clause of investment in BITs. I shall discuss it in later parts of this chapter. This when seen in conjunction with the treatment of investment clauses, we find that a definition extending the property rights in intangible property along with the property rights in nature of the right in rem would act as a restriction against the authority of state to changes the 'bundle of rights' or conditions attached to it. Herein the US doctrine of conceptual severance which does not consider the annulment of one of the rights in the bundle of property rights doesnot amount to taking.

The problem with the idea of value as investment in cases of investment as a right in rem is that everything valuable cannot be considered as investment, for example A's love for her wife is valuable but then could not qualify as investment. It needs to have some economic value as well as existence as property[99] with qualification that it is capable of alienation. For example, A was a doctor whose license was annulled under the domestic order. He could not call it an expropriation because it can though be annulled but it cannot be alienated to someone else. This takes us to understand and evolution of the concept of investment as property which needs to have certain

[98] Douglas, Z.2010. "Property, Investment and the Scope of Investment Protection Obligations." In *The Foundations of International Investment Law: Bringing Theory into Practice*, edited by Z. Douglas, J. Pauwelyn, and J. Vinuales. USA: Oxford University Press, page11.

[99] Id at 12: while elaborating upon this quotes **J.E. Penner, The Idea of Property in Law (1997),** 112 reads thus:

> A necessary criterion of treating something as property, therefore, is that it is only contingently ours. Contractual rights and rights to damages that arise on the commission of a tort, are of course contingent as well, since one has no necessary contractual rights or rights to damages. What distinguishes property rights is not just that they are only contingently ours, but that they might just as well be someone else's

qualities. As per Douglas, such kind of taking cannot be categorised as direct expropriation and he considers the definition of 'direct expropriation' as incorrect.[100] They qualify well as cases of indirect expropriation.

On the other hand, if the concept of investment as value or expectation is considered even the denial or absence of one of the property rights in bundle or the expectations under the contractual regime will lead to the breach of the treaty standards. The problem as per Douglas, here is that whether it is a fit case for claims as against act of expropriation or is actually a case of breach of Fair and Equitable treatment.[101] In the case of *Pope & Talbot Inc* v *Canada,* the case was related to the govt. measure which stopped the export of a particular kind of wood. Canada's claim that the expectation of access to foreign market cannot be regarded as a property which is capable of expropriation was not accepted. The tribunal recognised this claim on behalf of the claimant and held that it amounts to expropriation as (i)the claimant had an expectation that it shall have the market access and this expectation of access is valuable (ii) that everything valuable is a property interest and (iii) any property is capable of expropriation.[102] Finally the tribunal held that it does not amount to expropriation as no substantial link exists between the measures taken by the government and the alleged argument of property being 'taken'.

It must be mentioned here that the case raises an interesting conclusion that the expectation of profit is a form of investment in nature of property which is capable of expropriation. This is based on the idea of the investment as expectation. It must be explained here that such forms of investment fits well in the cases of investment contracts or investment agreement or the business concession or rights awarded for the exploitation of natural resources. On the other hand if the above case would be observed as a case of investment in form of property, the claim of the investor would have failed because the claimant was still a company capable of doing business and its business still continues. In another case *Merrill & Ring Foresty* v *Canada,* the tribunal held that the 'potential interest through market access which may or may not

[100] Id at para 17.
[101] Id at para 18.
[102] *Pope & Talbot* v *Canada,* Interim Award, IIC 192 (2000)

materialize' cannot qualify as an investment capable of expropriation.[103] The tribunal discussed this case also from the perspective of fair and equitable treatment which I shall discuss in the next chapter.

Investment also exists as a *right in personam.* We broadly find them in the definition in the following category of assets: 'claim to money' , 'right to future income', 'claim to performance', 'business concessions in relation to exploration, extraction and exploitation of natural resource'[104], 'IPRs'[105] or 'turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts' [106] or 'investment agreements'[107].

In cases where the investment exists as a ***right in persona,*** we find that the idea of investment as value and investment as expectation come into play. The denial of one of the rights in these contracts would qualify as valid claims against the expropriation or nationalization. Such kind of agreement popularly called the Economic Stabilization Contract or Concession are popular since the 1960s when the natural resource rich economies(mainly oil-exporting countries) entered into such agreements with the investors of the developed capital-exporting countries. As per Salascue this was done with intention of putting these contracts beyond the rigor of the domestic politics and law-making. Almost every BIT since 1960s contains these clauses. These forms of agreement through PPP in form of BOT contracts have been used by the economies which shifted towards economic liberalisation in the 1990s and by China as well.

The provision of Investment Contracts originated because of the failure of investment as a property regime which guaranteed a treatment which a State decided in regard to the particular of property rights. In light of this, there was always a possibility that with change in political regime or change in the thinking of government, these rights in rem would fall. To check this, the Investor used to enter into an investment contract/agreement with the State-owned enterprise/government company or they

[103] Award, IIC 427 (2010).
[104] All BITs contain these clauses. To understand the difference , please refer to Tables which are provided in the above section.
[105] Both European as well as North American BITs contain this clause in varying degrees.
[106] US BITs contain this specific clause. It is an innovation
[107] US BITs contain such a clause

used to get concessions through government which had the advantages that it could be customized as per the needs of that sector and as per the bargain which the parties are able to do. The parties in case of a contract may facilitative to attain an exception for their investments which property law was not able to provide. The concept of privity of contract gives it an exclusive status. Cases like *Salini* v. *Morocco, Impregilo v. Pakistan*[108] recognise that only the investment contract which is entered by the State directly could be considered as a fit case for the ISA under BIT. On the other hand cases like *Vivendi v. Argentina*[109]and the Tribunal *in SGS v. Philippines*[110] (the service agreement qualified as investment) believe that any contract claim could be included if a broad dispute redressal clause is used in the BIT and the investment is made under BIT. A more restrictive approach is adopted in *LESI-Dipenta v. Algeria* where the tribunal held that the alleged violation must result in the breach of Standards of Treatment clause.[111] *Occidental* v. *Ecuador,* wherein one of the highest awards was given (US$ 1.77 Billion) is a case aroused out of the unilateral cancellation of Oil Contract.

Overall in regard to the investment contracts, we find that they are treated as investment for the purpose of the BIT if the State has entered into agreement with the foreign investor as a State directly or it has entered through a State-owned company or deals in an area where the State exercises monopoly by restricting the entry of private sector in that area. The controversy is by far unsettled. But even in case if we adopt the most restricted understanding, we find that these investments actually impact the regulatory structures and their exercise. It subverts the regulatory sovereignty of the State to a definite level. The restrictive approach visible in the North-American BITs which creates exception in form of non-conforming clauses as

[108] *Impregilo SpA* v. *Islamic Republic of Pakistan,* ICSID Case No. ARB/03/3, Decision on Jurisdiction dated April 22, 2005.

[109] *Compañía de Aguas del Aconquija, S.A. et Compagnie Générale des Eaux (Vivendi Universal)* v. *Argentine Republic,* ICSID Case No. ARB/97/3, Decision of the ad hoc Committee of July 3, 2002. It adopting a broader approach held thus:

> "the provision "does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT"

[110] *SGS Société Générale de Surveillance S.A.* v. *Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction dated January 29, 2004.

[111] *Consorzio Groupement L.E.S.I.-Dipenta* v. *People's Democratic Republic of Algeria*, ICISD Case No. ARB/03/8, Award (in French) dated January 10, 2005.

well as in form of the exceptions for the regulations in certain areas is an effort to regain their regulatory sovereignty

The question of true definition of Investment: Salini Test and ahead

Salini Case is the first landmark pronouncement which acts as break from the existing practice by adopting a more restrictive view by adopting a strict definition of 'investment' which as per Julian Davis Mortenson threatens to exclude any activity which is outside the hard infrastructures.[112] This is though limited to the IAS under ICSID. Such a test would shrink this regime and will lead to exclusion of activities in service delivery, investment which do not directly result in the creation of physical infrastructure. As per Galliard, the non-adoption of the definition of Investment was a conscious decision taken at time of ICSID drafting. [113]

In the initial phase of ISA awards at ICSID, the *Fedax v Venezuela*[114] is a land mark pronouncement wherein its approach led to inclusion of a broad range of assets as investment and actually went on to declare promissory note as investment for the purpose of Jurisdiction. As per Mortenson, this reflects the adoption of '*deferential approach'* which approves of an extraordinarily wide array of investments including liaison office in cases where core activities are performed abroad, hotel construction and operation contract.[115] Herein the tribunal would just look at the definition clause in BIT and if it covers the asset, it amounts to investment and jurisdiction exists.

Salini case[116] adopts the restrictive understanding of investment and evolved a test as to which economic activities qualify as investment. The origin of this test goes to the

[112] Mortenson, Julian Davis. 2010. "The Meaning of 'Investment': ICSID's Travaux and the Domain of International Investment Law." *Harvard International Law* 51 (1).
[113] Galliard, Emmanuel. 2009. "Indentify or Define? Reflections on the evolution of the concept of investment in ICSID practice". in *International Investment Law for 21st century,* edited by Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich, Oxford: Oxford University Press,
[114] *Fedax N.V.* v. *Republic of Venezuela* (ICSID Case No. ARB/96/3), Award of March 9, 1998, 37 *ILM* 1391 (1998), para. 21-23. Incidentally this is the first case which provided that the investment must have certain minimum elements. We still classify it an expansive definition because its threshold criteria leads to creation of a very liberal understanding of Investment. It provided what does not qualify as investment thus: (a)short-term; (b) occasional" arrangements in the nature of volatile capital, (c) yielding only quick gains and (d) immediate departure from the host country.
[115] *Supra* note 112.
[116] *Salini Costruttori, S.P.A.* v. *Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001).

Christophe Schreur's landmark work wherein he provided following qualities of investment: "(i) a certain duration" of the enterprise, (ii) a certain regularity of profit and return, (iii) an assumption of risk, (iv) a substantial commitment by the investor, and (v) some significance for the Host State's development."[117] The tribunal in Salini case has quoted him. The Tribunal in this case was dealing with a three year contract for highway construction in Morocco. The respondent claimed that the payment under the contract does not qualify as an investment. The tribunal in this case held that it is an investment for the purpose of ICSID Jurisdiction on the similar criteria as suggested by Schreuer and declared them as a mandatory test for the purpose of Article 25. These features are : (a) contributions, (b) certain duration of performance of contract(the tribunal set it at a minimum of 2 years, (c) participation in the risks of the transaction and (d) reading it in conjunction with the preamble, it added that 'contribution to the economic development of the host state of the investment'.[118] As per Mortenson, some of the later case actually moved ahead and established specific criteria of objectively satisfying each of these criteria.[119] Galliard classifies the method adopted in these case an example of deductive method of reasoning and stresses that they intend to find a true definition of investment. This method believes that the concept of investment under the other method (I will discuss it in next paragraph) is subjective. This methodology applies a definition of investment in place of the method identifying certain characteristics of investment which may be vary from case to case.

Intuitive Methodology is another approach wherein if certain characteristics of investment are present it suffices the Jurisdiction requirement. It does not require that the same characterstics is available in every case. It avoids generalization. This method finds its initial existence in the *CSOB* v *The Slovak Republic* wherein the

[117] Schreuer, Christoph.2009.*The ICSID Convention: A Commentary.*2nd edition Cambridge: Cambridge University Press.
[118] *Supra* note 117 at para 54.
[119] Mortenson, footnote 62 provides the list of these cases: .

> " Helnan Int'l Hotels, A.S. v. Arab Republic of Egypt, ICSID Case No. ARB 05/19, Decision on Objection to Jurisdiction, para 77 (Oct. 17, 2006); Saipem, S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, para 99 (Mar. 21, 2007); BM World Trade Corp. v. Republic of Ecuador, ICSID Case No. ARB/02/10, Decision on Jurisdiction (Dec. 22, 2003); Mitchell v. Congo, ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 1, 2006); Joy Mining v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), reprinted in44 I.L.M. 73 (2005)"

tribunal recognised that the ICSID Convention did not provide for a definition of investment because of its intent to leave it open upon the needs of investor and the Host State.[120] As per me, this provided policy flexibility to the States to evolve the range of instruments as per their condition and sovereign needs. In the case of *MCI* v. *Ecuador* the tribunal held that the criteria provided in some of the earlier awards must "*be considered only as examples and not necessarily as elements that are required for its existence…"*[121] As per Dolzer, *Biwater Gauff* v *Tanzania* is another case which is an exception to the Salini Test. The tribunal criticized the Salini Test on the pretext of the fact that Article 25 does not contain any such element and the negotiation history also reveals no such intent. It further said that the fixed and inflexible test in Salini Case is problematic because it takes away the autonomy of the parties to bargain. It has huge possibility of excluding a range of activities from its purview, even though the BIT intends to cover them. It may actually lead to two interpretations of terms of BIT: One for ICSID, other for Non-ICSID awards. In the *Malaysian Historical Salvors* v. *Malaysia,* the attack on Salini was fiercer and the award declared that the Salini Test is an error on part of the Tribunal.[122] The *Pantechinki* v *Albania* award recongnised the argument of party autonomy and actually decided that the Salini Test and such deductive pronouncement actually leads to subjectivity in the arbitral decisions. [123]

The decision in the *Phoenix* v *Czech Republic* is a case which requires special mention as in this case the tribunal after analyzing the various elements as suggested in earlier awards provided the additional requirement that the investment should be made as per the law of host state and that the asset has to be an investment which is *bonafide.*[124] This has a special relevance in light of the recent cases which have been filed by the investors against India which have been cancelled because of them made *malafide* via corruption for ex. Devas case in relation to the Antrix- Devas Deal, licenses of Telecom cancelled in light of the 2G corruption case etc.

[120] ICSID Case No. ARB/96/3, Decision on Jurisdiction 24 May, 1999.
[121] *MCI* v. *Ecuador,* ICSID Case no.- ARB/03/6, Award, 31 July 2007, para 165.
[122] Decision on Annulement, 16 April, 2009.
[123] Award, 30 July, 2009.
[124] *Phoneix* v *Czech Republic*, award 15 April, 2009.

The *Romak* v *Uzbekistan* is a non-ICSID case and here the Tribunal held that the word 'investment' must have a meaning of its own for the purpose of BIT. It had made reference to the putative list given in the definition clause and thereafter relying upon the Legal Dictionary decided that the investment for the purpose of BIT needs to have three features: contribution, duration and risk. It said that the word investment has to be construed uniformly whether it is ICSID case or a non-ICSID case. This position however could be exempted if the Contracting countries decide to do so.

The *Romak SA* v *Uzbekistan* signifies the emergence of a trend in the ISA practice that the term investment has to be seen as having some economic characteristics.[125] It provided that every investment must fulfill 'minimum requirement' to be qualified as investment. This is growing practice in Tribunal.[126] It will appropriate here to quote Douglas who is one of the important exponents of this idea and writes thus:

> "The legal materialization of an investment is the acquisition of a bundle of rights in property that has the characteristics of one or more of the categories of an investment defined by the applicable investment treaty where such property is situated in the territory of the host state or is recognized by the rules of the host's private international law to be situated in the host state or is created by the municipal law of the host state."[127]

One common point which the scholars criticizing the autonomous approach adopted in *Salini Case* is that each BIT is a self-contained instrument and that the qualifications added in Salini Case or similar cases is an unnecessary exercise of creativity. There argument is losing sheen when we see that the States like US, Colombia, definition adopted by Indian Model BIT, 2015. India BIT adopts an extremely restrictive definition of BIT.[128]

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[125] Award, PCA Case No AA280, IIC 400 (2009), 26th November 2009, Permanent Court of Arbitration [PCA] at paras. 180 and 207.
[126] UNCTAD IIA NOTES may 2015
[127] *Supra* note 98 at 14.
[128] Article 1.6 reads thus: ""Investment" means an Enterprise in the Host State, constituted, organised and operated in compliance with the Law of the Host State and owned or controlled in good faith by an Investor:
(i) in accordance with this Treaty; and

Ultimately I would like to conclude that the terms of 'grand bargain' typically represented as a transaction between a capital-exporting country and a capital-importing country is rapidly changing. We can say that it is result of the emerging economies from the undeveloped world which is also making significant investment in the earlier developed economies. US is cited as a major example which after 6 arbitration cases adopted the restrictive approach. Economies like India, Colombia and Mexico{under influence of NAFTA(Mexico is a party) and US influence}etc. are also example which have gone for a restrictive approach. They are carrying the characteristics requirement which more or less agrees with the Salini case.

AS far as the link between the understanding of Investment and domestic regulatory structure is concerned, I have following brief observations:

(a) The earlier adoption of open-ended unqualified definition of investment found in the largest no. of BITs had actually provided the gate for 'too-many' tools of investment. The awards recognizing the Portfolio Investment as Investment was unjustified extension of the definition of investment. In an era of liberalized economy which accommodates variety of capital generation tool, it ties the hand of State in almost every sector.

(b) The adoption of closed-list or enumeration of specific characteristics is welcome change. This changes the State liability to only those investments which held the State in the grand bargain.

(c) The inclusion of 'what is not investment' in North-American approach and Model Indian BIT, 2015 adopts is a welcome step.

(ii) that is at all times in compliance with the obligations in Articles 9, 10, 11 and 12 of Chapter III of this Treaty."

Chapter 3

Fair and Equitable Treatment

3.1 Thematic Introduction

It is a clause which in its variegated versions exists in every Bilateral Investment Treaty.[1] As per Rudolph Dolzer, this is the most-vigorously invoked clause in Investor-State Arbitration (ISA).[2] He goes on to observe that it is often invoked clause of the ISA that it has "almost ubiquitous presence" in these litigations.[3] The clause on Fair and Equitable Treatment is a promise which a state makes about its actions and behaviours towards the foreign investment.[4] In the *Suez, Sociedad General d Aguas de Barcelona, and Vivendi Universal, SA* v *The Argentina Republic*[5], the tribunal while explaining the content of Treatment held that these clauses restrain Host State from denying the rights of Investors and its obligation towards these investments. In *MTD Equity v. Chile*[6], the tribunal providing an overview of the concept quoted Judge Schwebel, "fair and equitable treatment" is "a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, nondiscrimination, and proportionality".[7]

As per Alavrez, BITs provides promises against prospective probable breaches of their obligations.[8] BITs usually contain two kinds of standards (a) general and (b) specific. The general standards apply to all the issues related to investment, on the other hand, the specific standards are the clauses which deal with specific aspects of

[1] Kenneth J. Vandevelde. 2010-11. "A unified theory of fair and equitable treatment." *N.Y.U.J. Int'l L. & Pol* 43:43.
[2] Dolzer, Rudolph and Schreur, Christoph. 2013. *Principles of International Investment Law.* Oxford: Oxford University Press, 136.
[3] Dolzer. 2005. "Fair and Equitable Treatment: A key standard in Bilateral Investment Treaty", 39 *The International Lawyer* 39:87.
[4] Salacuse, Jeswald W. 2013. *The Three Laws of International investment: National, Contractual and International frameworks for foreign capital.* Oxford: Oxford University Press , page 383.
[5] *Suez, Sociedad General d Aguas de Barcelona, and Vivendi Universal, SA* v *The Argentina Republic,* ICSID Case No. ARB/03/19.
[6] *MTD Equity* v. *Chile* Award (25 May 2004) ICSID ARB/01/07.
[7] Opinion of Judge Steven Schwebel, para. 23. Witness Statement submitted with the Memorial as quoted in the TED Case, para 109.
[8] Alvarez, José E. 2011. "The Return of the State." *Minnesota Journal Of Int'l Law,* 20:2, observes thus: "Bilateral investment treaties (BITs) are efforts by states to bind themselves to the mast to avoid the tempting sirens calling for breaches of investment contracts or nationalizations without compensation."

the investment e.g. repatriation. The general standard could be further sub-classified as (a) absolute and (b) relative. FET is a clause which belongs to the former category. Such clauses do not need a comparator.[9] These clauses are not contingent upon any special factor or government behaviour towards the investor. In this way, it is actually a clause which impinges upon the regulatory space of State most. The diversified off-shoots of this clause emerging in various arbitral awards actually tie the hand of Host-State in a number of ways. As per Dolzer, it is almost impossible to predict the categories of infringements which can emerge with regard to treaty standards.[10] In *Merrill & Ring Forestry L.P.* v. *The Government of Canada*[11], the tribunal while dealing with the content of 'minimum standard of treatment' said that the treatment shall be considered to have been breached if it attacks the sense of fairness, equality, and reasonableness. On the other hand, tribunal in *CMS* v. *Argentina*[12] deplored the vagueness of the FET clause and lack of definition. This is a very relevant factor when we analyse the impact of this clause on the regulatory flexibility of the Host State. In the *ADF case*, the tribunal observed that the clause specific content which could be used for substantiation (or refutation) of the investor's right and thereby the host-state's liability.[13] In *Saluka Investment B.V.* v. *The Czech Republic*[14], the tribunal will interpreting the content of the FET clause in light of the preamble of the Netherland-Czech and Slovak BIT held that the tribunals must desist from adopting an interpretation of BIT which takes so exaggerated a position that it dissuades the host state from admitting the foreign investment. It further said that investment protection is not the only goal of the Bilateral Investment Treaty and that the tribunal must adopt a balanced approach in interpreting the clauses. It is clear from this observation that the vagueness of the FET clause actually leads to unpredictability about what actions of Host State shall amount to its violation and which shall not. This does not mean that there is lack of complete certainty. As per S.

[9] Khalil, M. I. 1992. "Treatment of Foreign Investment in Bilateral Investment Treaties." *ICSID Rev-Foreign Investment Law Journal* 7: 339-51.
[10] *Supra* note 1 at 133.
[11] *Merrill & Ring Forestry L.P.* v. *The Government of Canada* (UNCITRAL), Award, 31 March 2010, paras. 210-223.
[12] *CMS* v. *Argentina,* Award 12 May, 2005 para 273.
[13] *ADF Group, Inc.* v. *United States*, ICSID Case No. ARB(AF)/00/1, 18 ICSID Rev. 195, 279 (Jan. 9, 2003).
[14] Partial award, March 17, 2006.

Vasciannie, it is not devoid of any independent legal content.[15] It can be specified through the survey of judicial practice as other broad-worded legal concepts are specified.[16] In light of this observation, UNCTAD in one of its paper explained the content of FET thus:

> "IT broadly to include a variety of specific requirements including a State's obligation to act consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an evenhanded manner, to ensure due process in decision-making and respect investors' legitimate expectations."[17]

A very interesting question is what level of violation of these requirements actually amount to violation of FET and how does it corresponds with the right of state to regulate in public interest. I shall attempt to answer these questions in the later sections of this chapter. Before proceeding ahead, I would like to give a brief history of this concept. The concept consistently exists in the treaties since the Havana Charter of 1948.[18] Post-World War II FCN treaties of USA contained this clause in its BIT.[19] The later treaties on foreign investment included the FET clause on a regular basis. The Abs-Shawcross Convention, 1959 contained it under Article and ensured the FET in regard to the property of foreigners. The OECD Draft Convention on the Protection of Foreign Property, 1967 also provided for this standard clause. The BITs since the Germany-Pakistan and BIT contain a clause on this.

There are different conceptions of FET under the BITs as well as through arbitral practice. It is linked (a) either to the international minimum standard under the customary international law or (b) the standard is *autonomous* and *additional* to the requirements of international law. The former concept has its origin in the assertion of developed countries in the pre-BIT era for a minimum level of treatment to the property of aliens irrespective of the treatment accorder by the host nations to its own nationals. The FET as per this view is referring only to this minimum international

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[15] Vasciannie, S. 1990. "The Fair and equitable treatment Standard in International Investment Law and Practice." *BYBIL 70:* 104.
[16] *Supra* note 1 at 134.
[17] UNCTAD, *Bilateral Investment Treaties 1995–2006*: Trends In Investment Rulemaking, page 7, *available at*: http://unctad.org/en/Docs/iteiia20065_en.pdf pdf (visited on march 12, 2015, page xiii.
[18] Article 11(2) (a) (i) reads thus: "to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another."
[19] *Supra* note 1 at 43.

standards and hence no additional rights are available to investor. In this way, it acts as ceiling limit.US, Canada, Mexico, Colombia, Model BIT of India, 2015 adopt this view of the FET. As an illustration, I will cite the 'Notes of interpretation of certain provisions of Chapter 11 of the NAFTA' which provides that, "the clause of FET does not require a treatment beyond that which is required by the customary international law."[20] While interpreting the FET clause[21] under the Estonia-USA BIT, the tribunal in *Genin* v. *Estonia* interpreted that the clause incorporates only a minimum standard of international law.[22] Even then the tribunal attempted a definition of FET as per which FET includes acts showing a willful neglect of duty, a insufficiency of action falling far below the international standards, or even subjective bad faith.[23]

On the other hand, if the treaty or tribunal considers it as autonomous or additional, FET without any further qualification is a clause which is not restricted by the minimum standards of international law. What does this kind of FET means and what is its content? The answer to this question could be traced at multiple levels. One, at the level of treaty drafting and a survey of the officials papers dealing with this. The 1967 OECD Draft Convention Commentary equated the status to the minimum standard clause. Similarly the UNCTAD report quotes 1984 OECD Committee on International and Multilateral enterprise which provided that FET as a substantive clause refers to the general principles of international law, irrespective of the fact that it does not refer to any such qualification. However arbitral award, in the light of non-binding nature of these commentaries, interpret it independent of the customary international law requirement. The textual ambiguity of the FET has been applied to evolve newer standards of protection. As per Christophe Schreuer, it is impractical and implausible to presume that a treaty would use FET in place of minimum standard

[20] Notes of Interpretation of Certain Provisions of Chapter 11 of the NAFTA Provisions, July 31, 2001, *available at*: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (visited on March29, 2015).

[21] Article (3) reads thus:

> "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law"

[22] *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil(US)* v. *Republic of Estonia*, Award, 25 June 2001, (2002) 17 *ICSID Review-FILJ*.

[23] Ibid.

of treatment i.e. if it is used then, it serves a particular cause.[24] It will pertinent to quote here Dolzer and Stevens who arrive at this same conclusion observe thus:

> "It is submitted here that the fact that the parties to BITS have considered it necessary to stipulate this standard as an express obligation rather than relied on a reference to international law and thereby invoked a relatively vague concept such as the minimum standard, is probably evidence of a self-contained standard. Further, some treaties refer to international law in addition to the fair and equitable treatment, thus appearing to reaffirm that international law standards are consistent with, but complementary to, the provisions of the BIT."[25]

It can be asserted that though these two forms of clause are different, they have few areas of common content As per Vasciannie, since there is already a history of minimum standards leading to controversy between the developed and developing countries. Therefore, it will highly improper to conclude that the international minimum standard clause is simply reframed as the FET clause and reflects that idea.[26] In the *MTD Case*, the tribunal said as the tribunal was established for the BIT, it will abide by the provisions of BIT and will be interpreting the provisions of BIT as the rules of interpretation under Vienna Convention on the Law of the Treaties (VCLT) which under Article 31(1) requires to interpret the treaty provisions in good faith as per the ordinary meanings of the terms used by treaty as per the stated object and purpose of the treaty. The tribunal went on to assert that the FET[27] as per the Malaysia-Chile BIT which is non-qualified FET clause should be understood as the treatment standard which is even handed and which insures an atmosphere conducive to the investor. It is a proactive promise on part of the Parties which requires them 'to promote', 'to stimulate' and 'to create' a just and fair environment for investor from the other State.

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[24] Christophe, Schreuer. 2005. "Fair and Equitable Treatment in Arbitral Practice." *Journal of World Investment and Trade* 6(3).
[25] Dolzer and Stevens. 1995. *Bilateral Investment Treaties.* Brill, Leiden.
[26] *Supra* note 15
[27] Article 3(1): "Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State."

The more interesting part of the Award comes from the fact that the tribunal used *TECMED Award*[28] which emerged from the Mexico-Spain BIT, 1995 which adopts a qualified definition of FET[29] to arrive at a meaning of FET and actually observed that the Tribunal would apply that standard for adjudication. This standard of FET required that the Host State acts consistently i.e. in a non-arbitrary fashion whereby it cannot arbitrarily revoke any pre-existing policy, concession, permit or decision issued by the Host State which was relied upon by the Investor to launch the commercial activity in the Host State. In the instant case the Chile Authority revoked a contract on the basis of non-feasibility of the project as per the environmental norms as well as the zoning requirements. Among several other grounds, one of the ground of Chilean authorities action was that as a democratic country, it could evolve its urban policies related to Land use regulation and the policies over a period of time and the process of modification in itself does not amount to arbitrary conduct but actually represents normal process of creation of standards.[30] The Tribunal decided on this issue that for the purpose of obligations under BIT, Chile is treated as a unit, as a monolith under International Law.[31] It has failed to act fairly and equitably towards the investor as its obligation was to act coherently and apply its policies consistently, independently of how diligent an investor.[32]

On the other hand, in the case of *White Industries* v. *India*[33], in spite of fact that India-Australia BIT provided for the unqualified BIT[34], the tribunal did not consent to the FET standard as prescribed in the *TECMED* case and observed that the test is too broad. In this way, we can say that the content of FET is fairly uncertain and the thread connecting the variegated interpretation is still evolving.

There is a third broad version of BIT which stands in between the 'unqualified FET' and the 'Minimum Standard of Treatment type FET' is the 'FET which ensures it as per principles of International Law'. This kind of FET clause provides a standard

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[28] *Técnicas Medioambientales TECMED S.A.* v. *The United Mexican States*, ICSID Case No. ARB(AF)00/2, award dated May 29, 2003, para. 154. See also *Waste Management*, *Inc*.v.*United Mexican Status*, ICSID Case No. ARB(AF)/00/3, para. 98.

[29] Article IV(1) Each Contracting Party will guarantee, within its territory, fair and equitable treatment, in accordance with international law, to investments made by investors of the other Contracting Party.

[30] id at para 144.

[31] id at para 165.

[32] id at para167.

[33] *White Industries* v. *Union of India*, UNCITRAL, Final Award. 30 Nov 2011

[34] Article II (2) reads thus: " Investments or investors of each Contracting Party shall at all times be accorded fair and equitable treatment."

above the minimum standard as customary law and actually adopts the standard as per the principle of international law. In the *Vivendi Case*[35], the tribunal while dealing with termination of contract with waste management and water delivery dealt on the content of FET which is of this kind.[36] The tribunal asserted that there is nothing in the clause which restricts the meaning of the FET to the international minimum standard and such an interpretation is inappropriate as per the BIT. The *Vivendi II* tribunal held that the clause should be interpreted *autonomously* and as per the ordinary meaning of the terms used in the BIT which requires the Host-state to 'do no harm' as a broad obligation. On the question of the Argentina's assertion of the exercise of the legitimate regulatory power on part of its provincial authority, the tribunal in *Vivendi II* held that the government actions were sovereign acts which illegitimately ends the concessions and makes the contract unprofitable. The *Vivendi II award*[37] is relevant because it went on to observe that the already considered broad *Neers Standard* is obsolete and applied 'do no harm' principle to arrive at the conclusion that legitimate expectation of investor has been infringed. This is an extremely wide interpretation of the FET clause which literally leads to freezing of the regulatory structure and leaves no scope for the evolution in the dynamic process of the State as was pleaded by Argentina in this case.

Among these three varying interpretations of FET, there are arbitral awards as well as scholarly writings which believe this debate is futile.[38] There is growing voice that this difference is more in the treaty standard as adopted by the countries and lesser in the arbitral practice. For example, in the above mentioned *MTD case,* thought the Treaty does not required the 'minimum standard of treatment', the award actually relied upon the *TECMED* award which was dealing with an issue emerging from a treaty which promised the Minimum Standard of Treatment. In the case of *El Paso*[39], the tribunal observed that this discussion about the linguistic content is not

[35] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *Republic of Argentina*, ICSID Case No. ARB/97/3 (Vivendi v. Argentina), available at : http://ita.law.uvic.ca/alphabetical_list_respondant.htm

[36] France-Argentina BIT, Article 4(1) reads thus: "Either Contracting Party shall extend and ensure fair and equitable treatment in accordance with the principles of International Law to investments made by investors of the other Contracting Party in its territory or in its maritime area, and ensure that the exercise of the right thus recognized shall not be hindered by law or in practice."

[37] ICSID Case No. ARB/97/3) (Annulment Proceeding) Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, *available at : http://www.italaw.com/documents/VivendiSecondAnnulmentDecision.pdf*

[38] *Supra* note 1 at 138.

[39] *EL Paso* v. *Argentina Award,* 31 October, 2011.

worthwhile because the idea of minimum standard as per the customary international law is as little deliberated as the idea of unqualified FET.

There is however another trend which we find in the arbitral practice which recognizes the regulatory space for the State. In the case of *Lemire* v. *Ukraine*[40], the tribunal observed that the legitimate expectation as an element of FET needs to recognise that there must be a regulatory flexibility in regard to the sphere of Host-State's activity and at the same time it said that FET[41] requires that the State should have a consistency, transparency, fairness, reasonableness, and enforcement of its decision without discrimination and arbitrariness.[42] There is a growing concern in the literature that the concept of FET cannot be treated like an umbrella clause and that breach of every domestic obligation cannot be treated as a cause of action based on violation of FET. The tribunal cannot become a supervisory body over the State for every cause of action. On the emerging misuse of FET, in *Waste Management* v. *Mexico*[43], the tribunal observed that the FET/Minimum Standard clause cannot become a mechanism for the debit collection and analogues processes in respect of all public contracts. Dr. Voss, in his dissenting opinion in *Lemire Case* has observed that, "FET standard cannot be construed as an empowerment of tribunals ex aequo et bono to develop a case law superseding host countries administrative laws."[44]

I shall be trying to examine in this chapter whether the clause of FET could be applied just as a proposition for determining whether state's action amount to breach or not or it could have been used in arbitral award to provide substantive content to the FET clause. The interpretation of FET between the investor (private actor) and the State if leads to establishment of a law, and then another question evolves whether a forum for adjudication of private dispute should actually create a standard which will have impact in the political sphere. This kind of law-making without accountability to the populace of the Host State and without proper know-how of the local situation is an interesting issue. This has relevance in light of the observation of Petersmann, where he asserts that the regulatory challenges of 21st century require a focus in

[40] *Joseph CHARLES LEMIRE* v. *UKRAINE*, ICSID CASE NO. ARB/06/18, March 28, 2011.
[41] USA-Ukraine BIT, Article II(3) reads thus: "(a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and **shall in no case be accorded treatment less than that required by international law.**"
[42] id at para 267.
[43] *Waste Management* v. *Mexico*, (case no. 2), Award 30 April, 2004, para 115-116.
[44] id at para 42.

international law for the adoption of a transnational or cosmopolitan regulation which effectively protects the human rights as well as secures the international economic law system.[45] Schneiderman believes that the concept of indirect expropriation and FET is providing a sort of certainty which constitutions provide at the domestic level. As per him, it restricts the government authority to behave fairly.[46] At the same time, he cautions us against any such regime because the ISA has inbuilt threats of serving the cause of privileged few. This in turn would make the Investor-State Arbitration System as a defective transnational system.[47] It is a very relevant observation. This when seen in light of the premise that the 'benefits (substantive rights under BIT or FTA) to investors is inversely proportion to the policy space enjoyed by the Host State'[48], we find that the regulatory space under BIT is enhancing. Spears citing the cases of *TECMED and Parkerings* v. *Lithuania* argue that in the former case, the concept of FET has been interpreted in a manner which leads to the restriction of governmental power of the State to in regard to social regulation and in the later case, it has recognized the sovereign right of the State to regulate.[49] Adeleke believes that the states must negotiate a treaty system which provides them the right to regulate its market and evolve economic policy which succeeds in securing the interest of the investor as well as the public interest issues.[50] I believe that the arbitral practice which started getting tilted towards the investor actually led to review of the BITs. The US BIT practices since 2004, India's Model BIT 2015, the Indonesia deciding not to sign BIT are signs that the states are finding the system problematic. There is a series of literature which assert that the expansionary tendency of IIA has led to possibility of loss of legitimacy of BIT.[51] Infact a survey of the arbitral awards reveals to us that the States are regularly submitting to the Tribunal that the alleged breach is actually an exercise of the non-discriminatory exercise of regulatory power. Some Tribunals have

[45] Petersmann ,E-U. 2012. *International Economic Law in the 21st Century* . Oxford: Hart Publishing, 2.

[46] Schneiderman, David. 2008. ***Constitutionalizing Economic Globalization*** *Investment Rules and Democracy's Promise*. Cambridge: Cambridge Studies in Law and Society, 222.

[47] Ibid.

[48] Fontanelli, Filippo and Bianco Giuseppe, 2014. "Converging Towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States." Stan. J. Int'l L. 50: 211-19.

[49] Spears. 2011. "Making way for the public interest in international investment agreements" in Evolution in Investment Treaty Law and Arbitration , edited by C Brown & K Miles Cambridge University Press.

[50] Adeleke, Dr.Fola 'Investor-State Arbitration and The Public Interest Regulation Theory', Online Proceedings Working Paper No. 2014/12, Published by the Society of International Economic Law, *available at:* http://ssrn.com/link/SIEL-2014-BernConference.html *(*visited on June 15, 2015), page 13.

[51] Brower, C. N. & Schill, S. W. 2009. "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" *Chi. J. Int Law 9*: 471.

started to recongise these facets of regulatory power. The *Parkerings Award* is a landmark award in this regard as the tribunal interpreting the BIT in light of the policy objectives of BIT recognised the notion of sustainable development in arriving at the content of equitable and reasonable treatment.[52] It elaborated upon the need of regulatory flexibility and investor's obligation while dealing with MFN clause to provide the basis for State to distinguish between foreign investors in light of its social and environmental concern. I will try to elaborate on this under the arbitral practice section of the paper.

In this chapter, the next sections will thus: **(3.2)** it will deal with the treaty practice of US, UK and India to see the varying pattern adopted in the BIT and try to derive inferences about the evolution of this concept. The practice on part of USA is the clearest example that even the capital-exporting states are finding problems in the expansive arbitral practice. The 2004 Model BIT is the breakpoint when US learning from the 6 ISA cases against it, shifted to a restrictive and narrower understanding of the FET clause which further narrows down in light of the exception clauses for environment and health. The Annex A also tells us what shall be customary international law for the purpose of BIT. These clauses make the FET clauses thoroughly restricted. Mexico which has been a recurring respondent in ISA cases has also adopted a similar BIT in its newer version.[53] Mexico has been the respondent in the *TECMED case* which has been considered as providing one of the most-expansive approaches to BIT. Canada, Colombia are other countries which have adopted this approach in their BITs. The second sub-portion shall deal with European Practice of Treaty Making. The European BITs have either adopted an unqualified FET clause or have adopted the FET clause to be approached as per the principles of International Law (France signs such treaties). The West European capital-exporting countries have not face much ISA as respondent or to more accurately assert, there are almost no landmark case where they are respondent and broad premise of FET is taken. India as a nation shifting gear to Development Model II actually signed the BIT as per the Model of the other nation if it is capital-exporting State. The official statement on behalf of India reveals to us that India actually signed these BIPA agreements to

[52] *Parkerings–Compagniet AS* v. *Republic of Lithuania*, ICSID Case No. ARB/05/8, 11 September 2007.
[53] India-Mexico, 2009 BIT goes for the Minimum Standard of Treatment clause.

provide confidence to the foreign investor.[54] This and adopting the BITS of the capital exporting country reveals to us that India was not considerate enough to understand the possible tying of its hand in the arena of regulation and governance. A study of BIT with UK, Germany and France reveal to us this fact. With UK, the FET clause is unqualified type and is only in regard to the Investment of investor and not the investor.[55] The FET clause with the Germany provides for unqualified FET in regard to the investor as well as the investment of investor.[56] The French BIT provides for the FET as per the principles of International Law only to the investment of the investor and it also provides that this should be accorded in principle and practice.[57] It also provided that this clause shall be available for "domestic transportation of persons and goods which are directly connected with an investment and to their international transportation." I would be dealing with BITs of India as discussed in the first chapter-Kuwait, China, Lithunia, Mexico and Model BIT, 2012.

The **Section 3.3** shall deal with the arbitral practice as it is evolving in regard to the dynamic principle of FET. This inquiry would focus upon the interrelationship between the investor's right of FET and the Host-State's right of regulation through the broad elements of FET which have been identified through arbitral awards. Here I would like to see how they interact. Host-State's right of regulation is actually an obligation on part of the State to take step as a responsible government in public interest (the term has been variously articulates). We interpret the clause of FET in light of objectives of Treaty. They are now providing for policy objectives which are in the interest of domestic regulation and establish the right to regulate. Czech Republic-Azerbaijan BIT, 2011 provides for "promotion of sustainable development, protection of health, safety and the environment"[58] where as neither of them in their earlier streak of BITs[59] adopted it. Latvia- Croatia BIT, 2002 provides for "improved

[54] Yashwant Sinha in his forward to the Germany-India BIT, 1998 dated 29.12.1998 wrote thus: "The Foreign Investment Policy of the Government of India was liberalised with India embarking on the Economic Reform Programme in 1991. Bilateral Investment Promotion and Protection Agreement (BIPA) with various countries was initiated following the liberalization of the foreign investment regime with a view to providing investor confidence to foreign investors."
[55] Article 3(2).
[56] Article 3(2).
[57] Article 4 (2).
[58] Czech Republic-Azerbaijan BIT, 2011.
[59] Azerbaijan-Finland BIT, 1998 did not contain such a clause.

living standard". [60] The Japan-Ukraine BIT, 2015 provides that the economic objectives can be achieved without compromising the norms related to health, safety and environmental norms which are general in operation. These new BITs provide the mechanism through which the earlier shrinking space of domestic regulations [61] expands against the faster expanding notion of Standards of treatment. I surveyed a presentation made on behalf of Ministry of Finance, Czech Republic[62] which provides that Czech Republic is planning to have BITs mainly with developing countries. It also asserts that its new Model BIT secures 'right to regulate for the Host-State. It shall include the right to issue "Measures necessary to pursue legitimate public policy objectives, such as social, environmental, security, cultural diversity, public health and safety."[63] With this brief overview , I shall proceed to next section.

3.2 Treaty Practice

3.2.1 United States of America

USA BITs over the period of time reflects the tension surrounding the scope of the substantive clauses and its uneasy relationship with the regulatory flexibility and exercise of sovereign power. US have succeeded in establishing a coherent model which balances the investor's interest with the regulatory space of state. [64] In 2004 Model BIT by adopting for the minimum standard as per customary international law, US has succeeded in limiting the scope of legitimate expectation and has succeeded in re-asserting the regulatory flexibility by creating autonomous provision related to environment, labour etc.[65] A commentator observes that US has succeed in enhancing the threshold level of State liability and thereby it has diminished the sphere of benefits to the investor.[66]

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[60] Latavia-Croatia BIT, 2002.

[61] Schill, S.W. 2011. "Enhancing Investment Law's Legitimacy: Conceptual and Methodological Foundations of a new Public Law Approach." *Va. J. Int'l* L. 4:*52.*

[62] Eliška Německá, 'The Czech Republic's Experience with Bilateral Investment Treaties (BITs)', a*vailable at:* http://investmentpolicyhub.unctad.org/Upload/Documents/DOWNLOAD15-Czech%20Rep.-Experience%20with%20BITs.pdf (visited on June 18, 2015).

[63] *Ibid.*

[64] *Supra* note 48 at 211-19.

[65] Fietta, Stephen. 2006. "Expropriation and the 'Fair and Equitable' Standard: The Developing Role of Investors 'Expectations' in International Investment Arbitration." *J. INT'L ARB.23:* 375-98.

[66] Sergey Ripinsky & Diana Rosert. March 2013. "European Investment Treaty Making: Status Quo and the Way Forward (A Development Perspective)." *TRANSNAT'L DIsP. MGMT.* 10:19 .

US FCN treaties contained a clause providing for 'minimum standard of treatment' and as per Dolzer, the post-world war II FCN treaties are called as the precursor of the FET clause in the BIT. However, when the US joined the regime of BIT, it started following the prototype of Germany and UK BITs.[67]

The US Model BIT, 1984 provided for unqualified FET clause which shall not be less than the standard provided under International law. The US-Argentina BIT, 1994, which is mentioned in the table, is a BIT based on it. In the case of *LG&E Energy Company*, the tribunal with aid from the objectives of the Preamble which provides that FET of investment is desirable for maintaining stable framework for the investment and maximizing the effective usage of economic resources. The tribunal basing its understanding upon the preambular objective held that stability of legal and business structure is a pre-condition for the FET in the above case only if does not pose any danger for the Host State.[68] In the *Occidental* v. *Ecuador case*[69], the tribunal was faced with the question as to whether transparency forms part of FET clause in relation to the claimant's contract for exclusive right to carry out hydrocarbon exploration and exploitation. The contract was cancelled when the claimant tried to transfer 40% legal title to EnCana. Ecuador cited the reason that this is not allowed under the new tax law. The tribunal in this case again basing its decision in conjoint reading of the clause with the preambular objective held that the stability of legal and business framework are necessary elements of FET clause. The tribunal observed that a change in tax policy which is apparently opaque and lacks transparency shatters the "need of stability" as required under the FET obligation. In arriving at this conclusion, it relied upon the decision in *Metalclad Case which* was a case emerging from the NAFTA, Chapter 11 and provided for a treatment not more than required by the

[67] Communications on behalf of US President to the Congress in regard to the US-Turkey BIT, 1985 illustrates that this was based on the pattern adopted by the other capital-exporting states like Germany. The relevant line reads thus:

> "Our BIT approach followed similar programs that had been undertaken with considerable success
> by a number of European counties, including the Federal Republic of Germany and the United Kingdom, since the early 1960s. Indeed, our industrialized partners already have nearly two hundred BITs in force, primarily with developing countries. Our treaties, which draw upon language used in the U.S. FCN treaties as well as European counterparts, are more comprehensive and far-reaching than European BITs."

[68] *LG&E Energy Company et a*l v. *The Argentine Republic* case, ICSID case no ARB/02/1(Decision on Liability) 3 October 2006 para 122-124.

[69] *Occidental Exploration and Production Company (OEPC)* v. *Republic of Ecuador*, London Court of International Arbitration Administered Case No. UN 3467, Final Award of July 1, 2004,

customary international law. The tribunal decided that a transparent and predictable framework" as well as "an orderly system whereby investor is treated fairly" are essential element of the FET.[70]

US continued with this format of FET under its Model BIT, 1994.US-Baharain BIT is an example of this pattern.

In its Model BIT, 2004, it shifted from the European way of FET to the NAFTA-type FET clause (US FCN treaties actually had this pattern only).[71] As per Schwebel, the 2004 Model BIT is a major event as it marks the end of an era whereby USA which was the most important player in the capital movement through treaties and other tools for last 150 years, recognising the possible fallouts of the BIT structure on the policy space, adopted a restricted understanding of BIT and its clauses.[72] As per this type of FET drafting, the investor is promised a minimum standard of treatment as per the customary international law which includes the fair and equitable treatment as a sus-species. The 2004 Model BIT adopts a narrowed sphere of cause of action basing itself in the FET Clause. It provides that the FET clause does not provide a standard superior or in addition to what standards exist and that it does not create any additional rights. As per the Article 5(3), the violation of breach of any other provision of treaty would by itself do not constitute breach of treatment under this article.[73] The Treaty provides to us as to what constitutes FET.[74] US-Rwanda BIT adopts this model of BIT. The Model BIT provides under Article 5 that the content of expression 'minimum standard of treatment' shall be governed by the Annex A of the treaty which provides for customary international law.[75]

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[70] Para 185.

[71] Alavarez. 2010. "Why are we recalibrating our Investment treaties?" *World Arbitration and Mediation Review*, 4(2): 143.

[72] Schwebel, Stephen M. 2009. 'A critical assessment of the U.S. Model BIT', Key note Address at INVESTMENT TREATIES AT 50: HOST STATE PERSPECTIVES, *available at*: http://www.biicl.org/files/4253_schwebelbiicl15may2009speech_cor2.pdf (visited on March 21, 2015).

[73] Article 5(3) of Model BIT, 2004: A determination that there has been a breach ofanother provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

[74] Article 5(2) (a) of Model BIT, 2004 reads thus: "(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;"

[75] The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international

As per Schwebel, this change in the perception of USA was directed by the realization of the fact that the system could be used both ways. It was more so a realization because of the 6 cases filed against it from Canadian Investor under NAFTA System.

At this point, I would briefly discuss the *Mondev* v. *United States of America Award*[76] which though dealt with the arbitration under NAFTA, did not have the freedom to interpret as per its understanding. It was to be interpreted in light of the authoritative interpretative note presented by the three members. This provided that the standard was to be interpreted as per customary international law and not as an autonomous concept. One more notable observation was that the provision will be interpreted in an evolutionary manner.[77] In light of this, the tribunal main work was to interpret it as per its contemporary meaning and not as it was understood in past. The tribunal was faced with the question as to use of modern investment treaties when the parties have observed that the elements of BITs have not become synonymous with the general international law. The tribunal on this point did not explicitly observe that the content of customary international law was identical to the contemporary treaty practice, but that the concordant system of practice will certainly 'influence' the content of customary international law.[78] What is extent of influence is not provided by the treaty.

In *Metalclad case*, the tribunal equated Article 1105 of NAFTA with the FET clause but it made two relevant observations which go beyond the FET standards. It provided that because of Article 102, the transparency on part of the Host-State government is part of the FET. As a result it observed that all the relevant rules need to exist in public domain and there should be no uncertainty in regard to their content. The tribunal held that the absence of due clarity as regard to policy amounts to breach of Article 1105.[79] In this way it places a very heavy burden on the Host state in regard to the legal certainty in regard to every investment.

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law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

[76] *Mondev Int'l Ltd.* v. *United States, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002), 42 I.L.M. 85, 106 (Stephen, Crawford, Schwebel, Arbs.)*

[77] *Id* at Para 124.

[78] Id at para 110.

[79] *Metalclad Corporation* v. *United Mexican States*, (ICSID Case No. ARB(AF)/97/1), Award of August 30, 2000, para. 122

The more critical element as provided by tribunal was that the Host state could be made liable for the statements which are made by the officials of the Host State. The tribunal observed that it creates a legal obligation towards the investor. This idea of reasonable expectation created the way for the idea of legitimate expectation which was later evolved in a number of cases. The notion reached its widest form in the TECMED case and was interpreted narrowly in the *Glamis* v. *United States.*[80]

In the *Glamis case*, the Canadian investor alleged breach of NAFTA standard because of the regulations of California State which made strict guidelines for the mining site and thereby it has reverted back from the reasonable expectation which the investor had when it made the investment. The company has claimed that the new regulations had led to lowering of the profit. The award is a major arbitration case. It restricted the understanding of the clause in comparison to the standards set in *Tecmed, S.D. Myers* v. *Canada* , *Metalclad case, Pope & Talbot* v. *Canada*. The tribunal observed that tribunal provides for the inter-connected and dynamic obligations on part of Host State which include duties, absence of arbitrary behaviour, and protection of legitimate expectation and requirement of predictable business framework.[81] It differed from them on its reference to the Neers Case standard (1926) which required that there must be highly egregious and shocking conduct on part of the Host State. On this point the tribunal also held that now Minimum Standard Treatment as standard has evolved ahead of Neers case. It held that claimant failed to prove violation of this standard. By inter-relating the Minimum Standard Clause and FET, it held thus, "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons…or the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations."[82] Only if the claimant succeeds in establishing this standard, it will lead to violation of Minimum Standard obligations. In this light, the tribunal held that as there was not objective commitment on part of the State towards the investor, it does not amount to violation of FET clause. This is a way provides a relatively flexible regulatory space for the state in absence of an objective specific commitment towards the investor. This observation has relevance in light of the fact that objective commitment in form of

[80] *Glamis* v. *United States*, ICSID, 8 June 2009.
[81] Id at para, 542.
[82] Id at para 25.

investment contracts or development contracts are mostly signed by the developing countries and not for the developed states. This then would create two set of policy-making space in regard to BIT.

The 2012 Model BIT almost provides the same standard of FET and has made changes with regard to the scope of escape clauses related to environment and labour issues. This is an instance of ensuring the cross-regime consistency and is an effort to mitigate the negative effects of the international law's fragmentation and is a bid to open the international investment law to the developments taking place in other regimes of international law.[83]

USA- Rwanda[84] 2008 (based on US Model BIT, 2004)	**Article 5: Minimum Standard of Treatment[85]** 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "Full protection and security" requires each Party to provide the level of police protection required under customary international law. 3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.
Argentina, 1994[8687]	Article II (2) (a) Investment shall at all times be

[83] *Supra* note 61 at 12-13.
[84] The Treaty provides that the treaty shall not apply in relation to environmental law, labour issue, and essential security exceptions.
[85] Annex A sets forth the shared understanding of the Parties regarding the meaning of ''customary international law'' in Article 5 (and in Annex B on Expropriation) and clarifies that the customary international law minimum standard of treatment of aliens owed under Article 5 refers to all customary international law principles that protect the economic rights and interests of aliens.
[86] Communications attached with the BIT provides that the sectoral and other exceptions provided in the BIT are for protection governmental regulatory interests and to accommodate the derogations from national treatment and, in some cases, MFN treatment in existing state or federal law.
[87] Article XI: This Treaty shall not preclude the application by either Party of measures necessary for the

(based on Model BIT 1984)	accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.[88] b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party. c) Each Party shall observe any obligation it may have entered into with regard to investments.
Turkey,1985[8990] (Model BIT 1984)	Article II (3) Investments shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in a manner consistent with international law. Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments.
Australia FET(chapter on investment)	ARTICLE 11.5 : MINIMUM STANDARD OF TREATMENT 11-1 1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. 2. For greater certainty, the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the

maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.

[88] Occidental case as quoted in Dolzer article while explaining a similar provision. : The cryptic answer given by the Tribunal seems to suggest that the two standards will b different in principle even though the Tribunal finds that they are identical in regard t requirements in the specific situation before the Tribunal: "[t]he Tribunal is of the opinio that in the instant case the Treaty standard is not different from that required under international law concerning both the stability and predictability of the legal and business framework of the investment.

[89] As per Article XI article II does no apply to taxation matters. However it provides that the State must have fairness and equity in the treatment of investment on matters associated with the tax policy.

[90] Article X: This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

	world; and (b) "Full protection and security" requires each Party to provide the level of police protection required under customary international law. 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
US-Baharain, 1999[91] (based on US Model BIT, 1994)	Article 3 (a) Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law.
NAFTA	Article 1105: Minimum Standard of Treatment 1. Each Party shall accord to Investments of investors of another Party treatment i n accordance with international law, including fair and equitable treatment and full protect i on and security. 2.Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife. 3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b)

3.2.2 Europe

Europe has adopted a free-standing statement of FET. This free-standing FET clause exist in two broad variants: (a) unqualified FET (Germany, UK, Netherland); or (b) FET as per the principles of International Law (France follows this format). The BITs differ also in regard to its availability to the investment or to investment as well as the investor. Overall, we can say that though the BITs of Europe differ in their intricate details, they share a common contemplate which is tilted towards investor protection.[92] This open-textured provision of FET offers a broader horizon than the

[91] Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law. The obligations to accord "fair and equitable treatment" and "full protection and security" are explicitly cited, as is each Party's obligation not to impair, through unreasonable and discriminatory means, the management, conduct, operation, and sale or other disposition of covered investments. The general reference to international law also implicitly incorporates other fundamental rules of customary international law regarding the treatment of foreign investment. However, this provision does not incorporate obligations based on other international agreements.

[92] Converging, 221.

North-American Minimum Standard Clause.[93] The Dutch Model BIT is recognised as the highest standard of the investor protection model.[94] It provides for nationality shopping, it does not take deference to domestic legitimate regulatory measure space for the Host State.

Germany, which led the process of BIT in 1959, has adopted FET which is actually expanding since the time it started. The first BIT with Pakistan does not contain a direct reference to 'fair and equitable treatment clause'. It only provided that discriminatory treatment shall not be accorded to any activity carried out by the Investor and also in connection to the activities associated with it like management, use or enjoyment of such property by company and nationals of either party. A bare perusal of this clause tells us that this language of clause does not provide the kind of promised treatment which a fair and equitable treatment clause provides to the investor. A survey of the FET arbitral practice reveals to us that the FET provides rights far wider than just ensuring non-discrimination. Germany shifted gears very soon and its later BIT started providing for FET to the investment in each case. The impact of Abs-Shawcross Draft Convention on Investment Abroad, 1959 is best reflected on this as it provided the FET only to the property and not to the property-holder. Similarly, the Germany-Korea BIT, 1963 provides for the FET only to the investment and not to the investor. The BIT signed by Germany in post 1990s provided the FET protection to the investor as well as the investment. As per Mann, such FET clauses are objective in their understanding and do not qualify or condition them. In a way, it treats FET as the autonomous and independent substantive provision.

A question concerned with such unqualified FET clause is what does it contain? The OECD commentary to Draft Convention on Foreign Property provides that this clause should be interpreted similar to minimum standard treatment clause.[95] The 1984 OECD Committee on International Investment and Multinational Enterprises report also provide that this clause must be interpreted only as a form of substantive legal standard connecting with the general principles of international law. A study of

[93] *Supra* note 15 at 102-05.
[94] Nikos Lavranos, In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs - A Member State's Perspective, 10 *TRANSNAT'L Disp. MGMT*., at 3 (2013).
[95] *Supra* note 1 at 120.

arbitral practice reveals to us that the interpretation of such kind of clauses is basically carried out in relation with the minimum standard clause. This appears correct when we look at the *White Industries Case*[96] where the tribunal relied upon the cases involving US-type FET clause. Dolzer's observation that treaties may be different in their content, but we find larger coherence in the arbitral practice appears pretty correct when we see read tribunal orders which apply the interpretation of differently-worded FET clauses.

UK also has adopted similar approach in its BIT. The UK-Ethiopia BIT, 2009 represents the BIT clause which UK adhere to in its BIT. It also provides the unconditional, unqualified BIT clause. It has been following this pattern uniformly across Treaties with Korea (1976), Singapore (1975), China (1986), India (1995), and Ethiopia (2009). The India-UK BIT contained a separate exception clause which does not exist in case of other BITs or for example the Kazakhstan (1995) which was its contemporary. It provided that this treaty shall not prevent the Host-State to take actions for protection of essential security interest, extreme emergency as per law which is applied non-discriminately and reasonably.[97] Similarly Thailand-UK BIT, 1973 does not contain an express separate substantive clause on FET and relates it to the MFN, NT and Expropriation. At the same time when Thailand signed BIT with Netherland (earlier rules) it provided for the FET in regard to the investment, goods, right and interests of nationals of each other.[98] This tells us that Salascue was right that one of the reason of the post-world war II BIT process being accelerated by the European nations was also to protect the property, goods and interest which have already accrued in the Host State(colony).

UK-Colombia BIT, 2009 needs a special mention in light of the fact that inspite of the continuity in the treaty practice of UK, the treaty with Colombia adopts a midway on the FET clause. It stays with unqualified FET clause, but then adds an explanation

[96] *White Industries* v. *Union of India*, UNCITRAL, Final Award. 30 Nov 2011. It emerged from India-Australia BIT which provides for the similarly worded FET clause.

[97] Article 11 reads thus: Notwithstanding paragraph (I) of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis.

[98] Netherland-Thailand BIT, 1973, article VII- Each Contracting Party shall ensure fair and equitable treatment of the investments, goods, rights and interests of nationals of the other Contracting Party and shall not impair, by unjustified or discriminatory measures, the management, maintenance, use, enjoyment or disposal thereof by them.

which draws inspiration from the 2004 US Model BIT as it provides that the FET treatment should not be understood to provide for a treatment in addition to what is provided by the international law. It also provides that if there has been a violation of any other provision of this BIT, it cannot automatically lead to violation of the FET clause for this section. This tells to us that the earlier notion of grand bargain between the capital-exporting country and capital importing country is fast shattering.

French Model BIT, 2006 provides that it provides for the FET as per the established principles of International Law. France has been applying this pattern of FET across its BIT history. France-India BIT, France-Argentina BIT are example of this fact. What does such clause of FET offers? In the landmark award in the Vivendi case, the tribunal adopted one of the most expansive understanding of FET with the aid of *Neers case(*turned it obsolete) and held that the FET standards requires certainty and consistency in the behaviour of Host-State and the true test of breach is as to whether the Host State's act led to the violation of the 'do no harm principle'. It must be noted here that Argentina has argued that the idea of FET under this format is actually the FET as per the minim standard of customary international law.

In this way, we find Western-European BITs have adopted an open-textured definition of the BIT. The process of reflection as is found in the BIT process of US, India, Colombia, Canada is not found in the BITs of West-Europe. The process of reflection as is found in the BIT process of US, India, Colombia, Canada is not found in the BITs of West-Europe.

Germany-Pakistan, 1959	Article 2 Neither Party shall subject to discriminatory treatment any activities carried on in connection with investments including the effective management, use or enjoyment of such investments by the nationals or companies of either Party in the territory of the other Party unless specific stipulations are made in the documents of admission of an investment.
Germany and Republic of Korea, 1963	Article 1(1) ... It(host state) shall treat, in each case, these investments in a fair and equitable manner.
Germany-India BIT, 1995	Article 3(2) Each Contracting Party shall **accord to investments as well as to investors** in respect of such investments at all times fair and equitable treatment and full protection and security in its territory.
UK-Ethopia BIT 2009	Article 2 (2)Investments of nationals or

	companies of each Contracting Party shall at **all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Part**y.
France-India	Article 4 (2) Each Contracting Party shall extend **fair and equitable treatment in accordance with internationally established principles to investments** made by investors of the other Contracting Party in its area and shall permit the full exercise of this right in principle and in practice.
UK-Columbia BIT, 2010[99]	Article II (2) Each Contracting Party shall protect within its territory investments made in accordance with its law by investors of the other Contracting Party and shall not impair by discriminatory measures the management, maintenance, use, enjoyment, extension, sale and liquidation of said investment Article II (3) 3. Each Contracting Party shall accord fair and equitable treatment and full protection and security in its territory to investments of investors of the other Contracting Party. 4. For greater certainty: (a) The concepts of "fair and equitable treatment" and "full protection and security" do not require additional treatment to that required in accordance with international law; (b) "Fair and equitable treatment" includes the prohibition against the denial of justice in criminal, civil, or administrative proceedings in accordance with the principle of due process embodied in the main legal systems of the world; (c) A determination that there has been a breach of another provision of this Agreement or another international agreement does not establish that the obligation to accord fair and equitable treatment has been breached; (d) The "full protection and security" standard does not imply, in any case, a better treatment to that accorded to nationals of the Contracting Party in whose territory the investment has been made.

[99] UK-Columbia BIT, 2010(not ratified) is an exception on part of UK as it differs from the usual UK BIT which it has signed with the other countries. It has a more restricted approach.

3.2.3 India

India which started opening its economy in 1991 started signing BIT in Mid-90s. India signed its first BIT with UK in 1995. India then aimed at bringing more and more FDI to India. It was guided by the need to enhance its Forex Reserves, bringing new technologies to India and capital. The earlier quoted statement on behalf of the Finance Minister of India that India intends to attract more and more FDI by assuring investor through BIT signifies the signaling function of the BIT. It is a very similar to what China did when it opened its economy.

A recent presentation by India at UNCTAD accepts the fact that India started signing these agreements without understanding the gravity and legal intricacies of the obligations under BIT. It reads thus: "At that time, little importance to the legal intricacies and consequences of these agreements was attached, primarily because of the economic need behind such agreements."[100] This should be seen in light of the premise that in the process of BIT between the developed and developing nation, the developing nations were virtually disinterested about the legal rights accruing to them in the BITs.[101] They appear to be more focused on the expected economic externality emerging from these adoptions. [102]They were more interested in the steady flow of foreign investment. The UNCTAD survey reveals to us that out though these BITS were bilateral but virtually all the obligation rested only with the developing country as the investment was coming to them.[103] A brief survey of India's BIT reveal that it has been adopting the open-textured, unqualified, unconditional FET. The Model BIT, 2003 also provides for the similarly-worded FET.

India, even then, cannot be blamed as following a blind path. Even though the wording in the BITs were mostly as per the other party, a survey of these treaty reveal to us that it made it a point that the treaty contains 'Self-judging type' of exception clause relating to extreme emergency cases to be decided reasonably and non-

[100] Transforming the international Investment Agreement regime, Presentation by Department of Economic Affairs, available at: http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/India_side-event-Wednesday_model-agreements.pdf. (visited on May 29, 2015)

[101] *Supra* note 48 at 211-19.

[102] Vandevelde, Kenneth J. 2005. "A Brief History of International Investment Agreements." *U.C. DAVIS J. INT'L L. & POLICY* 12:157-58 .

[103] United Nations Conference on Trade and Development, Dec. 2000, Bilateral Investment Treaties: 1959-99, at 4, U.N. Doc. UNCTAD/ITE/IIA/2 (2000).

discriminately and essential security clause. The clause occurs in one or other variant depending upon possibility of bargaining. India-UK BIT contained the same kind of clause; on the other hand, India-Germany BIT contains a different clause which provided a right to the Host state to proportionally exercise its power in relation to essential security interest or for prevention of diseases and pests in animals or plants.[104] A slightly different worded such clause exist in the BIT with France.[105] The relatively stronger bargaining power of India is reflected when we compare India-France BIT and France-Mexico BIT. The Mexican BIT contained an additional clause which provided that the Host State shall not be prevented because of this treaty to makes regulation regarding investment as per its policy to preserve and protect its cultural and linguistic diversity. [106]

In the post-*White Industries* award period, India's approach has gone sea-change. It has adopted the restrictive model of BIT. It has done with the unqualified FET clause and has replaced with a clause title 'Standard of Treatment' under the Chapter titled 'Obligations'. It provides for specific obligation in regard to it measures which is non-exclusive in nature.

These are:

(i) Denial of justice under customary international law[107]

(ii) Un-remedied and egregious violations of due process; or

(iii)Manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment.

This view is guided by the fact that the content of FET has been variously interpreted in theses treaties. These interpretations have made it difficult for Host states to access

[104] Article 12 reads thus Nothing In this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security Interests, or for the prevention of diseases and pests in animals or plants.

[105] Article 12 The provision of this Agreement shall not in any way limit the right of either Contracting Party in
cases of extreme emergency to take action in accordance with its laws applied in good faith, on a nondiscriminatory basis, and only to the extent and duration necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.

[106] 3. Nothing in this Agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign investors and the conditions of activities of these investors, in the framework of policies designed to preserve and promote cultural and linguistic diversity.

[107] For greater certainty, it is clarified that "customary international law" only results from a general and consistent practice of States that they follow from a sense of legal obligation.

the liability which has led to emergence of unnecessary controversies and shrinking of the regulatory space.

The presentation at UNCTAD tells us that it intends to make it a neutral treaty which balance the right of investor as well the right to regulate of the investor. It also observes that this is directed by the goal to change the nature of earlier treaties which were actually instruments of investment protection. It also tells us that India learning from the emerging arbitral practice as well as the changes in treaty practice of other states is shifting to this model of BIT. The presentation as well the above-quoted clause itself clears that India intends to extend the FET protection clause to redress only the grievances emerging from the genuine and gross violations of the treaty clauses. It also provides that the ordinary cases of disputes must be settled in the domestic courts.

An overview of the treaty tells us that India, being concerned about the regulatory space as well as its aim to provide protection to investment which meets a definite threshold is adopted. The preamble provides that Host State shall have the right to regulate investments as per its law and policy. It further provides that the State can makes changes to the conditions imposed upon the investment as per the need of aligning it to the aim of sustainable development and inclusive growth of parties. Further Article 2.4 provides that the clauses of this treaty cannot be used to restrict right of either party to changes its laws in good faith. It provides that the State retains right to regulation, compliance etc. Article 2.6 provides that the provisions of this Treaty shall not apply to the government procurement, subsidies, services supplied by government, taxation, compulsory license issuance, denies the right of arbitration in relation to commercial contracts entered by one of the Party and investor.

Article 8.3 provides that an investor must comply with Article 9, 10, 11 and 12 and that they are fundamental and compulsory for the operation of this Treaty. It provides that if an investor intends to claim the rights under this treaty, it has to comply with the requirements of these articles. It has a lot of relevance in light of the fact that since 2G License Cancellation by the Supreme Court of India several of Investors have

gone for arbitration.[108] Even Devas has gone for the arbitration after cancellation of contract because of the corruption in Antrix-Devas Deal.[109]

Under Chapter V titled 'Exception', Article 16 provides for general exceptions in regard to the obligation of Host-State. They are public morals or maintaining public order, ensuring financial and banking stability, remedying BOP crisis, public health and safety, conserving environment including living and non-living natural resources, improvement of working conditions, protecting privacy in regard to processing and dissemination of personal data; protecting national treasures or monuments of artistic, cultural, historic or archaeological value. [110] It also provides for security exception.

India-Kuwait,2001	Article 5(1) Each Contracting State shall at all time **ensure investments and associated activities**[111], made in its territory by investors of the other Contracting State, fair and equitable treatment.
India China, 2006	Article 3(2) (2) **Investments and returns of investors** of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party
India-Lithunia, 2010	Article 3 (2) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party
India-Mexico(American model), 2008	ARTICLE 5 Minimum Standard of Treatment 1. Each Contracting Party shall accord to investments of investors of the other Contracting Party fair and equitable treatment and full protection and security. 2. Each Contracting Party shall not deny justice to investments of investors of the other Contracting Party. 3. For greater certainty: (a) the obligations set forth in paragraphs 1 and 2 above do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens; and (b) a determination that there has been a breach of another provision of this Agreement, or of a

[108] Telenor seeks arbitration, claims damages of $14 bn from govt in 2G case., Economic Times, *available at:* http://economictimes.indiatimes.com/news/news-by-industry/telecom/telenor-seeks-arbitration-claims-damages-of-14-bn-from-govt-in-2g-case/articleshow/12420575.cms (visited on Mary 21, 2015)

[109] Devas investors take Antrix to arbitration court in The Hague, The Hindu, *available at :* http://www.thehindu.com/news/international/world/devas-investors-take-antrix-to-arbitration-court-in-the-hague/article4718339.ece (visited on May 20, 2015)

[110] Article 16.

[111] Article 1(8) defines associated activities.

	separate international Agreement, does not establish that there has been a breach of this Article.
Model BIPA 2014	Article 3: Standard of Treatment 3.1 Each Party shall not subject Investments of Investors of the other Party to Measures which constitute: (i) Denial of justice under customary international law; (ii) Un-remedied and egregious violations of due process; or ; (iii)Manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment. 3.2 A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

3.3 Arbitral Practice

In this portion, I shall be trying to enumerate the major elements of FET as identified over the course of arbitral practice. I shall employ in this portion the elements as identified by Dolzer and Schreuer in their book. Through these judgments, I would try to bring the inter-relation between the FET and the regulatory sphere of the Host State.

Elements of FET

By the survey of arbitral practice we find that some elements of FET have been broadly been agreed among the parties. Even the most-restricted versions of BIT provide for it. These elements are stability and protection of legitimate expectation of investor, transparency, compliance with investment contracts, procedural propriety and due process, good faith and freedom from coercion and harassment.[112] How these clauses are actually applied in a particular case depends upon the facts of the particular case. This includes the regulatory environment, level of commitment on part of Host State. I shall now elaborate on them.

Procedural propriety and presence of due process is an element of FET and same has been recognised across the arbitral cases. The concept of fair procedure is a basic

[112] *Supra* note 1 at 144.

constituent of any legal system abiding by the rule of law principle. Even the customary international law in pre-BIT era also recognizes this principle even to criminals and not just foreign investor.[113] It forms the standard of justice which is most simple and most fundamental principle and the one which enjoys general acceptance by every civilized country as part of International Law.[114] It also forms a major element of the FET clause under both the standards. It also relates to the clause of 'denial of justice'. It has been provided as an element of the FET expressly under the US BITs since 2004 which obliges state only for minimum standard of protection as per International Law. The cases relate mostly to the deficiency in recognition and enforcement of the rights of investor. In the case of *Azinian* v. *Mexico*[115] , the tribunal observed that a case for denial of justice basically emerges in cases where the concerned court has failed to take cognizance of the matter, unduly delay the judgement, administer justice in a flawed manner, or does the malicious misapplication of law. In the *Metalclad Case*, the claimant among other claims claimed that the ecological decree has led to breach of FET clause. The tribunal in this case held that the change in the environmental law which shifted jurisdiction to the federal jurisdiction has devoid it of the opportunity to due process of law and amounts on procedural impropriety. In the *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US)* v. *Republic of Estonia*, the tribunal while dealing with Article II(3)(a) of the US-Estonia BIT, held that the willful neglect of its duty, an insufficient action falling far below international standards amounts to violation of the minimum standard.[116] In the *Waste Management* v. *Mexico*, the tribunal among other grounds recognised that the judicial impropriety amounts to violation of FET. [117] In *Thunderbird* v. *Mexico*, the tribunal observed that the standards of due process and procedural fairness applicable in administrative proceeding are lower than in a judicial process but must ensure fair opportunity of hearing and judicial review.[118] When the question of judicial delay was raised as a breach of FET, the tribunal has

[113] Borchard, E. 1940. "The 'Minimum standard' of the treatment of Aliens.'' *Michigan Law Review 3:* 445-61.
[114] Root. 1910. "The Basis for Protection to Citizens Residing Abroad." *PROC. AM. SOC.INT.L. 4(*16): 21.
[115] *Azinian v. Mexico*, ICSID Case No. ARB/(AF)/97/2, Award, para 87 (Nov. 1, 1999).
[116] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin* v. *Republic of Estonia*, ICSID Case no ARB/99/2 (Award) (June 25, 2001)
[117] *Waste Management, Inc.* v. *The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Apr. 30, 2004
[118] Award, 26 January, 2006, *available at:* http://www.italaw.com/documents/ThunderbirdAward.pdf (visited on April 20, 2015)/

not recognized it as a breach. In the *White Industries case*, the ground of delay in judicial process was claimed by the claimant as the violation of FET. The tribunal in this case taking stock of the prevailing situation in India and its situation in India held that this delay was not discriminatory and that such delay does not amount to violation of FET.

Good faith is another inherent element of the FET. The French BITs provide it as an element of FET. It is one of the foundational principle ideas of International law and has also been recognized as a constituent of FET. In *Sempra* v. *Argentina*[119], the tribunal held that it is the "common guiding beacon" of this obligation and that "it is at the heart of the concept of FET which permeates the whole approach to investor protection." In the *TECMED S.A.* v. *The United Mexican State*, the tribunal held that *bona fide behaviour* on part of Party is an element of FET. It held that there is an expectation on part of the investor that the Host state shall maintain a non-discriminatory and equitable standard and it should be such that it must appear unbiased and without bad faith on part of the investor. It said that the *principle of good faith* requires the Host State to meet the expectation of the investor to ensure a non-discriminatory, unbiased, certain and non-ambiguous. It observed that there may be a case when the State has not acted legally, it could still amount to breach of FET if it creates shock or at least surprises the sense of judicial propriety to a person unconnected and impartial. In the case of *Frontier Petroleum* v. *The Czech Republic*, the tribunal gave description of violation of good faith thus: 'bad faith action includes the use of legal instrument for the purposes which are different from the one for which it was created…it also represents the presence of conspiracy on part of the State instrumentalities to cause damage to the investment or leading to termination of investment because of reasons other than the one stated by the Host state….if the State cites the layers of government as a reason for the non-enforcement of the contractual obligation then it amounts to the violation of good faith.'[120]

Transparency is also recognized as an element of the FET. The status of this clause has been only established as a part of FET in the late 1990s. It is a relatively new concept which has not yet attained the status of the customary international law. I had discussed this issue while elaborating about the inter-relationship between the FET

[119] *Sempra* v. *Argentina*, ICSID Award, 28 September , 2007, para 297.
[120] *Frontier Petroleum* v. *The Czech Republic* , UNCITRAL, Final award, 12 November, 2010.

and minimum standard. In the *Metalclad case*, the tribunal held that the absence of transparent framework on part of Host-State amounts to violation of FET. The tribunal had defined 'transparency' as the presence of all the necessary legal requirements in relation to investment available in public domain. It treated it as violation of article 1105 by reading it conjointly with article 1802. It actually went on to observe that as soon as the Party comes to know about the misunderstanding or confusion, it is an obligation on part of Party to clear it. In the *Maffezini (Argentina)* v. *Kingdom of Spain*, the tribunal decided that the lack of transparency in the manner in which the loan transaction was passed amounts to the breach of FET.[121]

Legitimate Expectation is one of the most debatable issues as an element of the FET clause. It has a particular relevance in regard to the domestic regulatory structures. The concept of legitimate expectation exists at two levels: one at the pre-establishment level and other at the post-establishment level. The investor's expectation is based upon the legal framework and any specific representation made explicitly or implicitly on behalf of the Host State.[122] It must be made clear here that the assessment of the expectation of investor shall be done in light of the situation existing on the date of investment. It should not be based upon the earlier practice on that issue. Another relevant point is the existence of the specific representation on behalf of the Host state. This has particular relevance in relation to the Investment contracts where the State itself or its instrumentality is party. As per Gazzini and Radia, the question of legitimate expectation has to be tested in light of the clear representation which then has to be seen in light of the entire circumstances associated with the case.[123] A reversal of the conditions upon which the investor has made the investment is a definite case for the violation of investor's expectation as a breach of FET obligation.[124]

In a series of cases, the tribunals have held that an exercise of power under the already existing legal instrument at the time of investment cannot be a ground of violation of legitimate expectations as the investor should known about the regulation easily.[125] It is the duty or concern of the investor to make such assessments before going ahead

[121] *Maffezini (Argentina)* v. *Kingdom of Spain*, ICSID case No ARB/97/7 Award (November 13, 2000).
[122] *Supra* note1 at 145.
[123] T Gazzini and Radi (note 158 above) 15 as quoted in Dolzer.
[124] *Supra* note 15.
[125] *Feldman* v. *Mexico,Award*, 16 December, 2002, para 128.

with the investment. In this way, though the legitimate expectation is inherent in the FET and exists as an objective standard, its real application would depend upon the circumstances of the case which include the applicable law existing specifically at the time of investment as well as the specific or implied representation made by a Party to the treaty.

It now takes me to the next part of the idea related to development/changes in legal policies/investment related to investment subsequent to investment. Suppose a regulation existed on the day of investment or suppose the investment contract has been signed with certain condition, whether every change in change in condition or regulation would amount to breach of legitimate expectation. If the answer to this question is given in yes, it amounts to the 'freezing of standards' and is a definite attack upon the right of State to make policy. The tribunals have taken cognizance of this position of State. Countries have taken it as an argument and tribunals have paid deference to this idea in their interpretation of notion of legitimate expectation.[126] *Perenco tribunal* taking cognizance of the fact that one of the party is an independent sovereign state has observed that ISA has always sovereign as one of the party, observed that this cannot preclude the tribunal on evaluating it in regard to the FET clause. The threshold for legitimate actions on part of state is to adopt a non-discriminatory policy across sectors and nationality. In the *Occidental case*, the tribunal has declared that the law which changed the manner in which the VAT was to be calculated amounts to breach of the legitimate expectation of the investor. It observed that there has been a marked change in the law which existed at the time of investment.[127] In this case tribunal has observed that the there is a certain element of obligation on part of the State to not alter the legal and business environment in which the investment was made.[128] The *Tecmed Case* is another example where the tribunal held that the amendment in the legal regulation signifies the absence of an orderly system in Host State and that the system lacks the certainty which is necessary for the protection of Investors' expectation.[129] The tribunal believed that there is a need for

[126] *Perenco Ecuador Ltd*. v. *The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Petro ecuador)(ICSID Case No.ARB/08/6), Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, para. 560.
[127] Occidental case, *supra* note 69 at para 184.
[128] *Ibid* at para. 191.
[129] *Técnicas Medioambientales TECMED S.A.* v. *The United Mexican States*, ICSID Case No. ARB(AF)00/2, award dated May 29, 2003, para. 154. See also *Waste Management, Inc*.v.*United Mexican Status*, ICSID Case No. ARB(AF)/00/3, para 76.

predictable framework in the host state in relation to the investment made. It extended the obligation on part of the State to pro-actively end the confusion or misunderstanding related to the investment. In *CMS* v. *Argentina*, the tribunal with the aid from the preambular goal observed that the stability and predictability is an essential element of the legitimate expectation of the investor under FET. However, it must be noted here that uncertain or general and vague statements cannot be deemed to create legitimate expectation. White Industries case is an example of this. In this case, the claimant claims were rejected by the tribunal in relation to the New York Convention, and the expectations emerging from the communications of the other party. Tribunal declared that Indian courts have interfering into the foreign awards since a long time and vague representations cannot be ground of creation of the legitimate expectation.

There is another side to this premise. Some of the tribunals have started to provide a decisive role to element of sovereignty and regulatory space of the State in examining whether the State has actually violated the legitimate expectation. In *Parkerings Case*, the tribunal observed in relation to the legitimate expectation that an investor must be ready to expect the legitimate and necessary regulatory action on and should do their due diligence.[130] It must "adapt…to the potential changes of legal environment"[131]; "any businessman or investor knows that laws will evolve over time. What is prohibited however is for a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power."[132] This is a very relevant observation in light of the recognition of problems with the stability of regulations as a tool to freeze the evolutionary process of governance. In the *El Paso Case*, the tribunal held that the assessment must be of the fact as to whether the measure exceeds the normal regulatory power and whether the changed regulation brings so fundamental change in the basic framework which goes beyond the margin of appreciation.[133] The *EDF v. Romania* tribunal recognised the limitation of the principle of the stability in the regulatory framework and observed that the concept of legitimate expectations cannot be used to imply that stable legal and business framework… this would amount to

[130] *Parkerings* v. *Lithunia*, ICSID Case No. ARB/05/8, 2007.
[131] *Ibid* at para. 333.
[132] *Ibid* at para331.
[133] *El Paso* v *Argentina, Award, ICSID* Case No. ARB/03/15, *31 October, para 402.*

virtual freezing of the norms. [134]Only in cases where specific obligations have been made by the Party that it could be declared to be liable for its violation. In *Saluka* v.*Czech Republic*, the tribunal observed that the question of investor's right and the right to regulate of the State, the test of legitimate expectation must try to weigh the expectation with the state's obligation to act in public interest.[135]

As far as the question of specific commitment emerging under the investment contract is concerned, the tribunal again has shown two trends. One supports the investor's stand whereas the other takes the balanced view. As elaborated in second chapter, these contracts are made to provide investor-specific contract by subverting the legal and business environment existing in the concerned Host State. It promises certain conditions for both the parties to the investment contract. In one way, the claim against the State in investment contract resembles the legitimate expectations but it must be taken due care to understand that the clauses of the agreement, may provide for a standard which may be higher or lower than the protection available under the normal legitimate expectation based contract.

A question in relation to the tribunals' practice is whether violation of any of the terms and conditions of the contract would amount to violation of FET. The *Mondev Tribunal* provided for that breach of any clause of the contract would be a wrong as per the international law and therefore it amounts to violation of the agreement. In the *SGS v. Paraguay*, the tribunal suggested that the baseline expectation of the contractual compliance cannot be breached or denied.[136] In this case the non-payment of due money under contract was recognised as the breach of the FET. However, there is another line of cases emerging on the issue. As per this line of thought, not every breach of contract could be called as FET violation. It must have the necessary element of the exercise of sovereign power.[137] If the tool of sovereign power has been exercised which has led to termination of contract, then it would be treated as the violation of FET.[138] At the same time if there has been an intervention on part of the government which affects the terms of contract between the investor and an

[134] *EDF* v. *Romania*, ICSID Case No. ARB/05/13, October 2, 2009.
[135] *Saluka* v.*Czech Republic*, Partial Award, para. 337, Mar. 17, 2006.
[136] Decision on Jurisdicion, 12 February, 2010.
[137] Bayindir v. Pakistan, Award, 27 August, 2009, para 377.
[138]Rumeli v. kazakhastan, Award 29 July, 2008, para 615.

instrumentality of State, it shall be treated as a case of violation of FET. The evidence of exercise of sovereign power is a must in this case. The *White Industries* is a good example of the same. In this case, CIL (a Public Sector Undertaking) has allegedly breached the conditions of the contract with the investor. The tribunal denied remedy on this basis as it held that the CIL is not a state instrumentality for the establishment of violation of the Contract. It must be noted here that US has adopted a very narrow definition of State-owned Enterprise to skip the liability in cases of business operation through a commercial entity. Only in cases, where there was a clear lack of transparency and presence of arbitrariness, it shall be treated as violation of FET.[139] In Waste Management II case, the tribunal held that FET cannot be used as debt recollection clause, unless there are evidences of sectoral bias or local prejudice. There must be an outright or unjustified breach of the contract as otherwise it open flood gate of arbitration. In *Gami v. Mexico*, the tribunal held that only in cases of maladministration on part of the host state leading to termination of contract, it could be considered that the investor has violated FET obligation.[140] It is the record as a whole which shall form base of the question as to whether FET has been violated or not.

A study of these elements reveal to us that from the initial era of expansive interpretation, the tribunal have now started to show deference to the obligation of government in relation to regulation. The tribunals have started to take cognizance of the evolutionary nature of economies and the dynamic character of governance. The inclusion of human rights issues, due regard to the environmental and labour norms are the bright signs that the regime of IIA and ISA would not remain simply as a regime of the investor protection. As per UNCTAD recent updates, the present phase is a phase of reflection on part of the States. The States have become conscious of the need to protect the regulatory space. Another lesson for the Host States is that they must at least not enter into contracts without due analysis. Vivendi is a relevant example in this case. In this case, the local government has failed to reserve its right for regulation of prices of water. When it did the same, it justified it in name of 'right

[139] *Waste Management* v. *Mexico*, Final award, 30 April, 2004.
[140] *Gami* v. *Mexico,* Award, 15 November, 2004, para 204.

to water' human right of its populace. This camouflage[141] on part of the Host State is inappropriate. It is a reasonable responsibility to take due care. Much of the fear about shrinking space of regulatory sovereignty is not completely justified as it is the State who entered into these agreements most willingly. A critique of the regime would say that the grand bargain was a result of high-handedness wherein the flow of investment was sourced from the developed nations, but the presence of more than 600 BITs between the developing countries and the fact that atleast 40% cases in 2014 had developed states as the respondent is the realization of the fact that the regime is undergoing tectonic changes. The US experience of 6 NAFTA case, India's experience with White Industries, Canada's experience at NAFTA are some of the example which have led to matured and reasonable agreements on behalf of the States.

In light of the need of public regulation, the states are now adopting interpretation notes with the Investment Treaties which are aimed at securing the state's right against the investor's expectation.[142] This process is happening in light of the fact that the Investor-State Arbitration has a public law remedy nature which requires it to reflect the needs of the states; else it has possibilities of losing legitimacy.[143] The clause dealing with FET has undergone changes in this process. North-American Model or NAFTA model adopts a restrictive arena of FET clause. Europe still continues with the earlier clause. India has also switched to the NAFTA type clause. The clause when read in light of preambular goals and other clauses are leading to establishment of the FET in a manner which is fairly balanced. The introduction of self-establishment clause in the recent BITs , for example Article XII of the US Model BIT, 2012 is not a creation of exception but a reaffirmation that legitimate regulation in the named field by itself won't amount to be a base of the breach of treaty obligations.[144]

I would conclude with the observation inspite of the present era of economic and legal globalization the principle of territorial sovereignty and economic self-determination

[141] Kullick,Andreas. 2012. *Global Public Interest in International Investment Law.* Cambridge: Cambridge University Press, page 294.
[142] *Supra* note 48.
[143] *Supra* note 50 at 13.
[144]Muchlinski, P. 2008-09. "Trend in Internationl Investment Agreement-Balancing the Investor Rights and the Right to Regulate. The issue of National Security." in *Yearbook on International Law and Policy* edited by K.P. Sauvant . Oxford University Press. para 35 at page 45.

remains the key doctrinal theories in how states behave.[145] It is through them the boundaries of Minimum Standard and FET is evolving. States have a right to evolve their own spheres of regulation. The international investment regime only requires them to adopt certain (it does not mean freezed), predictable, non-arbitrary in regard to sectors or nationality and must have a reasonable nexus between the regulation and its need. As per Dolzer, the concept of FET secures the legitimate expectation of investor against the discretionary rule making tendencies of the State which might be guided by unconnected political reasons, local pressures or change of government regime. It is a substantive right against this and should not be seen and applied as a tool of tying the hands of the State acting through domestic regulatory structure. The *Metaclad case* is an example of this. Here, the rules made by California government were recognised as legitimate. *Saluka* v. *Czech Republic* is a very important milestone in this debate as it used Article 31(3) (c) of the Vienna Convention on Law of Treaties to import into the treaty to create a customary international law exception which provides that a deprivation can be justified in case it arises from the exercise of regulatory action aiming at maintenance of public order, it shall make out a case where Host State shall not be held liable not to pay compensation to claimant emerging from the Bilateral agreement. A comparative administrative law structure is emerging because of public nature of investment laws and this is visible in the following (a) balancing of investor claim with non-investment concerns; (b) by ensuring cross-regime consistency, it mitigates the negative effect of the fragmentation of law through pointing the commonality between International investment law regime with regimes of human rights and environmental law, (c) by adopting the emerging practice in some jurisdictions across the globe to create enough public interest exception.

There is growing series of evidence that the BIT regime is tilting towards the North-American Model of BIT which saw its rise in NAFTA as it provides enough 'policy space' to states. India's Model BIT, 2015, China-Korea-Japan Trilateral Investment agreement, Canada-China FTA, Canada-EU FTA is examples of this fact.[146] It provides flexibility to States in following ways: (a) it provides opportunity to reserve

[145] *Supra* note 1 at 96.

[146] Nikos Lavranos, The New EU Investment Treaties: Convergence Towards the NAFTA Model as the New Plurilateral Model BIT Text? (Eur. Univ. Inst., Working Paper,2013) *available at* SSRN website: http://ssrn.com/abstract=2241455 or http://dx.doi.org/10.2139/ssrn.2241455 (visited on June 30, 2015).

some sectors of economy which are evolutionary in character in regard to their impact on public interest through non-confirming clause, (b) creation of exception in regard to certain kind of policies, for example US BIT clauses related to environment and labour, India Model BIT, providing for similar list of measure under the chapter III; (b) it adopts a very restricted approach in regard to FET and adopts for minimum standard as per customary international law which requires the tribunal to show deference to the public interest, public order needs etc, (c) to define FET with the clear reference to the due process requirement which provides that FET acts as a protection against denial of justice if adjudicatory proceeding does not act with due process of law or fail to provide a remedy as per the prevailing legal systems in world.[147] These clauses actually work both ways. Recent success of Ecuador on Law 42 against US companies and its failure against French company[148] because of treaty clause related to tax is an example of rising flexibility for regulation in this regime. However some like Schwebel believe that the US Model BIT 2004 is a regressive exercise which in name of 'policy space' is leading to sovereign discretion.[149] However Alavarez and others believe that this exercise of rebalancing of interest visible in treaty practice and arbitral practice marks the 'return of state' and the claims that this would make the International Investment Law regime toothless and irrelevant are over-stated claims.[150] It is definitely the way ahead to redress the threats emerging to regulatory regime of State from the present regime which is heavily tilted towards Investors and American Model of BITs provide the lead to the States which mostly remain host state.

[147] US- Rwanda BIT, 2008, Article 5(2) (a) read it thus: the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.
[148] *Perenco Ecuador Ltd*. v. *The Republic of Ecuador and Empresa Estatal Petróleos Del Ecuador (Petroecuado)*, ICSID Case No. ARB/08/6, May 8, 2009.
[149] *Supra* note 72..
[150] *Supra* note 8 at 251.

Chapter 4
Expropriation

4.1 Thematic Introduction

The clause on expropriation[1] is a result of the reciprocal needs of the investor and the host state to establish a viable premise of the investor protection.[2] The issue of public taking of the private property as a question of international law involves balance between the Sovereign's right to regulate and the Investor's right to protection of investment.[3] Since the investment is in foreign territory, it is subjected to the legislative and the administrative regulations of the host state during its existence and may affect their economic viability. This in past had been a major risk for the investor in relation to investor protection.[4] These risks may emanate from the formation of new government, shift in ideology, economic crisis, economic nationalism[5] and most importantly as a result of the regulation aimed at public welfare.[6] The law on the investor protection in foreign territory since its initial prototypes contained protection against expropriation without compensation.[7] The investment protection system whether domestic, contractual or through treaty system guarantees of investors'

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[1] Nikiema, Suzy H. 2012. *Best Practices Indirect Expropriation*. (The International Institute for Sustainable Development), explains that in International Investment Law, expropriation is defined as, "the formal withdrawal of property rights for the benefit of the State or for private persons designated by the State." (*Sempra Energy International* v. *Argentina* (ARB/02/13) award of September 28, 2007, para. 280; *Enron Corporation And Ponderosa Assets, L.P.* v. *Argentina* (ARB/01/3), award of May 22, 2007, para. 243). This definition of expropriation is a very narrow and restricted definition of expropriation which covers only the direct expropriation and leaves out the indirect expropriation and other forms.

[2] Expropriation clause in International Investment Agreement, GID, Geneva, *available at: http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Research%20Projects/Trade%20Law%20Clinic/Expropriation%20clauses%20in%20International%20Investment%20Agreements%20and%20the%20appropriate%20room%20for%20host%20States%20to%20enact%20regulations,%202009.pdf* (visited on June 29, 2015).

[3] Ibid.

[4] Taking of property expropriation, UNCTAD, UNCTAD/ITE//IIT/15, 2000:11.

[5] *Ibid*.

[6] Reisman, W. Michael and Sloane, Robert D. 2004. "Indirect Expropriation and its Valuation in the BIT Generation" *Faculty Scholarship Series*, Paper 1002, Yale Law School Faculty Scholarship.

[7] OECD, Novel Features in Recent OECD Bilateral Investment Treaties in International Investment Perspectives, 2006, *available at:* http://www.oecd.org/investment/internationalinvestmentagreements/40072428.pdf (visited on March 14, 2015).

property rights, which in case in case of deprivation had to be only on compensation.[8] The amount of compensation is itself debatable but that does not form part of this dissertation.[9] The concept of expropriation has evolved from instances of 'direct takings' to the notion of indirect expropriation, creeping expropriation, consequential expropriation and partial expropriation.[10]The clauses on expropriation under the BITs and FTAs have been complex and lengthy. They contain detailed clauses on the compensable regulatory takings as well as non-compensatory takings.[11]

G.C. Christie, in a seminal writing on expropriation among other conclusions derived that the law of expropriation may be applicable in cases where though the property remains with the owner; government action has deprived the owner from its commercial utilization.[12] Such a notion is impacted by two ideas of investment: 'investment as property' and 'investment as expectation'.[13] Another seminal writing a lecture by Higgins tells us how important it is to understand what does property means to demarcate when a takings has taken place and when it has not. She remarkably observes that we need to understand the social function of property to arrive at a better conclusion.[14]

4.1.1 *Investment as property and Expropriation*

The evolution of law on expropriation in BITs is impressed by paradigm movement of investment to the property.[15] Property rights are at the core of international economic law and the International Investment Law is not immune from this process.[16] The concept of property influences and is influenced by undergoing transition from a

[8] Salacuse, Jeswald W. 2013. *The Three Laws of International investment: National, Contractual and International frameworks for foreign capital.* Oxford: Oxford University Press, page 393.
[9] Sornarajah M.. 2010. *The International Law on Foreign Investment*. Cambridge: Cambridge University Press.p.193.
[10] Dolzer, Rudolph and Schreur, Christoph. 2013. *Principles of International Investment Law.* Oxford: Oxford University Press, page 115.
[11] US Model BIT 2004, Annexure B.
[12] Christie, G.C. 1962. "What Constitutes a Taking Under International Law." *BYBIL* 38: 307–11.
[13] Douglas, Z.2010. "Property, Investment and the Scope of Investment Protection Obligations." In *The Foundations of International Investment Law: Bringing Theory into Practice*, edited by Z. Douglas, J. Pauwelyn, and J. Vinuales. USA: Oxford University Press, page 11.
[14] Taking of Property by the State: Recent developments in International Law, 176 Collected Courses of the Hague Academy of International Law (1982) at 268.
[15] Lehavi, Amnon & Licht, Amir N.2011. "BITs and pieces of property." *Yale Journal of International law*, 36(1): 115.
[16] Cutler, A. Claire. 2011. "The Globalization of International Law, Indigenous Identity, and the New Constitutionalism." In *Property, Territory, Globalization-Struggles over Autonomy*, edited by William D. Coleman. Toranto: UBC Press, page 29.

domesticated notion of property to the one which accommodates the ideas of globalization.[17] As per Vadi, 'the perceived lack of established customary principles' with respect to the foreign investment has led to the enactments of a provision on this in BITS.[18] It is also argued that evolution of BITs as a cross-border legal framework leads to *reduction of uncertainty* about the property rights and it also helps in *enhancement of credibility of state's commitment* towards preserving the investor's legal rights. The regime of investment protection by applying the idea of the property to the investment has through BITs actually evolved a very broad sphere of investor protection which suitably applies the one which offers a better protection. This opens two sorts of remedy- one, at the domestic level, and the other is via the BIT which is a *lex specialis* tool of investment protection. It is argued that the introduction of property regime in investment law is not appropriate as it brings heterogeneous interests associated with property particularly in relation to the public interest (in rem aspect of property) to the ISA which goes on a case to case basis.[19] This will create problems in relationship between the Sovereign State's police power[20] and the regime on investor protection. This does not mean that it will lead to a system which is tilted to investor, though it seems so. If the arbitral practice and treaty law takes a definite turn to investment as property idea, it will open the investment to not 'public' view point of the property (i.e. inter-relation between the property and the state) but also 'private' aspect of the property (i.e. how the property as a right *in rem* is affected by the set of norms regulating the relationship of private persons *inter se*).

BITs also see investment as property which consists of a bundle of rights. Under this regime of unbundling of property right, newer range of state activities attracts compensation.[21] As per Douglas, property as a bundle of rights is a scientific or lawyer's view of property.[22] This is a clear derivation from the Hohfeld's view of

[17] Lehavi, Amnon & Licht, Amir N.2011. "BITs and pieces of property." *Yale Journal of International law*, 36(1): 115.
[18] Vadi, Valentina Sara.2011. "Through the Looking-Glass: International Investment Law through the Lens of a Property Theory."*Manchester J. Int'l Econ. Law*, 8:22.
[19] *Supra* note 15 at 117.
[20] Newcombe, Andrew. 2005. "The Boundaries of Regulatory Expropriation in International Law." *ICSID Rev-FILJ* 20 (1): 2.
[21] *Supra* note 9.
[22]Douglas, Z.2010. "Property, Investment and the Scope of Investment Protection Obligations." In *The Foundations of International Investment Law: Bringing Theory into Practice*, edited by Z. Douglas, J. Pauwelyn, and J. Vinuales. USA: Oxford University Press, page 12.

property as a bundle of rights.[23] This notion of property as a 'right in *rem*' presumes that the property consists of a set of rights which is identified to exist in certain identifiable person or group of person and which exist against everyone. Such a conception of property creates a set of juridical relationships between the possessors and others. This conception of property fills the gap between the right in *rem* and right in *personam.* If we view property as a bundle of rights and if the government regulation takes any one of them, it would still qualify as a case of expropriation for the purpose of BIT. When shall we consider a particular taking of property right as expropriation is a debatable question which shall be discussed under the indirect expropriation as well measures tantamount to expropriation? This conception of property has also led to creation of the partial expropriation wherein rather a lesser diminution of property would qualify for compensation.[24] However, it is not a clearly settled view of law. NAFTA tribunal ruling in the *Grand River* v. *United States,* the tribunal held that NAFTA had adopted a very narrow understanding of expropriation and only in cases where the government measures lead to expropriation of property as a whole, it will be a fit case for compensatory expropriation.[25] The idea of property as a bundle of rights has been applied variously by the tribunals in relation to establishment of the indirect expropriation. The degree of intrusion caused by the government regulation into the right of enjoyment of property is a question to be decided on a case to case basis. For example in *Lauder* v *The Czech Republic*, the tribunal observed that the regulation has not caused enough transferring or deprivation of the property and that the property remains economically viable.[26] It therefore does not qualify for expropriation and the compensation thereby. I have dealt with this issue of investment as property and investment as value under the title 2.3 with a comparative study of *Lauder* v *The Czech Republic* and the *CME* v *The Czech Republic*. The concept of property rights in regard to investments have been applied by the tribunals in regard to BIT disputes. There are a number of awards wherein the idea of investment was viewed as consisting of a set of property rights and this has the most prompt relation with the issue of 'expropriation' among the various substantive

[23] Hohfeld. 1916. "Fundamental Legal Conceptions as Applied in Judicial Reasoning." *Yale* Law Journal , 26: 710–20.
[24] *Waste Management* v. *Mexico*, (case no. 2), Award 30 April, 2004.
[25] *Grand River* v. *US*, para 146, *available at:* http://www.italaw.com/sites/default/files/case-documents/ita0384.pdf (visited on March 19, 2015).
[26] *Lauder* v *Czech Republic*, Final Award, IIC 205 (2001) and *CME* v *Czech Republic*, Partial Award on the Merits IIC 61 (2001).

clauses of the investment treaty. [27] As per Lehavi and Licht, the interpretation of clauses on 'expropriation' and 'indirect expropriation' is methodologically similar to the idea of 'takings' as well as 'regulatory takings' doctrines of USA.[28] Sornarajah observes that the hegemonic powers have been capable to stress their domestic notions of property at the international level.[29] The Model US BIT almost adopts verbatim of the Penn Central Transportation Co. v. City of New York in regard to the indirect expropriation clause. Canada, Mexico and Colombia adopted a similarly worded clause. The convergence process toward the NAFTA type BIT and FTA is also taking place in regard to the content of the expropriation clause and the non-compensatory government regulation. [30]

The question of expropriation takes turn in light of a changing understanding of State. The earlier simplified notion of direct expropriation was effective when the States were primarily *lassiez-faire* state. The state's periphery of regulation was very limited. With the evolution of idea of welfare state, the horizon of State's regulatory power expanded. This was bound to create conflicts and cases. There was an increased interference in the property rights in investment which in turn leads to claims of expropriation at international level. The acknowledgement of the fact that property is a bundle of rights opens possibilities where the particular investment would qualify as an instance of indirect expropriation even though the physical possession of property remains with the owner.[31] The efforts to draw boundary between compensatory and non-compensatory expropriation becomes difficult.

The classification of government regulation as non-compensatory in nature is countered by the domestic notions of the property law which considers property as a bundle of right. They have adopted an absolutist notion of property which could also

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[27] *S. Pac. Props. (Middle E.) Ltd*. v. *Egyp*t, ICSID Case No. ARB/84/3, Award on the Merits, I 160-68 (May 20, 1992), 32 I.L.M. 933, 967-69 (1993); *Plama Consortium Ltd*. v. *Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 1 128 (Feb. 8, 2005), 44 I.L.M. 721, 740 (2005) as quoted in BITS and pieces of property.

[28] *Mexico* v. *Metalclad Corp*., ICSID Case No. ARB(AF)/97/1, Judicial Review, TIT 102-12 (May 2, 2001), 5 ICSID Rep. 236 (2001) (describing "indirect expropriation" as depriving the owner of a "reasonably-to-be-expected economic benefit).

[29] *Supra* note 9 at page 385.

[30] Nikos Lavranos, The New EU Investment Treaties: Convergence towards the NAFTA Model as the New Plurilateral Model BIT Text, available at: http://ssrn.com/abstract=2241455 (visited on March 12, 2015), page 5.

[31] *Supra* note 9 at 382.

be ‘severed’ into difference sets of rights. This concept of investment as property has also contributed to the enlargement of expropriation to indirect and creeping expropriations. It provides a remedy against the covert or *malafide* government regulations aiming at depriving the rights accruing from investment against colored government regulation in public interest. With the wave of neoliberalism where state was considered a problem, the foreign investments has undergone a *qualitative* change whereby they do not exist as simple isolated plants for ex. exploration and exploitation of natural resource or a plant for manufacturing, but they now also exist in the arena of public utilities, sellers of goods, providers of services ex. media which in turn make these investments part of the local economy. There is a conceptually new relation between the idea of property rights and international law. [32] This phenomenon of ‘becoming part of the local economy’ opens them to a broader range of regulation which are primarily intended and driven by the public interest, which creates necessary conflicts related to the breach of treaty obligation as well as the specific commitments under the investment contract. It presents a normative conflict because of their status as foreign investor which in turn opens the ISA route for redressal of grievance which is not open for the local investor. The foreign investor uses the BITs as *lex specialis* even in this case. He uses the national treatment clause in case where the domestic environment suits his need and uses the FET clause which provides a suitably favorable environment over and above the domestic system. Their supporters believe that the State as a sovereign entity entered into these treaties and decided to waive some of its right. They also assert that the idea of regulation has moved beyond the idea of domestic regulation to the idea of international regulation.[33] This in then way is an effort towards neutrality.

The arbitral practice as well as the treaty practice on BIT creating *lex specialis* recently tells us that the idea of property is not a self-contained regime and therefore it should be seen in light of the international law development in other spheres. The investment treaty appear to contain within them ideas which clearly gives due recognition to other values in the international law. The arbitral awards have started recognising the social function of the property and the relative limits of the rights. The

[32] Barnes, Richard. 2009. *Property Rights and Natural Resources*. Oxford and Portland, Orgon: Hart Publishing.
[33] Shihata, I.F.I. 1986. “Towards a Great Depoliticization of Investment Disputes: The Role of ICSID and MIGA.” *ICSID Rev-FILJ* 1: 1–25:4.

initial understanding was that the heart of free trade agreements is an economic efficiency theory of property rights and that economic efficiency is the key factor in international economic law. [34] This idea is getting challenged by the present era of reflection on part of States signing BITs. The investment law has been criticized for adopting an uncritical notion of the absolutist notion of property. [35] It is also criticized for adoption of primacy of property law over the other values.[36]

The clauses of BITs and other international investment law tools have led to a form of constitutionalisation of the investment as property wherein the property nature of the assets (investment) is applied to obtain remedy against the regulatory exercise of power. Tienharra observes that the assigning of the *adjudicative* aspect of investment as property which originally belonged to the constitutional court to the ISA leads to the usurping of the regulatory power of the State. [37] The problem with the ISA is that whereas the national courts in dealing with the takings case (for ex. Courts in USA applying the Fifth Constitutional Amendment Act) adopt more nuanced and broad parameters and try to balance the property right with other fundamental rights, ISA fails to go beyond the absolutist notion of property.

The International economic law as well as the recent BITs contain reference to the other values like sustainable development etc either in their preamble or they also contain specific clauses on this. While elaborating on the content of FET, I had dealt with how the object and reason of treaties are impacting the content of these clauses. The concept of restrictions on the property rights take place in domestic law for the avoidance of nuisance, loss to others or sometimes for the preservation of public interest, avoidance of public harm, to tackle some emergency. These ideas of restrictions on property has transcended into the BITs through inclusion of exception clauses.[38] Limitations on the absolutist notion of property are laid down for the legitimate public welfare as well as the evolutionary nature of governance since the

[34] Lawson-Remer, Terra. 2006. "Values under Siege: AAFTA, GATS, and the Propertization of Resources." *N.Y.U. Environmental Law* 481: 515–16.
[35] Story, Alan. 1998. "Property in International Law: Need Cuba Compensate US Titleholders for Nationalizing Their Property?" *Journal of Political Philosophy* 6 (3): 306–10.
[36] *Supra* note 9 at 383
[37] Tienhaara, K. 2009. *The Expropriation of Environmental Governance*. CUP: Cambridge., page 21.
[38] Article 11(2) of the India-UK BIPA.

pre-BIT era.[39] The European notion of property as a communal concept[40] is providing the jurisprudential support against this notion of property and thereby it is providing push to wider arena of governmental regulations and actions immune from the clutches of compensatory expropriation. Every time when the bundles of rights of property injures the public interest or to better say, is leading to the denigration of public morality, health and environment, there is an abuse of property rights. In this sense the society which has recognised these property rights could deny these rights even without the compensation.[41] As per Byers, this legal principle of '*abuse of right'* has been part of the customary international law and has due relevance in the present International Economic Law. The NAFTA, US, Canada have went for these exceptions. In a certain compressed way, these notions of abuse of rights are also found in the Indian BITS as well as the French BITs. The presence of this doctrine in BITs or their induction in the arbitral practice through the Article 42(1) of the ICSID convention provides a premise to the host states to avoid the compensation in case of regulation, provided it is non-discriminatory. It does not go without saying that the application of the doctrine of *abuse of rights* needs to be applied with due application of the doctrine of proportionality.[42] The ECHR judgments on the right to property as well as arbitral awards apply these doctrines to arrive at conclusion as to whether the alleged governmental action calls for compensation.[43] In the case, tribunal observed that the concept of the environmental regulation is for public welfare and that the actions were proportionate, therefore this does not qualify as an instance of compensatory expropriation.[44] The abuse of rights limit the absolute version of property rights where as the doctrine of proportionality checks the unnecessary interventions on the part of host state in the exercise of these rights. There is a movement towards the fair balance between the right to regulation of State (for public

[39] Cohen, Morris R. 1927-28. "Property and Sovereignty." *Cornell L.Q.* 13 (8): 21.
[40] *Supra* note 9 at 392.
[41] Byers, Michael. 2002. "Abuse of Rights, an Old Principle, A New Age." *McGill LJ.* 47: 389.
[42] Henckels, and Caroline. 2012. "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration." *Journal of Int'l Econ.* 15: 223.
[43] *The Queen* v *Secretary of State for Health* (ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd), Case C-491/01, December 10, 2002 [2002] *ECR* 1-11453. The court observed that: "'its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest ... and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed"
[44] *Fredin* v *Swed*en, 192 *ECtHR* (Ser A) (1991)

interest) and the private interest of the property holder in the various spheres of international law including the international investment law.

BIT regime *prima facie* supports the absolutist notion of property but it will be naïve to think that it promotes the absolute protection at the weal of the public interest. Though the investment treaties contain an exhaustive set of State's obligation which does not have precise content and thereby they bring a wider range of governmental regulations within the nets of these treaties on the pretext of denial of the bundle of rights emanating from the investment. [45] This uncertainty creates a sort of regulatory chill as state believes that there action would lead to ISA.[46] The awards like *Metalclad Corp*. v. *United Mexican States* argued that uncertainty must not prevail in host state and actually found certainty more virtuous than the uncertainty because of the governmental regulation.[47] The tribunal in declaring that the governmental regulation goes against the law and had led to the denial of reasonably-to-be-expected economic benefit of property, though this has not been necessarily to the obvious benefit of the host State. On the other hand, the *Methanex award* overlooked the *Metalclad* award as it adopted a traditional approach to the question of legitimate exercise of governmental police power and thereby a narrower understanding of the defacto expropriation.[48] It held that if the State has enacted the particular regulation for the public interest on a non-discriminatory basis and unless the state has made specific commitment, it shall not be liable for compensation. [49] The award gives due consideration to the purpose and effect of the governmental regulation and has not went for one or the other approach. The award took due note of the governmental continuous effort for the environmental regulation which could have easily guided the investor to the probability of the particular governmental action. A 'due diligence' exercise by the claimant would have revealed it and thereby it is an unreasonable expectation on part of the investor that no regulatory changes would take place. The award actually went beyond the *sole effect doctrine* and *police power doctrines* in arriving on the question of expropriation. The tribunal, however, on the similar lines

[45] OECD, 'Indirect Expropriation' and The 'Right to Regulate' in International Investment Law Working Paper on International Investment No 4 (2004), 3-4.
[46] Gross, SG, 2002-3. Inordinate Chill: BITs, BITS, Non-NAFTA MITS, and Host-State Regulatory Freedom - An Indonesian Case Study." *Michigan Journal of International Law*. 24: 893–94.
[47] *Metalclad Corp*. v. *United Mexican States*, ICSID Case No. ARB(AF)/97/1), para 76.
[48] *Methanex Corp.* v. *United States of America*, ICSID , 3 August 2005
[49] *Ibid* in Part IV, Chapter D, page 4, para. 7.

of the *Metalclad* decided that the denial or violation of specific commitments on part of State will qualify as case of expropriation. In *Tokios Tokeles* v. *Ukraine,* the tribunal held that the specific commitments i.e. contractual rights form part of the property and thereby it qualifies as investment and that the State is obliged for all the substantive obligations under BIT.[50] In *Siemens* v. *Argentina*, denial of such contractual rights by the governmental actions of the State was considered as leading to expropriation under the BITs.[51] It is one area where the arbitral practice reveals that if the breach of obligation under the investment contract because of the action which an exercise of sovereign power or governmental action, it would qualify as an act of the expropriation.[52] Here the tools of the accepted notions of the exercise of governmental power would come into play.

4.1.2 *Types of Expropriation and their relationship with Domestic regulations*

As stated above, the classification of expropriation is done on the basis of how government action affects the investment. It is of following kinds: direct, indirect, creeping, consequential and partial expropriation.

4.1.2 (a) Direct Expropriation

The most clear and easily identifiable form of expropriation is direct expropriation. This was one of the most expressly applied tools of takings among nationalization, expropriation and confiscation in nationalization process in the pre-colonial era as well as the initial decades after the colonial era (i.e. 1950s-60s). This form of expropriation rarely takes in the present era.[53] Under the BIT regime as well as under the customary international law, States have the legal right to expropriate property if the other conditions related to investment are met. They are presence of public purpose; non-discriminatory basis; as per due process of law, adequate compensation. This is always enterprise specific as well as the property specific. Here the property's ownership is not transferred from the investor to some other economic actor. There is thus a *de jure* transfer of ownership. Direct expropriation involves a mandatory transfer of legal title. The State manifests its intention to expropriate the property

[50] *Tokios Tokeles* v. *Ukraine*, Decision on Jurisdiction, 29 April, 2003
[51] *Siemens* v. *Argentina*, Award, 6 February, 2007.
[52] *Supra* note 24 at para 115-116.
[53] Christophe Schreuer, *The concept of expropriation under the ETC* and other Investment Treaties, available at: http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (visited on June 10, 2015).

unambiguously and does not involve deducing the incidence of power. Under this form of expropriation, the State takes the actions knowing the impacts thereof and therefore it causes a lesser degree of regulatory chill and confusion for the State to understand when the BIT would be invoked. On a broader level, if someone does not have the problem with idea of ownership, he would not find this form of expropriation, a problem for the regulatory structure. The question though might arise as to whether this direct expropriation is legal or not i.e. whether the conditions necessary for lawful expropriation are met.

4.1.2 (b) Indirect Expropriation

The second type of expropriation, which is the most frequently invoked form of expropriation in the post colonial era, is *indirect expropriation*. As per Brownlie, the decisive element in determining the incidence of the indirect expropriation is the substantial economic loss of control or economic value of the foreign investment.[54] A classical definition of indirect expropriation is found in the *Starrett Housing* case wherein it was observed that:

> ""…it is recognized under international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner."[55]

As per UNCTAD, "indirect expropriation means total or near-total deprivation of an investment but without a formal transfer of title or outright seizure."[56] Indirect expropriation is a form of taking wherein though the legal title of the investment remains with the investor, but the governmental actions has led to the denial of economic utility of the investment.[57] Indirect expropriation may lead to the denial of ability to manage, use or control its property in a meaningful way. As per Dolzer, host state may take a number of actions wherein the *de jure* ownership remains with the

[54] Brownlie. 2012. *Principles of International Law*. Crawford James(ed.),8th ed.
[55] *Starrett Housing* v. *Iran*, Interlocutory Award No. ITL 32-24-1, 19 December 1983.
[56] UNCTAD, Expropriation: UNCTAD Series on Issues in International Investment Agreements II, 2012, page7.
[57] *Suez et al.* v. *Argentina*, Decision on Liability, 30 July 2010, para. 121

investor, but effects similar to direct expropriation or nationalization might take place.[58] The possible actions calling for indirect expropriation expands when we see investment as property which consist a bundle of rights. BITs promise for a 'stable and favorable legal framework for the investor' and it is because of this obligation, if the government regulations bring changes, the obligation is breached, leading to the indirect expropriation. The exercise of regulatory mechanism from a range of governmental activities like environmental, social, economic, security etc. raises question as to whether expropriation has taken place or not. States have tendency as well as obligation to intervene in the economy, and which have the possibility of negative effect upon the investment and its relation with the investor. The treaties may contain the tests to identify when a particular action shall be compensatory regulatory taking. The states have carved out exception for themselves under BIT and other instruments about what constitutes the legitimate sphere of government activity (police power of the State). These sets of exceptions shall not require payment of compensation. These standards are also determined by the global practices as well as on a case to case basis. The instruments which can be used to determine legitimate expectation have also been provided by the States. This is helpful to decide as to when a particular expectation/right forms part of investment, which in turn would let us decide as to whether alleged act has caused any economic consequence. If at the very initial stage, it is clear that the alleged consequences are related to something which does not form part of the investment; it will end the cause of action.

4.1.2 (c) Creeping Expropriation

The third form of expropriation is creeping expropriation. Under this category, the foreign investment loses its economic utility or control slowly in stages. In *Generation Ukraine* v *Ukraine*, this form of expropriation has a temporal quality as it covers a series of governmental regulation or their effect which over a period of time results in the expropriation of the investment.[59] As per UNCTAD study, there is an incremental encroachment of the foreign property.[60] As per Dolzer, the creeping expropriation covers the possibility wherein the government intending to circumvent the possibility of expropriation does it in stages. To this effect, the concept of

[58] *Supra* note 10.
[59] *Generation Ukraine* v. *Ukraine*, Award, 16 September 2003, paragraph 20.22.
[60] UNCTAD, Expropriation: UNCTAD Series on Issues in International Investment Agreements II, 2012, page 11.

creeping expropriation ensures that the outright expropriation as well as expropriation in stages would require payment for compensation. Creeping expropriation in this sense covers the modus operandi wherein the takings take place in stages. As per some scholars, creeping expropriation is sometimes also referred as variant of indirect expropriation.[61] A major problem in regard to this is to determine when the expropriation has taken place. It may in retrospect only that it might be deduced that the particular act was part of the deleterious activities which causes expropriation. However, it must be noted that the series of acts must have taken place in a definite span of time. It is an acutely fact-sensitive investigation. It is very difficult to identify the 'moment of expropriation'. This moment would decide what shall be due compensation in a given instance. In *Benvenuti et Bonfant* v *People's Republic of the Congo*, the tribunal decided that the government policies in relation to taxation as well as management had cumulatively led to a situation whereby the investor has to end the contract.[62] Similarly in the *Metalclad Corp*. v *United Mexican States*, the investor was compelled by the 'totality of the circumstances' consisting of acts and omissions on part of the Host State led to expropriation of the investment.[63] Therefore it is actually a form of expropriation wherein there is no one single incidence of expropriation and wherein the governmental actions causing expropriation may be interspersed with the lawful non-compensatory regulation. Other than the question of power of regulation which emerges in indirect expropriation, it raises questions of regulatory chill as there is a possibility that though no specific set of actions cause expropriation, it could still qualify for compensation. In *Tradex v. Albania*, the government's effort in relation to agriculture sector reforms and steps for securing the farmers from the environmental harm, the tribunal held that though no particular act appears as an incidence of expropriation, however overall on a step-b-step analysis may sometime reveal that the expropriation of property has taken place.[64] In *Santa Elena*, the tribunal held that in analysis of the valuation of expropriated property, the methodology of creeping expropriation could be applied.[65] In *Tecmed* v. *Mexico*, the tribunal observed thus:

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[61] *Supra* note 6.
[62] ICSID Award of Aug. 1980
[63] Metalclad Corporation v. United Mexican States, (ICSID Case No. ARB(AF)/97/1), Award of August 30, 2000, para. 122.
[64] *Tradex Hellas SA* v. *Republic of Albania*, Award, 29 April 1999, 5 ICSID Reports 70
[65] *Compañía del Desarrollo de Santa Elena, S. A.* v. *Republic of Costa Rica*, Award, 17 February 2000, 5 ICSID Reports 153

> "This type of 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 short period of time or through simultaneous actions. Therefore, a difference should be made between creeping expropriation and *de facto* expropriation, although they are usually included within the broader concept of "indirect expropriation" and although both expropriation methods may take place by means of a broad number of actions that have to be examined on a case-by-case basis to conclude if one of such expropriation methods has taken place."[66]

4.1.2. (d) Consequential Expropriation

The next variant of the expropriation is *consequential expropriation.* It is covered by the words 'tantamount to expropriation' in the BITs. It is considered the most elusive category of expropriation. It emerges from altogether a different obligation of state wherein the State has failed to create and maintain a stable and favourable environment for the investment by failing to adopt efficient regulatory as well as legal framework. As per Reisman, the consequential expropriation differs from other *de factor* expropriation variants as here the intention does not exist to expropriate.[67] This is a very tricky variant for the host state as it is held liable even though no intention existed on part of the investor. This variant emerges from the fact that there has been a deprivation of the economic value of the foreign investment within legal framework of the BIT. This deprivation gives it a deemed status of expropriation because this deprivation in word of Reisman has casual links with governmental actions and the host state's government has the paramount obligation to ensure appropriate framework.[68] In Feldman v. Mexico, the tribunal held that though not all the governmental regulations leads to this but if there have been frequent changes in the regulations as an impact of political actions, it shall qualify as an instance of consequential expropriation as it might have the consequence of the loss of reasonable-to-expect profit.[69]

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[66] *Tecnicas Medioambientales Tecmed S. A.* v. *The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004).
[67] *Supra* note 6.
[68] *Ibid.*
[69] *Marvin Feldman* v. *The United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award of December 16, 2002.

4.2 Treaty Practice

4.2.1 USA

US, domestically adopts a very wide understanding of takings because of its adoption of the property as a bundle of rights. This conception of property does not give due credit to the idea of social function of property. As a result of this, regular governmental function infringing into the exercise of even some of the property rights amounted to the takings- direct or indirect. As per Sornarajah, this absolutist notion of property got strength with the growing economy of the USA.[70] This process, though, is witnessing counter-currents in regard to the regulatory spheres of governmental action. The courts in US have made fine dissection of the kinds of takings. This has led to emergence of compensatory taking as well as non-compensatory takings in light of the regulations leading to taking. The judgment in *Penn Central Case*[71] led to the emergence of jurisprudence on regulatory takings. The US Supreme Court took a balancing turn in this case as they started giving due consideration to the need of regulatory space and the economic consequence of the taking. This judgment marks a shift in the jurisprudence as it starts adopting a physical notion of property by replacing the bundle of rights notion of property.[72] This change ensures that in cases of regulatory takings if there has not been an extinguishment of the physical control over the property, subject other conditions are met; the property shall not be treated as being taken. However, this distinction between the compensatory and non-compensatory taking is blurred and problematic. It is still open-ended and far from being clear.

At the level of BITs, the 1984 Model BIT of US went ahead with European Model of BITs and the clause on expropriation was no different in this regard. As per Alvarez, the US BITs of 1984 provided the highest standard of investment protection.[73] It provided a very high attitude of protection to the investment and provided for an unqualified reference to expropriation, which resembles the pre-Penn Central sort of protection against takings. The 1984 Model BIT format provided for almost an iron-

[70] *Supra* note 9
[71] Penn Central Transportation Co v. New York City, 438 US 104 (1978)
[72] Honere, O. 1961. "Ownership." In *Oxford Essay in Jurisprudence*, edited by A.G. Guest, 107, Oxford:Oxford University Press.
[73] Alvarez, Jose E. 2010. "The Evolving BIT." *Transnational Dispute Management* 4 (1): 2–6.

clad security against the government regulations and applied Hull formula.[74] It covered direct, indirect as well as acts tantamount to expropriation. These treaties on part of USA were not concerned with the possible actions being pursue against them as they were almost always signed with the less-developed economies. In this sense, as a capital exporting country, it did not make necessary safeguards in their BITs. The Treaty with Argentina and Turkey are examples wherein US had went ahead with European BIT type expropriation clause. The communication by US President attached with the Turkey's BIT provides that the expropriation clause should be interpreted in light of the global practices prevailing on the issue.[75] The footnote attached with the US-Turkey BIT provides a detail of the communication wherein it was stated that irrespective of the kind of 'measure', if there is an unlawful interference, it is clear that the necessary safeguards in regard to the legitimate public welfare measures is not taken into the account. The requirement of the examination of the nature of government action which forms part of the Penn Central case is absent. Therefore, we find that whereas the domestic law provided for the non-compensatory regulation, US consciously did not go for such a clause in the BITs. The 1994 Model BIT did not make changes in the requirement of the expropriation clause.

USA learning from the NAFTA cases adopted a restrictive model of BIT in 2004 at several stages.[76] It enjoys the benefit of being the first mover after suffering from the impacts of broad-scope of the treaty clauses.[77] Among several other changes, the 2004 BITs adopted a different strategy from the EU BITs on expropriation. The annexure B is relevant in this regard. It provides that only in cases if tangible or intangible property rights or property interest in an investment are involves, a cause of action from expropriation would be argued. It also provides that in case where indirect expropriation is claimed, economic effect alone will not be relevant, it should also take into account the nature of the governmental action and whether government has interfered with the distinct, reasonable investment backed expectation. The article

[74] Alvarez, José E. 2011. "The Return of the State." *Minnesota Journal Of Int'l Law,* 20:2.
[75] International law standards shall apply to the expropriation of investments and to the payment of compensation for expropriation.
[76] Vandevelde, kenneth J. 2005. "A Brief History of International Investment Agreements." *U.C. Davis J. Int'l L. and Policy* 12: 157–58.
[77] Vandevelde, Kenneth J. 2009. "A Camparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests." In *Year Book on International Investment Law & Policy*, edited by Karl P. Sauvant, 283.

6(5) of the Model BIT contained clear provision that in cases of compulsory licenses related to the IPR shall not qualify for an action under the expropriation clause. The annexure attached to the BIT with Rwanda, it provides that the measures related to legitimate public welfare outside the purview of possible expropriation. [78] Governmental actions beyond them only qualify for the assessment as to whether expropriation has taken place. This helps the arbitral tribunal to decipher between a regulatory measure which qualifies for expropriation and the one which does not as these amounts to the exercise of police power by the State. It introduces a sort of presumption in claims of indirect expropriation as an exercise of regulatory power. As a result of this, it is the obligation on part of the investor to establish that the particular constitutes one of the rare circumstances which require compensation. The BIT also clarified that the treaty obligation should be understood as per the customary international law and not beyond it. The content of expropriation and the limitation on State's power is highly inconsistent and thereby far from being settled. The US Supreme Court in *Banco Nacional de Cuba* v. *Sabbatino* observed thus: "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens it classified different standards for different kind of expropriations." [79] BIT provided that the compensation has to be paid in cases of direct expropriations without the need to serve any test. In cases of indirect expropriation, the BIT provided that a three element test should be applied. These formed express special limitations in relation to indirect expropriation. This test originates from the *Penn Central case.* It provides that the adverse economic effect alone would not be sufficient for such a cause of action. The three elements are: economic impact, extent to which the government interfered with the distinct reasonable investment-backed expectation, and the nature of governmental actions. In this way, we find that the earlier incomplete definition of expropriation has been replaced by a more complete, close-ended definition of the expropriation.[80] This trend was visible in other clauses of BIT also. Overall impact of these layers of restriction has led to the enlarged scope of regulatory policy space for

[78] Annexure B, 4(ii) reads thus: "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."
[79] 376 U.S. 398 at p. 428 (1964)
[80] Fontanelli, Filippo and Bianco Giuseppe, 2014. "Converging Towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States." Stan. J. Int'l L. 50: 211, 219.

the State. The self-establishing escape clauses related to environment[81], labour rights[82], taxation[83], chapter on general exception consisting of essential security[84], financial services[85] have led to shrinking of the actions qualifying for the expropriation and payment of compensation.

USA- Rwanda 2008 (based on US Model BIT, 2004)	Article 6: Expropriation and Compensation[86] 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5(1) through (3). 2. The compensation referred to in paragraph 1(c) shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation"); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable…. 5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.
Argentina, 1994 (based on Model BIT 1984)	Article IV 1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation-) except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2) 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 paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation. 2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefore, conforms to the provisions of this Treaty and the principles of international law
Turkey,1985[87]	ARTICLE III

[81] Article 12. Model BIT, 2004
[82] Article 13.
[83] Article 21.
[84] Article 18 Model BIT, 2004.
[85] Article 19.
[86] Article 6 shall be interpreted in accordance with Annexes A and B.
[87] The model BIT also confers protection from unlawful interference with property interests and assures compensation in accordance with international law standards. It provides that any direct or indirect

(Model BIT 1984)	1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). 2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known. Compensation shall be paid without delay; be fully realizable; and be freely transferable. In the event that payment of compensation is delayed, such compensation shall be paid in an amount which would put the investor in a position no less favorable than the position in which he would have been, had the compensation been paid immediately on the date of expropriation.
Australia FET(chapter on investment)	Article 11.7 : Expropriation and Compensation[88] 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law. 2. The compensation referred to in paragraph 1(c) shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation"); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realisable and freely transferable. 3. If the fair market value is denominated in a freely usable currency or the Australian dollar, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. 5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Seventeen (Intellectual Property Rights).
US-Baharain, 1999[89],[90],[91]	ARTICLE 3

taking must be: for a public purpose; nondiscriminatory; accompanied by the payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general standards of treatment discussed above. The BIT's definition of "expropriation" is broad and flexible; essentially "any measure" regardless of form, which has the effect of depriving an investor of his management, control or economic value in a project may constitute an expropriation requiring compensation equal to the "fair market value." Such compensation, which "shall not reflect any reduction in such fair market value due to... the expropriatory action,"must be "without delay," "effectively realizable," "freely transferable" and "bear current interest from the date of the expropriation at a rate equal to current international rates." The BIT grants the right to "prompt review" by the relevant judicial or administrative authorities in order to determine whether the compensation offered is consistent with these principles. It also extends
national and MFN treatment to investors in cases of loss due to war or other civil disturbance. The BIT does not provide, however, a specific valuation method for compensating such losses.

[88] ANNEX 11-B

(based on US Model BIT, 1994)	1. Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article 2, paragraph 3.
NAFTA	Article 1110: Expropriation and Compensation 1. No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except : (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6. 7. This article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property). 8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt .

4.2.2 European Practice

European countries domestically recognize that the property has a social function. In that regard, there understanding on takings recognizes that the owner of the property does not enjoy an absolute right to the property. Their conception of property as a bundle of rights is not absolute and it tries to establish a balance with the public interest associated with the enjoyment of property rights. The conception of property in Europe recognises that the individual rights over property may be subordinated in case of interest of society at large. The European Convention on Human Rights also adopts a similar understanding of the property. In this sense, it is observed in light of the *Matos e Silva case* [92] and *James and Others*[93] that the Europe does not subside with the *sole effects* doctrine. It adopts a balanced approach towards property right. The position is best displayed in *Sporrong and Lönnroth* v *Sweden*, wherein the court

[89] Under this Treaty, the Parties also agree to customary international law standards for expropriation
[90] These obligations apply to both direct expropriation and indirect expropriation through measures "tantamount to
expropriation or nationalization" and thus apply to "creeping expropriations"--a series of measures that effectively amounts to an expropriation of a covered investment without taking title.
[91] Article 13 explanatory notes: In addition, the dispute settlement provisions of Articles 9 and 10 apply to tax matters in relation to alleged violations of the BIT's expropriation article
[92] *Matos e Silava LDA* v. *Portugal*, 24 *EHRR* 573:601–2.1996
[93]. *James and Others* v. *the United Kingdom*, 98 (9).*Eur Court HR (ser A)* 1986

observed that the court should attempt to establish a fair balance between demands of community driven interest and the need of protection of the fundamental rights of individual. [94]

The European BITs on the other hand do not adopt this approach. They adopt a very expansive strategy in regard to expropriation. The BITs adopts an absolutist notion of property wherein any intervention in the economic benefits from the property or creation of situation wherein the investment becomes economically viable attracts the expropriation clause. They have not changed their understanding of the expropriation clause till now. The Model BITs of Germany, France and UK provide for compensation irrespective of the nature of measure. They have not changed their position inspite of the rising possibility of their governmental actions classified as expropriating in nature. In *CME* v *The Czech Republic* ,involving the Netherland-Czech Republic BIT, the tribunal while interpreting the substantial deprivation found that the Czech Republic has 'coerced' the investor to compel it to extinguish the contract as it interfered into the contract by the continuing uncertainty.[95] The tribunal in this case adopted the absolutist notion of property. It further observed that the nature of governmental measure and their purpose is not relevant in evaluating whether it is compensatory or non-compensatory.

The European BITs does not create exception for non-compensatory regulatory exceptions i.e. they fail to consider the necessity of police power of the State. In this way, the only possibility for the host state to skip the payment of compensation is to prove that there has not been any deprivation or denial of benefits to the investment or that deprivation is not because of the Sovereign act of the State. The language of the clause adopted under European BITs adopts the *sole effect* test for the establishment of the expropriation. The proliferation of BIT process which most prominently involves Europe adopts "reference only to the effect of the measure for the investor, without taking into account the purpose sought by the expropriating authority."[96] For example, in *Lauder* v. *Czech Republic,* the tribunal decided that the claimed contract

[94] *Sporrong and Lonnroth* v. *Sweden,* 52 (24). *Eur Court HR (ser A)* 1982.
[95] *CME Czech Republic B.V.* v. *Czech Republic*, UNCITRAL Arbitration Proceeding, Partial Award of September 13, 2001.
[96] *Patrick Mitchell* v *The Democratic Republic of Congo*, ICSID Case No ARB/99/7 (Annulment Proceedings) (1 November 2006) at [53] ('Patrick Mitchell Annulment').

was with a company which does not represent state and that the particular deprivation of intellectual property right does not emerge from the act of the State.[97] On the other hand in the *Biwater Gauff* v. *United Republic of Tanzania*[98], the tribunal established following test for the lawful expropriation: state, (1) acting through exercise of its sovereign authority (as opposed to acting merely as a contractual party)[99], (2)unreasonably deprived an investor of its rights. As per this test, the termination of the right to terminate contract as per the agreed procedure amounts to the deprivation of a property right. The tribunal's observation that denial of a 'small subset of right under the investment' amounts to expropriation is adoption of *uncritical notion* of absolute right over property. The tribunal also supports the *sole effect doctrine* as it observed that, "many tribunals in other cases have tested governmental conduct in the context of indirect expropriation claims by reference to the *effect of relevant acts*, rather than the intention behind them." It goes against largely uniform practice that only a substantial deprivation of property rights amounts to expropriation. European BITs type expropriation clause adopts a practice wherein the absence of intention to expropriate is irrelevant.[100]

Overall the survey of BITs provided in the table it is clear that the open-ended model is still the popular mode. Though in the first paragraph, I have asserted that the ECHR gives due recognition to the social function of property, but there is another set of literature which points out that the status of right to property under ECHR narrows the possibility of intervention in the enjoyment of rights under investment without compensation.[101] Broadly all these treaties provided that in case of any form of expropriation; there must be presence of public interest/pubic benefit/public interest authorized by law/public interest as per internal needs and payment of adequate compensation.

[97] *Ronald S. Lauder* v. *The Czech Republic*, UNCITRAL Arbitration Proceeding, Final Award of September 3, 2001
[98] *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/2, 24 July 2008.
[99] *Ibid.* at para. 457–458.
[100] *Compañia del Desarrollo de Santa Elena, SA* v *The Republic of Costa Rica(*2000) 39 *ILM* 1317 at 1329
[101] *Supra* note 80.

Germany-Pakistan, 1959	Article 3[102] (2) Nationals or companies of either Party shall not be subjected to expropriation of their investments in the territory of the other Party except for public benefit against compensation, which shall represent the equivalent of the investments affected. Such compensation shall be actually realizable and freely transferable in the currency of the other Party without undue delay. Adequate provision shall be made at or prior to the time of expropriation for the determination and the grant of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law
Germany and Republic of Korea, 1963	Article 3[103] (2) The investments of nationals or companies of either Contracting Party in the territory of the other Contracting Party shall not be expropriated except for the public benefit and against compensation. Such compensation shall represent the equivalent of the investment affected; it shall be actually realizable, freely transferable, and shall be made without undue delay. Adequate provision shall have been made at or prior to the time of the deprivation for the determination and the giving of such compensation. The legality of any such deprivation and the amount of compensation shall be subject to review by due process of law of the Contracting Party in whose territory the investment has been expropriated.
Germany-India BIT, 1995	Article 5 (1) Investments of investors of either Contracting Party shall not be expropriated, nationalised or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting Party except in public interest authorized by the laws of that Party, on a non-discriminatory basis and against compensation which shall be equivalent to the value of the expropriated or nationalised investment immediately before the date on which such expropriation or nationalization became publicly known. Such compensation shall be effectively realizable without undue delay and shall be freely convertible and transferable. Interest shall be paid in a fair and equitable manner for the period between the date of expropriation or nationalization and the date of actual payment of compensation.
UK-Ethiopia BIT 2009	Article 5 1. Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a nondiscriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.
UK-Columbia BIT, 2010	Article VI 1. Investments of investors of a Contracting Party in the territory of the

[102] (3) The term "expropriation" within the meaning of paragraph (2) of Article 3 shall also pertain to acts of sovereign power which are tantamount to expropriation, as well as measures of nationalization.

[103] Protocol (4) ad Article 3 paragraph 2 : Expropriation shall be deemed to be any kind of deprivation by acts of sovereign power of any asset or right which constitutes an investment or is a part thereof, as well as other acts of sovereign power which are tantamount to expropriation, and also measures of nationalization

	other Contracting Party shall not be the subject of nationalization, direct or indirect expropriation, or any measure having similar effects (hereinafter "expropriation") except for reasons of public purpose or social interest (which shall have a meaning compatible with that of "public purpose"), in accordance with due process of law, in a non-discriminatory manner, in good faith and accompanied by prompt, adequate and effective compensation. 2. For the purposes of this Agreement, it is understood that: (a) indirect expropriation results from a measure or series of measures of a Contracting Party having an equivalent effect to direct expropriation without formal transfer of title or outright seizure; (b) the determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by case, fact based inquiry into various factors including, but not limited to the scope of the measure or series of measures and their interference with the reasonable and distinguishable expectations concerning the investment; (c) non-discriminatory measures that the Contracting Parties take for reasons of public purpose or social interest (which shall have a meaning compatible with that of "public purpose") including for reasons of public health, safety, and environmental protection, which are taken in good faith, which are not arbitrary, and which are not disproportionate in light of their purpose, shall not constitute indirect expropriation. 6. Subject to this Article, the Contracting Parties may establish monopolies and reserve strategic activities depriving investors from developing certain economic activities. 7.The Contracting Parties confirm that issuance of compulsory licenses granted in accordance with the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights may not be challenged under the provisions set out in these Articles.

4.2.3 India

Indian practice on expropriation clause like other parts of the BIT has been more of a capital-importing country till middle of the first decade of the twenty first century. India has gone for an open-ended clause on expropriation wherein sufficient measures have not been taken for non-compensatory regulations. It is adoption of the traditional clause on expropriation.[104] The BIT with Germany as shown in the table reveals that the character of the governmental measure is irrelevant in adjudicating the alleged expropriation. It allows for direct as well as indirect and creeping expropriation. Article 5 of the Model BIPA, 2003 adopts the EU practice on the expropriation clause.[105] This clause is framed to signal to the investor that the property associated

[104] UNCTAD, *Bilateral Investment Treaties 1995–2006*: Trends In Investment Rulemaking, page 7, *available at*: http://unctad.org/en/Docs/iteiia20065_en.pdf pdf (visited on march 12, 2015) at page 58.

[105] Article 5(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a fair and equitable rate until

with the investment shall not be nationalized or expropriated. India's expropriation clause like other traditional BITs lacks clarity on the degree of interference in the ownership which shall qualify for indirect expropriation.

The table provided below elaborate to us that India, inspite of having a Model BIPA to negotiate usually agreed for the clauses as per the other contracting party. India-Kuwait BIT other than the mention of types of possible expropriation, also provided for qualified regulatory expropriation in Article7 (4) wherein if by any of the specified measures or comparable measures of the host state, the investor is deprived of substantial benefits or the control is lost or economic value is damaged etc., it shall be considered as a case of expropriation. It covers consequential expropriation under it.

The India-China BIT, 2006 clause and annexed protocol is very unique as though both the nations at that point of time were signing European Type BITs with comparatively weaker nations; the expropriation clause in this BIT was NAFTA type. India-China BIT in the main clause adopted the language of Indian Model BIPA, but it added that interpretation shall be done as per the annexed protocol. It is being provided in the footnote attached with the text of expropriation clause of India-China BIT in the table. It provided for a four-point test to determine whether indirect expropriation has taken place or not in case where direct expropriation has taken place. The annexure provides for the regulatory space and recognizes the need of the space for the police power. It also adopts the Afro-Asian outlook towards property wherein property has a social function to perform.[106]

India's BIT since 2006 contained the additional protocol on expropriation which otherwise did not form part of the Model BIPA, 2003. The treaties signed with Iceland (2009), Latvia (2010), Senegal (2008), Jordan (2006) contained this kind of additional protocol. On the other hand BITs with Nepal(2011), Saudi Arabia(2006) contained in built qualification to the over-expansive nature of expropriation clauses in erstwhile BITs. The BITs with Myanmar (2000), Bosnia and Herzegovina (2006),

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the date of payment, shall be made without unreasonable delay, be effectively realizable and be freely transferable.

[106] *Supra* note 9.

and Greece (2007) continued with the Model BIPA, 2003. BIT with Mexico contained a NAFTA type expropriation clause.

This survey reveals to us that India as a capital importing country started signing these BITs without carefully examining the possible narrowing of its regulatory power. The clause on expropriation has underwent a peculiar change in the post-2005 period as India learning from the arbitral practice elsewhere realized that the regulatory power is most severely hurt by the European type BIT clause. It was a dangerous clause which could contemplate expropriation even if diminution of property is very small. It thereby compromised with the domestic regulatory structures and resultant policy space badly. However, the Indian practice is not uniform on this issue. As stated in above paragraph, inspite of this curve to secure regulatory space, it behaved like a capital-exporting country and went ahead for a expropriation clause which favors the *sole effect* doctrine.

The Model BIT, 2015 adopts an even restrictive version of expropriation clause. It recognised the fact that risk aversion is preferable to vague agreements. It diminishes the existing incompleteness of the expropriation. It ensured broader scope for the State to exercise police powers. It created specific category for actions which won't qualify for the expropriation proceeding. Mitigating factors provided under Article 5.7 elaborates and provides a source of activities which fall under legitimate sphere of public activity which does not qualify for compensation. The 'general exception clause' ends the possibility of St. Elena awards types as it altogether excluded them from the purview of the BIT. The presence of the escape clause/exception clauses in the BITs provides a countervailing current to the uncritical investor protection.[107] This recognizes the evolutionary character of governance regime and is acceptance of the fact that States also learn.

India-Kuwait, 2001	Article 7 1(a) Investments made by investors of one Contracting State in the territory of the other Contracting State shall not be nationalized, expropriated, dispossessed or subjected to direct or indirect measures having effect equivalent to nationalisation or expropriation or dispossession (hereinafter collectively referred to as expropriation') by the other Contracting State except for a public purpose related to the internal needs of that Contracting State and against

[107] Choudhury, Barnali. 2010. "Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreement." *Colum. J. Transnat'l L.* 49:670.

	expeditious, adequate and effective compensation and on condition that such measures are taken on a non-discriminatory basis and in accordance with the procedure established under law. (4) The term "expropriation" shall also apply to interventions or regulatory measures by a Contracting State such as the freezing or blocking of' the investment. levying or arbitrary or excessive tax on the investment, compulsory sale of all or part of the investment, or other comparable measures, that have a de facto confiscatory or expropriatory effect in that their effect results in depriving the investor in fact from his ownership, control or substantial benefits over his investment or which may result in loss or damage to the economic value of his investment.
India-China, 2006	Article 5[108] Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as " expropriation") in the territory of the other Contracting Party except for a public purpose in accordance with law on a nondiscriminatory basis and against fair and equitable compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a fair and equitable rate until the date of payment, shall be made without unreasonable delay, be effectively realizable and be freely transferable.
India-Lithunia,	Article 5[109]

[108] Protocol shall be applied for better understanding of the clause. It reads thus:
"III. Ad Article 5 With regard to the interpretation of expropriation under Article 5, the Contracting Parties confirm their shared understanding that:
1. A measure of expropriation includes, apart from direct expropriation or nationalization through formal transfer of title or outright seizure, a measure or series of measures taken intentionally by a Party to create a situation whereby the investment of an investor may be rendered substantially unproductive and incapable of yielding a return without a formal transfer of title or outright seizure.
2. The determination of whether a measure or a series of measures of a Party in a specific situation, constitute measures as outlined in paragraph 1 above requires a case by case, fact based inquiry that considers, among other factors:
i. the economic impact of the measure or a series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that expropriation or nationalization, has occurred;
ii. the extent to which the measures are discriminatory either in scope or in application with respect to a Party or an investor or an enterprise;
iii. the extent to which the measures or series of measures interfere with distinct, reasonable, investment-backed expectations;
iv. the character and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention on to expropriate.
3. Except in rare circumstances, non-discriminatory regulatory measures adopted by a Contracting Party in pursuit of public interest, including measures pursuant to awards of general application rendered by judicial bodies do not constitute indirect expropriation or nationalization.

[109] Annex to be used for the purpose of interpretation. It reads thus: "1. A measure of expropriation includes, apart from direct expropriation or nationalization through formal transfer of title or outright seizure, a measure or series of measures taken intentionally by a Party to create a situation whereby the investment of an investor may be rendered
substantially unproductive and incapable of yielding a return without a formal transfer of title or outright seizure."
It further provides a 4 element test to decide whether the expropriation has taken place in clause 2. It reads thus:
"(i) the economic impact of the measure or a series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that expropriation or nationalization, has occurred;

2011	Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is earlier, and shall be made without unreasonable delay, be effectively realizable and be freely transferable. The compensation shall include interest on the LIBOR basis from the date of expropriation until the date of full payment.
India-Mexico	Article 7 Neither Contracting Party may expropriate or nationalize an investment either directly or indirectly through measures tantamount to expropriation or nationalization (hereinafter referred to as "expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law; and (d) on payment of compensation in accordance with paragraph 2 below
Model BIPA 2014	Article 5 5.1 Neither Party may nationalize or expropriate an Investment (hereinafter "expropriate"), or take Measures having an effect equivalent to expropriation, except for reasons of public purpose [110] in accordance with the procedure established by Law, and on payment of adequate compensation. 5.2 The determination of whether a Measure or a series of Measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and usually requires evidence that there has been: (i) permanent and complete or near complete deprivation of the value of Investment; and (ii) permanent and complete or near complete deprivation of the Investor's right of management and control over the Investment.[111] (iii) an appropriation of the Investment by the Host State which results in transfer of the complete or near complete value of the Investment to that Party or to an agency or instrumentality of the Party or a third party; 5.3 For the avoidance of doubt, the Parties agree that an action taken by a Party in its commercial capacity shall not constitute expropriation or any other measure having similar effect. 5.4 For the avoidance of doubt, the parties also agree that, **non-discriminatory**

(ii) the extent to which the measures are discriminatory either in scope or in application with respect to a Party or an investor or an enterprise;
(iii) the extent to which the measures or series of measures interfere with distinct, reasonable, investment-backed expectations;
(iv) the character and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention to expropriate."
4. Actions and awards by judicial bodies of a Party that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns, do not constitute expropriation or nationalization.

[110] For the avoidance of doubt, where India is the expropriating Party, any Measure of expropriation relating to land shall be for the purposes as set out in its Law relating to land acquisition and any questions as to "public purpose" and compensation shall be determined in accordance with the procedure specified in such Law.

[111] This does not prohibit a Party from regulating the management or control of an Investment when done in compliance with the Law of the Party where the Investment is made. This would cover, for example, requirements under the financial laws and regulations or insolvency laws of the Party in question or a law requiring that nationals of a Party hold certain senior management positions in sensitive industries that it considers necessary.

	regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives such as public health, safety and the environment shall not constitute expropriation. 5.7 **Mitigating Factors under Article 5.6 include**:- (a) current and past use of the Investment, including the history of its acquisition and purpose; (b) the duration of the Investment and previous profits made by the Investment; (c) compensation or insurance payouts received by the Investor or Investment from other sources; (d) the value of property that remains subject to the Investor or Investment's disposition or control, (e) options available to the Investor or Investment to mitigate its losses, including reasonable efforts made by the Investor or Investor towards such mitigation, if any; (f) conduct of the Investor that contributed to its damage; (g) any obligation the Investor or its Investment is relieved of due to the expropriation, (h)liabilities owed in the Host State to the government as a result of the Investment's activities, (i) any harm or damage that the Investor or its Investment has caused to the environment or local community that have not been remedied by the Investor or the Investment, and (j) any other relevant considerations regarding the need to balance the public interest and the interests of the Investment.

4.3 Arbitral Practice

In this section, I will adopt a different technique to understand the relationship between the emerging trends in the arbitral practice on expropriation and the domestic regulatory space as an exercise of sovereignty. I will attempt study this upon the premise in the light of an observation of the US Supreme Court in *Pennsylvania Coal Co* v *Mahon* by Justice Holmes which reads thus, "government could hardly go on if to some extent values incident to property could not be diminished without paying for every…change in the general law."[112] I shall be analysing it through the awards on this issue and trying to find how arbitral practice is bringing an uncertainty in regard to State's action. Some support *sole effects doctrine* (lesser regulatory space for the State), or expansive *police power* doctrine (this supports a wider scope of regulation for the State) and the *rebalancing* scenario. As stated in section 4.1.2 that the States rarely exercise direct expropriation, this section moves on the premise that the indirect regulation and associated variants of expropriation forms the background of this work. This section will do survey of arbitral practice and turn as a guide to distinguish between the compensable regulatory taking and non-compensable regulatory takings. The *Suez v. Argentina* case is a sample at hand which makes a clear reference to the idea of 'regulatory taking' in declaring the acts of the Argentina Government during the crisis of 2001-03 as indirect expropriation. In this arbitration, tribunal decided that,

[112] *Pennsylvania Coal Co* v *Mahon*, 260 US393 at 413 (1922).

> "In case of an indirect expropriation, sometimes referred to as a 'regulatory taking,' host States invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without actually changing or cancelling investors' legal title to their assets or diminishing their control over them."[113]

Sole effects Doctrine and Narrower regime of Domestic Regulation

In *Santa Elena* v. *Costa Rica*[114], the tribunal has adopted uncritically the sole effects doctrine. The case related to the environmental issue and the tribunal held that irrespective of the legitimate public interest involved in the environmental regulation, the alleged regulation definitely impacts the rights associated with property of the investor and thereby it requires a payment of compensation. This judgement in this way elaborates that the cardinal question in the examination is the *effect* of the measure. As per Dolzer and Bloch, this means that once a certain level of diminution is established, the payment of compensation is unavoidable.[115] This approach is being adopted in a number of arbitral awards in varying degree. The *Metalclad award* provides the widest amplitude of this approach which reads thus:

> "Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[116]

This formulation of test to determine the expropriation opens the floodgate with regard to the expropriation claims. This in turn compromises with the State's sovereignty and power to determine the domestic structures as per the evolutionary practices of governance. Any environmental mechanism definitely leads to some kind of cost upon the investor and it shall qualify for an expropriation claim. *Methanex*

[113] *Supra* note 57 at para. 121

[114] *Santa Elena* v.*Costa Rica* (2000) 39ILM317; (2002) 5ICSID Reports153.

[115] Dolzer, Rudolf, and Felix Bloch. 2003. "Indirect Expropriation: Conceptual Realignments?" *International Law Forum* 5 (155): 164.

[116]*Supra* note 28.

award and *Glamis award* provides almost an opposite view to this, which in turn adds to the uncertainty on the question.

Vivendi Case[117] is another clear adoption of *sole effect* doctrine in the sense that tribunal observed that the presence or absence of the intent to expropriate is secondary in the sense that they must be applied only to decide whether the expropriation was lawful or not. The first step in the case is to understand the *effects* of the measures. It is the most critical element in the decision on expropriation. To assert this, it relied upon the language of the clause which provides that the intent or purpose of the measure is a necessary condition only for the constitution of lawful expropriation. The tribunal relying upon the *Santa Elena* case held that the intent of the government is irrelevant for the payment of compensation. Even a cursory study, would reveal to us how these lines of awards are creating a sort of regulatory chill for the States as they fear that the moment they apply a policy, the investor might claim that his property is expropriated.

The tribunal in the *Tokios Tokelės* case though observed that only a substantial deprivation qualifies as expropriation, it certainly is a support for the *sole effect doctrine* as it does not giver due recognition to the needs of the State to regulate. It observed thus

> "A critical factor in the analysis of an expropriation claim is the *extent of harm caused by the government's actions*. For any expropriation- direct or indirect -to occur, the state must deprive the investor of a "substantial" part of the value of the investment. Although neither the relevant treaty text nor existing jurisprudence have clarified the precise degree of deprivation that will qualify as "substantial", one can reasonably infer that a diminution of 5% of the investment's value will not be enough for a finding of expropriation, while a diminution of 95% would likely be sufficient. The determination in any particular case of where along that continuum an expropriation has occurred will turn on the particular facts before the tribunal."[118]

[117] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Jurisdiction of November 14, 2005.
[118] *Supra* note 50.

Regulatory measures taken by a state are bound to impact the private property rights i.e. they are bound to have *effects* and if an unqualified *sole effect* doctrine is applied, every governmental actions would qualify as expropriation.[119] The doctrine has based itself in the customary international law. Before uncritical criticism of the doctrine, we must understand this doctrine is necessary in one form or the other as BITs aims to establish a balance.[120] They serve as a reciprocal promise between two states to govern relation between one of the parties to treaty and the investor. In this light, we must understand that just because some legitimate public welfare goal is followed, there is no expropriation and thereby no compensation. We need to understand that though doctrine best applies to the cases of the direct expropriation; we must understand that the indirect expropriation is just another variant of the larger genus of expropriation. Irrespective of the fact whether it is direct or indirect, the question of absence of intent of expropriation is irrelevant and in both cases, compensations must be paid. In this way, it will be inappropriate to argue that it must not be applied to indirect expropriation. The expropriatory regulation differs from general regulation because of the severity of the economic impact. In the case of *LG&E* v. *Argentina*, the tribunal was dealing with violation of the concession agreement in relation to gas service.[121] Inspite of the fact that the agreement has been violated, the tribunal did not adjudicate it as expropriation. It observed that ownership of the property could be deemed as neutralized only if it no longer remains under the control of the owner or that the day to day operation is not possible for the investor and thereby it cannot be deduced that there has been an intervention in the enjoyment of investment. Every diminishment in the possible profit cannot be deemed as expropriatory.[122] An expropriation occurs only if the all or most of the rights in investment have been denied or interfered with.[123] Dolzer, best summarizes, the balanced understanding of the *effects doctrine*, thus:

> "No one will seriously doubt that the severity of the impact upon the legal status, and the practical impact on the owner's ability to use and enjoy his property, will be a central factor in determining whether a regulatory measure effects a taking."[124]

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[119] *Supra* note 53.
[120] *Supra* note 6.
[121] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc*. v. *Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of October 3, 2006,
[122] *Ibid.*
[123] Restatement (Third) of Foreign Relation Laws of United States, 1986,Vol.2, page 196, section 712.
[124] R. Dolzer, Indirect Expropriations: New Developments? 11 *N.Y.U. Environmental Law Journal* 64, 79 (2002).

If we accept that the BIT or the investment contract serves as a *lex specialis*, and then if the State agrees to European type expropriation clause, it should not be allowed to later claim it as an aspersion on its sovereign power to regulate. This must be followed because under International law, States as a sovereign entity has agreed to it and it cannot break it.

State's Right to regulate and Police Power Doctrine

The second major trend in the application of expropriation clause, involves Sovereign's right to regulate through the idea of police power of the State. This theory manifest itself in the idea of non-compensatory regulations i.e. regulations which do not lead to expropriation. Under the customary international law, State always has a right to regulate the commercial and business activities.[125] This right has been recognised in a number of Investor-State Arbitration.[126] As per Subedi, the State's right to regulate gets strength from other regimes of international law like human rights and international environmental law.[127]

It has always remained a problem to determine as to when a non-expropriatory regulation converts into a expropriatory regulation liable for payment of compensation.[128] The question of determination of indirect expropriation remains valid since 19th century as the State has been active in regulation of the private property.[129] The growth of international law in non-traditional sphere of regulation creates obligation on States to change laws domestically, for example health, IPR etc. Environment is one prominent area in this regard.[130] This has led to increased litigation on indirect expropriation. The growth of international law has led to

[125]Mostafa, Ben.2008. "The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law." *Australian International Law Journal* 15:268.
[126] *Saluka Investments BV (The Netherlands)* v *The Czech Republic*, Permanent Court of Arbitration, Partial Award (17 March 2006) at [306]; *LG&E Energy Corp* v *Argentine Republic*, ICSID Case No ARB/02/1 at [195] ; *Tecnicas Medioambien tales Tecmed SA* v *The United Mexican States*(2004) 43 *ILM* 133 at [115].
[127] Subedi, Surya. 2006. "The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term 'Expropriation.'" *International Lawyer* 40 (121): 123.
[128] Herz, John. 1941. "Expropriation of Foreign Property." *American Journal of International Law* 35 (243): 251.
[129] Legum, Barton. 2002. "The Innovation of Investor-State Arbitration under NAFTA." *Harvard International Law Journal* 43 (531): 539.
[130] Wagner, J. Martin. 1999. "International Investment, Expropriation and Environmental Protection." *Golden Gate University Law Review* 29: 465–68.

shredding off of some of sovereign immunities which in turn leads to increased litigation on indirect expropriation. [131] Investor-State Arbitration is an example of this process.

In the *Sedco award*, the tribunal observed that the state cannot be held pecuniary liable for the economic wrong emerging from the State's bonafide exercise of police power.[132] As per Aldrich, this doctrine is an accepted notion in the international investment law.[133] It has been accepted by tribunals as part of modern investment law.[134] The notion of police power provides that the State should not be held liable for any claim arising out the exercise of police power. It leads to the exclusion of the liability to pay compensation.

The role of police power in determining the question of expropriation, one view is that not very exercises of police power will immune the regulation. Only in cases, where this power is applied for the "tax, crime and 'the maintenance of public order'", it shall be able to immune the state.[135] Another broader version, but still narrower, of police power which immunes the State is that actions related to health, safety or morality qualifying as exercise of police power.[136] A communication in the European Union recognised that the future investment or trade agreements must try to balance different kind of interests, such as each party's right to regulate for public interest and the protection for investor against unlawful expropriation.[137] The incomplete contracts of European BITs are turning to shift towards recognition of these propositions.[138]

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[131] *Supra* note 125.
[132]. *Sedco Inc* v. *National Oil Co.* Iran-Us CTR. 1985 vol. 9*: 248–75.*
[133] Aldrich, George. 1994. "What Constitutes a Compensable Taking of Property? The Decisions of the Iran United States Claims Tribunal." *American Journal of International Law* 88: 585–609.
[134] *Supra* note 126.
[135] Baughen, Simon. 2006. "Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven." *Journal of Environmental Law* 18: 207.
[136] Gudofsky, Jason. 2000. "Shedding Light on Article 1110 of the North American Free Trade Agreement (NAFTA) Concerning Expropriations: An Environmental Case Study." *Northwestern Journal of International Law and Business* 21: 243.
[137] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards a Comprehensive European Investment Policy, COM (2010) 343 final (July 7, 2010), *available at* http://trade.ec.europa.eu/doclib/docs/2011 /may/tradoc 147884.pdf. (visited on March 24, 2015).
[138] Wolfgang Alschner, Interpreting Investment Treaties as Incomplete Contracts: Lessons from Contract Theory 8 Submitted for the 30th Annual Conference of the European Association of Law and Economics (EALE), *available at*: http://ssrn.com/abstract=2241652 (visited on March 28, 2015).

In the *Methanex Case*[139], the tribunal recongnised the application of police power doctrine for the exclusion of its liability. The test laid down in this award provides that in order to determine a particular measure as expropriatory, we must observe its effect on the investment, whether it has led to permanent and irreversible neutralization or destruction of the economic value of the investor's right/assets. The tribunal further provided that it must also be adjudicated as to whether this measure was proportional to the public interest at stake. The tribunal in its test denied the existence of any regulatory stand still and recognised among other grounds that the investor must expect that the regulations might change. It said that keeping in view the complex nature of environmental legislation of the concerned state, it does not qualify as expropriation.

In the *Tecmed Case*, the tribunal held that to determine whether the alleged act constitutes expropriation; it shall first look at the *effects* of the measure. In assessing this, it shall examine whether the measure 'permanently and irreversibly' destroys the economic value/enjoyment of the investor's right/assets. It held that due *deference* must be given to the idea of the State's legitimate right of regulation in public interest. It recognised that the States have right to legitimately change their regulations. It proposed the application of the proportionality test which was first used in the modern investment law which differs from the 'sole effect' test as it strikes a balance between the investor's right and domestic needs in arena of health, environment etc.

In the *Glamis case*[140], the tribunal held that the non-discriminatory regulations which relate to a public purpose qualify as non-compensatory regulations. This forms two-stage test for adjudicating expropriation. They are- 'significant economic impact on the investment'; the other was that the measure be expropriatory in nature, as opposed to a bona-fide regulation. Relying upon the *Tecmed case*, the tribunal held that only if it is ascertained that the investor has been radically deprived of his rights emerging from the investment and it appears that the right has ceased to exist, the intervention must be recognised. Mere restrictions on enjoyment of rights do not constitute takings. This in a way provides that tribunal must adjudge first, as to whether the exercise of governmental power is regulatory or expropriatory.

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[139] *Supra* note 48 at Part IV, Chapter D, para. 7.
[140] *Glamis Gold Ltd.* v. *United States of America*, Final Award (14 May 2009), para. 354.

In the *SD Myers* v. *Canada*[141], the tribunal expressly rejected the *effects doctrine* and held that it is generally accepted via precedents that regulatory actions, generally do not amount to expropriation and held that any adjudication must try to examine the real interest, purpose and effect of the government action.

Another area, which concerns the State, is the violation of the specific commitments made by the State under the investment contract or denial of legitimate expectation emerging from the contract. This has many facets. First is to deduce what forms part of legitimate expectation, as it well tell what forms part of assets/rights emerging from the contract. This will be the prima facie facts to admit or deny expropriation claims. In the *Azurix case*, the tribunal held that decision on whether there was specific commitment or what were the expectations, it is necessary to view the documents and negotiations which have taken place.[142] In the case of *White Industries* v. *India*, the tribunal found the claimant's claim of alleged violation of several of the expectation was found to be unreasonable and nondeductible from the negotiations which took place. The tribunal, among other grounds, relied on this for denying expropriation claim. [143] Similarly in the *Methanex case*, the tribunal held that no 'specific commitment' can be presumed unless they are made.[144] The expectation of certainty cannot automatically give a presumption that laws and regulations may not change.

The second aspect of investment as expectation interacts is change in the specific promises made on part of the State. Whether changes in those promise/ commitment constitute expropriation? In this regard in *Waste Management* v. *Mexico*, the tribunal held that "it is not the function of the international law of expropriation to eliminate the normal commercial risks of a foreign investor."[145] In the *Grand River Enterprises* v. *USA*, the tribunal while elaborating upon the expropriation and the legitimate expectation observed thus, "ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or

[141] *S.D. Myers* v. *Canada, First Partial Award, 13 November 2000, paras.281 and 285.*
[142] *Azurix Corp*. v. *Argentina*, ICSID Case No. ARB/01/12 (2006), para. 316.
[143] *White Industries* v. *Union of India*, UNCITRAL, Final Award. 30 Nov 2011..
[144] *Supra* note 48.
[145] *Supra* note 24 at para. 159.

assurances made explicitly or implicitly by a State Party."[146] Under the customary international law, the *Chin judgement* decided that, "it is clear, investors constantly face changing circumstances and not all expectations must necessarily be fulfilled."[147] I would again go back to the *Methanex case*, where the tribunal held that an investor must be ready to expect changes in the regulation.[148] The changes of regulation can be made the ground only in a case where it is abrupt, discriminatory or dramatic would be valid question for expropriation examination.

In *Saipem SPA* v. *People's Republic of Bangladesh,* the tribunal observed thus:

> "It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."[149]

Therefore we find that inspite of shift towards one particular theory, the shift in arbitral practice is towards the balance between the investor protection and State's right to regulate. This should be the direction if the international investment law has to remain effective. The recalibrating efforts of asserting the sovereignty via BIT is visible in the American BITs and a large number of countries are shifting towards it. Therefore, if it desires to remain legitimate and expand further without more irritation or reservations by States, it must recognise its normative position in public international law.

In the end I summarize thus:

(a) The European Model of BITs do not give enough space to state to regulate. They do not recognize the non-compensatory regulations.

(b) The American Model is a more balanced model as it recognizes the necessary safeguard to investor protection and also the right of the State to exercise regulatory power.

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[146] *Grand River Enterprises* v. *USA*, Award, 12 January 2011, para. 141.
[147] Oscar Chinn (*U.K.* v. *Belg.),* 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12, 1934)
[148] *Supra* note 48 at para. 7.
[149] *Saipem S.p.A.* v. *People's Republic of Bangladesh*, Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 67 (Mar. 21, 2007)

(c) The introduction of test to determine whether there has been a regulatory taking is appropriate test as while recognising the effects theory, it also recognizes the police powers of State and through the test of proportionality balances both of them.

(d) States must adopt a more narrow definition of investment so that interference with some of rights attached with the investment would not qualify as expropriation for the purpose of the BIT.

(e) The arbitral practice which was earlier tilted towards the investor and overlooked to recognize the public nature of dispute and impact on larger public has been replaced by the balanced approach which does not recognise non-substantial deprivation as well as the ready to balance the legitimate needs of the State.

(f) The idea of investment as property consisting of bundle of rights should go the European and Afro-Asian way whereby it recognizes the social function of property. This would reduce the regulatory chill which is being created because of denial of this side of property.

Chapter 5
Conclusion

Summary of Discussion

I have studied this topic with regard to three clauses of BIT. I will do this summary of discussion chapter wise.

In chapter II, I have dealt with the definition clause on 'Investment'. The concept of investment replaced the concept of property in the international law on investment protection. This change took place because the assets which were used by the investor in the foreign territory had become complex and also because the host states have evolved their regulatory sphere in newer arenas which the earlier property rights jurisprudence failed to handle efficiently. The investment now includes a very broad category of assets attached with the investment which can range from the tangible property to intangible property. It extends to include contract, concessions, licences permits, approvals to carry out exploration and exploitation of natural resources, IPRs, debts, shares, debentures, any right under the public law, investment contract etc. This means that it now includes a variegated set of assets and that investment is now not just property. This opens the possibility of investment as contracts, investment as expectation, and investment as values. When we start adopting these wide categories of assets as investment, the possibility of government regulation affecting the investment increases many fold. I will explain it with a small example. Industries working in public utility sector know that there activities impact the general public and that the government could be expected to make new regulations which might increase their cost. Suppose government does it. The investor will proceed to Investor-State Arbitration because this new set of regulation has diminished the reasonably expected profit from the investment. Here the conception of investment as expectation comes into picture. The case may go any side depending on the facts of the cases and how the treaty has dealt with them. The case may strike down if the tribunal does not find the expectation of profit a part of the investment. This in turn would enhance the regulatory power of the State.

The US BITs were the first to recognise administrative law based rights as investment. This in turn means that even in case a non-discriminatory administrative

order changes the earlier recognised right, it would means that this particular part of investment has seized to exist. The investor in such a case becomes eligible to challenge the regulatory structure. This in turn ensures that the Host State would hesitate to change the regulation leading to a sort of regulatory chill. EU BITs later adopted them in their BITs. In this way, the investment becomes delocalized from the domestic sphere of law and starts to exist in the international law regime. This means that the broader clause on investment makes a broader sphere of government activity open for adjudication. States across globe are generally adopting open-ended clause on elements of investment. However in the post-Salini case, there is a growing set of literature (award and treaties) which provide the characteristics necessary for an investment to qualify as investment. Other than duration, regularity of profit or return and the risk involved in the asset, the requirement of contribution to economic development is also included. US BITs since 2004 contain a qualifications to the definition of asset which only shall qualify as investment. India in it Model BIPA, 2015 has gone for investment as enterprise and only if it has real and substantial business operation' in India, it shall qualify as investment. The inclusion of legitimate expectation attached to investment as investment restricts the sphere of the government activity to a broader degree. Overall, now the States are changing their BITs so that only those investments get protections which qualify the required standard.

The third chapter dealt with the FET clause. FET which serves as a safety valve against the possible misuse of legal loopholes is one of the most frequently invoked clause. It provides a higher level of stability and favourable environment than the clause on MFN and National treatment would provide the investor. There are several formulations of the FET clause which provide varying degree of protection to the investor and in turn restrict the regulatory space enjoyed by the government. The clause secures the investor technically from the idiosyncrasies of the host state. However, the manner in which this clause has been invoked in cases, it gives a representation that it freezes the governmental regulation in regard to the particular investment or to the sector, it belongs to. The US has shifted to the International Minimum Standard as per customary international law to ensure that the State enjoys a higher level of regulatory independence. The concept of FET is a substantive legal obligation to ensure the goal of stable and favorable environment for the investment.

The idea of legitimate expectation forms part of the FET clause. This means that if the specific commitment or reasonable expectation has been denied by the exercise of Sovereign power, it shall amount to violation of FET. Similarly in regard to the investment contracts, this obligation exists if the State performs as a sovereign authority.

The concept of FET should not be applied by the tribunals in a manner which presumes that no regulations shall change. In case if the State enacts a positive regulation and has reasonable reason, the tribunal prima facie must desist from recognising it as violation of FET. Only in cases where there has been arbitrary exercise of power or complete absence of transparency, it shall be treated as an instance of FET. The concept of proportionality and reasonable nexus must be applied by the tribunal in determining whether there has been a violation of the FET clause. Through the tilt towards the American Model, the states are untying their hands and adopting for a sort of global administrative law which while evaluating the conduct of State towards investor balances it with the non-investment concerns. Through the adoption of interpretation notes, states are now securing their rights for the public regulation. As developed states are becoming respondent, we find that the public nature of the BIT is getting visible. This shift leads to the shift from it serving as a forum of 'public interest, private rights' to 'public interest and balancing of private rights with other rights'. It is also vital because with the neoliberalism getting strengthened, under a sort of share wisdom, a number of state functions have shifted to private sector. However, they still involve public interest. If we study the kind of cases that have gone to these tribunals, we find them as belonging to public utilities, public transport, energy contracts etc.. Therefore it is important that concept of FET must be understood holistically and not as a concept which unambiguously supports the foreign investor. It must show deference to the need of public regulations.

In the chapter IV, I have dealt with the concept of expropriation. The European version of BIT adopts a model of expropriation clause which does not recognise the need of government regulation. It recognised all forms of expropriation. As per this model, if the State infringes with the rights associated with the investment, it will only study the purpose of expropriation to understand whether it is lawful expropriation or unlawful expropriation. It does not recognise the possibility of an expropriation clause

which recognizes that there may be takings for which no compensation shall be paid. On the other hand, the American Model of expropriation is inspired from the *Penn Central case* wherein it was recognised that economic effect of expropriation alone would not be enough to decide whether taking has taken place. It recognizes that the nature of governmental action and their impact on reasonably-accepted expectation must be analyzed. It also recognizes that only tangible and intangible property rights could be expropriated. This opens rest of the right in the investment as capable of expropriation. It also enacts an exception as per which in case if certain legitimate public interest regulations are made, then their impact on investment will not qualify for a claim of expropriation. In this way , we find that at the treaty level, it adopts a restrictive model of exprorpriation which opens the arm of State to exercise its sovereignty to protect its right to regulate.

At the level of arbitral practice, we find that there are two doctrines which are at work. The *sole effect* doctrine provides that in case if the investment has been impacted by the regulation, irrespective of the nature of function, the State shall be required to pay compensation. This doctrine thus does not give due consideration to the needs of the State and its responsibility to regulate in public interest as well as international obligation(environmental law obligation). On the other hand, if the arbitrators recognise the police power doctrine or the need of governmental regulation, it shall go for a Penn Central kind of test wherein it tries to weigh the need of public regulation and its proportionality vis-à-vis the rights of investor. Even in case, the police powers are recognised, there is always a possibility that the investor might still succeed in his claim if the action taken is more than required or wherein the under the Investment contracts, the State had recognised that it shall not change the governmental regulations on a particular issue.

Ultimately, with the insertion of exception clauses in the BITs and the growing deference of arbitrators towards the State's need of regulation, we are reaching a point of balance whereby these conflicting claims of investor and state meet.

Overall, I would like to conclude with following observations:

a. The BIT regime which shoot off in the 1960s and reached its peak in 1990s when a number of developing and least developed countries started signing it

to signal that they provide a stable and favourable environment for investment it is undergoing a period of reflection as the earlier capital exporting countries also become the capital importing countries.

b. We find that the European model of BIT which is most common model of BIT and which even USA has adopted in beginning is a model wherein the sovereignty of state to manage domestic regulatory structure has been severely compromised. At the level of arbitral awards on these BITs, we find that they do not create enough space for the State's need to regulate. The substantive obligation clauses leave very little scope for the States.

c. On the other hand, US, Canada and Mexico after becoming respondent in NAFTA arbitration shifted towards a restrictive model of BIT whereby they have asserted their position as the Sovereign State by creating necessary exception at the level of definition of investment, FET and expropriation. In regard to other clauses of BIT, we find a similar pattern.

d. American model creates large number of exceptions which are sector specific as well as general in nature. It is because of their realization of evolutionary character of governance. We can say that States are reasserting their sovereignty in BIT regime.

e. At the global level, we find that there is a convergence towards the American model of BIT. Developing countries are quickly adopting it after having been a practitioner of the European Model. India fits this description. Even European countries which individually persist with this model have started shifting to the American Model as we find in Canada-EU FTA.

f. With the interaction of BIT with other regimes of international law like human rights, environmental law etc., even the European BITs at the level of arbitral practice shall undergo modifications and more flexible to State's need. *Foresti case*[1] serves to us a classic example of how the Human Rights obligations

[1] Piero Foresti and others v The Republic of South Africa, ICSID Case No. ARB(AF)/07/1 Award 4 August 2010, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH actionVal=showDoc&docld=DC 1651 En&caseld=C90 > accessed 3 May 2011.

could be used by the Host State to legitimize exercise of their regulatory power.

g. The BIT regime, however should desist from shifting so much that the foreign investors stop finding it viable mechanism for the investment protection. If it adopts that path, then in that case the benefits of the BIT will be neutralized and a sort of environment of 1950s and 1960s will be established wherein though direct expropriation as well as blatantly opaque indirect expropriation might not take place but through one or other exceptions, investor shall be denied of the protection to investment which it must get under a civilized system.

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