Transporting the Concept of Creeping Expropriation from *de Lege Ferenda* to *de Lege Lata*: Concretizing the Nebulous under International Law

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I. INTRODUCTION

The evolution of International Law bears witness to the growing recognition of the need to protect persons,[1] their properties and interests, and other important values.[2] Through time, this recognition eventually became internationally binding norms, that is, *de lege lata.* This transformation, however, was not an instantaneous process; these norms were the product of various contemporary law-making mechanisms[3] which have joined forces to transport these principles from the realm of soft law into legally binding norms.

In the particular field of foreign investment law, it is to be noted that the field is not as aged as the other fields in International Law. It was only after World War II, at the time when States were recovering and newly independent States were born, that foreign investments from capital exporting States substantially increased. Foreign direct investment (FDI)[4] brings in "capital, generates employment, and is an important means of

1. The term refers to both natural and artificial persons. Fletcher explains that "person" includes corporations and other entities having artificial or juridical personality that exist in contemplation of law. 1 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7 (Basil Jones, et al. eds., 1931).

2. Louis Henkin, *International Law: Politics and Values, reprinted in* LORI F. DAMROSCH, LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 2 (4th ed. 2001) [hereinafter DAMROSCH, ET AL.].

3. *See infra* discussion Part II.

4. *Id.*

facilitating technical and managerial know-how transfers and foreign market access."[5] It aids in the transfer of product and process technologies and is a significant factor in the improvement of management and marketing abilities in the host State.[6] The United Nations Committee on Transnational Corporations espouses the view that FDIs "could be beneficial to the host economy if the foreign investment is harnessed [properly]."[7] Clearly, the benefits that flow to the host States from FDIs are "often *a powerful fuel for economic growth and development.*"[8] Noting the significance of foreign investments in international trade and domestic economic development, the international community has invested considerable debate on the issue of taking by some host States of the physical property of aliens in their respective territories.

The concern over the taking of physical property led to the adoption of norms that regulate direct expropriation under International Law. Initially, this sparked increased foreign investment the world over; investors were reassured that International Law will protect them against illegal takings by host States. Unfortunately, however, some States were able to sidestep these norms. Instead of directly taking property, these States instead indirectly interfered with the property's effective use, enjoyment or disposal rendering it useless to the alien investor.

Publicists were initially adamant in supporting the proposition that there is hard law prohibiting creeping expropriation — that "no rule of customary international law emerges" from the international jurisprudence on creeping expropriation.[9] In the mid 1980s and early 1990s — when creeping expropriation disputes were at the height of controversy, Prof. Rudolf Dolzer commented that the law on indirect expropriation is "sketchy and rough" and that it is still a field where a "large lacunae remain."[10] Even in the mid-1990s, when economic liberalism was at its height and attempts to transport foreign investment norms into International Law were at its

5. DAMROSCH, ET AL., *supra* note 2, at 1613.

6. *Id.*

7. *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 14 (2d ed. 2004).

8. DAMROSCH, ET AL., *supra* note 2, at 1613 (emphasis supplied).

9. *See, e.g.* Naveen Gurudevan, *An Evaluation of Current Legitimacy-based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process,* 6 SAN DIEGO INT'L L.J. 399, 406 (2005); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 429, 84 S. Ct. 923, 940-41 (1964) (U.S.) (holding that at the time Sabbatino was ruled on, there were only a few issues, if any, on which the view is divided, such as the issue on the limitation of a State's power to expropriate foreign investments and properties); SORNARAJAH, *supra* note 7, at 1.

10. Rudolf Dolzer, *Indirect Expropriation of Alien Property,* 1 ICSID REV. – FOREIGN INVESTMENT L.J. 41, 41 (1986) [hereinafter Dolzer ICSID].

strongest,[11] the zeal for economic liberalism nevertheless "rolled back" due to the consecutive global economic crises that occurred.[12]

The advent of globalization once again brought international investment to the fore giving rise to soft law norms on creeping expropriation.[13] The author questions this conclusion arguing that the prohibition against creeping expropriation is already *de lege lata.*

An examination of the Philippine economic landscape reveals the need to protect foreign investments against illegal creeping expropriations. Congress has adopted laws liberalizing foreign investment and trade.[14] The Government has signed numerous bilateral investment treaties and free trade agreements with a multitude of States demonstrating its zeal to attract even more foreign investments.[15] The importance given by the Philippines to

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11. SORNARAJAH, *supra* note 7, at 27.

12. *Id.*

13. *Id.* at 5; *see infra* discussion Part IV.

14. *See, e.g.* An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines and for Other Purposes, R.A. No. 7042 [FOREIGN INVESTMENTS ACT OF 1991] (1991); An Act to Further Liberalize Foreign Investments, Amending for the Purpose, Republic Act No. 7042, and for Other Purposes, R.A. No. 8179 (1996); An Act Liberalizing the Retail Trade Business, Repealing for the Purpose Republic Act No. 1180, As Amended, and for Other Purposes, R.A. No. 8762 [RETAIL TRADE LIBERALIZATION ACT] (2000).

15. *FDIs in '07 to Reach $3B,* Department of Trade and Industry, 17 PHIL. BUSINESS REP. No. 11, November 2006, at 2, 11; *Taiwanese Firm Eyes New RP Factory,* Department of Trade and Industry, 11 DTI DATALINE NO. 2, Jan. 15, 2007, at 5; *Hilton, Hyatt to Invest in Retirement Industry,* Department of Trade and Industry, 10 DTI DATALINE NO. 25, Dec. 4, 2006, at 8; *Subic Port Nets $1.4B Investments,* Department of Trade and Industry, 11 DTI DATALINE NO. 4, Feb. 12, 2007, at 4; *Korean Firm to Set Up Golf Course in Cebu,* Department of Trade and Industry, 11 DTI DATALINE NO. 4, Feb. 12, 2007, at 7; *Indian Firm Sets Up Call Center in Muntinlupa,* Department of Trade and Industry, 10 DTI DATALINE NO. 26, Dec. 18, 2006, at 5; *Singaporean Firm, Microsoft to Make RP as IT Hub,* Department of Trade and Industry, 10 DTI DATALINE NO. 26, Dec. 18, 2006, at 6; *Chinese Firms to Invest $1B in Nickel Mine,* Department of Trade and Industry, 17 PHIL. BUSINESS REP. No. 11, Nov. 2006, at 3; *British Gas Infuses More Investments,* Department of Trade and Industry, 17 PHIL. BUSINESS REP. No. 11, Nov. 2006, at 3-4; *Danish Firm to Increase Subic Investments,* Department of Trade and Industry, 17 PHIL. BUSINESS REP. No. 11, Nov. 2006, at 4; *British Desk to Open at BOI,* Department of Trade and Industry, 17 PHIL. BUSINESS REP. No. 10, Oct. 2006, at 2; *South African Firms Keen on RP Mines; Malaysian Group to Invest in Cebu; Hawaiian Firm Eyes Energy Sector; Israeli Company Teams Up with FLI,* Department of Trade and Industry, 17 PHIL. BUSINESS REP. No. 10, Oct. 2006, at 3-4; Philippine Energy Secretary Angelo Reyes stated in a news report in August 2007 of ABS-CBN Broadcasting

foreign investments, as seen from these State acts, highlights the need for it to provide a holistic protection of foreign investments in the country by, among others, adhering to the customary prohibition against illegal creeping expropriation and amending Philippine laws to reflect such norms. Indeed, the Philippines remains to be a poor protector of foreign investors. In a recent report of the Asia Pacific Economic Cooperation (APEC), the Philippines ranked last among 20 other countries when it comes to the protection of foreign investments.[16]

It is worth recalling the words of Professors Kirton and Trebilcock that "soft law has its place, but is by no means a silver bullet solution in all spheres."[17] Thus, while soft law may be significant in the progressive development of international investment law, it is still necessary to translate soft norms to *lex lata* in order to better guarantee the principles they seek to protect.

This Note will examine the contemporary law-making mechanisms that contributed to the transformation of the prohibition against creeping expropriation from *de lege ferenda* to *de lege lata*. The author will show that these mechanisms serve as evidence of both State practice and *opinio juris* sufficient to give rise to a customary prohibition against creeping expropriation. On the domestic level, the author will analyze Philippine law and jurisprudence to see what standards have been articulated with regard indirect taking. The domestic standards culled from this survey shall be compared with International Law standards on creeping expropriation. It will be shown that there exists a discrepancy between these two standards. Ultimately, this work seeks to demonstrate the necessity of incorporating the more comprehensive international standards into Philippine black letter law.

This Note is organized into seven parts with the first being the Introduction. Part Two contains a general discussion of the concept of *de lege ferenda* and the rationale for the translation of such norms into to *de lege lata*. Part Three presents an overview of foreign investment and its definition in International Law along with the distinction between foreign direct investments and portfolio investments. The first three parts aim to facilitate a better comprehension of the concept of creeping expropriation. Part Four begins the nub of this Note; it will discuss the definition and the concept of creeping expropriation. It includes a brief overview of the State's power to directly expropriate and the extent to which such power may be exercised.

Corporation that one of the main purposes why the Government is looking at the possibility of using nuclear power to generate electricity is to lessen the cost of electricity, which would therefore also attract more foreign investors.

16. *Today's Headline*, Business World Online, *available at* www.bworldonline.com (last accessed Jan. 9, 2009).

17. Francesco Sindico, *Soft Law and the Elusive Quest for Sustainable Global Governance*, 19 LEIDEN J. INT'L L. 829, 835 (2006).

This part will also lay down the general conditions or elements that, under International Law, will make creeping expropriation illegal. In relation to the element of compensation, Part Four will discuss the instances where a taking is valid or where a non-compensable taking is allowed. It ends with a discussion of the responsibility of host States for their illegal expropriation of property. Part Five consists of two related studies. The first examines contemporary law-making mechanisms that are relevant to the subject of illegal creeping expropriation. The second identifies these mechanisms with the two elements of custom, thereby establishing that the said prohibition is a legally binding norm under International Law. Part Six analyzes the extent to which the Philippines has recognized or has dealt with issues concerning indirect expropriation. It identifies the discrepancy between the Philippine's application of the norm vis-à-vis relevant international standards. It also discusses why there is a need for the Philippines to address such discrepancy. Finally, Part Seven concludes and summarizes the key points supporting the position that the prohibition against illegal creeping expropriation is now customary and proceeds to propose an amendment to the Foreign Investments Act of the Philippines of 1991, as amended, to include a provision on creeping expropriation.

The enormity of the field of International Law is reflected by the numerous available law-making mechanisms and the continuously growing body of positive laws and emerging norms. Admittedly, understanding the nature of contemporary law-making mechanisms is a complex and delicate task.[18] Accordingly, this Note will limit itself to those mechanisms that are relevant to the goal of demonstrating that the elements of State practice and *opinio juris* exist with regard the prohibition against creeping expropriation.

II. *DE LEGE FERENDA* AND ITS TRANSPORTATION TO *DE LEGE LATA*

A. A Familiarization with De Lege Ferenda

Soft laws, emerging or evolving norms or *de lege ferenda,* as they are understood from a law-making perspective, simply contemplate the variety of non-legally binding international rules and instruments currently used by States and non-State actors such as international organizations (IOs) in their international relations.[19] They also refer to "a set of legal terms or informal

18. ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW vii (Malcolm D. Evans & Phoebe N. Okowa eds., 2007).

19. *Id.* at 212; Alan E. Boyle, *Soft Law in International Law-Making, reprinted in* INTERNATIONAL LAW 142 (Malcolm D. Evans ed., 2d ed. 2006); Dinah Shelton, *Normative Hierarchy in International Law,* 100 AM. J. INT'L L. 291, 319 (2006) [hereinafter Shelton Journal]; Margaret Chon, *Intellectual Property and the Development Divide,* 27 CARDOZO L. REV. 2821, 2901-02 (2006); *see also* Robert Hockett, *The Limits of Their World,* 90 MINN. L. REV. 1720, 1748 (2006).

duties" existing in International Law.[20] Prof. Christine Chinkin describes soft laws as norms which (1) have been expressed in nonbinding form; (2) contain ambiguous and imprecise terms; (3) originated from bodies without International Law-making authority or capacity; (4) are intended for non-State actors whose practice cannot attain customary status; (5) are deficient in any corresponding theory of responsibility; *or* (6) are exclusively based upon voluntary observance.[21]

States resort to soft laws for a variety of reasons. The foremost of reasons why States use soft laws include: (1) foregoing or decreasing the domestic constitutional or legislative obstructions to treating-making; (2) abbreviating the time required to negotiate and arrive at an agreement at an international level; (3) maintaining the governmental control over the level of commitment; (4) allowing the required resilience considering the varying circumstances among States; (5) allowing the participation of non-international legal persons in negotiations and in implementation; and (6) enabling the progressive development of standards according to prevailing circumstances.[22] Soft laws are important most especially when the subject matter is not yet ripe for treaty action because of technical or methodical

20. Lawrence L.C. Lee, *The Basle Accords as Soft Law: Strengthening International Banking Supervision,* 39 VA. J. INT'L L. 1, 3 (1998); K.C. Wellens & G.M. Borchardt, *Soft Law in European Community Law,* 14 EUR. L. REV. 267 (1989); *A Hard Look at Soft Law,* 82 ASIL. PROC. 371 (1988); Willem Riphagen, *From Soft Law to Jus Cogens and Back,* 17 VICTORIA U. WELLINGTON L. REV. 81 (1987); John King Gamble Jr., *The 1982 United Nations Convention on the Law of the Sea as Soft Law,* 8 HOUS. J. INT'L L. 37 (1985); Steven J. Carlson, *Hunger, Agricultural Trade Liberalization, and Soft International Law: Addressing the Legal Dimensions of a Political Problem,* 70 IOWA L. REV. 1187 (1985); Tad Gruchalla-Wesierski, *A Framework for Understanding "Soft Law,"* 30 MCGILL L.J. 37 (1984); Joseph Gold, *Strengthening the Soft International Law of Exchange Agreements,* 77 AM. J. INT'L L. 443, 443 (1983); Sindico, *supra* note 17, at 831; Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance, in* INTERNATIONAL ORGANIZATION 54 (2000); Shelton Journal, *supra* note 19, at 319.

21. Christine M. Chinkin, *Normative Development in the International Legal System, reprinted in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 30 (Dinah Shelton ed., 2000) [hereinafter Chinkin Normative Development]; José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences,* 38 TEX. INT'L L.J. 405, 421 (2003).

22. *See, e.g.* Alexandre Kiss, *Commentary and Conclusions, reprinted in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 223, 237-38 (Dinah Shelton ed., 2000); Hartmut Hillgenberg, *A Fresh Look at Soft Law,* 10 EUR. J. INT'L L. 499, 501 (1999).

uncertainty or the lack of political consensus.[23] And since *lex ferenda* do not need any ratification, they avoid political disputes among States.[24]

The range of what forms part of soft law is multi-cornered — from declarations and General Assembly resolutions, to voluntary codes of conduct, certification schemes, labeling programs, guidelines, common international standards, inter-State conference declarations and non-treaty agreements between States or between States and other non-State actors.[25] While soft laws are generally not obligatory and nonbinding, they facilitate the progressive development and transformation of International Law.[26] These nonbinding commitments may be entered into precisely "to reflect the will of the international community" in resolving a controversial and pressing issue in the world, notwithstanding the oppositions by one or a small number of States that caused the dilemma.[27] The nonbinding instruments are concluded "while avoiding the doctrinal barrier of lack of consent to be bound by the norm."[28] This flexibility[29] allows modifications based on expectations, agreements and change of circumstances at a time when the norm is still emerging under International Law.[30] Be that as it may, *de lege ferenda* made clear the *omnes'*[31] collective will and intention.[32] Soft laws also offer alternatives to law-making and may even complement hard laws.[33] Consequently, their weight within the development of International

23. Shelton Journal, *supra* note 19, at 322.

24. *Id.*

25. Boyle, *supra* note 19, at 142-43; Sindico, *supra* note 17, at 831; DAMROSCH, ET AL., *supra* note 2, at 154; BOYLE & CHINKIN, *supra* note 18, at 2-3, 212-13; Shelton Journal, *supra* note 19, at 319; Margaret Chon, *supra* note 19, at 2901-02.

26. BOYLE & CHINKIN, *supra* note 18, at 229.

27. Shelton Journal, *supra* note 19, at 319; Jan F. Triska & Robert M. Slusser, *Treaties and Other Sources of Order in International Relations: The Soviet View*, 52 AM. J. INT'L L. 699, 710 (1958).

28. Shelton Journal, *supra* note 19, at 319; Triska & Slusser, *supra* note 27, at 710.

29. Sindico, *supra* note 17, at 835.

30. Charles K. Whitehead, *What's Your Sign? – International Norms, Signals, and Compliance,* 27 MICH. J. INT'L L. 695, 716 (2006); Anthony Aust, *The Theory and Practice of Informal International Instruments,* 35 INT'L & COMP. L.Q. 787, 789 (1986); Michael Bothe, *Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?,* 11 NETH. Y.B. INT'L L. 65, 86 (1980).

31. BOYLE & CHINKIN, *supra* note 18, at 17.

32. Alexandra Gatto, *Governance in the European Union: A Legal Perspective,* 12 COLUM. J. EUR. L. 487, 492 (2006); Shelton Journal, *supra* note 19, at 319.

33. BOYLE & CHINKIN, *supra* note 18, at 229.

Law's framework is well founded.[34] Most soft laws, if not all, evidently have normative value notwithstanding their nonbinding character.[35]

B. Identifying Soft Laws' Significance and their Contribution in the Translation of Norms to Hard Laws

However significant *de lege ferenda* or soft laws are, the fact remains that it must be distinguisehed from hard laws.[36] *De lege lata* or hard laws are "binding compulsory legislation(s), which [are] not optional for the subjects of the legal order."[37] Hard law refers to the traditional sources of International Law[38] as reflected in the four sources of International Law under Article 38 of the Statute of the International Court of Justice (I.C.J.).[39] These include the two main sources of International Law: treaties and custom,[40] General Principles of International Law,[41] and judicial decisions in contentious cases.[42]

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34. MALCOLM N. SHAW, INTERNATIONAL LAW 110-11 (5th ed. 2003); Shelton Journal, *supra* note 19, at 292-93; *see also* Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law,* 38 I.C.L.Q. 850 (1989) [hereinafter Chinkin Soft Law]; Bothe, *supra* note 30.

35. BOYLE & CHINKIN, *supra* note 18, at 214.

36. *Id.*

37. NIGEL D. WHITE, THE LAW OF INTERNATIONAL ORGANIZATIONS 159 (2d ed. 2005).

38. Alvarez, *supra* note 21, at 421.

39. Statute of the International Court of Justice, 1945, art. 38, ¶ 1, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179, 15 U.N.C.I.O. 355 [hereinafter I.C.J. Statute].

40. Shelton Journal, *supra* note 19, at 320.

41. Alvarez, *supra* note 21, at 421.

42. Julie Calidonio Schmid, *Advisory Opinions on Human Rights: Moving beyond a Pyrrhic Victory,* 16 DUKE J. COMP. & INT'L L. 415, 415-16, n. 3 (2006).

> Overall, advisory opinions are said to be 'soft' law because they are not binding. Absent a binding legal obligation, advisory opinions must encourage, but not compel, states to behave in a certain manner. Yet, in recent practice, the International Court Justice and the Inter-American Court of Human Rights' advisory opinions suggest attempts at using this soft law to impose binding obligations on states through their development of international custom and treaty norms. Judicial decisions in contentious cases are said to be 'hard' because states have given the court jurisdiction to issue binding opinions; advisory opinions are said to be 'soft' because in most instances states have not given the court jurisdiction to issue binding opinions.

Id. at n. 3; Alvarez, *supra* note 21, at 421.

Soft law plays a very significant role — "a large and complex impact" — in the progressive development of International Law.[43] It (1) functions as a guide in the interpretation, expansion, or the application of hard law; (2) operates as a haven to norms, which are still emerging to hard law; (3) serves as evidence of hard law; (4) co-exists with, or complements hard law obligations, and act as a "fall-back;" and (5) may even serve as a "source of relatively hard obligations through acquiescence or estoppel."[44] International Law scholars have observed that while nonbinding instruments are drafted "advertently" and "knowingly" by States at that time,[45] soft laws as a whole are potentially law-making or at the very least contribute to the translation of norms to hard laws.[46] Undeniably, soft laws are rarely isolated because they are actually the foundation of, and the supplement to, hard laws,[47] i.e., soft laws are the pioneer of hard laws.[48] Soft laws in the form of nonbinding materials and instruments have more often than not expanded the scope of available evidence to prove the existence of *opinio juris* and State practice, the precursors of any customary norm.[49] Indeed, matters underlying these soft norms, such as the progression in the drafting and voting for nonbinding instruments may also constitute as State practice.[50] From the foregoing, what is ascertained is not that soft laws or sources in nonbinding form constitute hard laws *per se;* but that these norms and sources, when taken collectively, (1) may evince an existing law; or (2) may produce a new hard law altogether.[51] *Lex ferenda* form new laws by (a) establishing the necessary elements of custom under International Law; (b) creating a subsequent treaty or the codification of norms in an ensuing binding instrument; (c) assisting in the development and treatment of General Principles of International Law; and (d) aiding in the interpretation of a particular norm or agreement.[52] For example, in the area of human rights, most if not all contemporary multilateral conventions were concluded as a result of previously adopted

43. Sindico, *supra* note 17, at 835; Shelton Journal, *supra* note 19, at 320.

44. Alvarez, *supra* note 21, at 421; Chinkin Normative Development, *supra* note 21, at 30-31.

45. Sindico, *supra* note 17, at 835; Shelton Journal, *supra* note 19, at 320. (This is especially when the international community needs time to deal with more sensitive global issues).

46. BOYLE & CHINKIN, *supra* note 18, at 212.

47. Shelton Journal, *supra* note 19, at 320.

48. Sindico, *supra* note 17, at 836.

49. BOYLE & CHINKIN, *supra* note 18, at 212; Shelton Journal, *supra* note 19, at 320-21; *see, e.g.* U.N. General Assembly Ban on Driftnet Fishing, G.A. Res. 46/215, U.N. GAOR, U.N. Doc. A/RES/46/215 (20 Dec. 1991).

50. Shelton Journal, *supra* note 19, at 320.

51. BOYLE & CHINKIN, *supra* note 18, at 212.

52. *Id.* at 212; Shelton Journal, *supra* note 19, at 321.

nonbinding declarations.[53] In some instances, courts and other dispute settlement mechanisms are even authorized to use soft laws and instruments, such as the Codex Alimentarius,[54] the International Labour Organization recommendations,[55] the standards and recommendations of the International Atomic Energy Agency,[56] the Arrangement for Export Credits of the Organisation for Economic Co-operation and Development (OECD), and the standards set by the International Organization for Standardization.[57] Indeed, the widespread acceptance of soft laws tends to legitimize an act and actually "make it harder to sustain the legality of opposing positions."[58]

Contemporary law-making mechanisms or tools[59] are the constitutive processes[60] of how International Law is made — or how *de lege ferenda* is

53. Shelton Journal, *supra* note 19, at 321; *see, e.g.* Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 30 I.L.M. 1 (1999) (similar example in environmental law).

54. *See* JOSÈ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 222-23 (2006).

55. *Id.* at 227-31.

56. *Id.* at 231.

57. *See, e.g.* General Agreement on Tariffs and Trade: Multilateral Trade Negotiations (the Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, 15 Apr. 1994, art. I.3, 33 I.L.M. 81; General Agreement on Tariffs and Trade: Multilateral Trade Negotiations (the Uruguay Round): Agreement on Subsidies and Countervailing Measures, 15 Apr. 1994, annex 1A (13), *available at* http://www.wto.org/english/docs_e/legal_e/24-scm.pdf (last accessed Jan. 9, 2009); General Agreement on Tariffs and Trade: Multilateral Trade Negotiations (the Uruguay Round): Agreement on the Application of Sanitary and Phytosanitary Measures, 15 Apr. 1994, annex 1A (4), art. 3.1, annex A, ¶ 3, *available at* http://www.wto.org/english/docs_e/legal_e/15-sps.pdf (last accessed Jan. 9, 2009); General Agreement on Tariffs and Trade: Multilateral Trade Negotiations (the Uruguay Round): Agreement on Technical Barriers to Trade, 15 Apr. 1994, annex 1A (6), art. 2.4, annex 1, ¶ 4, *available at* http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf (last accessed Jan. 9, 2009), *cited in* Alvarez, *supra* note 21, at 422; *see also* Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 19 I.L.M. 15 (1980); Antarctic Treaty, 01 Dec. 1959, 12 U.S.T. 794, 402 U.N.T.S. 71; International Atomic Energy Agency, The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-proliferation of Nuclear Weapons, I.A.E.A. Doc. No. INFCIRC/153 (May 1971), *cited in* Dinah Shelton Journal, *supra* note 19, at 321.

58. BOYLE & CHINKIN, *supra* note 18, at 212; Chinkin Soft Law, *supra* note 34, at 866.

59. BOYLE & CHINKIN, *supra* note 18, at 211.

transported to *de lege lata*.[61] While traditional sources of International Law are established in seemingly countless materials,[62] contemporary law-making mechanisms "identifies the processes, participants and instruments employed in the making of [I]nternational [L]aw."[63]

Contemporary law-making mechanisms will be identified in order to demonstrate the customary or *de lege lata* nature of the prohibition against creeping expropriation. Professors Boyle and Chinkin assert that this does not mean that Customary International Law is being ignored. Rather, a norm's attainment of customary status is considered and established "through its interlocking with other law-making processes, the contribution to its evolution made by different participants, and the arenas in which claims about its existence and content are made."[64] Ascertaining when an emerging norm becomes hard law gives rise to debates among international lawyers and scholars.[65] In this regard, the fact that a "supposedly emerging norm" is supported by contemporary law-making mechanisms and by soft law instruments taken collectively makes it reasonable to assert that such norm has already been transported to hard law. In this case, the prohibition against creeping expropriation, as the author shall establish in Part Five of this Article, is already customary and is considered as hard law.

III. INTERNATIONAL LAW ON FOREIGN INVESTMENTS

A. Defining Foreign Investment in International Law and Distinguishing between Foreign Direct Investment and Portfolio Investment

The protection of private property rights of foreign investors has figured prominently in International Law.[66] International Law's attraction to the field of foreign investment originated from the fact that it concerns the movement of property from one State to another.[67] This process is now encapsulated in the term "foreign direct investment."[68]

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60. *See* H. LASSWELL & M. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 1131-54 (1992).

61. BOYLE & CHINKIN, *supra* note 18, at 1.

62. I.C.J. Statute, art. 38, ¶ 1; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3-29 (6th ed. 2003).

63. BOYLE & CHINKIN, *supra* note 18, at 1.

64. *Id.* at 2-3, 210.

65. *Id.* at 212.

66. SORNARAJAH, *supra* note 7, at 10; Sean Murphy, *The ELSI Case: an Investment Dispute at the International Court of Justice,* 16 YALE J. INT'L L. 391, 444 (1991).

67. SORNARAJAH, *supra* note 7, at 17, 25.

68. *Id.* at 7.

Foreign direct investment is the lifeblood of the global economy.[69] Since time immemorial, trans-boundary investment flows have stimulated a colossal amount of discussions in International Law, particularly in the past decades due to the significant increase in foreign direct investment.[70] Foreign direct investment entails the transfer of tangible or intangible assets from one country into another for "their use in that country to generate wealth under the *total or partial control of the owner of the assets*."[71] It is more formally defined as "ownership of assets by foreign residents for purposes of *controlling the use of those assets*."[72] FDIs are undertaken for the purpose of (1) acquiring a *lasting interest* in an enterprise operating in the host State; and (2) generating wealth with an *effective choice in the management* of the enterprise, and with total or partial control of the assets.[73] The transfer of property, e.g., equipments from the home State to the host State; or the properties bought to or constructed by the foreign investor in the host State, e.g., machineries and plantations, are clear examples of foreign direct investments.[74] A portfolio investment, on the other hand, exists where a foreign actor purchases securities or shares in a domestic company of another State solely for financial return earnings, *without intention to own, control or manage the domestic firm.*[75] It is typically represented only by a transfer or interchange of money only for purposes of purchasing shares in a company incorporated or doing business in another

69. Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment through Bilateral and Multilateral Treaties,* 18 N.Y. INT'L L. REV. 1, 3 (2005), citing Bernardo M. Cremades & David J.A. Cairns, *The Brave New World of Global Arbitration,* 3 J. WORLD INV. 173, 174 (2002); Van V. Mejia, *The Modern Foreign Investment Laws of the Philippines,* 17 TEMP. INT'L & COMP. L.J. 467, 482 (2003); Stacey Allen Morales & Barbara Anne Deutsch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity,* 39 BUS. LAW 1573, 1597 (1984).

70. JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND THE CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 240 (2006); MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 335 (2d ed. 2002); Neil Sørensen, *Bilateral Investment Treaties and Disputes,* Institute for Agriculture and Trade Policy (2001), *available at* http://www.bilaterals.org/article .php3?id_article=122 (last accessed Jan. 9, 2009).

71. SORNARAJAH, *supra* note 7, at 7.

72. EDWARD M. GRAHAM & PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 7 (1991).

73. THE I.M.F., BALANCE OF PAYMENTS MANUAL ¶ 408 (1980); SORNARAJAH, *supra* note 7, at 7, n. 10.

74. SORNARAJAH, *supra* note 7, at 7.

75. *Id.* at 7; TREBILCOCK & HOWSE, *supra* note 70, at 335; NIGEL GRIMWADE, INTERNATIONAL TRADE: NEW PATTERNS OF TRADE, PRODUCTION AND INVESTMENT 144 (1989).

State.[76] Foreign direct investments must be differentiated from portfolio investments for two reasons. First, in the former, the foreign investor actually removes from his home State certain resources, which could have been used in his home State to advance its economy.[77] Thus, it is reasonable for the home State to ensure that these properties invested by its nationals are protected in the host State.[78] Also, in a foreign direct investment, the entry of the alien in the host State's territory for investment must be authorized and consented to by the host State.[79] A portfolio investment can be done easily through stock exchanges "virtually anywhere in the world."[80] In the latter, no solid or distinct relationship is made that can create responsibility because the host State cannot really know "to whom linkages are created" by selling the shares in stock exchanges.[81] Finally, unlike a portfolio investment,[82] it is "clear that foreign direct investment is subject to the protection of Customary Law,"[83] and for the past decades, this protection relates to protection against direct expropriation.[84] Contemporary forms of foreign investment also include joint ventures and production sharing agreements.[85] This distinction is very relevant to this Note because the prohibition against illegal creeping expropriation only applies to FDIs and does not extend to portfolio investments.

B. The Development of the Term "Investment" in International Law

Since the early times, the term "investment" in International Law was already limited to foreign direct investment.[86] At first, the minimum standard on the treatment of aliens was extended only to physical property, which as a general rule cannot be interfered with by the host State through taking. These cases mostly dealt with the taking of land owned by foreigners.[87] Prof. Sornarajah observed that the "genesis of international law on foreign

76. SORNARAJAH, *supra* note 7, at 7.

77. *Id.* at 8.

78. *Id.*

79. *Id.*

80. *Id.*

81. There is however a move to create responsibility in portfolio investments through treaties. *See* SORNARAJAH, *supra* note 7.

82. *See, e.g.* SORNARAJAH, *supra* note 7, at 9 (citing ASEAN Framework Agreement on Investment (expressly excluding portfolio investment from the scope of the treaty).

83. SORNARAJAH, *supra* note 7, at 8-9.

84. *See infra* discussion Part IV (A).

85. *See, e.g.* SORNARAJAH, *supra* note 7, at 363-64.

86. *Id.* at 7-9.

87. *Id.* at 10.

investment was in the obligation created by the law to protect the alien and his physical property and state responsibility arising from the failure to perform that obligation."[88] But in the evolution of its meaning, the term investment broadened its horizon to include intangible assets, such as contractual rights, leases, mortgages and liens.[89] Whether shares of stocks are intangible assets falling under the category of "investment" became an issue in the *Barcelona Traction, Light and Power Co., case*. In that case, the exercise of diplomatic protection[90] by the State of the shareholder[91] was not allowed. It was held that the State where the corporation itself was created should be the one to exercise such protection on behalf of the corporation.[92] In stark contrast, Judge Philip C. Jessup in his separate opinion in *Barcelona Traction*,[93] and the *Case Concerning Elettronica Sicula S.p.A.*[94] recognized the right of the shareholder's State of nationality to exercise diplomatic protection on his behalf to a certain extent[95] and especially where the foreign investor wholly owns the subsidiary. In these instances, the Chamber felt that the rights of the foreign investor as shareholder with respect to the assets of the company should be safeguarded.[96] Intellectual property rights have also crept into the definition of FDIs due to the proliferation of piracy and the copying of inventions.[97] Further extensions to the list of intangible properties that fall

88. *Id.*

89. *Id.*

90. Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain) (Second Phase), 1970 I.C.J. 3, 33-34; BROWNLIE, *supra* note 62, at 391-92, 466-71.

91. *Barcelona Traction Second Phase*, 1970 I.C.J. at 42, 295 (Ammoun, J., separate opinion). *See* DAMROSCH, ET AL., *supra* note 2, at 135 (stating that "the separate opinions of dissenting judges or other individual opinions contain cogent reasoning that influences subsequent doctrine more than the decision of the majority").

92. *Barcelona Traction Second Phase*, 1970 I.C.J. 3.

93. *Barcelona Traction Second Phase*, 1970 I.C.J. at 188 (Jessup, J., separate opinion).

94. Case Concerning Elettronica Sicula S.p.A. (U.S. v. Italy), 1989 I.C.J. 15.

95. *Id.*; *Barcelona Traction Second Phase*, 1970 I.C.J. at 130-35 (Tanaka, J., separate opinion), 168-79 (Gros, J., separate opinion); BROWNLIE, *supra* note 62, at 470.

96. *Case Concerning Elettronica Sicula*, 1989 I.C.J. ¶ 118; Murphy, *supra* note 66, at 422. This development in the inclusion of the protection of shareholders as foreign investors does not go against the notion of foreign investment as to be equated with foreign direct investment. In the *Elettronica Sicula,* diplomatic protection was allowed to be exercised by the State of nationality of the shareholders because the shareholders particularly wholly own the company based in Italy. The U.S. parent-corporations thus exercised control and management over the subsidiary, Elettronica Sicula, which is opposed to the notion of a portfolio investment.

97. SORNARAJAH, *supra* note 7, at 11.

within the meaning of foreign investment included administrative rights acquired in the host State by the foreign investor.[98] Indeed, in *Ceskoslovenska Obchodni Banka v. Slovak Republic,* it was held that the more liberal interpretation should be supported in determining what constitutes foreign investment.[99] From this it may be inferred that "an international transaction which contributes to cooperation designed to promote the economic development of a contracting state may be deemed to be an investment."[100] The scope of the prohibition against creeping expropriation in relation to the term "investment" is further expounded by different sources of International Law in Part Four.[101]

IV. THE CONCEPT OF CREEPING EXPROPRIATION

A. Creeping Expropriation at a Glance

Considered to be a principal International Law issue since the beginning of the 20th century, the notion of expropriation is usually seen in the context of an "outright taking of private property" by the State.[102] The most notable cases of expropriation of foreign investments throughout the century include the Communist and Mexican nationalization activities in the 1920s, the socialization[103] of private property in Eastern European States after the Second World War, and the expropriation of foreign investments during the decolonization era and the oil concession disputes in developing nations in the 1960s and 1970s.[104] These cases illustrate the traditional type of expropriation, i.e., direct expropriation, which contemplates a taking which involves the transfer of ownership or legal title of the property to the State or to a third person.[105]

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98. *Id.* at 11-12.

99. Ceskoslovenska Obchodni Banka v. Slovak Republic, 18 Apr. 1997, *reprinted in* 14 ICSID REV. – FOREIGN INVESTMENT L.J. 251 (1999); *see also* Fedax NV v. Venezuela, 37 I.L.M. 1378 (1998); SORNARAJAH, *supra* note 7, at 16-17.

100. *Ceskoslovenska Obchodni Banka, reprinted in* 14 ICSID REV. – FOREIGN INVESTMENT L.J. 251; *see also* SORNARAJAH, *supra* note 7, at 16.

101. *See infra* discussion Part IV.

102. August Reinisch, *Expropriation* 2 (2005), *available at* https://www.ila-hq.org/pdf/Foreign%20Investment/ILA%20paper%20Reinisch.pdf (last accessed Jan. 9, 2009).

103. *Id.*

104. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 392 (John H. Jackson ed., 2003); Reinisch, *supra* note 102, at 2.

105. Reinisch, *supra* note 102, at 2.

While host States have a right to control the entry of, and regulate foreign investments, the same is not unqualified.[106] It is a well-settled rule in the field of international investment law that physical properties of aliens cannot be expropriated without the concurrence of four elements: (1) public purpose; (2) as provided by law; (3) non-discriminatory; and (4) payment of just or adequate compensation.[107]

The protection of an alien's property in International Law encounters difficulty in the face of certain types of interferences made by host States.[108] This involves acts which, although do not amount to a direct taking, causes substantial interference that renders the investment useless or not available for use or disposal to the said investor. Examples of such interferences include the appointment of a company's managers so as to control the operations thereof, or the unjustified withdrawal of licenses or concessions. Thus, the evolution of expropriation expanded its horizon to relate not only

106. SORNARAJAH, *supra* note 7, at 104.

107. Catherine Yannaca-Small, *"Indirect Expropriation" and the "Right to Regulate"* in *International Investment Law,* Organisation for Economic Co-operation and Development, Working Papers on International Investment, Number 2004/04 7 (2004) [hereinafter OECD Report]; DAMROSCH, ET AL., *supra* note 2, at 778; RESTATEMENT (THIRD) ECONOMIC INJURY TO NATIONALS OF OTHER STATES § 712 (1986); ANTHONY I. AUST, HANDBOOK OF INTERNATIONAL LAW 186 (2005); Gerhard Loibl, *International Economic Law, reprinted in* INTERNATIONAL LAW 689, 709 (Malcolm D. Evans ed., 2006); L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor,* 19 ICSID REV. – FOREIGN INVESTMENT L.J. 293, 295-96 (2004). *See* PHIL. CONST., art. III, § 9 (providing that "[p]rivate property shall not be taken for public use without just compensation.). Under this inherent power of eminent domain, the elements are (1) the existence of a "taking" of private property; (2) for public use; and (3) with just compensation. *See* JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION: A COMPREHENSIVE REVIEWER 102 (2006 ed.) [hereinafter BERNAS COMPREHENSIVE REVIEWER].

108. *Case Concerning Elettronica Sicula,* 1989 I.C.J. at 68, ¶ 114; Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962) (U.S.); Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, et al., Partial Award No. 310-56-3, 15 Iran-U.S. Cl. Trib. Rep. 189, 220 (July 14, 1987); Starrett Housing Corp. v. The Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 32-24-1, 4 Iran-U.S. Cl. Trib. Rep. 122, 154 (Dec. 19, 1983); Lauder v. Czech Republic, UNCITRAL Arb. Trib., ¶ 54 (2003), *available at* http://www.mfcr.cz/static/Arbitraz /en/FinalAward.doc (last accessed Jan. 9, 2009); OECD Report, *supra* note 107, at 3-4, 11; AUST, *supra* note 30, at 185; RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 99 (1995); Michael G. Parisi, *Moving Toward Transparency? An Examination of Regulatory Takings in International Law,* 19 EMORY INT'L L. REV. 383, 387-88 (2005); Gurudevan, *supra* note 9, at 406.

to an absolute taking of property but also to "any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an interference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference" even where the property is not seized and the legal title thereto formally remains with the original owner.[109] The unbundling of property rights[110] has given rise to the concept of *indirect* or *creeping expropriation;* it is also termed as *constructive, de facto or disguised* expropriation — a taking of the *effective use* of property, or a measure *amounting to, tantamount to,* or *equivalent to* expropriation.[111] This is the more predominant form of expropriation today in the field of international investment law.[112]

B. Delineating the Scope of Protected Properties under the Prohibition against Creeping Expropriation

Before establishing the customary status of the prohibition against illegal creeping expropriation, it is imperative to first outline the scope of properties and rights that may be affected. The predominant question that arises is whether or not intangible rights — such as contractual and intellectual property rights — can be expropriated.

To know which properties and property rights are under the umbrella of protection from creeping expropriation, a scrutiny of treaties and a long line of judicial and arbitral tribunal decisions in international investment law is indispensable. An investigation of arbitration practice[113] will be necessary,

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109. *Case Concerning Elettronica Sicula,* 1989 I.C.J. at 68, ¶114; OECD Report, *supra* note 107, at 3-4, 11; *Starrett Housing Corp.*, Interlocutory Award No. ITL 32-24-1, 4 Iran-U.S. Cl. Trib. Rep. at 154; *Lauder*, UNCITRAL Arb. Trib. ¶ 54; DOLZER & STEVENS, *supra* note 108, at 99; Gurudevan, *supra* note 9, at 406; DAMROSCH, ET AL., *supra* note 2, at 785; Louis Sohn & Richard Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens,* art. 10, *reprinted in* 55 AM. J. INT'L L. 545, 553-54 (1961) [hereinafter Draft Convention on the International Responsibility of States for Injuries to Aliens]; Middle Eastern Shipping and Handling Co. v. Egypt, ICSID ARB/99/6, ¶ 107 (2002).

110. SORNARAJAH, *supra* note 7, at 352.

111. S.D. Myers, Inc. v. Canada (Partial Award), 40 I.L.M. 1408, ¶ 286 (13 Nov. 2000); *Starrett Housing Corp.,* Interlocutory Award No. ITL 32-24-1, 4 Iran-U.S. Cl. Trib. Rep. 122; OECD Report, *supra* note 107, at 4; Dolzer ICSID, *supra* note 10, at 44; DAMROSCH, ET AL., *supra* note 2, at 786; Murphy, *supra* note 66, at 431, n. 170; Rosalyn Higgins, *The Taking of Property by the State,* 176 RECUEIL DES COURS – ACADÉMIE DE DROIT INTERNATIONAL 259, 324 (1982); Fortier & Drymer, *supra* note 107, at 297; DOLZER & STEVENS, *supra* note 108, at 99.

112. Reinisch, *supra* note 102, at 2.

113. *Id.* at 3.

particularly those conducted before the International Centre for the Settlement of Investment Disputes (ICSID),[114] the ICSID Additional Facility,[115] and Chapter 11 of the North American Free Trade Agreement (NAFTA).[116] The experience of the I.C.J., the Permanent Court of International Justice (P.C.I.J.), the Iran-US Claims Tribunal,[117] the ICSID Tribunals, the NAFTA Tribunal, the Permanent Court of Arbitration (P.C.A.), the European Court of Human Rights (ECHR),[118] the United Nations Commission on International Trade Law (UNCITRAL) Arbitral Tribunal, and rulings of other *ad hoc* tribunals for investment disputes is also indispensable. Finally, the writings of scholars and highly qualified publicists in international economic and investment law shall be given weight in the discussion.

The notion of expropriation is not limited to direct expropriation or the taking of physical property.[119] Unlike direct expropriation, creeping expropriation does not only affect tangible property but also the foreign investor's "intangible assets of economic value."[120] Accordingly, property subject to expropriation include intangible property rights, or in the words of August Reinisch, "immaterial rights and interests."[121] Madam Rosalyn Higgins, President of the I.C.J., has noted that the notion of property also

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114. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, 4 I.L.M. 532 (1965).

115. *Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings,* ICSID Doc. No. 11 (1979), *available at* http://www.worldbank.org/icsid/facility/facility.htm (last accessed Jan. 9, 2009).

116. North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

117. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 Jan. 1981, 1 Iran-U.S. Cl. Trib. Rep. 9 (1981).

118. *See, e.g.* Técnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Award Case No. ARB(AF)/00/2, ¶ 122 (2003), 43 I.L.M. 133 (2004) (The ICSID Tribunal looked into the practice of the European Court of Human Rights to determine whether a particular act or measure constitutes an expropriation.). *See also* Reinisch, *supra* note 102, at 3.

119. Loibl, *supra* note 107, at 709.

120. *Id.*; Reinisch, *supra* note 102, at 3.

121. Reinisch, *supra* note 102, at 3, citing Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection,* 269 RECUEIL DES COURS 251, 381 (1997).

includes contractual rights,[122] the taking of which may constitute a creeping expropriation of the investment.[123] The succeeding subsections provide for sources of International Law, such as treaty provisions and judicial decisions that expound on the scope of the properties protected by the prohibition against creeping expropriation.

1. Scope of Properties Protected in Treaty Provisions and International Investment Instruments

International instruments, such as bilateral investment treaties (BITs) and free trade agreements (FTAs), prohibit the creeping expropriation of foreign investments. These instruments provide similar, if not uniform definition of investment. The typical BIT defines investment so as to include intangible assets and property rights such as contractual rights:[124]

> [T]he term "investments" comprises every kind of asset, in particular: (a) movable and immovable property as well as other rights in rem, such as mortgages, liens and pledges; (b) shares of companies and other kinds of interest in companies; (c) claims to money which has been used to create an economic value or claims to any performance having an economic value; (d) copyrights, industrial property rights, technical processes, trade-marks, trade-names, know-how, and good-will; (e) business concessions under public law, including concessions to search for, extract and exploit natural resources ... .[125]

More concretely for example, Article 1139 of the NAFTA defines investment as "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes."[126] Other international instruments on investment link

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122. Higgins, *supra* note 111, at 271. *See, e.g.* SGS v. Philippines (Jurisdiction), No. ARB/02/6, ¶ 161 (29 Jan. 2004); Phillips Petroleum Company, Iran v. The Islamic Republic of Iran, Award No. 425-39-2, 21 Iran-U.S. Cl. Trib. Rep. 79, ¶ 76 (1989); Norwegian Shipowners' Claims (Nor. v. U.S.), 1 R.I.A.A. 307, 325 (1922).

123. Stanimir A. Alexandrov, *Breaches of Contract and Breaches of Treaty, The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines,* 5 THE JOURNAL OF WORLD INVESTMENT & TRADE 555, 559 (2004). *See, e.g. SGS v. Philippines Jurisdiction,* No. ARB/02/6 ¶ 161; *Norwegian Shipowners' Claims,* 1 R.I.A.A. at 325.

124. *See, e.g.* Agreement between the Russian Federation and the United Kingdom, 1989, 29 I.L.M. 366, art. 1, ¶ a (1990); Reinisch, *supra* note 102, at 4.

125. Bilateral Investment Treaty Between Germany and Guyana, 08 Mar. 1989, *cited in* DOLZER & STEVENS, *supra* note 108, at 27; Reinisch, *supra* note 102, at 4.

126. NAFTA, art. 1139.

the definition of investment with the provision against expropriation in order to demarcate the scope of the protection. For instance, the U.S. FTAs include intangible properties in the discussion of the application of the protection against expropriation.[127] The Philippines, in the BITs and FTAs that it has signed or is negotiating, discusses investment to include "every kind of asset, owned or controlled by investors of one Party and admitted by the other Party subject to its law and investment policies applicable from time to time ... ."[128] Words of similar or the same import are likewise found in other BITs signed by the Philippines.[129] The ASEAN Investment Treaty

127. *See, e.g.* U.S.-Morocco Free Trade Agreement, 15 June 2004, annex 10-B, *available at* www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/Section_Index.html (last accessed Jan. 9, 2009); U.S.-Australia Free Trade Agreement, 01 Mar. 2004, annex 11-B, art. 4, ¶ b, *available at* www.dfait.gov.au/trade/negotiations/us_fta/final-text/index.html (last accessed Jan. 9, 2009); U.S.-Chile Free Trade Agreement, June 6, 2003, annex 10-D, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html (last accessed Jan. 9, 2009); U.S.-Central America Free Trade Agreement (CAFTA), 28 Jan. 2004, annex 10-C; *see also* Text of Model U.S. BIT, *available at* http://www.state.gov/e/eb/rls/prsrl/2004/28923.htm (last accessed Jan. 9, 2009); Text of New Canadian Foreign Investment Promotion and Protection Agreement (FIPA) Model, *available at* http://www.dfait-maeci.gc.ca/tna-nac/what_fipa-en.asp (last accessed Jan. 9, 2009).

128. Agreement between the Government of Australia and the Government of the Republic of the Philippines on the Promotion and Protection of Investments, and Protocol, 08 Dec. 1995, art. 1, ¶ 1 (a), Australian Treaty Series 28 (1995) [hereinafter Australia-Philippines BIT].

129. *See, e.g.* Acordo Entre a República Portuguesa e a República Das Filipinas Sobre a Promocçã e a Protecçao Reciprocas de Investimentos (Agreement between the Portuguese Republic and the Republic of the Philippines on the Promotion and Protection of Investments), art. 1, ¶ 1 (a), *reprinted in* DIARIO DA REPUBLICA – I SERIE-A 3131 (2003); Agreement between the Republic of Austria and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, 11 Apr. 2002, art. 1, ¶ 1; Agreement between the Government of the Kingdom of Cambodia and the Government of the Republic of the Philippines Concerning the Promotion and Protection of Investments, art. 1, ¶ 1; Accord Entre la Confederation Suisse et la Republique des Philippines concernant la Promotion et la Protection Reciproque des Investissements, art. 1, ¶ 2, Doc. No. 0.975.264.5 (2001); Agreement between the Government of the Philippines and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investment, art. 1, ¶ 1 (1999); Agreement between the Government of the Republic of the Philippines and the Government of the Islamic Republic of Pakistan for the Promotion and Reciprocal Protection of Investment, art. 2, ¶ 1 (1999); Agreement between the Republic of Turkey and the Republic of the Philippines Concerning the Reciprocal Promotion and Protection of Investments, art. 1, ¶ 2 (1999); Abkommen zwischen der Bundesrepublik

Deutschland und der Republik der Philippinen über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments), art. 1, ¶ 1, *reprinted in* BUNDESGESETZBIATT JARGANG 1998 TEIL II NR. 27, AUSGEGEBEN ZU BONN AM 1449 (1998); The Government of the Republic of the Philippines and the Government of the Republic of Finland on the Promotion and Protection of Investment, art. 1, ¶ 1 (1998); Agreement between the Government of the Republic of the Philippines and the Belgo-Luxemburg Economic Union, on the Reciprocal Promotion and Protection of Investments, art. 1, ¶ 2 (1998); Agreement between the Government of the Republic of the Philippines and the Government of the Kingdom of Denmark Regarding the Promotion and Reciprocal Protection of Investments, art. 1, ¶ 1 (i) (1997) [hereinafter Philippines-Denmark BIT]; Agreement between the Government of the Republic of the Philippines and The Government of the People's Republic of Bangladesh for the Promotion and Reciprocal Protection of Investments, art. 1, ¶ a (1997); Australia-Philippines BIT art. 1, ¶ 1 (a); Acuerdo Entre el Gobierno de la Republica de Chile y el Gobierno de la Republica de Filipinas Sobre la Promocion y Proteccion Reciprocas de las Inversiones, art. 1, ¶ 2 (1995); Accord Entre Le Gouvernement du Canada et Le Gouvernement de la Republique des Philippines Pour L'Encouragement et la Protection des Investissiments, art. 1, ¶ f (1995); Agreement between the Government of the Republic of the Philippines and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments, art. 1, ¶ 1 (1995); Agreement between the Czech Republic and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, art. 1, ¶ 1 (1995); Agreement between the Government of the Republic of the Philippines and the Government of Romania for the Promotion and Protection of Investments, art. 1, ¶ 1 (1994); Agreement between the Government of the Republic of Korea and the Government of the Republic of the Philippines for the Promotion and Protection of Investments, art. 2, ¶ c (1994); Acuerdo de Promocion y Proteccion Reciprocas de Inversiones Entre el Reino de España y la Republica de Filipinas, art. 1, ¶ 1 (1993); Agreement between the Government of the People's Republic of China and the Government of the Republic of the Philippines Concerning Encouragement and Reciprocal Protection of Investments, art. 1, ¶ a (1992); Agreement between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments, art. 1, ¶ c, 1488 U.N.T.S. 304 (1985); Agreement between the Government of the Republic of the Philippines and the Government of the Union of Myanmar for the Promotion and Reciprocal Protection of Investments, art. 2, *available at* www.unctad.org/sections/dite/iia/docs/bits/philippines_myanmar.pdf (last accessed Jan. 9, 2009); Agreement between the Government of the Republic of the Philippines and the Government of the Kingdom of Sweden on the Promotion and Reciprocal Protection of Investments, art. 1, ¶ 1, *available at* www.unctad.org/sections/dite/iia/docs/bits/sweden_philippines.pdf (last accessed Jan. 9, 2009); Agreement between the Government of the Republic of the Philippines and the Government of the Republic of Italy Concerning the Encouragement and

of 1987 also contains a similar provision.[130] International instruments also provide that the protection against direct and indirect expropriations includes but is not limited to all assets of investors, both "tangible and intangible,"[131] both owned or controlled, including mortgages, liens, usufructs, similar rights, shares of stocks, securities, any form of company participation, loans, intellectual property rights, business concessions and rights having economic value, the purchase and sale of foreign exchange, licenses and permits, activities associated with investment, among others.[132] Considering this scope, the prohibition against creeping expropriation therefore applies to both tangible and intangible properties of foreign investors, and extends to their use, enjoyment, operation, management and disposal thereof.

2. Scope of Properties Protected as discussed in Decisions of International Tribunals

Jurisprudence of judicial and arbitral tribunals also shows that the scope of protected foreign property includes both tangible and intangible properties.[133] As early as 1903, the U.S.-Venezuelan Claims Commission in the *Rudloff Case* has recognized that certain interferences by the Government with acquired or vested rights may amount to expropriation[134] and thus engages a State's responsibility. The Tribunal noted that "the taking away or destruction of rights acquired, transmitted, and defined by a contract is as

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the Reciprocal Protection of Investments, art. 2, ¶ 1 (1988); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of the Philippines for the Promotion and Protection of Investments, 03 Dec. 1980, art. 1, ¶ 5, Treaty Series No. 7 (1981) [hereinafter U.K.-Philippines BIT]; Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of the Philippines Concerning the Extension to the Turks and Caicos Islands of the Agreement for the Promotion and Protection of Investments signed in London on 03 Dec. 1980, 17 Dec. 1985, Treaty Series No. 28 (1986) [hereinafter U.K.-Philippines Exchange of Notes].

130. Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments, art. 1, ¶ 1 (3) (1987) [hereinafter ASEAN Investment Treaty].

131. Philippines-Denmark BIT, art. 1, ¶ 1 (i).

132. Australia-Philippines BIT, art. 1, ¶ 1 (a); U.K.-Philippines BIT, art. 1, ¶ 5; U.K.-Philippines Exchange of Notes. *See also* SORNARAJAH, *supra* note 7, at 371-72, n. 70.

133. Reinisch, *supra* note 102, at 5.

134. Rudloff (Interlocutory Decision), U.S.-Venezuelan Claims Comm'n, 9 R.I.A.A. 244, 250 (1903); *see also* Reinisch, *supra* note 102, at 5.

much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property."[135]

Among early judicial decisions, the P.C.I.J.'s decision in the *Norwegian Shipowners' Claims Case* plays a significant role in the development of the law on creeping expropriation.[136]

The controversy stemmed from the seizure of ships manufactured in U.S. shipyards made for both foreign or U.S. nationals. This measure was taken pursuant to a series of legislative and administrative actions undertaken by the United States during the First World War. The U.S. laws also cancelled perfected contracts for the manufacture of ships. The U.S. also took over the shipbuilding operations through Fleet Corporation, an entity created by the Government. Norway brought the case before the P.C.I.J. on behalf of its nationals who have been affected by the U.S. measures and whose properties and contractual rights have been seized by the U.S. Government. The United States alleged that expropriation cannot apply to interference with contractual rights and that the bundle of property rights protected under International Law does not include such right. The tribunal decided otherwise holding that there was indeed an expropriation of the Norwegian nationals' contractual rights saying that "Fleet Corporation took over the legal rights and duties of the shipowners toward the shipbuilders"[137] and "that the cancellation of existing contracts for the building of ships by Norwegian contractors had amounted to a *de facto* expropriation."[138] The tribunal further noted that "whatever the intention may have been, the United States *took,* both in fact and in law, *the contracts under which the rights in question were being or were to be construed.*"[139]

Two other P.C.I.J. cases shed light on the dawning of creeping expropriation: the *German Interests in Polish Upper Silesia Case*[140] and the *Oscar Chinn Case.*[141] In the former, the P.C.I.J. held that aside from the factory, contractual rights of Gernman nationals were also expropriated.[142]

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135. *Rudloff Interlocutory Decision,* 9 R.I.A.A. at 250.

136. *Norwegian Shipowners' Claims,* 1 R.I.A.A. 307; *see also* Reinisch, *supra* note 102, at 5-6.

137. *Norwegian Shipowners' Claims,* 1 R.I.A.A. at 323.

138. Reinisch, *supra* note 102, at 5-6; *Norwegian Shipowners' Claims,* 1 R.I.A.A. at 325.

139. *Norwegian Shipowners' Claims,* 1 R.I.A.A. at 325.

140. Case Concerning Certain German Interests in Polish Upper Silesia (F.R.G. v. Pol.) (Judgment), 1926 P.C.I.J. (ser. A) No. 7 (1926)).

141. Oscar Chinn (U.K. v. Belg.) (Judgment), 1934 P.C.I.J. (ser. A/B) No. 63 (1974).

142. *German Interests in Polish Upper Silesia Judgment,* 1926 P.C.I.J. at 44.

The *Oscar Chinn Case* also tackled indirect expropriations although the P.C.I.J. rejected the existence of a taking.[143]

The widely celebrated *Amoco International Finance Corp. v. Iran* by the Iran-U.S. Claims Tribunal defined expropriation to include the "compulsory transfer of [any] *property right* that may be the object of a commercial transaction."[144] The 1989 *Phillips Petroleum Co. Case* held that there exists compensable expropriation "whether the property is tangible ... or intangible, such as the contractual rights involved in [that] present Case."[145]

The ICSID Tribunals also considered the protection of intangible property. In *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* or the *Pyramids Case,* it was held that "[t]he respondent's cancellation of the project had the effect of taking certain important rights and interest of the Claimants. *What was expropriated* was not the land or the right of usufruct, *but the rights* that SPP (ME), as a shareholder of ETDC."[146]

Another ICSID Tribunal supported the previous ruling on the *Pyramids Case* in *Wena Hotels Ltd. v. Egypt,* recognizing that it is "well established that an expropriation is not limited to tangible property rights."[147] The UNCITRAL Tribunal held that the interference and destruction of the commercial value of an investment in *CME Czech Republic B.V. v. The Czech Republic,*[148] and the prevention of an investor from pursuing an

143. *Oscar Chinn*, 1934 P.C.I.J. (ser. A/B) No. 63; *see Phillips Petroleum Company*, Award No. 425-39-2, 21 Iran-U.S. Cl. Trib. Rep., ¶ 76.

144. *Amoco International Finance Corporation*, Partial Award No. 310-56-3, 15 Iran-U.S. Cl. Trib. Rep. 189.

145. *Phillips Petroleum Company*, Award No. 425-39-2, 21 Iran-U.S. Cl. Trib. Rep., ¶ 76.

146. Southern Pacific Properties (Middle East) Ltd. v. Islamic Republic of Egypt (Award), Case No. ARB/84/3, 3 ICSID Rep. 189, 228, ¶ 164 (1992), 32 I.L.M. 993 (1993) (emphasis supplied).

147. Wena Hotels Ltd. v. Arab Republic of Egypt (Award), 6 ICSID Rep. 68, ¶ 98 (2000).

148. CME Czech Republic B.V. v. The Czech Republic, (Partial Award), UNCITRAL Arb. Trib. (2001) (reprinted in 14 WORLD TRADE & ARB. MATERIALS 3, 109, ¶ 591 (2002)); *see also* The Czech Republic v. CME Czech Republic B.V. (Judgment), Case No. T 8735-01 (Court of Appeal, 2003) (Sweden) The Svea Court of Appeal *upheld* the Partial Award and *denied* the Czech Republic's motion to declare the 13 September 2001 ruling of the UNCITRAL Arbitral Tribunal invalid. The Svea Court of Appeal, aside from acting as a court of appeal for its district, also functions as a court for appeals regarding "certain special kinds of cases, among other things, those from the regional rent tribunals." *See Court of Appeal,* Sveriges Domstolar, *available at* http://www.dom.se/templates/DV_InfoPage____ 2319.aspx (last accessed Jan. 9, 2009).

approved project in *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*,[149] constituted indirect expropriation. The *CME Czech Republic B.V. Case* was later upheld by the Svea Court of Appeal in Stockholm, Sweden.[150] The NAFTA Tribunal in *S.D. Myers, Inc. v. Canada* also accepted that "in legal theory, rights other than property rights may be 'expropriated.'"[151] Lastly, the ECHR viewed the protection of "possessions" as to include intangible ones, such as licenses and permits,[152] shareholder rights,[153] intellectual property,[154] tort claims,[155] enforcement of awards[156] and professional clientele,[157] among many others.[158]

C. Understanding Further the Meaning and Scope of Creeping Expropriation through Illustrations by Case Laws

Creeping expropriation has been defined by numerous instruments, tribunals and commentators, especially during the height of its controversy from the late twentieth century, until the present. In 1961, Louis Sohn and Richard Baxter prepared the Draft Convention on the International Responsibility of States for Injuries to Aliens (Harvard Draft Convention), which defined what constitutes a taking.[159] This definition, which is essentially how creeping

149. Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana (Award on Jurisdiction and Liability), UNCITRAL *ad hoc* Trib., 95 I.L.R. 183, 209 (1989).

150. *The Czech Republic Judgment*, Case No. T 8735-01.

151. *S.D. Myers Partial Award*, 40 I.L.M., ¶ 281.

152. Tre Trakiörer AB v. Sweden, Eur. Ct. H.R. (ser. A) No. 159, ¶ 53 (1989); Fredin v. Sweden, 13 Eur. Ct. H.R. 784 (ser. A) No. 192, ¶ 47 (1991); *see also* SORNARAJAH, *supra* note 7, at 371-72, n. 70.

153. Lithgow v. United Kingdom, 8 Eur. Ct. H.R. 329 (ser. A) No. 102, ¶ 107 (1986).

154. British-American Tobacco Company Ltd. v. The Netherlands, Eur. Ct. H.R. (ser. A) No. 331, 90-91 (Nov. 120, 1995); Smith Kline and French Laboratories v. The Netherlands, Applications Nos. 12633/87, Eur. Ct. H.R. (1990).

155. Pressos Compania Naviera S.A. v. Belgium, 9 Eur. Ct. H.R. 119 (ser. A) No. 332, ¶ 31 (1995).

156. Stran Greek Refineries and Stratis Andreadis v. Greece, Eur. Ct. H.R. (ser. A) No. 301, ¶ 62 (1994).

157. Van Marle v. The Netherlands, 8 Eur. Ct. H.R. 483 (ser. A) No. 101, ¶ 41 (1986).

158. *See* Reinisch, *supra* note 102, at 10.

159. Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 10, ¶ 3; LOWENFELD, *supra* note 104, at 465.

expropriation is defined in subsequent treaties and jurisprudence, was quoted by Judge Aldrich in his concurring opinion in *ITT Industries v. Iran*:[160]

> (a) A 'taking of property' includes not only an outright taking of property but also any such unreasonable interference, use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.
>
> (b) A 'taking of the use of property' includes not only an outright taking of property but also any unreasonable interference with the use or enjoyment of property for a limited period of time.[161]

According to the Iran-U.S. Claims Tribunal in *Starrett Housing Corporation v. Iran,* a State's action interferes with property rights when to such an extent, 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."[162] The doctrine in the *Starrett Case* was later complemented and clarified by the *Tippetts Case* in 1984 where it was held that "[a] deprivation or taking of property may occur under international law through interference by a state with the use of that property or with the enjoyment of its benefits, *even where legal title to the property is not affected.*"[163]

The ICSID also threw in its definition of creeping expropriation in the 2001 case *Metalclad Corp. v. United Mexican States*,[164] the 2002 *Feldman Karpa v. Mexico*,[165] and the 2003 *TECMED v. United Mexican States.*[166] For

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160. LOWENFELD, *supra* note 104, at 465.

161. ITT Industries v. The Islamic Republic of Iran, 2 Iran-U.S. Cl. Trib. Rep. 348 (1983).

162. *Starrett Housing Corp.*, Interlocutory Award No. ITL 32-24-1, 4 Iran-U.S. Cl. Trib. Rep. at 154; *CME Czech Republic B.V. Partial Award*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS at 109, ¶ 319; OECD Report, *supra* note 107, at 11; Fortier & Drymer, *supra* note 107, at 302.

163. Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1984) (emphasis supplied). (The Iran-U.S. Claims Tribunal also discussed that "[t]he Tribunal prefers the term 'deprivation' to the term 'taking,' although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required.").

164. Metalclad Corp. v. United Mexican States (Award), ICSID Case No. ARB(AF)/97/1, ¶ 103 (2000), *reprinted in* 16 ICSID REV. – FOREIGN INVESTMENT L.J. 168, 195, ¶ 103 (2001).

165. Marvin Roy Feldman Karpa v. Mexico, ICSID Award Case No. ARB(AF)/99/1, ¶ 100 (Dec. 16, 2002), *reprinted in* 18 ICSID REV. – FOREIGN INVESTMENT L.J. 488 (2003).

instance, in *Feldman*, the Tribunal concluded that in the past, "confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regimes, among others, have been considered to be expropriatory actions."[167] This is because expropriation not only includes "open, deliberate and acknowledged takings of property" 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 of reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[168]

The UNCITRAL case *CME Czech Republic B.V. v. The Czech Republic* defined *de facto* or creeping expropriation as "measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner."[169] In that case, it was held that the wiping out of the commercial value of the investment of the Claimant constituted an unlawful taking.[170] Prof. Sornarajah enumerated certain governmental activities and circumstances that could amount to an indirect expropriation. These include:

a) forced sales of property;

b) forced sales of shares in an investment through a corporate vehicle;

c) indigenisation measures;

d) taking over management control over the investment;

e) inducing others to take over the property physically;

f) failure to provide protection when there is interference with the property of the foreign investor;

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166. *Técnicas Medioambientales TECMED S.A.*, ICSID Award Case No. ARB (AF)/00/2, ¶ 114.

167. *Marvin Roy Feldman Karpa*, ICSID Award Case No. ARB(AF)/99/1, *reprinted in* 18 ICSID REV. – FOREIGN INVESTMENT L.J., ¶ 100; *see also* OECD Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, art. 4, ¶ b, 7 I.L.M. 117 (1968); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712, comment g (1986).

168. *Metalclad Corp.*, ICSID Case No. ARB(AF)/97/1, *reprinted in* 16 ICSID REV. – FOREIGN INVESTMENT L.J. at 195, ¶ 103; *see also* Gurudevan, *supra* note 9, at 417; SORNARAJAH, *supra* note 7, at 355.

169. *CME Czech Republic B.V. Partial Awara*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS, ¶ 604; *see also The Czech Republic Judgment*, Case No. T 8735-01.

170. *CME Czech Republic B.V. Partial Awara*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS , ¶ 591.

g) administrative decisions which cancel licenses and permits necessary for the foreign business to function within the state;

h) exorbitant taxation;

i) expulsion of the foreign investor contrary to [I]nternational [L]aw; and

j) acts of harassment such as the freezing of bank account or promoting strikes, lockout and labour shortages.[171]

A creeping expropriation could result from a series of measures or actions undertaken by the State, which when taken together, ultimately deprives the foreign investor of its property rights.[172] The United Nations Conference on Trade and Development (UNCTAD), in its Report on the Taking of Property in 2000, noted that creeping expropriation "may be defined as the slow and incremental encroachment on *one or more* of the ownership rights of a foreign investor that diminishes the value of its investment."[173] Thus, while the "legal title to the property remains vested in the foreign investor ... the investor's rights of use of the property are diminished as a result of the interference by the State."[174]

Aside from treaty provisions,[175] case law has also advanced the position that the occurrence of a "series of actions" may result in expropriation. The *Biloune Case,* for example, found an "irreparable cessation of work on the project"[176] because of the series of governmental actions undertaken, such as the stop work order, demolition of a part of the project, summons, arrest and detention, requiring the filing of assets declaration forms, and the deportation

171. SORNARAJAH, *supra* note 7, at 358.

172. Gurudevan, *supra* note 9, at 406; Reinisch, *supra* note 102, at 19-20; PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW: LEGAL ASPECTS OF POLITICAL RISK 8 (1996) ("accomplished through a series of hostile actions that cumulatively deprive the investor of the value of the investment").

173. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, TAKING OF PROPERTY 11 (United Nations Publication 2000), *cited in* Reinisch, *supra* note 102, at 19.

174. *Id.*

175. *See, e.g.* U.S.-Chile Free Trade Agreement, annex 10-D; Model BIT of Canada, 2004, annex B-13 (1), *available at* http://www.naftaclaims.com /files/Canada_Model_BIT.pdf (last accessed Jan. 9, 2009) [hereinafter 2004 Canadian Model BIT].

176. *Biloune and Marine Drive Complex Ltd.*, UNCITRAL *ad hoc* Trib., 95 I.L.R. at 209 (construction of a hotel and recreational facility in Accra, Ghana).

of Biloune.[177] The NAFTA Tribunal in the *Metalclad Case* found an indirect expropriation because of the accretion of a series of acts or omissions by the State.[178] The same finding was made in *Liberian Eastern Timer Corporation v. Republic of Liberia* where the series of unilateral reductions by Liberia in the territorial scope of the concession area after the signing of the concession agreement, amounted to the deprivation and interference in the operation on the part of the investor.[179] And in *Benvenuti & Bonfant v. Congo*, the series of governmental actions consisted of fixing the ceiling price for the sale of mineral water,[180] dissolving a Congolese entity that served as the marketing arm of the investor, commencing criminal charges against Bonfant, and occupying the premises of the investor in Congo; all this in addition to Congo's omission to provide preferential tax status to the investor and to remove foreign competition.[181]

In the *TECMED Decision*, the Tribunal remarked that creeping expropriation "may be carried out through a single action, through a series of actions in a short period of time or through simultaneous actions."[182] *Tradex Hellas S.A. v. Republic of Albania* noted that it is possible to find a creeping expropriation as a result of an accumulation of circumstances "in a long, step-by-step process by Albania."[183] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* reconciled *TECMED* and *Tradex* when the Tribunal held that "the period of time involved in the process may vary — from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership."[184] Finally, an omission by a State could also constitute an expropriation. *Amco Asia Corporation v. Republic of Indonesia* held that expropriation may also result when a State withdraws

177. *Id.*; *see also* Reinisch, *supra* note 102, at 16.

178. *Metalclad Corp.*, ICSID Case No. ARB(AF)/97/1, *reprinted in* 16 ICSID REV. – FOREIGN INVESTMENT L.J. at 195, ¶ 107.

179. Liberian Eastern Timber Corporation v. Republic of Liberia, ICSID Case No. ARB/83/2 (1986), *reprinted in* 2 ICSID Rep. 343, 367 (1994).

180. PLASCO Company, where Benvenuti & Bonfact Corporation invested, was engaged in the manufacture of plastic bottles and mineral water.

181. Benvenuti & Bonfant v. Congo (Award), (1980), *reprinted in* 1 ICSID Rep. 330 (1993).

182. *Técnicas Medioambientales TECMED S.A.*, ICSID Award Case No. ARB (AF)/00/2, ¶ 114.

183. Tradex Hellas S.A. v. Republic of Albania (Award), 5 ICSID Rep. 70, ¶ 191 (1999).

184. Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (Award), 5 ICSID Rep. 153, ¶ 76 (2000).

the "protection of its courts ... *tacitly allowing* a *de facto* possessor to remain in possession of the thing seized."[185]

D. Discussing the Elements of Creeping Expropriation under International Law

International Law does not prohibit a host State from expropriating foreign investments and properties so long as certain requirements are met.[186] The existence of a seemingly infinite line of rulings of international tribunals makes it possible to identify a structure and dissect the boundaries of the sphere of permissible taking of foreign investments and the corollary outer realm of illegal creeping expropriation. These tribunals "have achieved a surprising degree of consistency in their decision-making,"[187] making it possible to draw a line between a legitimate taking and an illegal indirect taking.[188] The factors considered by the various judicial and arbitral tribunals that have dealt with the concept of creeping expropriation are: (1) the degree of interference with the property rights; (2) the character of governmental measure (Purpose Test); (3) the interference of the measure with reasonable and investment-backed expectations; (4) non-discrimination; and (5) payment of just compensation.[189]

1. Degree of Interference with Property Rights

The traditional notion that only an outright taking of physical property may constitute expropriation no longer holds.[190] Since the use, enjoyment and disposal of property and property rights are equally constitutive of the bundle of property rights, they are likewise protected.[191] Thus, interference with the exercise of property or ownership rights by host States could also amount to

185. Amco Asia Corporation v. Republic of Indonesia (Award) (1984), *reprinted in* 24 I.L.M. 203, 1 ICSID Rep. 413, 455 (1993); *see also Metalclad Corp.*, ICSID Case No. ARB(AF)/97/1, *reprinted in* 16 ICSID REV. – FOREIGN INVESTMENT L.J. at 195, ¶ 107; *Liberian Eastern Timber Corporation*, ICSID Case No. ARB/83/2, *reprinted in* 2 ICSID Rep. at 367; *Benvenuti & Bonfant*, *reprinted in* 1 ICSID Rep. 330.

186. OECD Report, *supra* note 107, at 3.

187. Gurudevan, *supra* note 9, at 419.

188. OECD Report, *supra* note 107, at 9.

189. Fortier & Drymer, *supra* note 107, at 302-25; Reinisch, *supra* note 102, at 28-43; OECD Report, *supra* note 107, at 10; Gary H. Sampliner, *Arbitration of Expropriation Cases under U.S. Investment Treaties – A Threat to Democracy or the Dog that Didn't Bark?*, 18 ICSID REV. – FOREIGN INVESTMENT L.J. 1, 5-18 (2003).

190. SORNARAJAH, *supra* note 7, at 367.

191. *Id.* at 368.

an expropriation, particularly, a creeping expropriation that is compensable.[192]

a. Severe Economic Impact

International decisions have considered the severity of the economic impact on the foreign investment caused by the host State. In determining whether the interference amounts to a creeping expropriation, such interference must be substantial, i.e., the measure must deprive the foreign investor of the fundamental rights of ownership, or it must cause interference for a considerably long period.[193] Decisions of international judicial and arbitral tribunals show that State action, usually in the form of regulation, may constitute an illegal creeping expropriation when it *substantially impairs* the investor's economic rights or its right to the use, enjoyment, disposal, ownership, operation or management of the investment, by making them useless to the foreign investor.[194]

Starrett Housing Corp. v. Iran demonstrates when interference by the host State amounts to an illegal expropriation.[195] In that case, the claimants asserted that their property rights have been effectively taken in view of the measures which Iran took.[196] The Iran-U.S. Claims Tribunal held:

> It is undisputed ... that the Government ... did not ... expressly ... [expropriate claimants' properties]. However, *it is recognized in [I]nternational [L]aw 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* ... .[197]

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192. *Id.*

193. OECD Report, *supra* note 107, at 10-11.

194. *Id.* at 11.

195. *Starrett Housing Corp.*, Interlocutory Award No. ITL 32-24-1, 4 Iran-U.S. Cl. Trib. Rep. 122.

196. *Id.*; MARTIN DIXON & ROBERT MCCORQUODALE, CASES AND MATERIALS ON INTERNATIONAL LAW 440 (4th ed. 2003).

197. *Starrett Housing Corp.*, Interlocutory Award No. ITL 32-24-1, 4 Iran-U.S. Cl. Trib. Rep. at 154 (emphasis supplied). In this case however, no unlawful expropriation was found because of the existence of the Iranian Revolution. The Tribunal explained that

> [t]here is no reason to doubt that the events in Iran prior to January 1980 to which the Claimants refer, seriously hampered their possibilities to proceed with the construction work and eventually paralysed the Project. But investors in Iran, like investors in all other countries, have to assume a risk that the country might experiences strikes, lock-outs, disturbances, changes of the economic and political system and even revolution. That any of these risks materialized does

In *Sea-Land Service, Inc. v. Iran,* the Tribunal did not find the interference substantial enough because the bank account, which was alleged to have been expropriated, still remains in existence and available in *rials* and is at the disposal of Sea-Land.[198] In the *Tippetts Case*, the Tribunal found an unlawful creeping expropriation through substantial interference when the Iranian government appointed Tippetts' manager.[199] The Tribunal noted that

> [w]hile assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation ..., such a conclusion is warranted where events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that the deprivation is not merely ephemeral.[200]

The UNCITRAL Arbitral Tribunal found an unlawful creeping expropriation in the *CME Czech Republic B.V. v. The Czech Republic.*[201] In that case, the claimant alleged that the Czech Republic breached its obligation under the 1991 Bilateral Investment Treaty between the Netherlands and the Czech Republic[202] because of the actions taken by the Czech Media Council against a joint venture media company that was purchased by CME.[203] Pursuant to the Czech Media Law (Act No.

> not necessarily mean that property rights affected by such events can be deemed to have been taken. A revolution as such does not entitle the investors to compensation under [I]nternational [L]aw.

Id. See also CME Czech Republic B.V. Partial Award, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS at 109, ¶ 319; DIXON & MCCORQUODALE, *supra* note 196, at 440-41.

198. Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al., Award No. 135-33-1, 6 Iran-U.S. Cl. Trib. Rep. 149 (June 22, 1984); *see also* OECD Report, *supra* note 107, at 11.

199. *Tippetts, Abbett, McCarthy, Stratton*, 6 Iran-U.S. Cl. Trib. Rep. 219.

200. *Id.*

201. *CME Czech Republic B.V. v. The Czech Republic Partial Award*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS at 109, ¶ 591; *see also The Czech Republic Judgment*, Case No. T 8735-01.

202. *Id.* ¶ 24. ("Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.").

203. CME Czech Republic B.V. has a 99% equity interest in Česká Nezávislá Televizní Společnost, spol. s r.o. ('ČNTS'), which is a "Czech television services company." *See CME Czech Republic B.V. v. The Czech Republic Partial Award*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS at 109, ¶ 4.

468/1991), the Czech Media Council issued a license to CET 21.[204] The investment of the claimants were premised on the issuance of such license.[205] CET 21 was the license holder and ČNTS was to operate the broadcasting station under the Service Agreement.[206] CET 21 and ČNTS then broadcasted what became the Czech Republic's most popular and successful television station.[207] However, after consultations with the Media Council, CET 21 arbitrarily terminated the Service Agreement with ČNTS,[208] thus destroying the latter's US$500-million investment.[209] Negotiations were made but the Media Council coerced ČNTS to give up its rights on CET 21.[210] Finding an expropriation, the Tribunal said:

> A "deprivation" occurs ... whenever a State takes steps "that effectively neutralize the benefit of the property for the foreign owner." Such expropriations may be deemed to have occurred regardless of whether the State "takes" or transfers legal title to the investment. It is also immaterial whether the State itself (rather than local investors or other third parties) economically benefits from its actions. These rules arise under the well-established principle that State interference with an investor's use of property should be deemed an actionable "deprivation" regardless of the form that the interference takes.
>
> A deprivation effected by coercing an investor [amounts to] a direct taking. Attempts by State defendants to use "consent" obtained from an investor on pain of administrative sanction ... have a long pedigree in expropriation cases. States often "take the circuitous route of expropriation by consent," either due to a "recognition of the existence of an international [prohibition against expropriation] or out of a practical desire not to advertise their defiance of it."[211]

The UNCITRAL Tribunal found that the coercion exerted by the Media Council upon the claimants to amend the terms of its investment and its subsequent filing of an administrative proceeding against them resulted in

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204. *CME Czech Republic B.V. v. The Czech Republic Partial Award*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS at 109, ¶ 8.

205. CET 21 is a co-founder of ČNTS. *See CME Czech Republic B.V. v. The Czech Republic Partial Award*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS at 109, ¶ 7.

206. *CME Czech Republic B.V. v. The Czech Republic Partial Award*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS at 109, ¶¶ 12 & 16.

207. *Id.* ¶¶ 12-14.

208. *Id.* ¶ 17.

209. *Id.* ¶ 477.

210. *Id.* ¶ 602.

211. *Id.* ¶¶ 150-54 & 520.

the destruction of its investment and therefore amounts to a creeping expropriation.[212] The Tribunal held that:

> The Respondent, through the Media Council, breached its obligation not to deprive the Claimant of its investment. The Media Council's actions and omissions ... caused the destruction of ČNTS' operations, leaving ČNTS as a company with assets, but without business. The Respondent's view that the Media Council's actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State or because the original Licence granted to CET 21 ... has been ... kept untouched, is irrelevant. What was touched and indeed destroyed was the Claimant's and its predecessor's investment ... . What was destroyed was the commercial value of the investment in ČNTS by reason of coercion exerted by the Media Council against ČNTS ... .[213]

In *Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation*, a concession agreement to last for 20 years was concluded by Revere Copper with Jamaica.[214] The agreement had a stabilization clause that guaranteed the retention of a fixed rate of taxes and financial accountabilities. However, notwithstanding such provision, royalties were increased.[215] Subsequently, Revere Copper had to close. The Tribunal found an illegal taking stating that

> the effects of the Jamaican Government's actions in repudiating its long term commitments ... have substantially the same impact ... as if the properties were themselves conceded by a concession contract that was repudiated ... .
>
> [W]e do not regard RJA's control ... of its properties as any longer effective in view of the destruction by government action of its contract rights.[216]

Other cases show when Host State limitations do not amount to illegal creeping expropriation. *Pope & Talbot v. Canada* held that the reduction of a quota that resulted in the company's decrease in profits does not constitute substantial interference as to amount to a taking because the investor can still make profits.[217] The NAFTA Tribunal held that "mere interference is not

212. *CME Czech Republic B.V. v. The Czech Republic Partial Award*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS 3, 109, ¶ 601.

213. *Id.* ¶ 591.

214. Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation, 56 I.L.M. 258 (1980).

215. *Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation,* 56 I.L.M. 258, *cited in* OECD Report, *supra* note 107, at 13.

216. *Id.*

217. Pope & Talbot Inc. v. Canada (Interim Award) (2000), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc7.pdf (last accessed Jan. 9, 2009); *see also* Gurudevan, *supra* note 9, at 412-13.

expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required."[218]

In another NAFTA case, *S.D. Myers, Inc. v. Canada,* the interference was found to be something less than expropriation and that it only amounts to a regulation.[219] In *Feldman Karpa v. Mexico*, the host State's refusal to grant rebate or tax refund for the export tax paid for the export of cigarettes is not an expropriation.[220] The ECHR, in *Sporrong and Lönnroth v. Sweden* held that while the land use regulation made it more difficult for the owner to dispose of his property, it did not amount to a creeping expropriation because the Claimants can still use and enjoy their property and that the "possibility of selling [the property] subsisted."[221]

b. Duration of the Regulation

In determining the gravity of interference by the host State, duration of the regulation or interference plays an important function. The *Tippetts Case* provides that an illegal creeping expropriation exists "whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears *that the deprivation is not merely ephemeral.*"[222] In the *S.D. Myers Case,* Canada banned the export of polychlorinated biphenyls (PCBs).[223] The Claimant's principal business was the carrying of PCB waste from Canada to the United States where it is to be treated and readied for disposal. The Claimant alleged that the ban caused serious economic losses on its part that amounted to an indirect expropriation. The Tribunal ruled that no expropriation was made in this case because the ban is merely of temporary nature, i.e., 18 months.[224] Also, in *Hauer v. Land Rheinland-Pfalz,* the prohibition of the planting of a particular type of vine for only three years by the European Commission was not found to be an indirect expropriation.[225]

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218. Pope & Talbot Inc. v. Canada (Award on the Merits, Phase Two), NAFTA Ch. 11 Arb. Trib., ¶ 99 (2001), 41 I.L.M. 1347 (2002).

219. *S.D. Myers Partial Award*, 40 I.L.M., ¶ 282.

220. *Marvin Roy Feldman Karpa*, ICSID Award Case No. ARB(AF)/99/1, *reprinted in* 18 ICSID REV. – FOREIGN INVESTMENT L.J., ¶ 110.

221. Sporrong and Lönnroth v. Sweden, 52 Eur. Ct. H.R. (ser. A) No. 52 (1982); *see also* OECD Report, *supra* note 107, at 13.

222. *Tippetts, Abbett, McCarthy, Stratton*, 6 Iran-U.S. Cl. Trib. Rep. 219 (emphasis supplied).

223. *S.D. Myers Partial Award*, 40 I.L.M., ¶ 126.

224. *Id.* ¶ 283.

225. Hauer v. Land Rheinland-Pfalz, E.C.J. Case No. 44/79 (1979), *reprinted in* 1981 COMMON MKT. REP. 8629, at 7450; OECD Report, *supra* note 107, at 14; Sampliner, *supra* note 189, at 17.

c. Economic Impact and Effect on the Investor as the Main Criterion (Sole Effect Doctrine)

Judicial and arbitral decisions dealing with the existence of creeping expropriation show that the severity of the effect of the interference on the foreign investor constitutes the determinative criterion.[226] The *Tippetts Case* discussed that the reason for the governmental measure is "less important" than the effect of such measure on the Claimant "and the form of the measures of control or interference is *less important* than *the reality of their impact.*"[227]

In *Phelps Dodge Corp. v. Iran,* the New York based Claimant, asserted an indirect expropriation of its investment in an Iranian company that manufactures and sells wires and cables.[228] Iran transferred management over the operations from the Iranian company to agencies of the Iranian Government. Iran maintained that such measure was undertaken in order to prevent the closure of factories and guarantee the payment of wages and the payment of debts owed to the government. The Iran-U.S. Claims Tribunal held that notwithstanding the intent of the government in its action, the fact was that it effectively interfered with the investment rights of the Claimant, and must therefore compensate Phelps Dodge for its loss.[229]

The Sole Effect Doctrine was also discussed in the *Biloune Case* where the UNCITRAL Tribunal held that the "motivations for the actions and omissions of Ghanaian governmental authorities are not clear ... . But the *Tribunal need not establish those motivations to come to a conclusion in the case.*"[230]

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226. Fortier & Drymer, *supra* note 107, at 309-10; OECD Report, *supra* note 107, at 15; LOWENFELD, *supra* note 104, at 472.

227. *Tippetts, Abbett, McCarthy, Stratton*, 6 Iran-U.S. Cl. Trib. Rep. at 130 (emphasis supplied).

The UNCITRAL Tribunal in the CME Case also had this view, when it held that:

> The Media Council's possible *motivation* for such action — to obtain regulatory control again over the broadcasting operation of CET 21 after the new Media Law came into force in 1996 — *is irrelevant.* A change of the legal environment does not authorize a host State to deprive a foreign investor of its investment ... . *CME Czech Republic B.V. v. The Czech Republic Partial Award*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS at 109, ¶ 602 (emphasis supplied).

228. *Phelps Dodge Corp.*, Award No. 217-99-2, 10 Iran-U.S. Cl. Trib. Rep. at 130; Fortier & Drymer, *supra* note 107, at 309.

229. *Phelps Dodge Corp.*, Award No. 217-99-2, 10 Iran-U.S. Cl. Trib. Rep. at 130; OECD Report, *supra* note 107, at 15.

230. *Biloune and Marine Drive Complex Ltd.*, UNCITRAL *ad hoc* Trib., 95 I.L.R. at 209 (emphasis supplied).

The Tribunal held that the series of governmental actions undertaken by the government (i.e., stop work order, demotion, summons, arrest, detention, deportation of Mr. Biloune) "had the effect of causing the irreparable cessation of work on the project."[231] In *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica,* while the Costa Rican Government's expropriation decree against the property owned by American nationals was for environmental purpose, since the Claimant's property and property rights were taken, compensation must be paid lest such taking will be an illegal expropriation.[232] Certain multilateral agreements, such as the Multilateral Investment Guarantee Agency Convention (MIGA Convention), also consider the injury or loss to the foreign investor and not the gain on the part of the host State as the determinative consideration in creeping expropriation cases.[233]

d. Summarizing the Element of Interference with the Property Rights

Fortier and Drymer summarized the circumstances which when present will amount to a substantial interference in the foreign investment and constitute an illegal creeping expropriation:

> [I]n order to be considered an expropriation, the effect of a regulatory measure on property rights — that is, the required level of interference with such rights — has been variously described as: (1) *unreasonable;* (2) an interference that renders rights so *useless that they must be deemed to have been expropriated;* (3) an interference that deprives the investor of *fundamental rights of ownership;* (4) an interference that makes rights *practically useless;* (5) an interference *sufficiently restrictive* to warrant a conclusion that the property has been "taken"; (6) an interference that deprives, in whole or in significant part, the *use or reasonably-to-be-expected economic benefit* of the property; (7) an interference that *radically deprives* the economical use and enjoyment of an investment, as if the right related thereto had ceased to exist; (8) an interference that makes *any form of exploitation of the property disappear* (i.e., it destroys or neutralizes the economic value of the use, enjoyment or disposition of the assets or rights affected); and (9) an interference such that the property can no longer be put to *reasonable use.*[234]

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231. *Id.*

232. *Compañia del Desarrollo de Santa Elena S.A.*, 5 ICSID Rep., ¶¶ 71-72.

233. Convention Establishing the Multilateral Investment Guarantee Agency, art. 11, ¶ a (ii), T.I.A.S. 12089, 1508 U.N.T.S. 99, 24 I.L.M. 1598 (1985) [hereinafter MIGA Convention]; LOWENFELD, *supra* note 104, at 491. This view is also espoused by the United States Supreme Court in United States v. Causby, 328 U.S. 256 (1946) (U.S.).

234. Fortier & Drymer, *supra* note 107, at 305.

2. Character of Governmental Measures (Purpose Test): The purpose and the context of the governmental measure and the Police Power of the State

The Sole Effect Doctrine is not the only element that determines the existence of an indirect taking.[235] This Doctrine under the interference element also needs to be reconciled with the Purpose Test under which a taking may be held valid provided that it is for a public purpose in exercise of the police power of the State. States are entitled "to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose."[236] Accordingly, it was held in *S.D. Myers* that International Law makes it appropriate "for tribunals to examine the purpose and effect of government regulatory measures," and must "look at the real interests involved and the purpose and effect of the government measure."[237] For instance, in *Emmanuel Too v. Greater Modesto Insurance Associates*, it was held that taxation *per se* does not amount to expropriation:

> A State is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.[238]

As regards the element of public purpose, commentators suggest that

> [t]he conclusion that a particular interference is an expropriation *might also be avoided* if the State whose actions are the subject of complaint had a purpose in mind *which is recognized in [I]nternational [L]aw as justifying even severe, although by no means complete, restrictions on the use of property*. Thus, *the operation of a State's tax laws, changes in the value of a State's currency, actions in the interest of the public health and morality, will all serve to justify actions which because of their severity would not otherwise be justifiable;* subject to the proviso, of course, that the action in question is not what would be "commonly" called discriminatory either with respect to aliens or with respect to a certain class of persons, among whom are aliens, residing in the State in question.[239]

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235. *Id.* at 313.

236. *Sporrong and Lönnroth*, 52 Eur. Ct. H.R. (ser. A) No. 52; *see also* OECD Report, *supra* note 107, at 17.

237. *S.D. Myers Partial Award*, 40 I.L.M., ¶¶ 281-85.

238. Emanuel Too and Greater Modesto Insurance Associates, et al., Award No. 460-880-2, 23 Iran-U.S. Cl. Trib. Rep. 378 (1989).

239. Fortier & Drymer, *supra* note 107, at 319, citing G. C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307, 331-32 (1962) (emphasis supplied).

International Bank v. Overseas Private Investment Corp. is another case of a valid taking because of the State's exercise of its police power. In that case, the Tribunal dismissed the claimant's allegation of having been deprived of its investment in timber.[240] The Tribunal held that the measures "were aimed at a genuine concern with forestry conservation, [and] were not discriminatory in application.[241] Further, States change laws and policies, in the exercise of their police power, "in response to changing economic circumstances ... or social considerations;" and these changes in the laws can make a particular business or investment "less profitable or even uneconomic to continue."[242] The Tribunal in *Feldman,* noted:

> [G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that [C]ustomary [I]nternational [L]aw recognizes this.[243]

A considerable number of governmental measures have been deemed to be within the lawful exercise of a State's police power thereby justifying the expropriation and the non-payment of compensation.[244] In such cases, the taking of property or rights may be effected even though the community at large has no direct use or enjoyment of the property taken, e.g., leasehold reform measures.[245] Note, however, that the taking must not be an act of unlawful retaliation or reprisal against another State is devoid of any legitimate public purpose.[246]

a. The Enrichment of the Host State: Expropriatory measures need not benefit the State

An expropriation may arise notwithstanding the absence of any benefit or increase in the wealth of the expropriating State.[247] It can thus be inferred

240. International Bank v. Overseas Private Investment Corp., 11 I.L.M. 1216, 1227-28 (1972); Fortier & Drymer, *supra* note 107, at 321.

241. *International Bank,* 11 I.L.M. at 1227-28.

242. *Marvin Roy Feldman Karpa,* ICSID Award Case No. ARB(AF)/99/1, *reprinted in* 18 ICSID REV. – FOREIGN INVESTMENT L.J., ¶ 112.

243. *Id.* ¶ 103.

244. *See infra* Part IV (E), discussion on Valid and Non-Compensable Takings.

245. James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) No. 98, ¶ 45 (Feb. 21, 1986), *reprinted in* 8 EUR. HUM. RTS. REP. 123 (1986); *see also* Reinisch, *supra* note 102, at 33.

246. BROWNLIE, *supra* note 62, at 514.

247. Reinisch, *supra* note 102, at 31.

that property could be expropriated for the benefit of third parties.[248] For example, in the *S.D. Myers Case,* it was stated that expropriations seek to transfer ownership or rights "*usually*" to the expropriating State.[249] This implies that expropriations do not always transfer the ownership or rights to the State.[250] The *Amco Case* is more explicit in its discussion:

> it is generally accepted on [I]nternational [L]aw, that a case of expropriation exists not only when a [S]tate takes over private property but also when the expropriating [S]tate transfers ownership to another legal or natural person.[251]

The same view is supported by the *TECMED Case:*

> Although formally an expropriation means a forcible taking by the Government of ... property owned by private persons by means of administrative or legislative action to that effect, the term also covers situations ... *where such actions or laws transfer assets to third parties different from the expropriating State* or *where such laws or actions deprive persons of their ownership over such assets, without allocatmg such assets to third parties or to the Government.*[252]

Finally, the ECHR has decided that expropriation can exist even though the deprivation does not benefit the State. In the *James Case,* it was held that the law, which aspires to allow certain long-term tenants to acquire leased properties at prices below the said properties' market value, amounted to a taking, and held that "the transfer of property from one person to another for the latter's private benefit alone can never be 'in the public interest.'"[253]

b. Proportionality

It is well settled that the measures adopted by the expropriating State must be proportionate to the demands of public purpose.[254] The *James Case* explained that

> [n]ot only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest," but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized ... . *The requisite balance*

248. *Id.*

249. *S.D. Myers Partial Award,* 40 I.L.M., ¶ 280.

250. Reinisch, *supra* note 102, at 31.

251. *Amco Asia Corporation, reprinted in* 24 I.L.M. 203, 1 ICSID Rep. at 455.

252. *Técnicas Medioambientales TECMED S.A.*, ICSID Award Case No. ARB (AF)/00/2, ¶ 113 (emphasis supplied).

253. *James,* 98 Eur. Ct. H.R. (ser. A) No. 98, ¶ 39; *see also* Reinisch, *supra* note 105, at 32-33.

254. OECD Report, *supra* note 107, at 17.

> *will not be found if the person concerned has had to bear "an individual and excessive burden."*[255]

The need for proportionality was reiterated in *TECMED v. Mexico* where it was held that "there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."[256] It further discussed that

> the Arbitral Tribunal will consider ... whether such measures *are proportional to the public interest presumably protected thereby and to the protection legally granted to investments,* taking into account that [a measure's negative financial impact on the investment] has a key role upon deciding the proportionality.[257]

The requirement of proportionality was also addressed by the ECHR in the *Case of the former King of Greece and Others v. Greece* and the *Sporrong Case* where it held that "interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[258]

3. Interference of the Measure with Reasonable and Investment-Backed Expectations: Protection of legitimate investor expectations

This element is best illustrated by the *TECMED Case*. In that case, Mexico's refusal to renew TECMED's license to operate a hazardous waste landfill was held to be a deprivation of economic rights as well as the legitimate expectation on the part of the Claimant.[259] It was ruled:

> Even before the Claimant made its investment, it *was widely known that the investor expected its investments in the Landfill to last for a long term* and it took this into account to estimate the time and business required to recover such investment and obtain the expected return upon making its tender offer for the acquisition of the assets related to the Landfill. To evaluate if the actions

255. *James*, 98 Eur. Ct. H.R. (ser. A) No. 98, at 32, ¶ 50 (emphasis supplied).

256. *Técnicas Medioambientales Tecmed S.A.*, ICSID Award Case No. ARB(AF)/00/2, ¶ 122.

257. *Id.* (emphasis supplied).

258. Case of the former King of Greece and Others v. Greece (Judgment), Eur. Ct. H.R. Application No. 25701/94, ¶ 89 (Nov. 20, 2000), citing *Sporrong and Lönnroth*, 52 Eur. Ct. H.R. (ser. A) No. 52, ¶ 69.

259. *Técnicas Medioambientales TECMED S.A.*, ICSID Award Case No. ARB (AF)/00/2; OECD Report, *supra* note 107, at 20.

> ... [constitute an expropriation,] such expectations should be considered legitimate and should be evaluated in light ... of [I]nternational [L]aw."[260]

Note, however, that risk of strikes, lock-out, disturbances, changes of economic and political system and revolutions also fall within the scope of reasonable expectation but do not necessarily constitute a taking.[261]

4. Non-Discrimination

It is established that an expropriation that is discriminatory is illegal in International Law.[262] Conversely, "where economic injury results from a *bona fide* non-discriminatory regulation within the police powers of the State," no unlawful expropriation occurs.[263]

The principle of non-discrimination in expropriation is internationally recognized as part of Customary International Law,[264] General International Law,[265] Treaty Law,[266] and established in judicial and arbitral rulings,[267] as well as in expressions of national governments and commentators.[268]

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260. *Técnicas Medioambientales TECMED S.A.*, ICSID Award Case No. ARB (AF)/00/2, ¶ 50.

261. *Starrett Housing Corp.*, Interlocutory Award No. ITL 32-24-1, 4 Iran-U.S. Cl. Trib. Rep. at 154.

262. SORNARAJAH, *supra* note 7, at 395.

263. OECD Report, *supra* note 107, at 5; DOLZER & STEVENS, *supra* note 108, at 98.

264. *Amoco International Finance Corporation*, Partial Award No. 310-56-3, 15 Iran-U.S. Cl. Trib. Rep., ¶ 140; A. F. M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. TRANSNAT'L L. & POL'Y 57, 57 (1998); IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 81 (1983) [hereinafter BROWNLIE STATE RESPONSIBILITY]; OECD Report, *supra* note 107, at 5, n. 10; Michael G. Parisi, *supra* note 108, at 398; DAVID J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 588 (6th ed. 2004).

265. Maniruzzaman, *supra* note 264, at 57; BROWNLIE STATE RESPONSIBILITY, *supra* note 264, at 81; RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES, § 712 (1986).

266. Maniruzzaman, *supra* note 264, at 57; BROWNLIE STATE RESPONSIBILITY, *supra* note 264, at 81.

267. B.P. v. Libya, 53 I.L.R. 297, 329 (1979); Libya v. Libyan Am. Oil Co., 20 I.L.M. 1, 58 (1981); *Norwegian Shipowners' Claims*, 1 R.I.A.A. at 334, 339; A. F. M. Maniruzzaman, *supra* note 264, at n. 2; *Oscar Chinn*, 1934 P.C.I.J. (ser. A/B) No. 63, at 87; Factory at Chorzów (F.R.G. v. Pol.) (Merits), 1928 P.C.I.J. (ser. A) No. 17, at 46-47; *Sabbatino*, 376 U.S. at 429, 84 S. Ct. at 940-41.

268. *Sabbatino*, 376 U.S. at 429, 84 S. Ct. at 941, citing *Dispatch from Lord Palmerston to British Envoy at Athens*, Aug. 7, 1846, 39 BRIT. & FOREIGN STATE PAPERS 1849-50, 431-32; *Note from Secretary of State Hull to Mexican Ambassador*, July 21,

The twin elements of discrimination are: (1) "measures directed against a particular party for reasons unrelated to the substance of the matter;" and (2) "like persons being treated in an inequivalent manner."[269] In the particular field of international foreign investment, unlawful discrimination exists when (1) the measures are aimed exclusively at alien-owned property in a field where there are also national interests;[270] and (2) where the measures are general in scope but singles out alien property for unfavorable treatment, unless there is justification for such treatment in a treaty provision.[271] Further, a State's action or measure is considered discriminatory when it "results in an actual injury to the alien ... with the intention to harm the aggrieved alien to favour national companies."[272] An act that is found to be purely discriminatory is illegal and wrongful.[273]

5. Payment of Just Compensation

It is a general rule in International Law that a State has the duty to pay compensation in order for a taking of alien property to be lawful.[274] Consequently, if compensation is not paid, then the taking is deemed to be unlawful, and is described as confiscation.[275]

To say that foreign investments are entitled to protection under International Law, such that once taken the obligation to make compensation arises,[276] is one thing; determining the standard of compensation in case a taking occurs is quite another. Indeed, this issue has

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1938, 5 FOREIGN RELATIONS OF THE UNITED STATES 674 (1938); *Note to the Cuban Government,* July 16, 1960, 43 DEPT. STATE BULL 171 (1960); Lord McNair, *The Seizure of Property and Enterprises in Indonesia,* 6 NETHERLANDS INT'L L. REV. 218, 243-53 (1959); Restatement, Foreign Relations Law of the United States (Proposed Official Draft 1962), §§ 190-95.

269. Maniruzzaman, *supra* note 264, at 59; DAMROSCH, ET AL., *supra* note 2, at 779; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712, comment f (1986).

270. Maniruzzaman, *supra* note 264, at 59; GILLIAN WHITE, NATIONALIZATION OF FOREIGN PROPERTY 44 (1961).

271. Maniruzzaman, *supra* note 264, at 59; WHITE, *supra* note 270, at 44; DAMROSCH, ET AL., *supra* note 2, at 779, citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712, comment f (1986).

272. OECD Report, *supra* note 107, at 5, n. 10; DOLZER & STEVENS, *supra* note 108, at 98.

273. Libyan American Oil Company v. Libyan Arab Republic, 62 I.L.R. 140, 20 I.L.M. 53 (1977); DIXON & MCCORQUODALE, *supra* note 196, at 443.

274. SORNARAJAH, *supra* note 7, at 395.

275. BROWNLIE, *supra* note 62, at 509, 514.

276. *Southern Pacific Properties (Middle East) Ltd. Award,* 3 ICSID Rep. at 228, ¶ 164.

been the subject of considerable debate ever since the inception of the law on expropriations.[277] On the one hand, developed countries and many European and North American scholars support the Hull Formula[278] which conditions the lawfulness of an expropriation to the prompt, adequate and effective payment of compensation.[279] The Hull Formula was first introduced by U.S. Secretary of State Cordell Hull as a reaction to the nationalization by Mexico of American petroleum companies in 1936.[280] On the other hand, the Calvo Doctrine, which only requires "appropriate" compensation, is a standard evolved among developing States in the 1960s and 1970s.[281] In contemporary times however, "the Hull [F]ormula and its variations are often used and is accepted both in treaties and judicial and arbitral decisions and is considered as part of [C]ustomary [I]nternational [L]aw."[282] Moreover, the Hull Formula is more in line with the prevailing positive attitude towards foreign investment and is reflected in most BITs and other international agreements.[283]

E. Valid and Non-Compensable Indirect Takings

As a general rule, State measures concerning public interest, welfare, health and security are a lawful exercise of State power.[284] Mere restriction on the foreign investor's property or rights does not always equate to an illegal taking.[285] Takings done in compliance with the conditions discussed in the immediately preceding subsection are not unlawful but are rather valid exercise of the State's sovereign power.[286] For example, instances where a State is not responsible for the loss of property or for other economic disadvantages to foreign investors would be those which results from "*bona fide* general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of [S]tates."[287]

277. SORNARAJAH, *supra* note 7, at 395.

278. BROWNLIE, *supra* note 62, at 509.

279. *Id.*; OECD Report, *supra* note 107, at 2, n. 1.

280. OECD Report, *supra* note 107, at 2, n. 1.

281. *Id.*

282. *Id.*; Loibl, *supra* note 107, at 711 (one of the common features of bilateral investment treaties is the provision of compensation in case of a lawful expropriation, which "shall be paid according to the Hull Formula").

283. Sampliner, *supra* note 189, at 5; OECD Report, *supra* note 107, at 2; *see, e.g.* NAFTA, art. 1110.

284. BROWNLIE, *supra* note 62, at 509; OECD Report, *supra* note 107, at 4.

285. OECD Report, *supra* note 107, at 11.

286. *Id.* at 4; BROWNLIE, *supra* note 62, at 509.

287. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712, comment g (1986); OECD Report, *supra* note 107, at 9.

Therefore, foreign investments may be subjected to taxation, trade restrictions on licenses and quotas, and even devaluation measures.[288]

In Article 3 of the 1967 OECD Draft Convention on the Protection of Foreign Property, this sovereign right of States was recognized:

> Article 3 acknowledges, by implication, the sovereign right of a State, under [I]nternational [L]aw, to deprive owners, including aliens, of property which is within its territory in the pursuit of its political, social or economic ends. To deny such a right would be [to] attempt to interfere with its powers to regulate — by virtue of its independence and autonomy, equally recognized by [I]nternational [L]aw ... .[289]

Under International Law, there are certain exceptions that would justify a taking of foreign property without just compensation.[290] Examples of this are defence measures against external threats; "confiscation as a penalty for crimes;"[291] taking away by way of taxation or other fiscal measures; loss indirectly produced by the enactment of health and planning laws and the related or resulting limitations on property use; the damage to the property of "neutrals" as an effect of military operations, and the "taking of enemy property as part payment of reparation for the consequences of an illegal war."[292] Further, interference in property rights, which are made to control hazardous or "environmentally unsound" use of property, are considered as regulatory takings that does not necessitate the payment of compensation.[293]

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288. BROWNLIE, *supra* note 62, at 509; OECD Report, *supra* note 107, at 4; *see, e.g.* European Convention of Human Rights, Protocol 1, 1952, art. 1, E.T.S. No. 9 ("The proceeding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."). Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 10, ¶ 5, which provides:

> An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent right or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful.

289. OECD Draft Convention on the Protection of Foreign Property, art. 3; OECD Report, *supra* note 107, at 8 (emphasis supplied).

290. BROWNLIE, *supra* note 62, at 511-12.

300. *See* Allgemeine Gold-und Silberscheideanstalt v. Customs and Excise Commissioners, 2 W.L.R. 555 (1980).

292. BROWNLIE, *supra* note 62, at 511-12.

293. SORNARAJAH, *supra* note 7, at 370-71, *but see Técnicas Medioambientales TECMED S.A.*, ICSID Award Case No. ARB (AF)/00/2.

F. Determining State Responsibility in Expropriation

The International Law Commission's (ILC)[294] Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) codifies the principles on State responsibility.[295] The Articles on State Responsibility articulates the repercussions of a breach of an international legal obligation by a State and provides for and regulates the acceptable remedies and justifications for these breaches.[296]

Article 1 of the Articles on State Responsibility states that "[e]very internationally wrongful act of a State[297] entails the international responsibility of that State."[298] This first provision reflects the most basic principle in State responsibility.[299] In his commentary, ILC Special Rapporteur James Crawford noted that an internationally wrongful act of a

294. The International Law Commission was established by the United Nations General Assembly in 1948 so as to fulfill the Charter mandate of "encouraging the progressive development of international law and its codification." U.N. CHARTER, art. 13, ¶ a; JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 1 (2005). *See generally* A. D. WATTS, THE INTERNATIONAL LAW COMMISSION, 1949-1998 (1999); *see also* I. SINCLAIR, THE INTERNATIONAL LAW COMMISSION 46-47, 120-26 (1987); SHABTAI ROSENNE, PRACTICE AND METHODS OF THE INTERNATIONAL LAW COMMISSION 73-74 (1984); H. W. BRIGGS, THE INTERNATIONAL LAW COMMISSION 129-41 (1965).

295. *Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Annex, Agenda Item 162 at 3, U.N. Doc. A/RES/56/83 (2001) [Articles on State Responsibility].

296. Crawford & Olleson, *The Nature and Forms of International Responsibility, reprinted in* INTERNATIONAL LAW 451 (Malcolm D. Evans ed., 2d ed. 2006).

297. The first provision of the Articles expressly provides for the term *State*. However, the principle underlying this provision has nevertheless been applied to other international legal persons in International Law. The 5th Special Rapporteur Crawford maintains that it is "unproblematic to substitute the words 'international organization' or 'international legal person' for 'State' in Article 1 of the ILC Articles." *See* Crawford & Olleson, *supra* note 296, at 452; *see, e.g.* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion), 1999 I.C.J. 62, ¶ 66 [hereinafter Cumaraswamy Advisory Opinion]. Accordingly, the basic statement of the principle on responsibility under International Law is likewise applicable to other non-State actors possessing international legal personality. *See* CRAWFORD, *supra* note 294, at 80, ¶ 7; *see, e.g.* Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion), 1949 I.C.J. 174, ¶ 179.

298. Articles on State Responsibility, art. 1.

299. CRAWFORD, *supra* note 294, at 77, ¶ 1.

State may consist in one or more acts or omissions or a combination of the two.[300]

For State responsibility to be engaged, the breach must pertain to an international obligation that amounts to a "general law of wrongs," whether derived from custom, treaty, or any other source of international law.[301]

A State becomes internationally responsible[302] whenever two conditions concur: (a) that the conduct is attributable[303] to the State under International Law (element of attribution); and (b) that such conduct constitutes a breach of that State's international obligation (element of breach).[304]

State responsibility may be engaged in both direct and indirect takings[305] provided that the conduct amounting to an expropriation is in violation of International Law and is attributable to the State.[306] The case of *Amco Asia Corporation. v. Republic of Indonesia* explained that "as a *conditio sine qua non* there shall exist a taking of private property and ... such taking shall have been executed or instigated by a government, on behalf of a government or by an act which otherwise is attributable to a government."[307] Thus, in cases of illegal expropriations, whether direct or indirect, State responsibility is engaged so long as such illegal taking is attributable to the State following the modes of attribution embodied in the Articles on State Responsibility.

In the case of forced sales of property, a distinction must be made between those caused by civil unrest or economic recession in a particular State, and those caused by the State through its policies or programs, e.g., the indigenization of the economy.[308] In the former, the State cannot be

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300. *Id.* at 79-80, ¶¶ 4-5.

301. Crawford & Olleson, *supra* note 296, at 454-55.

302. Articles on State Responsibility, arts. 1 & 2, ¶ b; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3; S.S. Wimbledon, 1923 P.C.I.J. (ser. A) No.1, at 15, 30.

303. Articles on State Responsibility, art. 2, ¶ a; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) (Merits), 1986 I.C.J. 14, ¶¶ 117-18.

304. Articles on State Responsibility, arts. 2, ¶ a & 12; *United States Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. at 29, ¶ 56; *Military and Paramilitary Activities Merits*, 1986 I.C.J., ¶¶ 117-18, 226; Oil Platforms (Iran v. U.S.) (Prelim. Objections), 1996 I.C.J. 803; Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, ¶ 78; Phosphates in Morocco, 1938 P.C.I.J. (ser. A/B) No. 74, 10, 28; Dickson Car Wheel Company, Mexico-U.S. General Claims Comm'n, 4 R.I.A.A. 669, 678, (1931).

305. SORNARAJAH, *supra* note 7, at 358.

306. *Id.*

307. *Amco Asia Corporation, reprinted in* 24 I.L.M. 203, 1 ICSID Rep. at 455, ¶ 158.

308. SORNARAJAH, *supra* note 7, at 359.

held liable because such act is not attributable to the State and the foreign investor ought to have known that these economic circumstances are business risks faced by all, whether domestic or foreign.[309] However, if the measure that amounts to an illegal taking of property is "engineered" by the host State and "the violence is direct[ed] at the foreign investors for the specific purpose of ensuring that they leave the host [S]tate," clearly such is an illegal creeping expropriation that engages the State's responsibility under International Law.[310]

Where the conduct of the host State amounts to an unlawful expropriation, the responsibility of such State is engaged under International Law. For instance, it was held in the *DeSabla Claim* that governmental actions, which deprive an alien of its property without compensation, necessitate a corresponding international responsibility.[311] Consequently, the responsible State must cease the continuation of the internationally wrongful act, guarantee its non-repetition, and afford reparation.[312] The *Chorzów Factory Case* recognizes this obligation of reparation for the damages that the owner suffered from the illegal expropriation.[313] State responsibility is also engaged when it subjects the property of an alien, or the foreign investment, to taxation, regulation, measures or other policies that are confiscatory, or that unreasonably interferes with the effective enjoyment by the foreign investor of his property or property rights.[314] In sum, State responsibility is engaged whenever an act that is attributable to the State is considered to be an illegal expropriation under International Law, whether it is direct or creeping.

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309. *Id.*

310. *Id.*

311. DeSabla Claim (U.S. v. Pan.), 28 AM. J. INT'L L. 602, 611 (1934); LOWENFELD, *supra* note 104, at 396.

312. Articles on State Responsibility, arts. 30-31; *see* Crawford & Olleson, *supra* note 296, at 470; *see also Factory at Chorzów Jurisdiction*, 1927 P.C.I.J. (ser. A) No. 9 at 21.

313. *Factory at Chorzów Merits*, 1928 P.C.I.J. (ser. A) No. 17; *Amoco International Finance Corporation*, Partial Award No. 310-56-3, 15 Iran-U.S. Cl. Trib. Rep., ¶ 193; DIXON & MCCORQUODALE, *supra* note 196, at 443.

314. *Marvin Roy Feldman Karpa*, ICSID Award Case No. ARB(AF)/99/1, *reprinted in* 18 ICSID REV. – FOREIGN INVESTMENT L.J., ¶ 100; *see also* OECD Draft Convention on the Protection of Foreign Property, art. 4, ¶ b; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712, comment g (1986); OECD Report, *supra* note 107, at 8-9. But a State is not responsible for "loss of property or for other economic disadvantage resulting from *bona fide* general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of [S]tates"), RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712, comment g (1986).

V. RAISING THE NORM TO THE LEVEL OF *DE LEGE LATA*

A. Establishing the Contemporary Law-Making Mechanisms[315] used to Crystallize Prohibition against Illegal Creeping Expropriation into De Lege Lata, Particularly in the Form of Customary International Law

1. Treaties and Other Bilateral and Multilateral Agreements on Investment and Free Trade

Generally, a treaty only binds the States, which are parties to such treaty.[316] Article 34 of the 1969 Vienna Convention on the Law of Treaties (VCLT) provides that "[a] treaty does not create either obligations or rights for a third State without its consent."[317] There are instances however, when third States become bound by a particular provision that is codified in a treaty. Article 38 of the VCLT states that "[n]othing ... precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."[318] Accordingly, when a particular norm embodied in a treaty becomes recognized as having attained the status of Customary International Law, it becomes binding upon third States.

Treaties or conventions constitute as a group of precedents, which, along with other methods of State practice, judicial and arbitral decisions, and pronouncements and outputs of international organizations, contribute to the development of a customary norm.[319] A significant number of treaties have contributed to the development of the prohibition against unlawful creeping expropriations and its transportation from *de lege ferenda* to *de lege lata.*

As early as 1948, the Havana Charter already codified the international protection of foreign investment against taking.[320] Article 11, paragraph 1 (b) of the Charter provides that "no Member shall take unreasonable or unjustifiable action within its territory injurious to the *rights or interests of nationals of other Members in the enterprise, skills, capital, arts or technology which they have supplied.*"[321] Article 12 of the Charter, on International Investment

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315. *See supra* discussion Part II.

316. Vienna Convention on the Law of Treaties, 1969, art. 34, 1155 U.N.T.S. 331 [hereinafter VCLT 1969].

317. *Id.*, art. 34.

318. *Id.*, art. 38.

319. North Sea Continental Shelf (F.R.G. v. Den.) (F.R.G. v. Neth.), 1969 I.C.J. 3, 105 (Ammoun, J., dissenting).

320. LOWENFELD, *supra* note 104, at 404; The Philippines is a party to the Havana Charter.

321. Havana Charter for an International Trade Organization, 24 Mar. 1948, art. 11, ¶ 1 (b), *in United Nations Conference on Trade and Employment, Finaly Act and*

for Economic Development and Reconstruction, expressly provides that Members acknowledge that

> [i]nternational investment ... can be of great value in promoting economic development and reconstruction and consequent social progress .... [T]he international flow of capital will be stimulated to the extent that Members afford nationals of other countries *opportunities for investment and security for existing and future investments*.[322]

The 1950s saw the initiation of moves to create a multilateral investment insurance agency.[323] This initiative was pushed harder when during the years 1978 to 1982, 42 expropriations took place in different parts of the world, i.e., Africa, Latin America and Asia, in 24 different countries therein.[324] In 1985, the Convention Establishing the Multilateral Investment Guarantee Agency[325] (MIGA Convention) was concluded with the support of the World Bank.[326] The MIGA Convention aims to encourage the flow of investments among its member States, most especially developing member States.[327] The MIGA primarily has the purpose of issuing guarantees, "against non-commercial risks concerning investments in a developing member country that flow from other member countries."[328] Article 11, paragraph a, of the MIGA Convention recognizes the existence of creeping or indirect expropriation in International Law as a political risk that is covered by the Convention:[329]

> Article 11. *Covered Risks*
>
> (a) [T]he Agency may guarantee eligible investments against a loss resulting from one or more of the following types of risk:
>
> ...

Related Documents, U.N. Doc. E/Conf.2/78 (1948) [hereinafter Havana Charter] (signed on behalf of 53 States in March 1948) (emphasis supplied); LOWENFELD, *supra* note 104, at 404.

322. Havana Charter, art. 12 (emphasis supplied).

323. Loibl, *supra* note 107, at 712.

324. Lowenfeld, *supra* note 104, at 489; Multinational Investment Guarantee Agency, The First Ten Years 3 (1998).

325. *See generally* MIGA Convention.

326. Loibl, *supra* note 107, at 712; The MIGA has 171 member-States: 23 industrialized States and 148 developing States. As of July 2007, Niger and New Zealand have also become members of the MIGA. The Philippines is likewise a member country. *MIGA Member Countries (171),* Multilateral Investment Guarantee Agency World Bank Group, *available at* http://www.miga.org/quickref/index_sv.cfm?stid=1577 (last accessed Jan. 9, 2009).

327. MIGA Convention, art. 2; *see also* Loibl, *supra* note 107, at 712.

328. Loibl, *supra* note 107, at 712.

329. *Id.;* LOWENFELD, *supra* note 104, at 489; ALVAREZ, *supra* note 21, at 241.

(ii) Expropriation and Similar Measures

> any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which the governments normally take for the purpose of regulating economic activity in their territories.[330]

An act of expropriation was therefore explicitly recognized to include "any legislative action or administrative action or omission *attributable* to the host government *which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment.*"[331] Indeed, the MIGA covers political risks which include illegal creeping expropriations such as the incontrovertibility of local currency, breaches of contract, and war and civil disturbances caused by the host State.[332]

The MIGA Convention, which entered into force in 1988, has 171 parties at present.[333] Such membership amounts to State practice supporting the prohibition against illegal creeping expropriation.[334]

The Energy Charter Treaty[335] was concluded in order to stabilize foreign investments in the energy sector.[336] The Treaty likewise provides for the protection of investments against both direct and indirect expropriations.[337]

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330. MIGA Convention, art. 11, ¶ a (ii) (emphasis supplied).

331. MIGA Convention, art. 11, ¶ a (ii) (emphasis supplied); LOWENFELD, *supra* note 104, at 491-92; Loibl, *supra* note 107, at 712-13.

332. MIGA Convention, art. 11, ¶ a; Loibl, *supra* note 107, at 712-13; Lowenfeld, *supra* note 104, at 489-90; United Nations Conference on Trade and Development, World Investment Report 2006: FDI Policies for Development: National and International Perspectives 241 (2006) [hereinafter UNCTAD World Investment Report 2006]; MIGA Convention, art. 18; *see also* Loibl, *supra* note 107, at 713.

333. Loibl, *supra* note 107, at 712.

334. *See* LOWENFELD, *supra* note 104, at 490.

335. Energy Charter Treaty, Annex 1 to the Final Act of the European Energy Charter Treaty Conference, 17 Dec. 1994, art. 13, 34 I.L.M. 381 (1995). The Energy Charter Treaty was signed by 49 States in June 1995, and took effect in 1998. *See* David Howell, *International Investment Arbitration,* Oct. 19, 2006, *available at* http://www.fulbright.com/images/publications/Mondaq%20Reprint.pdf (last accessed Jan. 9, 2009).

336. Loibl, *supra* note 107, at 710.

337. Energy Charter Treaty, art. 13. It provides:

> [I]nvestment of investors of a Contracting Party ... shall not be nationalized, expropriated or subjected to a measure or measures

BITs constitute the most important instrument for the protection of foreign investments.[338] It is primarily aimed at encouraging and protecting investments in the territories of the States-parties.[339] The first BIT was concluded in 1959 between Germany and Pakistan, and BITs have drastically increased in number since then.[340] BITs have been concluded between developed and developing States, and between developing States.[341] They were traditionally concluded to protect developing States from political risks such as expropriations.[342] However, as developing States began to actively participate in capital exportation, this traditional notion began to blur.[343]

As of the yearend of 2005, the UNCTAD has recorded 2,495 BITs enforced worldwide; together with 232 international agreements with provisions on investment.[344] Over 140 States are party to at least one BIT.[345] At least 173 States from all regions were parties or were involved in BITs by the end of the 1990s:[346] 270 BITs were concluded by Western European States with Asia, 209 with Africa, 179 with Latin America and the Caribbean, 235 with Central and Eastern European countries, and nine

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having effect equivalent to nationalization or expropriation except where such measure complies with the rules of customary international law in this matter.

338. United Nations Conference on Trade and Development, Bilateral Investment Treaties 1959-1999 1 (2000) [hereinafter UNCTAD BITs 1959-1999]; *see also* SORNARAJAH, *supra* note 7, at 204-08.

339. Loibl, *supra* note 107, at 710.

340. *Id.*

341. *Id.*; UNCTAD World Investment Report 2006, *supra* note 332, at 228.

342. UNCTAD World Investment Report 2006, *supra* note 332, at 228.

343. *Id.*

344. *Id.* at xix, 26; Hamilton & Rochwerger, *supra* note 69, at 2; Mondev International Ltd. v. U.S., Case No. ART(AF)/99/2, NAFTA Ch. 11 Arb. Trib. (11 Oct. 2002), *reprinted in* 42 I.L.M. 85, 125 (2003); Charles H. Brower II, *NAFTA's Investment Chapter: Initial Thoughts About Second-Generation Rights,* 36 VAND. J. TRANSNAT'L L. 1533, 1546 (2003); George M. von Mehren & Aspasia A. Paroutsas, NAVIGATING *Through Investor-State Arbitrations – An Overview of Bilateral Investment Treaty Claims,* 59 DISP. RESOL. J. 69, 70, n. 1 (2004).

345. United Nations Conference on Trade and Development, World Investment Report 2003: FDI Policies for Development: National and International Perspectives 89 (2003) [hereinafter UNCTAD World Investment Report 2003]; Hamilton & Rochwerger, *supra* note 69, at 2-3.

346. UNCTAD BITs 1959-1999, *supra* note 338, at iii, 4; Hamilton & Rochwerger, *supra* note 69, at 6-7.

among themselves.[347] Moreover, BITs in developing States have increased from a total of 42 in 1990 to a total 644 by the end of 2005.[348] Also by the end of 2005, 1,003 BITs were concluded by States in Asia and Oceania; 464 by Latin American and Caribbean States; 660 by African States; 671 by South-East European States; of these, 1,511 by developed States and 1,878 by developing States.[349]

It is noteworthy that BITs have retained *uniformity* in their provisions[350] particularly with regard to one of their main provisions, the guarantee from both direct and indirect expropriations.[351] The number of BITs with a practically uniform provision on the protection against unlawful creeping expropriation forms a very significant corpus of State practice and *opinio juris* and therefore as evidence of custom. Indeed, *Pope & Talbot Inc. v. Canada* and *Mondev International Ltd. v. U.S.* have taken the view that BITs constitute, or at least contribute to custom.[352]

To illustrate, note the following model BITs of some States. The text of the 2004 U.S. model BIT provides that "[n]either Party may expropriate or nationalize a covered investment either directly or indirectly through

347. UNCTAD World Investment Report 2003, *supra* note 345, at 89; Hamilton & Rochwerger, *supra* note 69, at 7.

348. UNCTAD World Investment Report 2006, *supra* note 332, at 26.

349. *Id.* at 28.

350. Marie-France Houde & Catherine Yannaca-Small, Relationships between International Investment Agreements, Organisation for Economic Co-operation and Development (OECD) (May 2004), *available at* http://www.oecd.org/dataoecd/8/43/31784519.pdf (last accessed Jan. 9, 2009) [hereinafter OECD Investment]; International Centre for the Settlement of Investment Disputes (ICSID), *The World Bank Group, available at* http://www.worldbank.org/icsid/treaties/intro.htm (last accessed Jan. 9, 2009) [hereinafter ICSID World Bank]; *United States: President's Statement Announcing United States Foreign Direct Investment Policy (Dec. 26, 1991),* 31 I.L.M. 488, 489 (1992); Hamilton & Rochwerger, *supra* note 69, at 9; United Nations Conference on Trade and Development, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking 141 (2007) [hereinafter UNCTAD BITs Trends].

351. LOWENFELD, *supra* note 104, at 476; *see also* Hamilton & Rochwerger, *supra* note 69, at 8, n. 34; UNCTAD World Investment Report 2003, *supra* note 345, at 89; UNCTAD World Investment Report 2006, *supra* note 332, at 229; UNCTAD BITs TRENDS, *supra* note 350, at 141.

352. *Pope & Talbot Inc. Phase Two,* NAFTA Ch. 11 Arb. Trib., 41 I.L.M. ¶¶ 110-11; *Mondev International Ltd.*, Case No. ART(AF)/99/2, NAFTA Ch. 11 Arb. Trib., *reprinted in* 42 I.L.M. 85; Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work: An Evaluation of Bilateral InvestmentTreaties and Their Grand Bargain,* 46 HARV. INT'L L.J. 67, 113-14 (2005).

measures equivalent to expropriation or nationalization."[353] This provision is read and interpreted in conjunction with Annexes A and B thereof.[354] Annex A provides that expropriation is that which is contemplated under Customary International Law.[355] Annex B of the U.S. Model BIT provides further that "[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment."[356] The provision on expropriation contemplates two kinds: direct and indirect. Annex B expresses that "[t]he second situation addressed by Article 6 ... is *indirect expropriation,* where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[357] Besides the elements of a direct expropriation, Annex B enumerated other elements[358] that also apply in cases of creeping expropriations.[359]

The 2004 model BIT of Canada also has the same provision under Article 13, paragraph 1 which states that "[n]either Party shall nationalize or expropriate a covered investment either directly, or *indirectly through measures having an effect equivalent to nationalization or expropriation* ... ."[360] The

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353. Model BIT of the United States of America, 2004, art. 6, *available at* http://www.naftaclaims.com/files/US_Model_BIT.pdf (last accessed Jan. 9, 2009) [hereinafter 2004 U.S. Model BIT].

354. *Id.*, n. 9.

355. *See* 2004 U.S. Model BIT, *supra* note 353, at annex A. (providing that "[e]xpropriation results from a general and consistent practice of States that they follow from a sense of legal obligation"); annex B (stating that "Article 6 ... is intended to reflect customary international law concerning the obligation of States with respect to expropriation").

356. 2004 U.S. Model BIT, annex B, ¶ 2.

357. *Id.*, annex B, ¶ 4 (emphasis supplied).

358. *See supra* discussion Part IV (D) on the elements of creeping expropriation.

359. 2004 U.S. Model BIT, annex B, ¶ 4 (a).

> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (iii) the character of the government action.

Annex B provides however, that non-discriminatory actions undertaken by the host State on account of protecting a legitimate public welfare objective, e.g., public health, safety and the environment, shall not be deemed as indirect expropriation. *See* 2004 U.S. Model BIT, annex B, ¶ 4 (b).

360. 2004 Canadian Model BIT, art. 13; *see also* August Reinisch, *supra* note 102, at 16 (emphasis supplied).

provision on indirect expropriation in the 2004 Canadian model BIT is to be interpreted along with Annex B.13, paragraph 1 thereof.[361] It defines indirect expropriation as that which "results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[362] It further provides for the same elements and limitations as that enumerated in the 2004 U.S. model BIT.[363]

Treaties that contain the same prohibition have also been concluded by other States located in various parts of the globe, such as the Thailand-Hong Kong BIT,[364] the U.K. Model BIT, [365] the Mauritius-Africa BIT,[366] and the ASEAN Investment Treaty.[367] The Philippines itself has signed at least thirty BITs.[368] These BITs also recognizes the prohibition against unlawful creeping expropriation.

FTAs also contribute to the development of norms under International Law particularly on the subject of creeping expropriation. Rules on international investment have been increasingly incorporated in FTAs.[369] In fact, from January to May 2006 or within the period of only five months, the UNCTAD has recorded five FTAs that have been concluded with legally binding substantive provisions on investment.[370] The NAFTA[371] and the

361. 2004 Canadian Model BIT, n. 4.

362. *Id.*, annex B.13 (1), ¶ a.

363. *Id.*, annex B.13 (1), ¶¶ b & c.

364. Agreement between the Government of the Kingdom of Thailand and the Government of Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments, Nov. 2005, art. 5, ¶ 1 ("[i]nvestors of either Contracting Party shall not be deprived of their investments or subjected to measures having effect equivalent to such deprivation in the area of the other Contracting Party ...").

365. *See* Reinisch, *supra* note 102, at 15.

366. Agreement between the Government of the Republic of Mauritius and the Government of the Republic of South Africa for the Promotion and Reciprocal Protection of Investments, art. 5, ¶ 1, *available at* www.unctad.org/sections /dite/iia/docs/bits/mauritius_southafrica.pdf (last accessed Jan. 9, 2009) ("[i]nvestments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation ... in the territory of the other Contracting Party ...").

367. ASEAN Investment Treaty, art. 6, ¶ 1 ("[i]nvestments of nationals or companies of any Contracting Party shall not be subject to expropriation nationalisation or any measure equivalent thereto ...").

368. UNCTAD BITs 1959-1999, *supra* note 338, at 12.

369. UNCTAD World Investment Report 2006, *supra* note 332, at 27.

370. *Id.*

371. NAFTA, art. 1110.

Canada-U.S. FTA (CUSFTA)[372] are the most prominent among the many FTAs worldwide.[373] In the NAFTA, Article 1110 expressly recognizes the general prohibition against both direct and indirect expropriations by stating that "[n]o Party shall 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* ... ."[374] This provision has been interpreted in a long line of cases and the NAFTA Tribunal's discussions are consistent with interpretations by other tribunals on creeping expropriation.[375] The older CUSFTA also provided for an almost identical provision in its Chapter 16.[376]

2. Policy Statements and Legislations of States

The declarations of persons who act or speak in behalf of a State that expressly or implicitly presented views on International Law issues and which are solidified in acts or instruments may also evince the existence or non-existence of a custom.[377] Likewise, State legislations also contribute as State practice in support of a norm alongside other sources or contemporary law-making mechanisms under International Law. Examples are provided hereunder to show some States' unilateral recognition of the prohibition against creeping expropriation as seen from their policy statement or statutes. Along with other sources, these pile up to establish both State practice and *opinio juris* in support of the norm.

The records of Judge Schwebel and Prof. Lowenfeld, the United States delegation in the discussion on G.A. Res. 1803, concluded that foreign capital or investment shall be governed by International Law, shall not be subjected to discriminatory treatment, and that the taking of any of the investors' property shall be lawful, for public purpose, adhere to proportionality, and shall be accompanied with prompt, adequate and

372. The Canada-U.S. Free Trade Agreement, Jan. 1, 1989, *available at* http://www.naftaclaims.com/Papers/cusfta-e.pdf (last accessed Jan. 9, 2009) [hereinafter CUSFTA].

373. *See* UNCTAD World Investment Report 2006, *supra* note 332, at 228, 243, 288-89.

374. NAFTA, art. 1110, ¶ 1 (emphasis supplied).

375. *See supra* discussion Part IV; *see infra* discussion Part V (A) (5).

376. CUSFTA, art. 1605, which provides: "Neither Party shall directly or *indirectly* nationalize or expropriate an investment in its territory by an investor of the other Party or take *any measure or series of measures tantamount to an expropriation of such an investment* ... " (emphasis supplied).

377. HARRIS, *supra* note 264, at 23.

effective compensation.[378] The Parliament of Australia enacted The Multilateral Investment Guarantee Agency Act of 1997 recognizing both illegal direct and creeping expropriations as covered by risks under the MIGA.[379] The Law of Ukraine "On Investment Activities," particularly Article 19, Clause 2 thereof, provides that "Investments may not be nationalised, requisitioned or subjected to actions similar in their consequences without compensation."[380] The Official Report, as documented by the OECD, provides that the law should be understood to mean "that expropriation, including creeping expropriation, is an action similar by its consequences to nationalisation and requisition."[381] It is also well recognized that the BITs entered into by States generally form part of their respective laws.[382]

3. General Assembly Resolution

The United Nations' attempts to crystallize indirect expropriation into custom can be traced back in the middle of the twentieth century, with General Assembly Resolution 1803 on the Permanent Sovereignty over Natural Resources (G.A. Res. 1803).[383] After ten years of deliberations in the United Nations Human Rights Committee (UNHCR), the Economic and Social Council (ECOSOC), and the Special Commission on Permanent Sovereignty over Natural Resources, the General Assembly of the United Nations was able to convene in the fall of 1962 to discuss the draft on the

378. LOWENFELD, supra note 104, at 409; Stephen M. Schwebel, The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources, 49 ABA J. 463, 469 (1963).

379. The Multilateral Investment Guarantee Agency Act of 1997, No. 126, art. 11, ¶ a (ii) (15 Sep. 1997) (Aust.), *available at* http://www.gwb.com.au/gwb/news/mai/miga.html (last accessed Jan. 9, 2009).

380. *Actions Taken by the Government of Ukraine Towards Implementation of OECD Recommendations*, 1 (Feb. 21-22, 2002), *available at* http://www.oecd.org/dataoecd/22/13/1832766.pdf (last accessed Jan. 9, 2009) [hereinafter Ukraine Law & Policy].

381. Ukraine Law & Policy, *supra* note 380, at 1; Ukraine Investment Policy Review: The Legal and Institutional Regime for Investment: Assessment and Policy Recommendations 11 (March 2001), *available at* http://www.oecd.org/dataoecd/33/29/1905166.pdf (last accessed Jan. 9, 2009).

382. *See* LOWENFELD, *supra* note 104, at 473-88.

383. *Permanent Sovereignty over Natural Resources*, G.A. Res. 1803 (XVII), 17 U.N. GAOR, 17th Sess., 19th plen. mtg., Supp. (No. 17), Annex, Agenda Item 39 at 59, U.N. Doc. A/5217 (1962) [hereinafter G.A. Res. 1803]; *see also* G.A. Res. 1314 (XIII), U.N. GAOR, 13th Sess. Supp. No. 18, 788th plen. mtg. at 27, U.N. Doc. A/4090 (1958); G.A. Res. 1515 (XV), U.N. GAOR, 15th Sess., Supp. 16, at 9, U.N. Doc. A/4648 (1960).

Declaration on Permanent Sovereignty over Natural Resources.[384] G.A. Res. 1803 included provisions on the promotion of foreign investment for the economic progress of developing countries, and the provision on *expropriation* and *requisitioning*.[385] While the Declaration did not garner a unanimous decision, the same was considered to be a consensus.[386] In fact, the customary status of G.A. Res. 1803 found support in judicial and arbitral decisions on expropriation and foreign investments. In *Texaco Overseas Petroleum Company v. Libyan Arab Republic,* it was held that[387]

> [o]n the basis of the circumstances of adoption mentioned above and by expressing an *opinio juris communis,* Resolution 1803 seems to this Tribunal to reflect the state of customary law existing in the field ... . While Resolution 1803 appears to a large extent as the expression of a real general will, this is not at all the case with respect to the other Resolutions mentioned above ... .[388]

4. International Organizations and their Outputs

The term, international organization (IO) or intergovernmental organization (IGO),[389] is not capable of a precise definition. However, it is correct to state that IOs are "created by, and consist of States, though other subjects of [I]nternational [L]aw (including other organizations) and other international actors (individuals, corporations non-governmental organizations ... ."[390] IOs are "usually created by international agreement, normally, but not

384. *See* LOWENFELD, *supra* note 104, at 407.

385. G.A. Res. 1803, ¶¶ 4, 6 & 7.

386. 87 States voted in favor of the General Assembly Resolution, including the United States; France and South Africa voted no; 12 States abstained (the Communist bloc, Cuba, Ghana and Burma). *See* LOWENFELD, *supra* note 104, at 409.

387. Texaco Overseas Petroleum Company v. Libyan Arab Republic, 53 I.L.R. 389 (1977), 17 I.L.M. 1 (1978), 104 J. DU DROIT INT'L 350 (1977).

388. The Resolutions that the Tribunal held as not to reflect custom on foreign investment and expropriation pertain to G.A. Res. 3281 on the Charter of Economic Rights and Duties of States, which allows the full expropriation (no distinction between direct and indirect) of foreign investments with the sole condition of appropriate compensation. *Texaco Overseas Petroleum Company*, 53 I.L.R. 389, 17 I.L.M. 1, 104 J. DU DROIT INT'L ¶¶ 87-88; *see also* LOWENFELD, *supra* note 104, at 420; *Charter of Economic Rights and Duties of States,* G.A. Res. 3281 (XXIX), 29 U.N. GAOR, Supp. (No. 31) at 50, U.N. Doc. A/9631, *reprinted in* 69 AM. J. INT'L L. 484 (1975).

389. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986, art. 2, ¶ 1 (i), 25 I.L.M. 543 (stating that IO means IGO).

390. WHITE, *supra* note 270, at 1.

exclusively, a multilateral treaty."[391] Resolutions and other legal outputs of IOs, and multilateral declarations by States also contribute to the making of Customary International Law or to other sources of International Law as enumerated in Article 38 of the I.C.J. Statute.[392] States can be said to likewise act through the IOs of which they are Members.[393] The I.C.J. President Madam Rosalyn Higgins, explained that "[w]ith the development of international organizations, ... collective acts by [S]tates, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law."[394]

The OECD with 30 Member States,[395] the UNCTAD with 192 Member States,[396] and the World Bank with 185 States in its general membership,[397] have drafted outputs, or have otherwise spearheaded the formation of documents that demonstrate the entry of creeping expropriation into custom.[398]

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391. *Id.*

392. BOYLE & CHINKIN, *supra* note 18, at 225; G. Abi-Saab, *Cours Général de Droit International Public,* 207 RECUEIL DES COURS 33, 160-61 (1987); WHITE, *supra* note 37, at 158.

393. *See* WHITE, *supra* note 37, at 169.

394. *Id.;* Rosalyn Higgins, The Development of International Law Through the Political Organs of the United Nations 3 (1963).

395. OECD, *About the OECD, available at* http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last accessed Jan. 9, 2009). It also "also shares expertise and exchanges views with more than 70 other countries, from Brazil, China, and Russia to the least developed countries in Africa." *See* Convention on the Organisation for Economic Co-operation and Development, 14 Dec. 1960, arts. 7, 9-10, 88 U.N.T.S. 179, [hereinafter OECD Convention]; Supplementary Protocol No. 2 to the Convention on the OECD, 14 Dec. 1960, *available at* http://www.oecd.org/document/2/0,3343,en_2649_34483_1916226_1_1_1_1,00.html (last accessed Jan. 9, 2009).

396. United Nations Conference on Trade and Development, *Membership of UNCTAD and TDB, available at* http://www.unctad.org/Templates/Page.asp?intItemID=1929&lang=1 (last accessed Jan. 9, 2009).

397. It must be noted however that the World Bank Group is composed of five agencies, the membership of which differ. *See* World Bank, *About Us: Members, available at* http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTU/0,,contentMDK:20103870~menuPK:1697011~pagePK:51123644~piPK:329829~theSitePK:29708,00.html (last accessed Jan. 9, 2009).

398. It is also worthy to highlight that these IOs aspire for universal State membership, as opposed to mere regional membership. *See Ratification of the Convention on the OECD,* OECD, *available at* http://www.oecd.org/document/58/0,3343,en_2649_34483_1889402_1_1_1_1,00.html (last accessed Jan. 9, 2009).

Outputs by the OECD

The draft of the OECD's Multilateral Agreement on Investment (MAI) is "similar in most respects to the investment provisions of the NAFTA."[399] In relation to creeping expropriation, the final consolidated text by the Negotiating Group on the MAI provided that "[a] Contracting Party shall not expropriate or nationalise directly or *indirectly* an investment in its territory of an investor of another Contracting Party *or take any measure or measures having equivalent effect* ... ."[400] In the Commentaries to the MAI, the afore-quoted provision did not only expressly state the word, "indirectly" but also mentioned that the phase "measure or measures having equivalent effect."[401] The MAI however, did not materialize into a convention because of the strong attack by environmental and human rights groups, which objected on the protection of multinational corporations.[402] It was held that at the time the MAI was drafted, the creation of a multilateral convention on investment was not yet ripe.[403] The OECD's *Draft Convention on the Promotion of Foreign Property* also provided for a similar provision.[404]

Recently, in September 2004, the OECD, through the Investment Division Legal Advisor of its Directorate for Financial and Enterprise Affairs, drafted a Working Paper on *Indirect Expropriation and the Right to Regulate under International Investment Law*.[405] The 22-page Report briefly discussed the concept of creeping expropriation and its elements. It also cited a few

399. SORNARAJAH, *supra* note 7, at 291; Rainer Geiger, *Towards a Multilateral Agreement on Investment,* 31 CORNELL J. INT'L L. 467 (1998).

400. Multilateral Agreement on Investment Draft Consolidated Text, Negotiating Group on the MAI, Organisation for Economic Co-operation and Development, OECD Doc. No. DAFFE/MAI(98)7/REV1, at 56 (22 Apr. 1998) [hereinafter MAI]. (emphasis supplied)

401. Multilateral Agreement on Investment Commentary to the Consolidated Text, Negotiating Group on the MAI, Organisation for Economic Co-operation and Development, OECD Doc. No. DAFFE/MAI(98)8/REV1, at 56 (22 Apr. 1998).

402. SORNARAJAH, *supra* note 7, at 292.

403. *Id.* at 291.

404. OECD Draft Convention on the Protection of Foreign Property, art. 3.

405. *See generally* OECD Report, *supra* note 107. The Document was developed primarily as an input to the Investment Committee's work that would help better understand the notion of creeping expropriation under International Investment Law. However, such document has been used as a material in the field of international investment. For instance, the Report was used as part of the official basic materials issued by the International Law Students Association (ILSA) for the 2007 Philip C. Jessup International Law Moot Court Competition, which involves a problem on creeping expropriation. *See* www.ilsa.org/jessup.

examples of treaties, and judicial and arbitral decisions – sources which help evince the customary nature of norms under International Law.

Reports and Documents by the UNCTAD

The UNCTAD, which was established in 1964, seeks to promote the development-friendly integration of the many developing States into the globalizing world economy.[406] The "UNCTAD has progressively evolved into an authoritative knowledge-based institution whose work aims to help shape current policy debates and thinking on development, with a particular focus on ensuring that domestic policies and international action are mutually supportive in bringing about sustainable development."[407] Consistent with its mandate to undertake "research, policy analysis and data collection for the debates of government representatives and experts,"[408] the UNCTAD efficiently prepares legal outputs and publications, which relate to trade and development. In the field of international investment, it has prepared and issued a variety documents, tackling different economic and legal issues.[409] For instance, the UNCTAD has released titles such as the Taking of Property, FDI Reports, World Investment Reports in different years, BITs 1959-1999, BITs 1995-2006: Trends in Investment Rulemaking, among others. They proved to be very useful and significant in the study of foreign investments and legal investment issues today.

The World Bank Guidelines on Foreign Investment (1992)

Other than the MIGA Convention, which it has pioneered, the World Bank is also identified for another instrument on foreign investment, which evinces the prohibition against an illegal creeping expropriation, i.e., the World Bank Guidelines on Foreign Investment of 1992.[410] Particularly, Section 4 of the Guidelines provides that

> [a] state may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or *take measures which have similar effects*, except where this is done in accordance with applicable legal procedures, in

406. United Nations Conference on Trade and Development, *About UNCTAD, available at* http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1 (last accessed Jan. 9, 2009).

407. *Id.*

408. *Id.*

409. *See* www.unctad.org

410. Guidelines on the Treatment of Foreign Direct Investment by World Bank Group and the IMF, 25 Sep. 1992, 31 I.L.M. 1366 (1992) [hereinafter World Bank Guidelines on Foreign Investment].

> pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation.[411]

5. Decisions of International Tribunals

The Principle of *Stare Decisis*[412] or the Doctrine of Precedent is not generally adhered to by courts and tribunals on the international plane.[413] For example, Article 59 of the I.C.J. Statute provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."[414] However, Professors Brownlie, Damrosch, Henkin, Schachter, Pugh, Smit and Shaw opined that this does not mean that the courts actually ignore precedent, because such principle would find application in cases that involve Customary International Law principles.[415] And there is a "general desire for consistency and stability in the Court's case-law when the Court is dealing with legal issues."[416] From the trend set by international courts and tribunals, they have been generous in adhering to previous decisions so as to insert a measure of uniformity and stability in the doctrines, and to create a reasonable degree of certainty[417] for States that a case will be decided in a particular manner. Indeed, the I.C.J. for example, regularly refers to its previous decisions. The I.C.J. in the *Case Concerning the Land, Island and Maritime Frontier Dispute* referred for instance, to the *Nicaragua Case* and stated that "the Court has made clear in previous cases ...

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411. World Bank Guidelines on Foreign Investment, § 4, ¶ 1 (emphasis supplied).

412. DAMROSCH, ET AL., *supra* note 2, at 134-35; SHAW, *supra* note 34, at 130, 133, 157.

413. SHAW, *supra* note 34, at 133, citing Trendtex Trading Corporation v. Central Bank of Nigeria, 2 W.L.R. 356, 365, 64 I.L.R. 111, 128 (1977); BOYLE & CHINKIN, *supra* note 18, at 293.

414. I.C.J. Statute, art. 59.

415. BROWNLIE, *supra* note 62, at 44-45; SHAW, *supra* note 34, at 133, citing Chung Chi Cheung v. R, 1939 A.C. (L. REP., APPEAL CASES), 9 ANN. DIG. & REP. OF PUBLIC INT'L L. 214; *see also* Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, 3 ALL E.R. (ALL ENGLAND L. REP.) 961, 967, 969-70, 64 I.L.R. 81 (1975); DAMROSCH, ET AL., *supra* note 2, at 134 (stating that Court's decisions are likewise declaratory of the law laid down in conventions or treaties by States).

416. BOYLE & CHINKIN, *supra* note 18, at 293, *quoting* 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-1996 1610 (The Hague 1997). Judge Robert Jennings discussed in his dissenting opinion in the *Continental Shelf Case* between Libya and Malta that Article 59 does not have the weight to alter the persuasive capacity of decisions of the Court. *See* Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. 13, ¶ 27 (Jennings, J., dissenting); BOYLE & CHINKIN, *supra* note 18, at 296.

417. DAMROSCH, ET AL., *supra* note 2, at 135.

."[418] The *Nicaragua Case* referred to the *North Sea Continental Shelf Cases* in its discussion of custom.[419] It also adhered to certain principles discussed in the *Corfu Channel Case*: respect for territorial sovereignty,[420] the right of intervention,[421] and the principles of humanity.[422] In the *Arrest Warrant Case,* the I.C.J. used the phrase, "according to its settled jurisprudence."[423] The I.C.J. in the *Avena Case* held that "the fact that ... the Court's ruling has concerned only Mexico nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations ... ."[424] The I.C.J. President Higgins also made a very significant observation, saying:

> States which have no dispute before the Court follow the judgments of the Court with the greatest interest, because they know that *every judgment is at once an authoritative pronouncement on the law*, and also that, should they become involved in a dispute in which the same legal issues arise, *the Court, which will always seek to act consistently and build on its own jurisprudence*, will reach the same conclusions.[425]

Finally, judges or arbiters elected to international courts or tribunals are considered to be experts in International Law or even in a very specialized field or area thereof; and they undergo a process of selection or compliance with certain qualifications.[426] Accordingly, courts and tribunals through their

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418. Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 1990 I.C.J. 92, ¶ 52.

419. Military and Paramilitary Activities Merits, 1986 I.C.J. ¶¶ 177, 183, 185, 207.

420. *Id.* ¶ 202 (citing Corfu Channel (U.K. v. Alb.) (Merits), 1949 I.C.J. 4, 35).

421. *Id.* ¶ 202 (citing Corfu Channel Merits, 1949 I.C.J. at 34).

422. *Id.* ¶ 215 (quoting Corfu Channel Merits, 1949 I.C.J. at 22).

423. Arrest Warrant of 11 April (Congo v. Belg.), 2002 I.C.J. 121, ¶ 26.

424. Avena and other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581, ¶ 151 (2004); BOYLE & CHINKIN, *supra* note 18, at 293.

425. BOYLE & CHINKIN, *supra* note 18, at 294, *quoting* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 202-03 (1993) (emphasis supplied). Boyle and Chinkin also stated:

> *Courts provide the ultimate affirmation for law-making* undertaken by international organizations, treaty conferences and the International Law Commission. They can bring *some measure of coherence* to this fragmented institutional setting insofar as they have to adjudicate on the inter-relationship of different norms, but they can do so only sporadically and are dependent on the establishment of jurisdiction. BOYLE & CHINKIN, *supra* note 18, at vi-vii (emphasis supplied).

426. *Id.* at 298-99; *see, e.g.* I.C.J. Statute, art. 2; Rome Statute of the International Criminal Court, art. 36, ¶ 3, U.N. Doc. A/CONF.183/9, 37 I.L.M. 9999 [hereinafter Rome Statute]; World Trade Organization Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2, 1994, art.

decisions, have the capacity to contribute to hardening the law through the provision of hard remedies,[427] and may produce the necessary State practice and *opinio juris* that would establish Customary International Law.[428]

Countless international judicial and arbitral decisions demonstrate the international protection of foreign investments against illegal expropriations by States. The investment claims in these decisions related to issues of "fair and equitable treatment, non-discrimination, expropriation, and regulatory measures 'tantamount to expropriation,'" which is more commonly known as creeping or indirect expropriation.[429] The UNCTAD, in its 2006 World Investment Report, has recorded about 226 investor-State disputes that were filed by the end of 2005.[430] From such number, 136 were filed in the ICSID, 67 in the UNCITRAL, 14 in the Stockholm Chamber of Commerce, 4 in the International Chamber of Commerce, and 4 in *ad hoc* arbitrations.[431] Numerous cases have also been decided by the Iran-U.S. Claims Tribunal with its 29 volumes of reports.[432] It is also noteworthy that the P.C.I.J. and the I.C.J. also touched on the concept of indirect expropriation in a some of their decisions.[433] The decisions of all the aforementioned international courts and tribunals are considered to have been widely drawn upon and cited.[434]

Dating back to the first half of the twentieth century, the P.C.I.J. had the occasion to discuss what is now called indirect expropriation and its

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8, 1867 U.N.T.S. 154 [hereinafter DSU]; Statute for the International Tribunal for the Law of the Sea, 10 Dec. 1982, annex VI, United Nations Convention on the Law of the Sea, art. 2, 1833 U.N.T.S. 3, 21 I.L.M. 1345 [hereinafter ITLOS Statute].

427. Alvarez, *supra* note 21, at 421.

428. BOYLE & CHINKIN, *supra* note 18, at 295, 300; *see also* DAMROSCH, ET AL., *supra* note 2, at 137 (stating that "[i]nternational decisions also embrace the numerous judgments of arbitral tribunals established by international agreement for individual disputes or for categories of disputes. Though they are not in a strict sense judicial bodies, they are generally required to decide in accordance with law and their decisions are considered an appropriate subsidiary means of determining international law." The I.C.J. and Governments also refer to the consistent practice of arbitral decisions as evidence of law. Thus, they are considered to have weight on a par or at least comparable to judicial decisions, and therefore form part of what is embraced by the term, "international decisions").

429. Howell, *supra* note 335; *see also supra* discussion Part IV (A).

430. UNCTAD World Investment Report 2006, *supra* note 332, at 27.

431. *Id.*

432. LOWENFELD, *supra* note 104, at 471.

433. *See supra* discussion Part IV.

434. BOYLE & CHINKIN, *supra* note 18, at 300.

scope, in the *Norwegian Shipowners' Claims*. In such case,[435] although the United States alleged the non-application of expropriation to interference with contractual rights, the Court held that there was an expropriation because the U.S. through "Fleet Corporation took over the legal rights and duties of the shipowners toward the shipbuilders"[436] and "that the cancellation of existing contracts for the building of ships by Norwegian contractors had amounted to a *de facto* expropriation."[437] The P.C.I.J. also touched on the concept of indirect expropriation but without labelling it as such. In the *Oscar Chinn Case*,[438] Oscar Chinn, a British national, operated a shipping business in the Belgian Congo. He was in direct competition with a company partly owned by Belgium, the Unatra. Because of serious economic downfalls in Congo, Belgium subsidized and lowered the transportation rate of Unatra. This made it difficult for Oscar Chinn to compete on a par with Unatra, which resulted in the closure of his business. The United Kingdom filed a claim on behalf of Chinn against Belgium, anchored on the point that Belgium's action in lowering the rate of Unatra rendered the investment of Chinn valueless and incapable of operating without incurring losses. The P.C.I.J. ruled that the shutting down of Chinn's business cannot be attributed to Belgium because "[n]o enterprise — least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rate — can escape from the chances and hazards resulting from general economic conditions;"[439] hence, no creeping expropriation was found. The *German Interests Case* was also demonstrative of the prohibition against indirect expropriation. The German company, Bayerische, possessed contractual rights of managing and operating Chorzów Factory, a nitrate plant that was owned by another German company, Oberschlesische. During the First World War, measures were undertaken by Poland against the Factory, which is alleged to be an illegal expropriation. The P.C.I.J. held that not only the Factory was expropriated, but also the contractual and management rights of the owners-investors.[440]

The I.C.J. in the *ELSI Case* recognized the right of Raytheon Manufacturing Company, as the foreign parent corporation and thus the FDI, over its subsidiary in the host State: ELSI.[441] Thus, when the mayor of

435. *See supra* discussion Part IV (B) (2).

436. Norwegian Shipowners' Claims, 1 R.I.A.A. at 323.

437. Reinisch, *supra* note 102, at 5-6; *Norwegian Shipowners' Claims,* 1 R.I.A.A. at 325. It must be noted that a creeping expropriation is also known as a *de facto* expropriation. *See supra* discussion Part IV (A).

438. *Oscar Chinn,* 1934 P.C.I.J. (ser. A/B) No. 63.

439. *Id.* at 88.

440. German *Interests in Polish Upper Silesia Judgment,* 1926 P.C.I.J. (ser. A) No. 7, at 44; *see also* Reinisch, *supra* note 102, at 7.

441. *See generally* Case Concerning Elettronica Sicula, 1989 I.C.J. 15.

Palermo, Italy, "requisitioned" the plant, Raytheon eventually sought the help of the United States to espouse its claim against Italy. It alleged that the *interference* of Italy *in the management* of the ELSI constituted a violation of International Law. The Chamber however, ultimately rejected the claim because the United States was not able to prove that the ELSI plant still had substantial value at the time the measure was undertaken by the mayor.[442]

The concept of creeping or indirect expropriation became more pronounced in recent judicial and arbitral decisions. For instance, the ICSID Tribunal summarized a number of decisions in the 2005 decision of *CMS Gas Transmission Company v. The Argentine Republic*:[443]

> 261. The Tribunal in the *Lauder* case rightly explained that
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> "The concept of indirect (or "de facto", or "creeping") expropriation ... is a measure that does not involve an overt taking, but that effectively neutralized the enjoyment of the property."[444]
>
> 262. The essential question is therefore to establish whether the enjoyment of the property has been *effectively neutralized*. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of *substantial deprivation*. In the *Metalclad* case the tribunal held that this kind of expropriation relates to *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 reasonable-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."*[445] Similarly, the Iran-United States Claims Tribunal has held that deprivation must affect "*fundamental rights of ownership*,"[446] a criteria reaffirmed in the *CME v. Czech Republic* case.[447] The test of interference with *present uses and prevention of the realization of a reasonable return on investments* has also been discussed by the Respondent in this context.
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> 263. Substantial deprivation was addressed in detail by the tribunal in the *Pope & Talbot* case ... .[448]

Also in *TECMED*, the widely known expectation of the Claimant for a long-term landfill business was properly considered; and by reason of such

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442. *Id. See also* LOWENFELD, supra note 104, at 436.

443. CMS Gas Transmission Company v. The Argentine Republic (Award), ICSID Case No. ARB/01/8, ¶¶ 261-63 (12 May 2005).

444. *Lauder*, UNCITRAL Arb. Trib. ¶ 200.

445. *Metalclad Corp.*, ICSID Case No. ARB(AF)/97/1.

446. *Tippetts, Abbett, McCarthy, Stratton*, 6 Iran-U.S. Cl. Trib. Rep. at 225; *see also Phelps Dodge Corp.*, Award No. 217-99-2, 10 Iran-U.S. Cl. Trib. Rep. 121.

447. *CME Czech Republic B.V. Partial Award*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS ¶ 688.

448. Pope & Talbot Inc. Interim Award, ¶¶ 96 & 102 (emphasis supplied).

legitimate expectation, a finding of indirect expropriation was made.[449] Indirect expropriation was also discussed by the ICSID tribunal in *Olguín v. Republic of Paraguay*,[450] and *Southern Pacific Properties v. Egypt.*[451]

The NAFTA also resolved disputes relating to creeping expropriation. In *Metalclad,* the Claimant was awarded a concession contract to construct and operate a waste-disposal system, and was given the required permit for the purpose. When the project was completed however, Mexico issued an Ecological Decree, which rendered the investment useless because the Claimant can no longer operate the landfill business. The Tribunal held that Mexico's act is tantamount to expropriation.[452] In the *S.D. Myers Case,* Canada's act of banning the export of polychlorinated biphenyls (PCBs) did not amount to expropriation because of the existence of a fixed period only during which the export shall be disallowed. Thus, it met the criterion that interference must merely be ephemeral.[453] It also concurred with the statement in *Pope & Talbot* that "tantamount to expropriation" is actually the same as indirect expropriation.[454] In *Pope & Talbot,* the claimant, a Delaware corporation, invested in a Canadian subsidiary company engaged in the business of manufacturing and exporting softwood lumber to the United States. When Canada and the U.S. however, concluded the Softwood Lumber Agreement in 1996, it created limits on the export of softwood lumber to the U.S.; hence Canada implemented the Canadian Export Control Regime. The claimant alleged that the Regime amounts to indirect

449. *See supra* discussion Part IV (D) (3); *Técnicas Medioambientales TECMED S.A.*, ICSID Award Case No. ARB (AF)/00/2 ¶ 50.

450. Eudoro A. Olguin v. Republic of Paraguay (Award), ICSID Case No. ARB/98/5, ¶ 84 (2001). "For an expropriation to occur there must be actions that can be considered reasonably appropriate for producing the effect of *depriving the affected party of the property it owns*, in such a way that whoever performs those actions will acquire, *directly or indirectly, control, or at least the fruits of the expropriated property*." (emphasis supplied)

451. *Southern Pacific Properties (Middle East) Ltd. Award*, 3 ICSID Rep. at 228, ¶ 164. The ICSID Tribunal held that "there is considerable authority for the proposition that *contract rights* are entitled to the protection of [I]nternational [L]aw and that the taking of [or substantial interference with] such rights involves an obligation to make compensation therefor."

452. *Metalclad Corp.*, ICSID Case No. ARB(AF)/97/1. It noted that "[e]xpropriation under NAFTA includes not only takings of property, such as outright seizure or formal or obligatory transfer of title in favor 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 of reasonable-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."

453. *S.D. Myers Partial Award*, 40 I.L.M. ¶¶ 285-86.

454. *Id.* ¶ 286.

expropriation because it deprived the claimant the normal capacity to dispose of its products, while Canada invoked police power. The Tribunal ruled in favour of *Pope & Talbot*, saying that a "blanket exception for regulatory measures would create a gaping loophole in international protection against expropriation ... . The test is whether that interference is sufficiently restrictive to support a conclusion that the property has been *taken* from its owner."[455]

In *Feldman Karpa v. Mexico*, the NAFTA Tribunal denied Feldman's claim that the Mexican Government's decision to deny rebates on excise tax for the export of certain cigarettes from Mexico constituted an indirect creeping expropriation of its business.[456]

The Iran-U.S. Claims Tribunal is also renowned for its interpretation and scholarly discussion of creeping expropriation. For example, in the *Tippetts Case,* the majority of the Tribunal concluded that the Claimants were entitled to compensation for their 50% interest in a joint venture that they entered into. This is because of Iran's appointment of a manager for the business, which deprived the Claimant of control of and benefit over the property.[457]

In *Starrett,* the Iranian Government took a series of adverse measures against the Claimant. It started with the appointment of the managers who would direct all of Starrett Housing's activities. It was held that by such

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455. *See Pope & Talbot Inc. Phase Two*, NAFTA Ch. 11 Arb. Trib., 41 I.L.M. ¶ 99.

456. *Marvin Roy Feldman Karpa*, ICSID Award Case No. ARB(AF)/99/1, *reprinted in* 18 ICSID REV. – FOREIGN INVESTMENT L.J. ¶ 110.

457. Tippetts, Abbett, McCarthy, Stratton, 6 Iran-U.S. Cl. Trib. Rep. at 225. The Tribunal held:

> The Tribunal prefers the term "deprivation" to the term "taking", although they are largely synonymous, because the latter may be understood to imply that the Government had acquired something of value, which is not required.
>
> A deprivation or taking of property may occur under [I]nternational [L]aw through interference by a [S]tate in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.
>
> While assumption of control over property by a government does not automatically and immediately justify a conclusion that property has been taken by the government, *thus requiring compensation* under [I]nternational [L]aw, such a conclusion is warranted whenever events demonstrate that the owner was *deprived of fundamental rights of ownership* and it appears that this deprivation is *not merely ephemeral.* The intent of the government *is less important than the effects of the measures on the owner,* and the form of the measures of control or interference is less important than the reality of their impact. (emphasis supplied).

actions, Iran effectively deprived the Claimants of "the effective use, control, and benefits of their property rights." The Tribunal discussed that a State's measure is considered to be a creeping expropriation when it interferes "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."[458]

The UNCITRAL, through its tribunals, also ruled upon cases on creeping expropriation. Two of its prominent cases include *CME Czech Republic B.V. v. The Czech Republic*[459] and *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana.*[460]

The ECHR, in *Sporrong and Lönnroth*[461] held that no expropriation occurred because the Claimants can still use, enjoy and dispose of his property.[462] In discussing proportionality as part of the element of purpose, the ECHR in the *Case of the former King of Greece and Others v. Greece,* cited the *Sporrong Case*, saying that the interference with the enjoyment of property must be balanced with general interest.[463]

The E.C.J. also noted in *Hauer v. Land Rheinland-Pfalz,* that no indirect expropriation could exist if the European Commission's prohibition to plant grape vines does not substantially interfere with property rights since the said proscription was merely for a short period of time in order to control surplus in the production.[464]

Many other decisions contribute to the crystallization of the prohibition against illegal creeping expropriation.[465] Whether or not the tribunal ruled in

458. *Starrett Housing Corp.*, Interlocutory Award No. ITL 32-24-1, 4 Iran-U.S. Cl. Trib. Rep. at 154; *CME Czech Republic B.V. Partial Award*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS at 109, ¶ 319; OECD Report, *supra* note 107, at 11; Fortier & Drymer, *supra* note 107, at 302.

459. *CME Czech Republic B.V. Partial Award*, UNCITRAL Arb. Trib., *reprinted in* 14 WORLD TRADE & ARB. MATERIALS at 109, ¶ 591; *see also The Czech Republic Judgment*, Case No. T 8735-01. *See supra* discussion Part IV.

460. *Biloune and Marine Drive Complex Ltd.*, UNCITRAL *ad hoc* Trib., 95 I.L.R. at 209. *See supra* discussion Part IV.

461. *See supra* discussion Part IV (D) (1) (a).

462. *Sporrong and Lönnroth*, 52 Eur. Ct. H.R. (ser. A) No. 52, *cited in* OECD Report, *supra* note 107, at 13.

463. *Case of the former King of Greece*, Eur. Ct. H.R. Application No. 25701/94 ¶ 89, citing *Sporrong and Lönnroth*, 52 Eur. Ct. H.R. (ser. A) No. 52 ¶ 69. *See supra* discussion Part IV (D) (2) (b).

464. *Hauer*, E.C.J. Case No. 44/79; Gary H. Sampliner, *supra* note 189, at 17.

465. *Técnicas Medioambientales TECMED S.A.*, ICSID Award Case No. ARB (AF)/00/2; *CME Czech Republic B.V. Partial Award*; *Marvin Roy Feldman Karpa*,

favor of the existence of a creeping expropriation in the particular case being decided upon is not material. What is significant is that these courts and tribunals recognized the concept of creeping expropriation; and determined

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ICSID Award Case No. ARB(AF)/99/1; *Middle Eastern Shipping and Handling Co.*, ICSID ARB/99/6 ¶ 107; *Pope & Talbot Inc. Phase Two*, NAFTA Ch. 11 Arb. Trib., 41 I.L.M. ¶ 99; *Pope & Talbot Inc. Interim Award*; *Case of the former King of Greece*, Eur. Ct. H.R. Application No. 25701/94 ¶ 89; *Compañia del Desarrollo de Santa Elena S.A.*, 5 ICSID Rep. ¶ 76; *Metalclad Corp.*, ICSID Case No. ARB(AF)/97/1; *Wena Hotels Ltd.*, 6 ICSID Rep. ¶ 98; *S.D. Myers*, 40 I.L.M. ¶ 281; *Tradex Hellas S.A.*, 5 ICSID Rep. ¶ 191; *British-American Tobacco Company Ltd.*, Eur. Ct. H.R. (ser. A) No. 331, at 90-91; *Pressos Compania Naviera S.A.*, 9 Eur. Ct. H.R. 119 (ser. A) No. 332, ¶ 31; *Southern Pacific Properties (Middle East) Ltd.*, 3 ICSID Rep. at 228, ¶ 164; *Fredin*, 13 Eur. Ct. H.R. 784 (ser. A) No. 192, ¶ 47; *Smith Kline and French Laboratories*, Applications Nos. 12633/87, Eur. Ct. H.R.; *Biloune and Marine Drive Complex Ltd.*, UNCITRAL *ad hoc* Trib., 95 I.L.R. at 209; *Emanuel Too and Greater Modesto Insurance Associates*, Award No. 460-880-2, 23 Iran-U.S. Cl. Trib. Rep. 378; *Phillips Petroleum Company, Iran*, Award No. 425-39-2, 21 Iran-U.S. Cl. Trib. Rep. ¶ 76; *Tre Trakiörer AB*, Eur. Ct. H.R. (ser. A) No. 159, ¶ 53; *Liberian Eastern Timber Corporation*, ICSID Case No. ARB/83/2; *Amoco International Finance Corporation*, Partial Award No. 310-56-3, 15 Iran-U.S. Cl. Trib. Rep. 189; *Lithgow*, 8 Eur. Ct. H.R. 329 (ser. A) No. 102, ¶ 107; *Van Marle*, 8 Eur. Ct. H.R. 483 (ser. A) No. 101, ¶ 41; *James*, 98 Eur. Ct. H.R. (ser. A) No. 98, ¶ 39; *Phelps Dodge Corp.*, Award No. 217-99-2, 10 Iran-U.S. Cl. Trib. Rep. at 130; *Amco Asia Corporation*; *Tippetts, Abbett, McCarthy, Stratton*, 6 Iran-U.S. Cl. Trib. Rep. at 130; *Sea-Land Service, Inc.*, Award No. 135-33-1, 6 Iran-U.S. Cl. Trib. Rep. 149; *ITT Industries*, 2 Iran-U.S. Cl. Trib. Rep. 348; *Starrett Housing Corp.*, Interlocutory Award No. ITL 32-24-1, 4 Iran-U.S. Cl. Trib. Rep. at 154; *Sporrong and Lönnroth*, 52 Eur. Ct. H.R. (ser. A) No. 52, ¶ 69; *Libya v. Libyan Am. Oil Co.*, 20 I.L.M. at 58; *Benvenuti & Bonfant, reprinted in* 1 ICSID Rep. 330; *Allgemeine Gold-und Silberscheideanstalt*, 2 W.L.R. 555; *Hauer*, E.C.J. Case No. 44/79; *Revere Copper & Brass, Inc.*, 56 I.L.M. 258; *B.P. v. Libya*, 53 I.L.R. at 329; *International Bank*, 11 I.L.M. at 1227-28; *Lauder*, UNCITRAL Arb. Trib.; *Stran Greek Refineries and Stratis Andreadis*, Eur. Ct. H.R. (ser. A) No. 301, ¶ 62; Ethyl v. Canada, 38 I.L.M. 708 (1999); *DeSabla Claim, in* 28 AM. J. INT'L L. at 611; Azinian v. Mexico, 5 ICSID Rep. 269 (1998); Loewen v. U.S. 42 I.L.M. 811 (2003); *Mondev International Ltd.*, Case No. ART(AF)/99/2; Goetz v. Burundi, 26 Y.C.A. 24 (2001); Shahin Shaine Ebrahimi, et al. v. The Government of the Islamic Republic of Iran, Final Award No. 560-44/46/47-3, 30 Iran-U.S. Cl. Trib. Rep. 170 (12 Oct. 1994); United Painting Company, Inc. v. The Islamic Republic of Iran, Award No. 458-11286-3, 23 Iran-U.S. Cl. Trib. Rep. 351, 366-70 (20 Dec. 1989); Sedco, Inc. v. National Iranian Oil Company, et al., Award No. 309-109-3, 15 Iran-U.S. Cl. Trib. Rep. 23 (07 July 1987); *Libyan American Oil Company*, 62 I.L.R. 140, 20 I.L.M. at 61-62; Sapphire, 35 I.L.R. 136 (1963); Gudmundson v. Iceland, 30 I.L.R. 253 (1960); *CMS Gas Transmission Company*, ICSID Case No. ARB/01/8; Aminoil v. Kuwait, 21 I.L.M. 976 (1982).

its existence or non existence that would engage a State's responsibility based on the uniform general elements of such type of expropriation under International Law.

6. Decisions of Municipal Tribunals

A myriad of occasions have proved that persons or individuals act or speak on behalf of a State; or that they have made declarations that have expressly or implicitly presented views on issues in International Law, such as the domestic courts. These circumstances that are solidified in acts or instruments may also evince the existence or non-existence of a custom.[466] Conversely, decisions of municipal courts or tribunals are *indicative* of State practice and *opinio juris*.[467] The *Paquete Habana* and the *Lotus Cases* for instance, cited municipal decisions to evince custom.[468] Certain municipal courts had the occasion to rule on matters, which relate to the concept of indirect expropriation.

The United States in *U.S. v. Causby*,[469] discussed expropriation in the light of the concept of creeping expropriation.[470] *Penn Central Transportation Co. v. New York City* tackled the issue of whether a city may pose restrictions on the owners' control over property in order to preserve the City's historical landmarks,[471] which in the said case, was the Grand Central Terminal; and whether such act would not constitute a taking.[472] In the said case, the Terminal, having been designated as a landmark, the owners thereof were required to keep the exterior features of the building "in good repair" and any alterations on the structure must be approved in advance by the Landmarks Preservation Commission. But since the proposal for the alteration of the structure included the tearing down of the façade along 42nd Street, such proposal was denied. The Supreme Court held that the regulation did not amount to a taking (or to a substantial interference) because the appellants may still continue to use the property as it has been used for the past years, i.e., a railroad terminal with office space; and that the regulation does not interfere with the "present use" of the said Terminal.[473] *Penn Central* cited a number of U.S. cases relating to indirect takings. For

466. HARRIS, *supra* note 264, at 23.

467. DAMROSCH, ET AL., *supra* note 2, at 139.

468. *Id.*

469. *Causby*, 328 U.S. 256.

470. *See infra* discussion Part VI.

471. In compliance with the City's Landmarks and Preservation Law. *See generally* Penn Central Transportation Co., et al. v. York City, et al., 438 U.S. 104 (1978) (U.S.).

472. *Penn Central*, 438 U.S. 104.

473. *Id.*

instance, *Pennsylvania Coal Co. v. Mahon* held that important public policy may frustrate or interfere with the owner's "distinct investment-backed expectations as to amount to a 'taking.'"[474] But in the case, although the claimant had an agreement where he reserved the right to remove coal under the properties, which he has previously sold, the subsequent law forbidding the mining of coal (unless the house or property belongs to the owner of the coal thereunder) prevented him from mining his coal. The Court held that the law was void for it validates a taking without just compensation.[475]

The UNCITRAL Tribunal's *CME Case*,[476] which discussed the issue of creeping expropriation, was upheld by Department 16 of the Court of Appeal of Svea of Sweden and denied the Czech Republic's motion to declare such ruling as invalid.[477] Even the Philippines *somehow* recognized the concept of creeping expropriation[478] in *Republic v. Philippine Long Distance Telephone Company* (PLDT)[479] in the course of interpreting Article 12, Section 18 of the 1987 Philippine Constitution.[480]

7. Teachings of the Most Highly Qualified Publicists

A highly qualified publicist may refer to those who have a high degree of expertise in a particular field of International Law, has been recognized as such, and whose works have been published in international documents, such as in journals, books and reports.[481] The forerunners in the discussion of

474. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (U.S.).

475. *Id. See also* Penn Central, 438 U.S. 104.

476. *See supra* discussion Part IV (C).

477. The Czech Republic v. CME Czech REPUBLIC B.V. Judgment, Case No. T 8735-01 at 2, ¶ 1.

478. Fr. Joaquin G. Bernas, S.J. mentioned in his scholarly work that to constitute a compensable taking, the appropriation of any of the property interests in the bundle of rights would suffice, "even if the bare title to the property still remains with the private owner." *See* BERNAS COMPREHENSIVE REVIEWER, *supra* note 105, at 105; JOAQUIN G. BERNAS, S.J., THE PHILIPPINE CONSTITUTION: A REVIEWER-PRIMER 134-35 (4th ed. 2002) [hereinafter BERNAS PRIMER].

479. *See generally* Republic v. Philippine Long Distance Telephone Company, 26 SCRA 620 (1969); *see infra* discussion Part VI.

480. PHIL. CONST., art. 12, § 18 ("The State may, in the interest of national welfare or defense, establish and operate vital industries and, upon payment of just compensation, transfer to public ownership utilities and other private enterprises to be operated by the government.").

481. *See generally* SHAW, *supra* note 34, at 105-07; HARRIS, *supra* note 264, at 53-54 Although the weight of teachings of highly qualified publicists are not as great as it used to be, they are still considered to be persuasive. They are also important

creeping expropriation include: Andreas F. Lowenfeld, Rudolf Dolzer, Margrete Stevens, M. Sornarajah, Catherine Yannaca-Small, L. Yves Fortier, Stephen L. Drymer, Gary H. Sampliner, Louis Sohn, Richard Baxter, August Reinisch,[482] Michael J. Trebilcock, Robert Howse, Naveen Gurudevan, Gerhard Loibl, Martin Dixon, Robert McCorquodale, Malcolm D. Evans, Lori F. Damrosch, Louis Henkin, Oscar Schachter, Richard Crawford Pugh, Hans Smit, David J. Harris, Malcolm N. Shaw, and Ian Brownlie. Their writings have been published in various documents such as books,[483] journal articles,[484] and materials of IOs.[485] These scholars are law professors,[486] lawyers, or even counsels in some of these disputes[487] who are learned and experienced in the field of Public International Law, or even more specifically, in international investment law. Further, outputs of institutions such as the UNCTAD, the OECD and the World Bank, may also be considered as teachings of the most highly qualified publicists. These highly qualified publicists have (1) recognized the notion of indirect expropriation; (2) viewed the possibility of the customary nature of creeping expropriation; *or* (3) documented contemporary law-making mechanisms or sources that would evince Customary International Law in the particular norm.

The Restatement of Foreign Relations Law of the United States is also considered as another category of the writings of publicists.[488] It is prepared by "recognized legal scholars and adopted after discussion by the American

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in putting focus in the structure of International Law, especially in particular fields thereof. *See* SHAW, *supra* note 34, at 106.

482. Reinisch, *supra* note 102, at 13.

483. E.g., by renowned publishers in the field of International Law, such as the Martinus Nijhoff Publishers, Oxford University Press, Cambridge University Press, Sweet & Maxwell, West Publishing or Thomson West, Manchester University Press.

484. E.g., American Journal of International Law, ICSID Review – Foreign Investment Law Journal, San Diego International Law Journal, Practicing Law Institute, Georgetown International Environmental Law Review, New York University Environmental Law Journal, International Law and Management Review.

485. E.g., World Bank, including the ICSID, the UNCTAD, the OECD.

486. E.g., Columbia University, New York University, National University of Singapore, University of Toronto, University of Sheffield, University of Michigan, University of Bristol, University of Leicester, Harvard University, University of Tasmania, University of Bonn, Germany.

487. *See, e.g.* Barry Appleton, *Regulatory Takings: The International Law Perspective,* 11 N.Y.U. ENVTL. L.J. 35, 48 (2002). Ms. Margrete Stevens also participated as Secretary of the ICSID Tribunal; *see, e.g. CMS Gas Transmission Company*, ICSID Case No. ARB/01/8.

488. DAMROSCH, ET AL., *supra* note 2, at 141.

Law Institute."[489] The Restatement is primarily a body of rules of International Law, which finds application in the United States in its foreign relations, but also contains other rules which exists in International Law.[490] Section 712, comment g, of the 1986 Restatement Third of Foreign Relations Law, discusses that a "[S]tate is responsible as for an expropriation of property ... when it subjects the alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the [S]tate's territory."[491]

Pursuant to Article 38, paragraph 1 (d) of the I.C.J. Statute,[492] their outputs are subsidiary means of determining the rule of law, are highly persuasive, and as contemporary law-making mechanisms, may likewise contribute in evincing the customary nature of creeping expropriation. Justice Gray in the *Paquete Habana Case* discussed that the writings of scholars are of great weight and authority in establishing custom.[493] Citing the publicist Wheaton, the honorable Justice explained that text-writers of authority elucidates what the approved usage of nations is, or the general opinion on the mutual conduct of States, including the definitions and modifications that have been generally introduced by and through States.[494] The case also discussed that the weight of the writers' works also increases every time they are cited.[495] The P.C.I.J. also looked at the teachings of publicists in the *Lotus Case* in holding that there exists a customary rule that ships on the high seas are subject to the jurisdiction of the State whose flags they fly.[496] Accordingly, the works of writers and publicists in International

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489. *Id.* (The American Law Institute is a non-official professional body).

490. *Id.*

491. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712, comment g (1986). The 1986 Restatement Third is the revised version of the 1965 Restatement Second, which curiously is the first restatement. *See* DAMROSCH, ET AL., *supra* note 2, at 141.

492. I.C.J. Statute, art. 38, ¶ 1 (d).

493. The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290..

494. *Id.*

495. *Id.*

496. The Case of the S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, 28, *reprinted in* DAMROSCH, ET AL., *supra* note 2, at 72. The P.C.I.J. held that Turkey, by instituting criminal proceedings against Lt. Demons who was the French officer on watch duty during the collision of the ships, did not act contrary to any principle of International Law. In ruling so however, the P.C.I.J. did not renounce the customary norm that ships on the high seas are subject to the jurisdiction of the State whose flag they fly. But the Court discussed that the "important point is the significance attached by them to [the] principle; ... . It does not appear that in general, writers bestow upon this

Law also contribute to the crystallization of norms as additional weights of authority.

8. Other Recent Experiences on the Issue of Foreign Investment and Creeping Expropriation

Professors Sohn and Baxter championed the 1961 Harvard Draft Convention,[497] which as explicated earlier,[498] defines the taking of property as not only inclusive of "an outright taking of property but also *any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.*"[499] This has been utilized by tribunals, together with other earlier decisions and writings, in interpreting the provisions relating to creeping expropriation.[500] Finally, it is also worth noting that even the annual Philip C. Jessup International Law Moot Court Competition, which incorporates current International Law issues, included the discussion of foreign investment and creeping expropriation in its 2007 *compromis.*[501]

B. Harmonizing the Available Contemporary Law-Making Mechanisms with the Elements of Customary International Law.

Since the codification of the I.C.J. Statute, the sources of International Law have been clearly compiled and enumerated. Article 38, paragraph 1 (b) of the I.C.J. Statute refers to "international custom, as evidence of a general practice accepted as law" as a source of International Law.[502] Customary International Law[503] is defined as the general and consistent practice of States

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principle a scope differing from or wider than that explained above and which is equivalent to saying that the jurisdiction of a State over vessels on the high seas is the same extent as its jurisdiction in its own territory." *See* The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290.

497. *See generally* Draft Convention on the International Responsibility of States for Injuries to Aliens.

498. *See supra* discussion Part IV (C).

499. Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 10, ¶ 3; *see also* Sampliner, *supra* note 189, at 7 (emphasis supplied).

500. *See, e.g. ITT Industries*, 2 Iran-U.S. Cl. Trib. Rep. 348.

501. Philip C. Jessup International Law Moot Court Competition 2007 Problem, International Law Students Association, *available at* http://www.ilsa.org/jessup (last accessed Jan. 9, 2009).

502. I.C.J. Statute, art. 38, ¶ 1 (b); BROWNLIE, *supra* note 62, at 6; HARRIS, *supra* note 264, at 21.

503. *Military and Paramilitary Activities Merits*, 1986 I.C.J. 14, ¶ 184; *Continental Shelf*, 1985 I.C.J. at 29; *North Sea Continental Shelf*, 1969 I.C.J. 3; HARRIS, *supra* note 264, at 22; SHAW, *supra* note 34, at 66-88. *See generally* Andrew T. Guzman,

recognized and followed by them from a sense of a legal obligation.[504] On the international plane, custom is a dynamic source of law because of the international system's character and its want of centralized government organs.[505] Consequently, it actually reflects the characteristics of the international system that is decentralized.[506] The *Asylum Case* had the opportunity to discuss the reliance on custom by stating that

> [t]he party which relies on a custom ... must prove that this custom is established in such a manner that it has become binding on the other Party ... that the rule invoked ... is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law."[507]

The *Asylum Case* also explained that an alleged rule, in order to be customary, must be "in accordance with a constant and uniform usage practised by the States in question."[508] It must be a rule of unilateral and definitive qualification, and must not disclose so much uncertainty and contradiction, or so much fluctuation and discrepancy.[509] The consent of all States however, is not required in establishing custom.[510] This is because if the existence of a few objectors or dissidents could obstruct the creation of Customary International Law, then consequently, no customary rule would arise.[511] Prof. Brownlie discusses that the material sources for custom are

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Saving Customary International Law, 27 MICH. J. INT'L L. 115 (2005); ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

504. *North Sea Continental Shelf*, 1969 I.C.J. ¶ 77; BROWNLIE, *supra* note 62, at 6; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102, ¶ 2; LOWENFELD, *supra* note 104, at 486; DAMROSCH, ET AL., *supra* note 2, at 92.

505. SHAW, *supra* note 34, at 69.

506. *Id.* at 70.

507. Asylum (Colom. v. Peru), 1950 I.C.J. 266; *see* HARRIS, *supra* note 264, at 21; BROWNLIE, *supra* note 62, at 7.

508. *Asylum*, 1950 I.C.J. at 280.

509. *Id.* at 266; HARRIS, *supra* note 264, at 21-22.

510. South West Africa (Second Phase), 1966 I.C.J. 6, 191-92 (Tanaka, J., dissenting).

511. *South West Africa Second Phase*, 1966 I.C.J. at 191-92 (Tanaka, J., dissenting); Anglo-Norwegian Fisheries (U.K. v. Nor.), 1951 I.C.J. 191.

countless[512] but nonetheless enumerated a non-exclusive list of examples of these sources.[513]

In order to establish the customary status of a particular norm in International Law, two elements must concur, namely: State practice and *opinio juris et necessitatis*.[514] These two elements required for the formation of custom *should not be construed too rigidly*.[515] The examination of the elements must be comparative to the circumstances and therefore elastic; hence, the teleological approach.[516]

It is reasonably undeniable to maintain that the prohibition against expropriation of foreign investments has now been extended to creeping expropriation.[517] The concurrence of extensive State practice and *opinio juris*[518] demonstrate that indirect or creeping expropriation is now prohibited. Accordingly, the prohibition against creeping expropriation has now crystallized into Customary International Law.

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512. BROWNLIE, *supra* note 62, at 6; HARRIS, *supra* note 264, at 39.

513. BROWNLIE, *supra* note 62, at 6; *see also* Guzman, *supra* note 503, at 152; Michael Akehurst, *Custom as a Source of International Law,* 47 BRIT. Y.B. INT'L L. 1, 1 (1977).

514. Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 I.C.J. 66, ¶ 64, *reprinted in* 35 I.L.M. 809 (1997); *Military and Paramilitary Activities Merits*, 1986 I.C.J. ¶¶ 183-84; *Continental Shelf*, 1985 I.C.J. at 29-30, ¶ 27; *North Sea Continental Shelf*, 1969 I.C.J. at 43-45; *S.S. Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 28; BROWNLIE, *supra* note 62, at 6-10; HARRIS, *supra* note 264, at 22; BOYLE & CHINKIN, *supra* note 18, at 278. *See infra* discussion Part V (B).

515. *North Sea Continental Shelf*, 1969 I.C.J. at 176 (Tanaka, J., dissenting).

516. *Id.*

517. Reinisch, *supra* note 102, at 13; Restatement (Third) of Foreign Relations Law § 712, ¶ 1 (1986).

518. For further references on the discussion of custom and its elements, *see South West Africa Second Phase*, 1966 I.C.J. at 292 (Tanaka, J., dissenting); *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, 1996 I.C.J. ¶ 70; *North Sea Continental Shelf*, 1969 I.C.J. ¶ 77; *Continental Shelf*, 1985 I.C.J. at 29-30, ¶ 27; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15; *Reparations for Injuries Advisory Opinion*, 1949 I.C.J. 174; *Military and Paramilitary Activities Merits*, 1986 I.C.J. ¶¶ 183 & 207; *Asylum*, 1950 I.C.J. 266; *S.S. Lotus*, 1927 P.C.I.J. (ser. A) No. 10; MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 60 (1997); VLADIMIR D. DEGAN, SOURCES OF INTERNATIONAL LAW 151 (1997); BROWNLIE, *supra* note 62, at 7-8; DAMROSCH, ET AL., *supra* note 2, at 93, 97-98, 801; Hugh Thirlway, *The Sources of International Law, reprinted in* INTERNATIONAL LAW 124-27 (Malcolm D. Evans ed., 2d ed. 2006); Michael J. Glennon, *How International Rules Die,* 93 GEO. L.J. 939, 942 (2005); Murphy, *supra* note 66, at n. 170.

1. State Practice

State practice or usage,[519] the first and objective[520] element of custom that can be considered as its *corpus*, is the continuous repetition of the same or similar kind of acts or norms by States.[521] This represents the quantitative factor of custom.[522] The International Law Commission (ILC) enumerated a non-exhaustive list of forms or materials that may evince State practice: "treaties, decisions of international and national courts, national legislation, diplomatic correspondence, opinions of national legal advisers and the practice of international organizations."[523] The practice of States is demonstrated upon the existence of the following distinguishing elements: (1) generality; (2) uniformity and consistency; and (3) duration.[524] It must be noted however, that it is "not necessary that the practice in question had to be in absolutely rigorous conformity with the purported rule."[525]

Creeping expropriation has succeeded to be named as the most prevalent form of expropriation today.[526] It is proper to assert that "the single most important development in [S]tate practice has become the issue of indirect expropriation."[527]

Treaties or conventions constitute as a group of precedents, which evince and contribute — along with other methods of State practice, judicial and arbitral decisions, pronouncements and outputs of international organizations, and writings of highly qualified publicists — to the

519. *North Sea Continental Shelf*, 1969 I.C.J. at 175 (Tanaka, J., dissenting); HARRIS, *supra* note 34, at 23.

520. HARRIS, *supra* note 264, at 22. State practice is also termed as the classic or traditional approach. *See* BOYLE & CHINKIN, *supra* note 18, at 284.

521. *North Sea Continental Shelf*, 1969 I.C.J. at 175 (Tanaka, J., dissenting).

522. *Id.*

523. HARRIS, *supra* note 264, at 22, citing 2 Y.B. INT'L L. COMM'N 368-72 (1950); SHAW, *supra* note 34, at 78.

524. Fisheries Jurisdiction (U.K. v. Ice.) (Merits), 1974 I.C.J. 3, 89-90 (de Castro, J., separate opinion); SHAW, *supra* note 34, at 72; 1 RÉPERTOIRE DES DÉCISIONS DE LA COUR INTERNATIONALE DE JUSTICE 8 (Rudolf Bernhardt, Michael Bothe, Josef Jurina & Karin Oellers-Frahm eds., 1978).

525. SHAW, *supra* note 34, at 73; *see Military and Paramilitary Activities Merits*, 1986 I.C.J. ¶ 186, 432 (stating that "[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of [S]tates should, in general, be consistent with such rules, and that instances of [S]tate conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indication of the recognition of a new rule.").

526. Reinisch, *supra* note 102, at 2.

527. Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 65 (2002); August Reinisch, *supra* note 102, at 2.

development of a customary norm[528] of the prohibition against illegal creeping expropriation.

The element of generality, as traditionally understood, is the result of the repetition of acts of States that creates a consensus on a certain rule of law; and this applies to existing multilateral treaties and BITs.[529] The thousands of BITs and the vast available contemporary law-making mechanisms enabled the development of the international consensus that evinces custom on the particular norm.[530] The "combined effect of individual or joint action, response and interaction in the field concerned, i.e., of that reciprocity so essential in international legal relations, there develops the chain-reaction productive of international consensus."[531] It is well established that BITs could become International Law because they evince the "consistent agreement of [S]tates;"[532] hence, they evince the customary practices of States.[533]

The explosion of many IOs, their agencies and institutions, also changed the individualistic view of establishing State practice and its sub-element of generality of practice into the method of *parliamentary diplomacy*.[534] Judge Kotaro Tanaka espouses that it is now established that a State can declare its view and position on a particular issue to all members of an organization and immediately know the feedback of other States on such matter instead of articulating the same to some States which are directly interested.[535] Also, the creation of a particular custom "is greatly facilitated and accelerated" through international organizations, "... one of the examples of the transformation of law inevitably produced by change in the social substratum."[536] This is because State practice can be evinced by the outputs of international organizations. Overall, Judges Tanaka and Barwick held that the repetition of pronouncements of international organizations, as well as individual resolutions, declarations, judgments, decisions and expressions of opinion may evince Customary International Law:[537] In this case, the legal

528. *North Sea Continental Shelf*, 1969 I.C.J. at 105 (Ammoun, J., dissenting); LOWENFELD, *supra* note 104, at 492.

529. *South West Africa Second Phase*, 1966 I.C.J. at 191-92 (Tanaka, J., dissenting).

530. *See* LOWENFELD, *supra* note 104, at 493.

531. *North Sea Continental Shelf*, 1969 I.C.J. at 231 (Lachs, J., dissenting).

532. SORNARAJAH, *supra* note 7, at 206.

533. *Id.*

534. South West Africa (Judgment), 1962 I.C.J. 319, 346; *South West Africa Second Phase*, 1966 I.C.J. at 191-92 (Tanaka J., dissenting).

535. *South West Africa Second Phase*, 1966 I.C.J. at 191-92 (Tanaka, J., dissenting).

536. *Id.*

537. *Id.*; Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 253, 435-36 (Barwick, J., dissenting); Guzman, *supra* note 504, at 152; Akehurst, *supra* note 513, at 1.

outputs of IOs, particularly the UNCITRAL, the OECD and the World Bank, contribute to the establishment of the prohibition against illegal creeping expropriation as customary.

In order to establish State practice — particularly the elements of generality and uniformity — unanimity or universality is not the requirement.[538] What is relevant is the determination of the "value of abstention from protest by a substantial number of [S]tates in face of a practice followed by some others," and silence may be held as implicitly conceding[539] or acquiescence.[540] The *Fisheries Case* ruled that not all States have the occasion or opportunity to apply a particular principle.[541] Consequently, evidence of practice must be ascertained from the behavior or conduct of "a great number of States, possibly the majority of States;"[542] and the general practice of States must be acknowledged as *prima facie* evidence that a norm is accepted as law.[543] In this case, while not all States have the opportunity of becoming a party to an indirect expropriation dispute does not negate the existence of a general and uniform practice of States. On top of State participation in creeping expropriation disputes, the overwhelming number of BITs concluded shows that over 140 States are party to at least one BIT.[544]

Further, it would be *over-exacting* to require the concurrence of all States on a particular issue or rule in International Law, and that they applied such rule conscious of an *obligation* to do so.[545] Thus, while some States may have enacted statutes or may have concluded agreements that are not on all fours with a particular norm and practice confirming such norm, said State actions

538. *North Sea Continental Shelf*, 1969 I.C.J. at 104 (Ammoun, J., separate opinion), 228-29 (Lachs, J., dissenting); Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 128; *Nuclear Tests*, 1974 I.C.J. at 435-36 (Barwick, J., dissenting); BROWNLIE, *supra* note 62, at 7; HARRIS, *supra* note 264, at 32; SHAW, *supra* note 34, at 76.

539. BROWNLIE, *supra* note 62, at 7-8.

540. HARRIS, *supra* note 264, at 40. It must be noted however that in the *Anglo-Norwegian Fisheries Case*, it was held that acquiescence cannot be determined unless the State alleged to have acquiesced has actual or constructive knowledge of the claim that is being made. *See Anglo-Norwegian Fisheries*, 1951 I.C.J. 191; *see also* SHAW, *supra* note 34, at 77.

541. *Fisheries*, 1951 I.C.J. at 128.

542. *North Sea Continental Shelf*, 1969 I.C.J. at 228-29 (Lachs, J., dissenting); *Fisheries*, 1951 I.C.J. at 128; HARRIS, *supra* note 264, at 32; Guzman, *supra* note 503, at 150.

543. *North Sea Continental Shelf*, 1969 I.C.J. at 231 (Lachs, J., dissenting).

544. UNCTAD World Investment Report 2003, *supra* note 345, at 89; Hamilton & Rochwerger, *supra* note 69, at 2-3.

545. *North Sea Continental Shelf*, 1969 I.C.J. at 231 (Lachs, J., dissenting).

by a few cannot be said to have disturbed the creation of a customary rule.[546] What is significant in establishing the element of uniformity and relaxing the element of duration is that the materials or sources that are demonstrative of State practice must have been "both *extensive and virtually uniform* in the sense of the provision invoked — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[547] In this case, the multilateral treaties and BITs are both extensive and virtually uniform as to the provision on indirect expropriation.

Since the early decades of the twentieth century, disputes on indirect expropriation have already arisen and from the 1950s, BITs with uniform provision on creeping expropriation have been concluded. This length of time also satisfies the element of duration.[548]

The fact that "arbitral tribunals have achieved a surprising degree of consistency in their decision-making,"[549] contributes to the establishment of State practice and *opinio juris*. Accordingly, the contemporary law-making mechanisms and sources presented herein are sufficient to establish the generality, uniformity and duration of State practice in the field of creeping expropriation. To reiterate, "the accumulation of authoritative

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546. *Id.* at 228-29 (Lachs, J., dissenting).

547. *Id.* at 43, ¶ 74; *Fisheries Jurisdiction Merits*, 1974 I.C.J. at 89-90 (de Castro, J., separate opinion) (emphasis supplied); Right of Passage (Merits), 1960 I.C.J. 6, 42-43.

548. It is however an established fact that "[p]rovided the consistency and generality of a practice are proved, no particular duration is required;" and that the International Court does not emphasize duration as an element in its practice. *See* BROWNLIE, *supra* note 62, at 7. The existing era of extremely developed forms of communication, transportation and information, as well as the enormous acceleration of social and economic change and of science and technology, drastically reduced the importance of the time element and has made it possible for the formation of custom in a very short period of time. *See North Sea Continental Shelf*, 1969 I.C.J. at 176-78 (Tanaka, J. dissenting), 230 (Lachs, J., dissenting), 244 (Sørensen, J., dissenting); *South West Africa Second Phase*, 1966 I.C.J. at 191-92 (Tanaka, J., dissenting). To illustrate, it was held that what "required a hundred years in former days now may require less than ten years." Accordingly, it is possible for an "instant custom" to exist, which does not have to go through a "long period of gestation." Certain international norms and rules have emerged into a rather quick customary crystallization. Examples of this are the rules on airspace and the continental shelf. But it is of course generally established that the passage of time is integrated in the proving of the elements of generality and consistency. *See North Sea Continental Shelf*, 1969 I.C.J. 3 (Lachs, J., dissenting), 176-78 (Tanaka, J., dissenting); HARRIS, *supra* note 264, at 33; BROWNLIE, *supra* note 62, at 7; SHAW, *supra* note 34, at 70 & 74.

549. Gurudevan, *supra* note 9, at 419.

pronouncements such as resolutions, declarations, decisions, etc., ... can be characterized as evidence of the international custom referred to in Article 38, paragraph 1 (b)."[550] The treaties, resolutions, policy statements, outputs of IOs, judicial and arbitral decisions, and the expressions of opinion and international practice, all combine to produce the evidence of customary law,[551] such as in this case.

2. Opinio Juris

Opinio juris et necessitatis[552] or simply *opinio juris*, is considered as the psychological[553] and subjective[554] element of custom that is also called as its *animus*.[555] Representing the qualitative factor of custom,[556] this is deemed as the *all-important* element, which differentiates a mere practice of States from custom.[557] This is because *opinio juris* separates the custom as a source of International Law from mere principles of morality or social usage that are also being practiced or may be practiced by States.[558] The *North Sea Continental Shelf Cases* discussed that *opinio juris* may be achieved by the fulfillment of two conditions.[559] It must take into consideration that the acts concerned must amount to a settled practice, and that such acts "must be carried out in such a way, as to evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[560] As to how to ascertain the belief of States of a norm's obligatory nature was discussed by Judge Tanaka in his separate opinion in the *North Sea*

550. *South West Africa Second Phase*, 1966 I.C.J. at 191-92 (Tanaka, J., dissenting).

551. *Nuclear Tests*, 1974 I.C.J. at 435-36 (Barwick, J., dissenting) (emphasis supplied).

552. *North Sea Continental Shelf*, 1969 I.C.J. ¶ 77.

553. *Id.* at 3 (Tanaka, J., dissenting); *Right of Passage Merits*, 1960 I.C.J. at 120 (Chagla, J., dissenting); BROWNLIE, *supra* note 62, at 8; HARRIS, *supra* note 264, at 31; Guzman, *supra* note 503, at 142; SHAW, *supra* note 34, at 70.

554. *North Sea Continental Shelf*, 1969 I.C.J. at 43-45; HARRIS, *supra* note 264, at 22; Guzman, *supra* note 503, at 141. *Opinio juris* is also termed as the modern approach. *See* BOYLE & CHINKIN, *supra* note 18, at 284.

555. *North Sea Continental Shelf*, 1969 I.C.J. at 175 (Tanaka, J., dissenting).

556. *Id.*

557. *Right of Passage Merits*, 1960 I.C.J. at 120 (Chagla, J., dissenting).

558. SHAW, *supra* note 34, at 70-71, citing FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF ¶ 110 (1899).

559. *North Sea Continental Shelf*, 1969 I.C.J. ¶ 77; Anthony D'Amato, *Manifest Intent and the Generality by Treaty of Customary Rules of International Law*, 64 AM. J. INT'L L. 892 (1970).

560. *North Sea Continental Shelf*, 1969 I.C.J. at 44, ¶ 77; *Fisheries Jurisdiction Merits*, 1974 I.C.J. at 89-90 (de Castro, J., separate opinion); SHAW, *supra* note 34, at 80.

Continental Shelf Cases. The determination of *opinio juris* is a very delicate matter, and it is extremely challenging to find concrete evidence that would constitute as such.[561] *Opinio juris* must thus be flexibly viewed, and must be deemed to be attached more sturdily with *overt* manifestations or acts.[562] The learned Judge rationalized that *opinio juris*:

> being of a psychological nature, cannot be ascertained very easily, particularly when diverse legislative and executive organs of a government participate in an internal process of decision-making in respect of ratification or other State acts. There is no other way than to ascertain the existence of *opinio juris* from the fact of the *external existence* of a certain custom and its necessity felt in the international community, *rather than to seek evidence as to the subjective motives for each example of State practice, which is something which is impossible of achievement.*[563]

Prof. Malcolm Shaw points out that there has to be an "aspect of legality" in the conduct or practice of States, such that when a State "takes a course of action, it does so because it regards it as within the confines of [I]nternational [L]aw, and not as, for example, purely a political or moral gesture."[564] Judge Lachs in his dissenting opinion noted that the uniform act or participation of States from various political, economic, legal systems and continents in the progressive development of an emerging norm in International Law is sufficient proof of *opinio juris* and practice widespread enough for the subject principle to be transported to a custom.[565]

The view of Lauterpacht and Sørensen as elucidated in the *North Sea Continental Shelf Cases* is that the uniform conduct of States evinces, and is a material proof of *opinio juris* except when such conduct is shown as not to have been complemented by any such intention.[566] The *Nicaragua Case* also explains that "the existence of the rule in the *opinio juris* of States is confirmed by practice."[567] The *Asylum*[568] and the *Lotus*[569] *cases* similarly

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561. *North Sea Continental Shelf*, 1969 I.C.J. at 175 (Tanaka, J., separate opinion).

562. SHAW, *supra* note 34, at 83.

563. *North Sea Continental Shelf*, 1969 I.C.J. at 176 (Tanaka, J., separate opinion); *see also* HARRIS, *supra* note 264, at 31; SHAW, *supra* note 34, at 83 (emphasis supplied).

564. SHAW, *supra* note 34, at 84.

565. *North Sea Continental Shelf*, 1969 I.C.J. 3 (Lachs, J., separate opinion); *see also* HARRIS, *supra* note 264, at 32.

566. HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 380 (1958), *cited in North Sea Continental Shelf*, 1969 I.C.J. 3 (Sørensen, J., dissenting); HARRIS, *supra* note 264, at 38.

567. *Military and Paramilitary Activities Merits*, 1986 I.C.J. ¶ 184.

568. *Asylum*, 1950 I.C.J. 266; *see also* BOYLE & CHINKIN, *supra* note 18, at 279.

569. *S.S. Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 28.

provide that the uniformity in State practice would infer and confirm the existence of *opinio juris*.[570] Even the International Criminal Tribunal for the Former Yugoslavia (ICTY) held in the *Tadic Case* that a norm or text recognized or supported by a "great number of States ... may be taken to express the legal position i.e., *opinio juris* of those States."[571] In this case, the uniformity and consistency in the conduct of States by means of treaties, policy statements, laws, outputs of IOs to which they are Members, as well as judicial and arbitral decisions, and the writings of publicists,[572] all contribute to the existence and proof of *opinio juris*.

First, the practice of States in treaties is material evidence in establishing the necessary element of *opinio juris*.[573] It may even be sufficient to establish the said element.[574] More specifically, scholars maintain that "[g]iven the large web of BITs covering every continent and [the] countries from the First, the Second, and the Third World, a fair inference might be drawn that, taken together, the Bilateral Investment Treaties are now evidence of [C]ustomary [I]nternational [L]aw, *applicable even when a given situation or controversy is not explicitly governed by a treaty*."[575] *Pope & Talbot Inc. v. Canada* and *Mondev International Ltd. v. U.S.* have likewise taken the view that BITs indeed constitute, or at least contribute to custom.[576]

Even on the assumption that custom must be received into International Law with the taking into strict account of the attitude of the *States of the Third World*,[577] it is maintained that these States likewise support, and have an affirmative attitude towards the crystallization of the prohibition against

570. *See also* DAMROSCH, ET AL., *supra* note 2, at 95; HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 450-52 (2d ed. 1966).

571. Prosecutor v. Dusko Tadi (Judgment), ICTY-IT-94-1, ¶ 223, *reprinted in* 38 I.L.M. 1518 (15 July 1999); *see also* BOYLE & CHINKIN, *supra* note 18, at 285.

572. *See supra* discussion Part V (A).

573. *North Sea Continental Shelf*, 1969 I.C.J. 3 (Sørensen, J., dissenting); HARRIS, *supra* note 264, at 35.

574. *North Sea Continental Shelf*, 1969 I.C.J. 3 (Sørensen, J., dissenting); HARRIS, *supra* note 264, at 35.

575. LOWENFELD, *supra* note 104, at 486; Mann, *British Treaties for the Promotion and Protection of Investment*, 52 BRIT. Y.B. INT'L L. 241, 249 (1981) (emphasis supplied).

576. *Pope & Talbot Inc. Phase Two*, NAFTA Ch. 11 Arb. Trib., 41 I.L.M. ¶¶ 110-11; *Mondev International Ltd.*, Case No. ART(AF)/99/2, NAFTA Ch. 11 Arb. Trib.; Salacuse & Sullivan, *supra* note 424, at 113-14.

577. *Barcelona Traction Second Phase*, 1970 I.C.J. at 330 (Ammoun, J., separate opinion).

creeping expropriation.[578] This can be seen from the overwhelming number of BITs that have been concluded between a developing and a developed State, or between two developing States.[579] And although the developing countries previously voted in favor of the Charter of Economic Rights and Duties of States, by concluding BITs in large numbers that guarantee the protection from illegal indirect expropriations, the developing countries have now rejected their view in the 1960s and the 1970s.[580]

It must be noted however, that a distinction must be made between the *common principles or provisions* embodied in BITs "that may be said to have ripened into" custom (e.g., prohibition against illegal direct and indirect expropriations), and very "*particular provisions* of BITs," which only apply between the Parties.[581] For instance, the specific agreement on arbitration and the applicable set of rules, or the prohibition of very specific actions, may not constitute *general principles* in a BIT but rather *very particular provisions.*[582] The uniform and consistent provision on the prohibition against direct and indirect expropriations in BITs however forms part of the common principles that may ripen into custom.[583]

Moreover, "*opinio juris* may ... be deduced from, *inter alia,* the attitude of the Parties and the attitude of States towards certain General Assembly resolutions ... ."[584] Conversely, General Assembly resolutions may evince or establish the emergence of *opinio juris.*[585] Bin Cheng even explicates that a clearly articulated expression of *opinio juris* through nonbinding resolutions or declarations would suffice without need for further State practice, in evincing a new norm as Customary or General International Law.[586] In the

578. *See generally* UNCTAD World Investment Report 2006, *supra* note 332; UNCTAD World Investment Report 2003, *supra* note 345; UNCTAD BITs 1959-1999, *supra* note 338; UNCTAD BITS TRENDS, *supra* note 350.

579. *See supra* discussion Part V (A) (1).

580. LOWENFELD, *supra* note 104, at 486; Mann, *supra* note 575, at 249; *see Texaco Overseas Petroleum Company*, 53 I.L.R. 389, 17 I.L.M. 1, 104 J. DU DROIT INT'L at 350.

581. LOWENFELD, *supra* note 104, at 488.

582. *Id.*

583. *Id.* at 476 & 488; *see also* Hamilton & Rochwerger, *supra* note 69, at 8, n. 34; UNCTAD World Investment Report 2003, *supra* note 345, at 89; UNCTAD World Investment Report 2006, *supra* note 332, at 229; UNCTAD BITS TRENDS, *supra* note 350, at 141; DAMROSCH, ET AL., *supra* note 2, at 809-10.

584. *Military and Paramilitary Activities Merits,* 1986 I.C.J. ¶ 188.

585. *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion,* 1996 I.C.J. ¶ 70; DAMROSCH, ET AL., *supra* note 2, at 81.

586. Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" Customary Law?,* 5 INDIAN J. INT'L L. 23, 23-48 (1965), *reprinted in* INTERNATIONAL LAW

Nicaragua Case, the I.C.J. referred to one General Assembly Resolution to determine the existence of *opinio juris* through resolutions.[587] But this was taken together with other sources, such as a number of treaties.[588] As regards the Principle of Non-intervention, it was backed up by two General Assembly Resolutions.[589] Here, together with other contemporary law-making mechanisms or sources when accumulated (e.g., treaties and judicial decisions), G.A. Res. 1803 supports and contributes to the customary prohibition against illegal creeping expropriation.

It is worth noting that the P.C.I.J. in the *Lotus Case* and the U.S. Supreme Court in the *Paquete Habana Case* recognized the contribution of teachings of publicists in the establishment of the existence of Customary International Law.[590] Similarly, in this case, the teachings of publicists and scholars in the field of International Economic and Investment Law, particularly as regards the recognition of the existence of the discussion of the elements of, or the examination of State practice in, creeping expropriation, likewise contribute significantly to the crystallization of the norm into Customary International Law.

The I.C.J. also made clear in the *Nicaragua* that:

> [i]f a State acts in a way *prima facie* incompatible with a recognized rule, *but defends its conduct by appealing to exceptions or justifications* contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, *the significance of that attitude is to confirm rather than to weaken the rule.*[591]

It must be observed that in all cases pertaining to indirect or creeping expropriations as discussed or mentioned in this Article,[592] the States that are acting incompatible to the recognized rule on creeping expropriation did not assert the non-recognition of creeping expropriation in International Law, but defended their conduct *as exceptions or justifications contained within the rule itself* (e.g., the interference was for public purpose, not substantial enough to render the investment useless to the investor, for a fixed duration, with just compensation, not discriminatory, among others). This fact intensifies the position that the parties to such cases recognized the norm's existence and

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TEACHING AND PRACTICE 237 (1982); A. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation,* 95 AM. J. INT'L L. 757 (2001); BOYLE & CHINKIN, *supra* note 18, at 226-27.

587. *Military and Paramilitary Activities Merits,* 1986 I.C.J. ¶ 188.

588. *Id.* ¶ 188.

589. *Id.* ¶ 203.

590. *S.S. Lotus,* 1927 P.C.I.J. (ser. A) No. 10, at 28; *The Paquete Habana,* 175 U.S. 677..

591. *Military and Paramilitary Activities Merits,* 1986 I.C.J. ¶ 186 (emphasis supplied).

592. *See supra* discussions, particularly in Parts IV & V.

application — another fruitful way of strengthening State practice and *opinio juris*.

V. DELINEATING THE DISCREPANCY BETWEEN THE STANDARDS RECOGNIZED BY THE PHILIPPINES AND THE ELEMENTS ESTABLISHED UNDER INTERNATIONAL LAW ON CREEPING EXPROPRIATION

It was not so long ago when foreign investors in the Philippines experienced governmental actions, which can possibly fall within the sphere of unlawful indirect takings of investments. For example, the tax incentives of investors in the Bases Conversion and Development Authority (BCDA) subsidiaries, Clark, Camp John Hay and the Poro Point Freeport and economic zones were withdrawn and nullified by the Supreme Court. The investors were deprived of such tax incentives that they were promised because of a mistake in the Government's recognition of the zones as economic zones enjoying the same incentives as that of the Subic Special Economic Zone.[593]

President Arroyo cancelled the Government's waste-to-energy project embodied in a Build-Operate-Transfer (BOT) Contract with Australian firm JANCOM Environmental Corporation in 2002, five years after it was approved.[594] This cancellation was made notwithstanding the fact that the Supreme Court declared the contract "valid and perfected."[595]

In the case of the Clark, Camp John Hay and the Poro Point investors, while the Senate and the House of Representatives are now moving for the enactment of a legislation that would provide for a "permanent resolution" to the revoked tax incentives and other duty-free perks,[596] loss and damage have already been done to the investors for the denial of the fiscal incentives

593. *See generally* John Hay Peoples Alternative Coalition, et al. v. Lim, et al., 414 SCRA 356 (2003); *see also* Supreme Court Resolution, John Hay v. Lim, G.R. No. 119775 (29 Mar. 2005) (denying the Motions for Reconsideration with finality).

594. Peter Wallace, *Sanctity is Not Just a Word, available at* www.manila standardtoday.com/?page=peterWallace_sept01 _2006 (last accessed Jan. 9, 2009); *see also* Compromise proposal by JANCOM Environmental Corporation in relation to its Build-Operate-Transfer (BOT) contract with the National Government for its Waste Management Project in San Mateo, Rizal, Opinion No. 54, Secretary of Justice (2002) (declined).

595. *See generally* Metropolitan Manila Development Authority v. JANCOM Environmental Corporation and JANCOM International Development Projects Pty. Limited of Australia, 375 SCRA 320 (2002).

596. *PIA Nationwide New Releases,* Philippine Information Agency, *available at* www.pia.gov.ph/Default.asp?m=10&fi=p060324.htm&no=21 (last accessed Jan. 9, 2009); *BCDA Hails Senate, House Moves on Tax Incentives,* Bases Conversion and Development Authority, *available at* www.bcda.gov.ph/philnews.asp?item=134 (last accessed Jan. 9, 2009).

meant that the investors will have to pay the ordinary corporate income tax rate of 32 percent, instead of just five percent.[597] And admittedly, those who have already invested in these economic zones have uncertainties and distrust over the Government. As it was declared by BCDA President and Chief Executive Officer Narciso Abaya, "the passage of the bills will once and for all erase whatever *uncertainty that will be left in the minds of our locators* in Clark, John Hay and Poro Point."[598]

In the situations above discussed, would the State of Nationality sue the Philippines due to the violation of the prohibition against creeping expropriation? To address this, the author must analyze pertinent Constitutional provisions and Supreme Court decisions, and determine the extent of application of the doctrine of creeping expropriation in the domestic sphere.

Article III, Section 9 of the 1987 Constitution of the Philippines states that, "[p]rivate property shall not be taken for public use without just compensation."[599] Commenting on this provision, Fr. Joaquin G. Bernas, S.J. stated that "[w]hen one or more of these property interests are appropriated and applied to some public purpose there already is compensable taking even if the bare title to the property still remains with the private owner."[600] This discussion was primarily anchored on the American case of *U.S. v. Causby*.[601]

In the case of *U.S. v. Causby*, Respondents owned a lot beside the airport in Greensboro, North Carolina, which was mainly used for raising chickens.[602] Because of the frequent and regular flights by the Government's army and navy aircrafts on Respondents' land at low altitudes, the chickens were killed by flying into the walls because of fright. It was because of this that Respondents had to close their business. The Supreme Court discussed:

> Flights over private land are not a taking, unless they are *so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.* We need not speculate on that phase of the present case. For the findings of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.[603]

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597. *BCDA Hails Senate, House Moves on Tax Incentives, supra* note 596.

598. *Id.* (emphasis supplied).

599. PHIL. CONST., art. III, § 9.

600. BERNAS PRIMER, *supra* note 478, at 134.

601. *Id.* at 134-35.

602. *Causby*, 328 U.S. 256.

603. *Id.* (emphasis supplied).

While the U.S. Supreme Court did not specify the case as that of an indirect expropriation but as an easement, the circumstances present in the case would show that there was interference in the enjoyment of the owners over their property.[604]

Subsequent cases in the Philippines cited the *Causby Case* in holding that a taking may exist even if there is no taking of title, so long as it involves the taking of any of the property interests that forms part of the bundle of property rights.

Republic of the Philippines v. Sarabia discussed the notion of taking in light of *Causby*. The Court held that there is a taking when "... he is deprived of the ordinary use [of his property]."[605] While the case explained taking in this way, such discussion was only made in the course of ruling on the issue of the reckoning point of just compensation.[606] The case involved the taking of a portion of land by the Air Transportation Office and the question of the value of the just compensation to be paid.[607] In *Republic of the Philippines v. Tagle and Benitez,* the Honorable Supreme Court through Justice Panganiban recognized the indirect type of taking, although the case primarily dealt with the expropriation of land.[608] Citing *U.S. v. Causby,* the Court stated that "[a]lthough eminent domain usually involves a taking of title, there may also be compensable taking of only some, not all, of the property interests in the bundle of rights that constitute ownership."[609] *Ansaldo v. Tantuico, Jr.* likewise referred to the *Causby Case*.[610] Similar with the other aforementioned cases, *Ansaldo* concerned the taking of land, the computation of just compensation and its reckoning point.[611]

Several other cases also touched on the concept of creeping expropriation without naming it as such. In *People v. Fajardo*, former Mayor Fajardo of Baao, Camarines Sur and his son-in-law, filed a written request to the incumbent mayor for the grant of a permit that would authorize the

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604. *See supra* discussion Part IV. *See also* Republic v. Philippine Long Distance Telecommunications Co. (PLDT), 26 SCRA 620 (1969) (stating that "real property may, through expropriation, be subjected to an easement of right of way.").

605. Republic of the Philippines v. Sarabia, 468 SCRA 142, 150-51, (2005).

606. *Id.* at 151.

607. *See generally Sarabia*, 468 SCRA 142.

608. Republic of the Philippines v. Tagle and Benitez, 299 SCRA 549, 559 (1998) (stating that the petitioner also intended to acquire the legal right to possess and own the property, and not mere physical possession. The case however, did not term such type as an "indirect or creeping" expropriation).

609. *Tagle and Benitez*, 299 SCRA at 558.

610. Ansaldo v. *Tantuico, Jr.*, 188 SCRA 300, 304 (1990).

611. *See generally Tantuico, Jr.*, 188 SCRA 300.

construction of a building beside their gasoline station, pursuant to Ordinance No. 7.[612] The request was denied because it was alleged that the construction of the proposed building would destroy the view of the Baao public plaza since Fajardo's land was beside the Baao public plaza, separated only by a creek. Notwithstanding the denial of the permit, Fajardo proceeded with the construction since they were in dire need of a residence after the typhoon destroyed their old residence. Hence, appellants were charged and convicted for violating Ordinance No. 7. The Supreme Court reversed the conviction, and declared the Ordinance null and void, saying that "the State may not, under the guise of police power, permanently divest owners of the beneficial use of their property and practically confiscate them solely to preserve or assure the aesthetic appearance of the community."[613] *Fajardo* cited a number of American cases. For instance, it cited *Arverne Bay Constr. Co. v. Thatcher,* stating that an "ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose ... [is] beyond regulation and must be recognized as a taking of the property."[614] Another relevant case cited by *Fajardo* is *Sundlum v. Zoning Bd.,* which stated that a regulation that "substantially deprives an owner of all beneficial use of his property is confiscation and is a deprivation within the meaning of the 14th Amendment."[615]

In *Municipality of La Carlota v. National Waterworks and Sewerage Authority* (NAWASA), the NAWASA alleged that although the ownership of the waterworks system of the municipality cannot be transferred without just compensation, Republic Act 1383 authorizes it to acquire "jurisdiction, supervision and control over ... all areas now served by existing government-owned waterworks and sewerage and drainage systems ... ."[616] The Supreme Court denied the appeal of the NAWASA on such ground, holding that the NAWASA's jurisdiction, supervision and control of the waterworks system would destroy the owner's right of dominion. "Ownership is nothing without the inherent rights of possession, control and enjoyment. Where the owner is deprived of the ordinary and beneficial use of his property or of its value by its being diverted to public use, there is taking within the constitutional sense."[617]

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612. People v. Fajardo, 104 SCRA 443, 445 (1958).

613. *Id.* at 447-48.

614. *Id.* at 448, citing Arverne Bay Constr. Co. v. Thatcher, 117 A.L.R. 1110, 1116, 278 N.Y. 222, 15 N.E.2d 587 (1938) (U.S.).

615. *Id.* at 448, citing Sundlum v. Zoning Bd., 145 Atl. 451 (U.S.).

616. Municipality of La Carlota v. National Waterworks and Sewerage Authority, 12 SCRA 164, 166 (1964).

617. *Id.* at 167.

The Supreme Court ruled upon *Republic v. PLDT*[618] in relation to Article XII, Section 18[619] of the 1987 Constitution. In this case, PLDT was compelled to inter-connect with the Government Telephone System (GTS) for the expansion of the services by the Bureau of Telecommunications to other government offices so as to allow these offices to call private parties.[620] This was being claimed to be interference in the property rights of PLDT. Such forcible use of PLDT's phone lines was however justified on account of public or national welfare and just compensation.[621] Citing the 1987 Constitution, the Court held that "[t]he State may, in the interest of national welfare or defense, establish and operate vital industries and, upon payment of just compensation, transfer to public ownership utilities and other private enterprises to be operated by the government."[622]

Republic of the Philippines v. Vda. de Castellvi[623] is closest to the principles embodied in International Law on creeping expropriation of foreign investment. The case involves the expropriation of a parcel of land, which belonged to the estate being administered by Carmen vda. de Castellvi.[624] The core issues of the case were (1) the actual valuation of the fair market value of the subject property to be paid as just compensation; and (2) the reckoning point of the existence of the "taking."[625] On the issue of the reckoning date of the taking, the Supreme Court invoked American jurisprudence in defining what constitutes a taking:

> Taking under the power of eminent domain may be defined generally as entering upon private property *for more than a momentary period*, and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way *as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.*[626]

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618. *PLDT*, 26 SCRA 620.

619. PHIL. CONST., art. XII, § 18 ("The State may, in the interest of national welfare or defense, establish and operate vital industries and, upon payment of just compensation, transfer to public ownership utilities and other private enterprises to be operated by the government.").

620. *PLDT*, 26 SCRA at 624, 626.

621. *Id.* at 628, 634.

622. *Id.* at 628, citing 1935 PHIL. CONST., art. XIII, § 6, *now* PHIL. CONST., art. XII, § 18.

623. *See generally* Republic of the Philippines v. Vda. de Castellvi, 58 SCRA 336 (1974).

624. *Id.* at 340.

625. *Id.* at 341.

626. *Id.* at 350 (emphasis supplied).

Similarly, the *Sarabia* and *Ansaldo cases* held that "[t]here is a 'taking' ... when the expropriator enters private property *not only for a momentary period* but for a more permanent duration, for the purpose of devoting the property to a public use *in such a manner as to oust the owner and deprive him of all beneficial enjoyment thereof.*"[627]

The case *Telecommunications and Broadcast Attorneys of the Philippines and GMA Network, Inc. v. The Commission on Elections*[628] almost illumined the issue of indirect expropriation in the Philippines. Here, the petitioners argued that Section 92 of the Omnibus Election Code (B.P. Blg. 881), which requires that radio and television time must be given free of charge to election candidates, constitutes a taking of property.[629] The petitioners were thus arguing that the State, by reason of the law enacted, interfered with their property right of selling radio and television time. The law forces the petitioners to give radio and television time to election candidates for free, which renders such airtime valueless for them. However, instead of delving on the issue of indirect taking, the Honorable Supreme Court found it more reasonable to discuss the merits based on the ownership of radio and television time, and did not anymore thrash out the issue of taking. It held that the franchise by petitioners is merely a privilege, subject to amendment or repeal whenever the common good so requires; and that "radio and television broadcasting companies, which are given franchises, do not own the airwaves and frequencies through which they transmit broadcast signals and images."[630] Accordingly, the privilege only allows them the temporary use of airwaves and frequencies.

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627. *Sarabia,* 468 SCRA at 151; *Tantuico, Jr.,* 188 SCRA at 304, (emphasis supplied).

628. Telecommunications and Broadcast Attorneys of the Philippines and GMA Network, Inc. v. The Commission on Elections, 289 SCRA 337 (1998) [hereinafter TELEBAP Case].

629. *Id.* at 345-46. The law, as cited in the case, provides:

> SEC. 92. *Comelec time.* - The Commission shall procure radio and television time to be known as "Comelec Time" which shall be allocated equally and impartially among the candidates within the area of coverage of all radio and television stations. For this purpose, the franchise of all radio broadcasting and television stations are hereby amended so as to provide radio or television time, free of charge, during the period of the campaign. (Sec. 46, 1978 EC)

630. *Id.* at 349. The Supreme Court, however, did not clearly explain who or which entity owns the said airwaves. Former Chief Justice Panganiban in his dissent, cited publicist Tolentino in his annotation of the Civil Code that air lanes are not property since they cannot be appropriated for a particular individual's benefit. This statement is highly contestable since it has been recognized the world over that property has already evolved to include those which have formerly been excluded from the definition, such as rights. *See supra* discussion Parts III & IV. The Supreme Court itself held that there is indeed a

From the foregoing discussions, while the Philippine jurisprudence touched upon the (1) deprivation of the substantial use or enjoyment of property; and (2) the sub-element of duration, there still exists a discrepancy between the standards set forth by the former, and the standards provided by International Law on the indirect expropriation of foreign investments. It must be noted that in all the aforementioned Philippine case-laws, while the discussion of the concept of taking included the use and enjoyment of property, the context in which they were used was actually for an outright taking, and not for an indirect one. All of the above cases, except the *Fajardo* and *PLDT cases*,[631] dealt with an outright or direct expropriation of land, and not with interference by the State with the use, enjoyment or disposal of the property rights. The cases, being on outright takings of land, were concerned with the transfer of the title, which is absent in an indirect expropriation. More importantly, the cases only enumerated these elements as part of the definition but they were not actually applied the determination of the existence of the actual expropriation. It must be noted that while *Castellvi* applied the two elements, the finding was still anchored on the existence or non-existence of a *direct taking of land*.[632]

On the other hand, the *Fajardo and PLDT cases,* which dealt with the interference of property rights, did not actually mention or consider the element of substantial interference with property rights, or the sub-element of duration. Both cases were decided mainly on public welfare.[633]

ELEMENTS OR APPLICATIONS	INDIRECT EXPROPRIATION IN INTERNATIONAL LAW	EXPROPRIATION IN THE PHILIPPINE LEGAL SYSTEM
DEGREE OF INTERFERENCE WITH PROPERTY RIGHTS:	Distinctions are made through the sub-elements.	
(a) Severe Economic Impact	Applied in cases of indirect takings or interference with property rights.	Discussed only in *selected* outright expropriation cases of land but not applied in interference with certain property rights cases.

contradiction between the aforementioned statement and another statement in Justice Panganiban's dissent. *Id.* at 371-73.

631. The *Fajardo* and *PLDT cases* shall be treated differently as the circumstances of the case are not on all fours with the other case-laws.

632. *Republic of the Philippines v. Vda. de Castellvi,* 58 SCRA at 351-54.

633. The general or national interest discussion is clear in *PLDT. See PLDT,* 26 SCRA at 628. The *Fajardo case* was also anchored on the proportionality of the ordinance with general welfare. *See Fajardo,* 104 SCRA at 447.

(b) Duration of the Interference	There is illegal indirect taking when the interference is not merely ephemeral or temporary.	Similar: it must not be for a momentary period (but the element was provided in relation to a direct taking, and was neither introduced nor applied in the two interference cases (*Fajardo* and *PLDT*)
(c) Sole Effect Doctrine	Focus is afforded to the existence and severity of the loss or injury to the foreign investor.	Case-law is silent on the doctrine.
CHARACTER OF THE GOVERNMENTAL MEASURE / PURPOSE TEST	Generally applied in both direct and indirect takings.	Generally similar, but the application is qualified by certain sub-elements.
(a) The enrichment of the host State	The interference need not benefit or increase wealth of the host State. Expropriation may be made for the benefit of third parties.	Expropriation must always be for the public or general welfare.
(b) Proportionality	Similar application.	Similar application.
INTERFERENCE OF THE MEASURE WITH REASONABLE AND INVESTMENT-BACKED EXPECTATIONS	Applies to indirect or creeping expropriations.	Not applied or used in domestic setting.
NON-DISCRIMINATION	Applied in both direct and indirect takings.	Similar application.
JUST COMPENSATION	Applied in both direct and indirect takings.	Similar application.
APPLICATION OF THE ELEMENTS PRESENTED, EXCEPT NON-DISCRIMINATION AND JUST COMPENSATION	Applied to interference by States, which are alleged or asserted to be regulatory acts (or in the exercise of police power).	Applied in direct takings by States, which are in the exercise of eminent domain, particularly the taking of land.

From the foregoing discussion and matrix, it is apparent that while some of the elements of creeping expropriation in International Law are either applied or mentioned by Philippine case-laws, the standards set by the latter, other than public purpose, non-discrimination and just compensation, were actually applied to outright takings of land, and not to the interference cases. They are also not sufficient to cover and address the forms of indirect takings or undue interference by the host State as it exists under International Law. For example, there are circumstances that are found to be illegal creeping expropriations under International Law based on the element of *interference of the measure with reasonable and investment-backed expectation* but these situations

cannot be considered as such using Philippine jurisprudence or law because such element is not addressed by the latter. It is very significant to note that the Philippines pushes for the inflow and liberalization of foreign investments in the country.[634] This particular situation thus necessitates the Philippines to adapt the standards set by International Law on the creeping expropriation of foreign investments. It must be noted that when the investment or property rights of a foreign investor in the Philippines is indirectly expropriated, which is an internationally wrongful act in International Law, the home State may exercise diplomatic protection on behalf of its national investing in the Philippines, file an application before an international tribunal having jurisdiction thereof, and engage the State's responsibility.[635] Accordingly, the want of the comprehensive application of the standards provided by International Law on creeping expropriation in the Philippines (or conversely, the insufficiency of the standards provided by the Philippines to address the State's possible indirect expropriations of foreign investments, which are protected under International Law), will subject the country to possible suits by States. Finally, the non-holistic protection of foreign investments in the Philippines will run counter to the goals of the country in attracting more investors, and in increasing foreign investments.[636]

VI. CONCLUSION AND RECOMMENDATIONS: CRYSTALLIZING THE CONCEPT NOT ONLY INTO CUSTOMARY INTERNATIONAL LAW, BUT ALSO INTO BLACK LETTER LAW IN THE PHILIPPINES

A. Conclusion: The attainment of customary status of the Concept of Creeping Expropriation, and its relevance, both on the international and the domestic planes

The rapidly expanding intricacies of International Law and the international legal system are very apparent in the seemingly multiplying array of types of commitment and instruments adopted by States and non-State actors to regulate and monitor a State's activities particularly in controversial global issues.[637] These international commitments are solidified in diverse forms, both binding and nonbinding — both hard and soft laws.[638] But because of this international occurrence, it is inexorable for clashes between principles

634. *See infra* discussion Part VII (B).

635. DAMROSCH, ET AL., *supra* note 2, at 802 (stating that "[w]hen an act or omission attributed to a [S]tate causes injury to an alien in violation of [I]nternational [L]aw, the [S]tate of which the injured alien is a national has, as against the responsible [S]tate, the remedies generally available between [S]tates for violation of [C]ustomary [I]nternational [L]aw.").

636 *See infra* discussion Part VII (B).

637. Shelton Journal, *supra* note 19, at 322.

638. *Id.*

and interpretation of norms to exist[639] particularly when the norm is still emerging or *de lege ferenda*. It is therefore a reality that the "interpretations or determinations of applicable rules may vary considerably, making all [I]nternational [L]aw somewhat relative."[640] Accordingly, it is essential for these norms, particularly those which exist with very much relevance in the world today, to crystallize into a legally binding form that would render such rules authoritative and obligatory among all States and non-State actors. One of these norms has indeed already transformed into hard law, i.e., the prohibition against illegal creeping expropriation.

State practice and *opinio juris* show that the prohibition against an illegal creeping expropriation is recognized under International Law.[641] The multitude of treaties, BITs and FTAs, the international and municipal judicial and arbitral decisions, policy statements, outputs of the U.N., the UNCTAD and other international organizations, and the discussions of highly qualified publicists, evince a consistent and general practice of States and *opinio juris* that are necessary to crystallize the norm as customary.

The fact that a multilateral convention expressly prohibiting creeping expropriation has not yet been concluded does not warrant the conclusion that the prohibition is yet to attain customary status. A multilateral investment treaty only endeavors to standardize the protection of investments by coming up with high standards for the liberalization of investment regimes and investment protection between and among States.[642] However, since States are yet to agree on such high standards, attempts to conclude such multilateral treaty has not yet materialized. This does not mean, however, that more specific or particular norms have not yet attained customary status. For instance, the concept of direct expropriation in the field of foreign investment is well settled in International Law. Similarly, it is submitted that the concept of creeping expropriation has likewise become custom. Moreover, it is also possible that a particular norm first crystallizes into custom before it is incorporated into a multilateral treaty.[643] The Geneva Convention on the Territorial Sea and Contiguous Zone of 1958, for instance, incorporated in Article 4 thereof the use of the straight baseline method. Notably, this method has already been accepted by the I.C.J. in the *Anglo-Norwegian Fisheries Case*[644] about seven years prior to the Convention.[645] The same provision was also incorporated into the United

639. *Id.*

640. *Id.*

641. *See supra* discussion Part V (A) & (B).

642. Loibl, *supra* note 107, at 711.

643. *See* BOYLE & CHINKIN, *supra* note 18, at 283.

644. *Anglo-Norwegian Fisheries*, 1951 I.C.J. 191.

645. BOYLE & CHINKIN, *supra* note 18, at 283.

Nations Convention on the Law of the Sea of 1982, particularly in Article 7 thereof.[646] The *Paquete Habana Case* also discussed that in the event there is no treaty available embodying a particular norm, "*resort* must be had to the customs and usages of civilized nations."[647] Clearly, the absence of a comprehensive and general treaty on a particular field of International Law does not negate the customary status of a particular norm in that field.

The author recognizes the sovereign right of States, particularly the host States to regulate investment activities within its territory. However, this right must never be used as a blanket exception, much less, as a cloak of discrimination, against an otherwise exercise of a lawfully protected right, i.e., the right to the protection of foreign investments and properties in the host State. Since time immemorial, it has been attempted to establish protection not only vis-à-vis physical property, but also over all other attributes of property from unwarranted and unlawful interference. The long experience in the battle to crystallize the prohibition against creeping expropriation in International Law has yielded the necessary sources to establish both elements of State practice and *opinio juris*. It is thus well opportune and proper to protect foreign investments against creeping expropriation in International Law once and for all; lest such a taking would certainly create a gaping loophole in the international protection of investments against expropriation,[648] and result in their unreasonable compromise in a globalizing arena.

B. Proposal to Amend the Foreign Investment Act to Include a Provision on the Prohibition against Illegal Creeping Expropriation

The Philippines is currently experiencing an explosion in FDIs. Recently, both Government[649] and Congress[650] have moved for the liberalization of

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646. *Id.*

647. *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320, *reprinted in* DAMROSCH, ET AL., *supra* note 2, at 65 (emphasis supplied).

648. *See Pope & Talbot Inc. Phase Two*, NAFTA Ch. 11 Arb. Trib., 41 I.L.M. ¶ 99; *see also* OECD Report, *supra* note 107, at 12, n. 38.

649. *See, e.g.* Creating the Public-Private Sector Task Force on Philippine Competitiveness, Executive Order No. 571 [E.O. 571] (2006); *Body Starts National Competitive Drive,* Department of Trade and Industry, 11 DTI DATALINE NO. 2, 15 Jan. 2007, at 3; *RP to Push U.S. Agreements Trade Pact,* 10 DTI DATALINE NO. 25, 4 Dec. 2006, at 3; *FTA in BIMP-EAGA Mulled,* Department of Trade and Industry, 10 DTI DATALINE NO. 25, 4 Dec. 2006, at 12; *RP, China Inked New Trade Pacts,* Department of Trade and Industry, 11 DTI DATALINE NO. 4, 12 Feb. 2007, at 2; *East Asian Leaders Okay Energy Pact,* Department of Trade and Industry, 11 DTI DATALINE NO. 4, 12 Feb. 2007, at 9; *ASEAN-India FTA, Inked by July,* Department of Trade and Industry, 11 DTI DATALINE NO. 4, 12 Feb. 2007, at 10; *ASEAN-China FTA Spells Boon to*

investments and trade resulting in an increase in FDIs in the Philippines.[651] Along with the international community of States, the Philippines is now moving towards the promotion of investments in order to fuel its economic growth and development. It hopes to improve its standing in the international community and among international creditors, foreign investors and financial institutions.[652]

To meet this objective, the author proposes that the following provision be incorporated in the Foreign Investments Act of 1991, as amended.[653] The elements of the amendment were culled from the uniformly crafted expropriation provisions of the thousands of existing FTAs and BITs; from judicial and arbitral decisions on the issue of creeping expropriation; and from the numerous discussions of scholars and highly qualified publicists in international investment law. These sources have been consistent in their discussion of the elements that show the existence of unlawful creeping expropriation. The proposed amendment to the Statute is as follows:

Region, Department of Trade and Industry, 17 PHIL. BUSINESS REPORT NO. 11, Nov. 2006, at 1.

650. *See, e.g.* FOREIGN INVESTMENTS ACT OF 1991; R.A. No. 8179; RETAIL TRADE LIBERALIZATION ACT.

651. *See FDIs in '07 to Reach $3B, supra* note 15, at 2, 11; *Taiwanese Firm Eyes New RP Factory, supra* note 15, at 5; *Hilton, Hyatt to Invest in Retirement Industry, supra* note 15, at 8; *Subic Port Nets $1.4B Investments, supra* note 15, at 4; *Korean Firm to Set Up Golf Course in Cebu, supra* note 15, at 7; *Indian Firm Sets Up Call Center in Muntinlupa, supra* note 15, at 5; *Singaporean Firm, Microsoft to Make RP as IT Hub, supra* note 15, at 6; *Chinese Firms to Invest $1B in Nickel Mine, supra* note 15, at 3; *British Gas Infuses More Investments, supra* note 15, at 3-4; *Danish Firm to Increase Subic Investments, supra* note 15, at 4; *British Desk to Open at BOI, supra* note 15, at 2; *South African Firms Keen on RP Mines; Malaysian Group to Invest in Cebu; Hawaiian Firm Eyes Energy Sector; Israeli Company Teams Up with FLI, supra* note 15, at 3-4.

652. DAMROSCH, ET AL., *supra* note 2, at 1613. U.S. Ambassador to the Philippines Kristie A. Kenney, also stated during the 32nd Philippine Business Conference that the Philippines "should not rest on its initial economic success but rather work on how to stay attractive to investors as well as focus on its positive advantages." *See RP Must Remain Attractive to Investors,* Department of Trade and Industry, 10 DTI DATALINE NO. 25, 4 Dec. 2006, at 2.

653. Department of Trade and Industry, Establishment of Business – Foreign Investments in the Philippines, *available at* www.business.gov.ph/Investment_Establishing Businesses_ForeignInvestments.php (last accessed Jan. 9, 2009) (Republic Act No. 7042, as amended, or the Foreign Investments Act of 1991, is the basic law, which governs foreign investments in the Philippines and which commenced the liberalization of the entry of foreign investments into the Philippines.).

> Foreign investments shall not be subjected to indirect expropriation, unless the following conditions under International Law are complied with:
>
> 1. The interference must not be so substantial as to deprive the investor of the effective use, enjoyment or disposal of the investment;
>
> 2. The expropriation is for a genuine public purpose and under the due process of law;
>
> 3. The expropriation must protect the investor's legitimate and investment-backed expectations;
>
> 4. The expropriation is non-discriminatory; and
>
> 5. The expropriation is accompanied by the payment of just compensation.

In the event that a court is faced with a particular case involving the creeping expropriation of foreign investment, it is recommended that it looks into the rich and vast, but uniform and consistent, international jurisprudence on the subject. The five general elements, and their sub-elements, are interpretive of a multitude of instances or circumstances that show the existence or non-existence of an illegal indirect expropriation. These examples will guide the court in determining whether or not a particular interference with property rights constitutes an illegal creeping expropriation. Below is a matrix prepared by the author showing a *non-exhaustive* example of when a particular interference is *generally* an illegal indirect expropriation or a valid regulation:

SITUATION	ILLEGAL CREEPING EXPROPRIATION	VALID REGULATION
FORCED SALES OF PROPERTY	X	
INDUCING OTHERS TO TAKE OVER THE PROPERTY PHYSICALLY	X	
EXPULSION OF THE FOREIGN INVESTOR CONTRARY TO INTERNATIONAL LAW	X	
ACTS OF HARASSMENT SUCH AS THE FREEZING OF BANK ACCOUNTS OR PROMOTING STRIKES, LOCKOUT AND LABOR SHORTAGES	X	
COERCING THE FOREIGN INVESTOR TO CHANGE A PREVIOUS CONTRACT OR AGREEMENT	X	
INCREASE OF FEES OR ROYALTIES NOTWITHSTANDING A PRIOR AGREEMENT FIXING THE AMOUNT AT A PARTICULAR PERIOD BETWEEN THE FOREIGN INVESTOR AND THE	X	

HOST STATE		
WITHDRAWAL OF A BUSINESS CONCESSION OR LICENSE THAT IS WIDELY KNOWN TO BOTH INVESTOR AND HOST STATE TO BE GRANTED TO THE INVESTOR FOR A LONGER PERIOD OF TIME, TAKING INTO ACCOUNT THE ESTIMATION OF THE TIME REQUIRED TO RECOVER INVESTMENT AND OBTAIN THE EXPECTED RETURN	X	
REGULATION OF FOREIGN INVESTMENT ONLY IN FAVOR OF PRIVATE THIRD PARTIES	X	
RESTRICTION THAT IS AIMED AT OR APPLIES ONLY TO FOREIGN INVESTORS WHO OR WHICH ARE NATIONALS OF A PARTICULAR STATE	X	
DENIAL OF ACCESS TO INFRASTRUCTURE OR NECESSARY RAW MATERIALS	X	
INTERFERENCE AS AN ACT OF UNLAWFUL RETALIATION OR REPRISAL AGAINST ANOTHER STATE	X	
IMPOSITION OF ZONING RESTRICTIONS PROPORTIONATE TO PUBLIC INTEREST		X
INTERFERENCE IN THE BUSINESS CAUSED BY STRIKES, REVOLTS AND SIMILAR ACTS		X
PROHIBITION OF A LAWFUL ACT ONLY FOR A SPECIFIC PERIOD		X
REDUCTION OF IMPORT OR EXPORT QUOTA THAT AFFECTS THE PROFITS OF THE FOREIGN INVESTOR		X
REFUSAL BY THE HOST STATE TO GRANT TAX REBATE		X
CONTROL ON THE USE OF HAZARDOUS OR ENVIRONMENTALLY UNSOUND USE OF PROPERTY		X

REGULATION THAT MAKES SELLING OF FOREIGN INVESTOR'S PROPERTY HARDER THAN IT USED TO BE		X
UNCOMPENSATED INTERFERENCE	Generally	Exception: e.g., as penalty for a crime committed
PROHIBITION TO REPATRIATE PROFITS OR CAPITAL TO THE HOME STATE	Exception: absolute ban	Generally
TAKING OVER MANAGEMENT CONTROL OVER THE INVESTMENT	Generally	Exception: public interest requires + duration is merely ephemeral
TAXATION AND FEES	Exception: exorbitant or discriminatory taxation	Generally

Despite the fact that the prohibition against illegal creeping expropriation has already crystallized into custom, the author submits that it is still imperative to incorporate the same in black letter law in the Philippines.

The reasons proffered by the author are stated and discussed below. On the international plane, a treaty provision[654] may relate to custom in three instances. It may (1) crystallize custom; (2) come to be recognized and adhered to by States as custom in their practice after the treaty has been adopted; or (3) *be declaratory or reflective of custom during the time that it was adopted.*[655] In the *Nicaragua Case*, the I.C.J. explained that

> [t]he Court cannot dismiss ... claims ... under principles of customary and general international law simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. *The fact that the abovementioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law,* even as regards countries that are parties to such conventions. *Principles ... continue to be binding as part of customary*

654. The term is treated to include both provisions of draft treaties and provisions of treaties already enforced. *See* HARRIS, *supra* note 264, at 35.

655. *North Sea Continental Shelf*, 1969 I.C.J. at 38-39, ¶ 63; *Military and Paramilitary Activities Merits*, 1986 I.C.J. ¶ 177; HARRIS, *supra* note 264, at 35.

international law, despite the operation of provisions of conventional law in which they have been incorporated.[656]

Clearly, it is well settled in International Law that a norm that has already attained customary status retains such character regardless of its subsequent codification in a treaty or convention. Drawing a parallelism from this, it becomes evident that the incorporation of the norm prohibiting creeping expropriations into the Foreign Investments Act of 1991 would only be declaratory of a custom that already exists at the time that such amendment is enacted. Such codification has the advantage of settling once and for all the issue on the protection of foreign investments from such kind of expropriation thereby dispensing with the need to resort to an accumulation of documents or materials in establishing the customary prohibition by ensuring its obligatory nature in domestic black letter law. This black letter law guarantee also facilitates convenience in establishing its obligatory nature since it is expressly provided in a statute. Consequently, its codification in domestic law ensures the implementation of the principle.[657]

As earlier explicated in Part Six, the Philippines needs to incorporate the prohibition against illegal creeping expropriation into its foreign investments law and adopt the comprehensive standards provided by International Law in order to attune the Philippine legal framework with international standards. The prohibition against illegal creeping expropriation, having now attained customary status, makes a violation thereof an internationally wrongful act that would engage a State's international responsibility. Until and unless the Philippines is equipped with a legal framework to protect foreign investors as International Law requires, the Philippines remains exposed to the possibility of committing a violation of International Law. This possibility is highlighted by the fact that at present the Philippines only applies standards narrower in scope than that of International Law.[658] In addition to the want of a legislative provision embodying international standards on indirect expropriation, Philippine jurisprudence also has not yet tackled the issue. It is thus significant in this period of global and Philippine liberalization of foreign investments that States, including the Philippines, provide holistic protection of foreign investments if only to reap the benefits that this movement promises.

656. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) (Jurisdiction), 1984 I.C.J. 392, 424; *see also Military and Paramilitary Activities in and against Nicaragua Merits*, 1986 I.C.J. ¶ 174 (emphasis supplied).

657. *See Military and Paramilitary Activities in and against Nicaragua Merits,* 1986 I.C.J. ¶ 188; HARRIS, *supra* note 264, at 37.

658. *See supra* discussion Part VI.