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TAX MEASURES AND EXPROPRIATION IN INTERNATIONAL INVESTMENT ARBITRATION: AN ANALYSIS OF WHAT CONSTITUTES EXPROPRIATION AND WHAT DOES NOT

ABSTRACT:

Investor State Arbitration has been the preferred means for states and investors alike to settle investment disputes. There is a constant shift in jurisprudence in this field because of the complexities and parties involved. Tribunals have to interpret the Bilateral Investment Treaty ("(BIT"))as they have to interpret each treaty in its context. This has led to differing versions of what would be protected and what would constitute expropriation. Tribunals face a challenge with respect to protecting investor rights or rights of the state in the context of the BIT against the backdrop of International Law Norms. This paper delves into a not under researched area of expropriation, i.e., "taxation measures". This paper aims to analyse jurisprudence with regard to instances where taxation methods were claimed to be tantamount to expropriation and arrive at the current law for the same.

Keywords: Expropriation, International Investment Agreements, Investor State Dispute Settlement, Right to Regulate, Tax Arbitration

INTRODUCTION:

Investor State arbitration has become a pivotal mechanism for resolving disputes between investors and host states, especially in cases where the latter's actions are perceived as encroaching upon the former's investments and rights. Within this framework, the contentious issue of tax measures as expropriation has increasingly gathered attention, reflecting the intricate interplay between sovereign states' fiscal policies and the protection afforded to foreign investors. As global markets continue to evolve, the relationship between tax measures and expropriation in the realm of Investor-State

Arbitration has grown in complexity, thereby calling for a re-examination of the interplay between fiscal measures of a state and expropriation.

The concept of expropriation, traditionally associated with the physical seizure of property, has progressively expanded to encompass a broader range of governmental actions that significantly impede or deprive investors of the benefits associated with their investments. Tax measures, often wielded by states to achieve various economic and social objectives, have emerged as a nuanced subject within the realm of expropriation, generating profound implications for the rights of foreign investors. The ambiguity surrounding the classification of tax measures as expropriatory actions necessitates a comprehensive analysis of their impact on investment protection and the ensuing implications for ISDS

Furthermore, the lack of a universally accepted definition of expropriation has engendered divergent interpretations within the context of ISDS, with tax measures often straddling the fine line between legitimate state regulation and indirect expropriation. The varying approaches adopted by arbitral tribunals in interpreting the legality of tax measures as expropriation have contributed to the evolving jurisprudence in this domain, creating a dynamic landscape that necessitates a nuanced and multifaceted approach in addressing the complexities inherent in such disputes.

This paper endeavours to critically examine the implications of tax measures as a form of expropriation within the framework of ISDS, exploring the evolving jurisprudence and the intricate interplay between sovereign fiscal policies and investor protection. By delving into pertinent case studies and analysing the evolving legal precedents, this study aims to shed light on the nuanced nature of disputes arising from tax measures and their implications for the broader discourse on investment protection and state sovereignty within the context of contemporary global economic dynamics.

EXPROPRIATION DEFINED

International law grants States a sovereign right to take property held by alien investors through a phenomenon termed "expropriation" for economic, political, social, or other reasons.[1] The debate surrounds the difficulty in distinguishing between regulatory measures which are 'tolerable' and unjustified ones that impose an obligation under international law.[2] The ambiguity concerning the evolving term is a source of concern for both the states and investors alike.

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[1] United Nations Conference on Trade and Development, Expropriation, UNCTAD Series on Issues in International Investment Agreements II (2012).

2 *Id*. at 6.

An expropriation by a State is considered lawful, provided the following four essentials are met:

(a) property has to be taken for a public purpose;

(b) on a non-discriminatory basis;

(c) by the due process of law;

(d) accompanied by compensation.

Amongst the four aforementioned criteria, it is the first and fourth criteria which have been under debate. However, the fourth principle has now become a settled principle of international law, that properties of foreign nationals may not be taken without adequate compensation.[3]

Modern treaties like the Germany-Bangladesh BIT[4] and guidelines by international organisations, such as the World Bank[5], have widened the scope of the term 'expropriation'. It has evolved to include indirect expropriation, albeit the reluctance to tread farther from the paradigm of law developed around direct expropriation. Indirect expropriation has been deemed as "measures tantamount to nationalisation" or "measures having an effect equivalent to nationalisation or expropriation."[6] The intent behind adopting an inclusive interpretation was to protect foreign investors from arbitrary State action in the form of diminishing the value of property, taxation, and other measures of 'taking' nature.

THE SOVEREIGN RIGHT TO REGULATE

The increase in International Investment Agreements (IIA), often considered an instrument of globalisation, has brought to light a range of sovereignty concerns. Unlike in a foreign direct investment, where the protection for the investor is limited to greenfield investments and M&A of existing enterprises, most IIAs apply to 'every kind of asset' of a foreign investor. The undefined scope leads to a broad and wide scope of protection. Arbitration tribunals have interpreted the phrase to include the extent of promissory notes, loan agreements and construction contracts being considered as 'investments'.[7] The ambiguity in the treaty language leads to interference with a State's right to tax.

3 OECD Working Papers, "INDIRECT EXPROPRIATION" AND THE "RIGHT TO REGULATE" IN INTERNATIONAL INVESTMENT LAW, September 2004.

4 Germany-Bangladesh Bilateral Investment Treaty (1981), Protocol § 3, in ICSID Reports, p. 7.

5 World Bank, Guidelines on the Treatment of Foreign Direct Investment (1992).

6 United Kingdom Model Bilateral Investment Treaty (1991), art. 5, in United Nations Conference on Trade and Development (UNCTAD) Yearbook of International Investment Treaties, Vol. III, p. 188 (1996).

7 UNCTAD, Investor-State Disputes Arising from Investment Treaties: A Review (New York and Geneva, 2005).

Countries like the US and Canada have tried to deal with the concerns regarding broad interpretation by reducing the ambiguity of the treaty language. The 2004 Unites States Model laid down the characteristics of an 'investment' and restricted the protection under the treaty. The US model included certain limitations on the access to arbitration in matters of taxation. The investor, prior to referring the matter to arbitration before the appropriate forum, has to refer the case to competent tax authorities of both the contracting parties in writing whether the impugned taxation measure involves an expropriation.[8] The practical constraints in place effectively restrict encroachments on State sovereignty.

The expropriation provisions iterated in International Investment Agreements are primarily drafted concerning the expropriation of "investments". The applicability of such a provision would consequently depend on the scope of the definition of "investment" in the treaty.

Once it is deemed to be a valid investment, then comes the question of whether the exercise of the fiscal powers of the state would amount to expropriation or not. At the very outset, it is recognised by international law that a State has the sovereign right to tax. This right would include the taxation of foreign entities which operate in the sovereign state.[9] However, this power is not absolute, and the rights of the investor should also be protected. In this context, the differences between the right to regulate and when a regulation becomes indirect expropriation become relevant.

States' sovereign right to regulate in the public interest often clashes with the legitimate expectations of foreign investors to safeguard their investments from measures that substantially diminish their value. The right to regulate is backed by the principle of state sovereignty and allows the government to implement measures aimed at promoting a wide range of objectives. In pursuance of these objectives, the state may enforce measures which impact foreign investments in the State. Hence, it is of paramount importance that this right is balanced with the legitimate expectations of investors.

Further, the issue of indirect expropriation not having a defined definition[10] and being considered a governmental measure which results in a loss of value of the investment has made it hard for states to draw the line between the right of the state to regulate and legitimate expectations of investors. As Ian Brownlie notes, "State measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures

8 U.S. Model Bilateral Investment Treaty (BIT) 2004, art. 21.

9 A.R. Albrecht, 'The Taxation of Aliens under International Law' (1952) 29 British Yearbook of International Law 145.

10 B. Weston "'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'", Virginia Journal of International Law, 1975, Volume 16, pp. 103-175 at 112.

of devaluation. While special facts may alter cases, in principle, such measures are not unlawful and do not constitute expropriation"[11]

As seen in the aforementioned quotation, in some instances, when the state legitimately utilises its powers, it may not constitute expropriation. The question tribunals have been faced with has been to delineate the threshold beyond which regulatory measures transform into de facto expropriation, recognising the need to safeguard the state's right to pursue public policy objectives while ensuring that investors are not unfairly deprived of the value of their investments. The application of the principle of proportionality has emerged as a crucial criterion in evaluating the legitimacy of regulatory measures, emphasising the necessity for states to demonstrate that their regulatory actions are necessary and proportionate to achieving the intended public policy objectives.[12]

Further on, there have been significant developments which tried to bring about a distinction between the right to regulate and expropriation. The following extract from a Commentary to the American Law Institute publication shows us how a demarcating line has been drawn between the right to regulate and expropriation.

"A state is responsible as for an expropriation of property when it subjects 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 state's territory. 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 states if it is not discriminatory"[13].

Now that the debate between the right to regulate and expropriation has been explored, the next section will examine when taxation measures would result in expropriation.

TAX MEASURES AS EXPROPRIATION

The ambiguity surrounding "expropriation" poses a substantial issue in International Investment Law.[14] States are under the international community's constant scrutiny to regulate the economy meticulously through measures that do not amount to "taking." ". ." It would be inappropriate to set

11 Ian Brownlie, "Public International Law", Oxford University Press, 6th Edition, 2003 at 509

12 H. Mountfield, "Regulatory Expropriations in Europe: the Approach of the European Court of Human Rights", N.Y.U. Environmental Law Journal, Volume 11, No 1, 2002 pp. 136-147.

13 "Restatement of the Law Third, the Foreign Relations of the United States," American Law Institute, Volume 1, 1987, Section 712, Comment g.

14 Dolzer, "Indirect Expropriations: New Developments?" Article of the Colloquium on Regulatory Expropriation organised by the New York University on 25-27 April 2002; 11 Environmental Law Journal 64.

an international standard for "expropriation", as it is dependent on the facts and circumstances of each case. Furthermore, the evolving jurisprudence on taxation amounting to expropriation presents a lack of precedential backing to lean back on.

One of the famous cases which dealt with expropriation and taxation was the Yukos case. In the award[15], the tribunal upheld the merits of the case under the Spain-Russia Bilateral Investment Treaty. One of the issues dealt with by the Tribunal was the Claimants here; the Spanish investors owned American Depository Receipts (ADRs) of Yukos and had contractual relationships with the Deutsche Bank, which was the formal shareholder/depository of the Yukos shares. With respect to jurisdiction, the Tribunal held that ownership of ADR would be enough to constitute a claim under the Spain-Russia Investment Treaty.

In Occidental v. Ecuador, the tribunal noted that "taxes can result in expropriation as can other regulatory measures"[16] and further reiterated in Tza Yap Shum v. Republic of Peru[17] that "arbitrary exercise of taxing power by a state constitutes indirect expropriation." A confiscatory tax measure introduced by the domestic laws of the host country that solely affects the profits arising out of business and does not directly affect the investment as a whole could fail to qualify as expropriation. Telenor Mobile v. Hungary tribunal stated: "The tribunal considers that, in the present case at least, the investment must be viewed as a whole and that the test the Tribunal has to apply is whether viewed as a whole, the investment has suffered substantial erosion of value."[18]

Introducing tax provisions that could hamper the flow of income from investment could embody the nature of "taking" or expropriation. The prime focus of business lies in making a profit; hence, Tribunals have taken the view that any measure resulting in a loss would amount to "expropriation". The Tribunals in the Burlington[19] and Perenco[20] cases took a similar stance, stating that "as long as the investor could operate and pay bills, it was not expropriated." Hence, any tax measure resulting in substantially diminished profits would not be considered "taking" or "expropriation," which is contrary to the interests of the investors.

15 Quasar de Valores et al. v The Russian Federation, Award dated 20 July 2012.

16 Occidental Exploration and Production Company v. The Republic of Ecuador ("Occidental v. Ecuador"), UNCITRAL Arbitration, Award of 1 July 2004, para. 85.

17 Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6 (July 7, 2011).

18 Telenor v. Hungary, Award, 13 September 2006, para. 67.

19 Burlington v Ecuador, ICSID Case No ARB/08/5, Decision on Liability dated 14 December 2012;

20 Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petro´leos del Ecuador (Petroecuador), ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability dated 12 September 2014.

The orders of Tribunals in disputes relating to International Investment Treaties and the methods of evaluation of impugned state measures have received international recognition as 'tests' which are used to determine whether a particular state action constitutes 'expropriation'.

THE FACTOR OF IMPACT

The arbitral tribunal in the case of Telenor v. Hungary pointed out that the determinative factors for establishing an expropriation were the intensity and duration of the economic deprivation suffered by the investor.[21] It was further mentioned that the impact of the measure or degree of interference must be such as to render the property rights useless, i.e., to deprive the owner of the benefit and economical use of the investment. Hence, any state action that substantially deprives the foreign investor of the income or profits arising out of the business should be considered as amounting to "expropriation".

In Pope & Talbot v. Canada, the test used by the arbitral tribunal to establish indirect expropriation was "whether the interference is sufficiently restrictive to support a conclusion that the property has been taken from the owner".[22] Hence, the destruction of the economic value should be total or close to the total. The *Burlington* Tribunal had employed the Pope and Talbot 'substantial deprivation' test for expropriation. The same test has been applied in multiple cases thereafter.[23]

LEGITIMATE EXPECTATIONS

The notion of legitimate expectations, as evident from the research on experiences by the European Court of Human Rights and the EU, concludes that "*one important factor for the court's assessment [of an expropriation claim] is whether the individual has some form of legitimate expectation that his or her rights will not be regulated or restricted in a certain way*".[24] The Bilateral Treaties entered carrying clauses which provide for the fair and equitable treatment of investors should in themselves be considered as a legitimate expectation.

Another test utilised by Tribunals in order to decide whether expropriation has occurred or not would be the degree of control over the investment. In the case of Feldman v. Mexico[25], wherein the issue was with regards to tax refund benefits which were not provided, the tribunal stated that even though economic loss had been caused, the investors still had complete control over the investment, and hence, it would not amount to expropriation.

[21] Telenor v. Hungary, Award, 13 September 2006.
[22] Pope & Talbot v. Canada, Interim Award, 26 June 2000, para. 102.
[23] *supra* note 1 at 65.
[24] M. Perkams, The Concept of Indirect Expropriation in Comparative Public Law – Searching for Light in the Dark, in International Investment Law and Comparative Public Law, ed. S. Schill, Oxford University Press (2010).
[25] Marvin Roy Feldman Karpa v. United Mexican States(ICSID Case No. ARB(AF)/99/1)

In such a situation, the foreign company would be unable to retrieve the expected Return on Investment. The interpretation in some instances may not include profits under the ambit of "investments". Still, the recovery of costs should be considered an essential component or attribute of the investment. The view of tribunals that in tax cases, investment arbitral tribunals require a substantial or even total economic deprivation more than simply abusive or illegal intent is an inclination in favour of host states due to the *lex specialis* character of tax measures.[26]

Amongst all the tests, the most dominant test to determine whether an indirect expropriation has taken place, which is also utilised in the context of tax measures and expropriation, is the "sole effects doctrine". This test has only one criterion, which is the severity of the measure on the investment.

One of the key cases which utilised this test is Burlington v. Ecuador,[27] wherein the Tribunal laid down two criteria to determine whether a tax measure would amount to expropriation or not. They were:

1. Whether the tax is discriminatory?
2. Whether the tax is confiscatory?

If the answer to the questions is affirmative, then the concerned taxation measure would amount to indirect expropriation. This was further upheld in the case of Encana v. Ecuador, where the three grounds on which a tax measure would be considered to be expropriation were if it was arbitrary or punitive in nature.

From the aforementioned cases, it can be ascertained that the main question to be dealt with when determining whether a taxation measure would amount to indirect expropriation would be whether it is arbitrary and punitive/confiscatory in nature.

Discriminatory criteria for determining the tax payable by a foreign investor could also amount to unlawful expropriation. Most developed countries tax non-resident aliens and foreign corporations on their passive income (such as dividends and interest) based on gross receipts, although citizens and residents, in contrast, pay tax on net income.[28] The Burlington Tribunal had stated that "as a matter of general international law, a wrongful purpose in a tax, such as a discriminatory purpose, could only be an expropriation if it resulted in substantial deprivation." Although an unfair

[26] Ali Lazem, Ilias Bantekas, The treatment of tax as expropriation in International investor–state arbitration, *Arbitration International*, Volume 38, Issue 1-2, March-June 2022, Pages 85–130, https://doi.org/10.1093/arbint/aiv030
[27] *supra* note 20.
[28] See, eg Reuven Avi-Yonah, 'Globalization, Tax Competition and the Fiscal Crisis of the Welfare State' (2000) 113 Harvard L Rev 1573; Michael J Graetz, Foundations of International Income Taxation (2003) ch 7.

discriminatory method of calculating the tax payable would amount to expropriation, the substantial economic impact would be considered over the intent behind such a provision.

TAX CARVEOUTS IN INTERNATIONAL INVESTMENT AGREEMENTS

Tax carveouts reflect the complex relationship between tax policies and the protection of investments. States have commonly begun to adopt tax carveouts in Bilateral Investment Agreements. The nature of tax carveouts underscores the multifaceted challenges in balancing the imperative of states to exercise their sovereign right to tax with the necessity to safeguard the legitimate expectations and investments of foreign investors.

Tax carveouts serve as specific provisions within international investment agreements that exempt certain aspects of a state's tax regime from the purview of ISDR. These carveouts are intended to delineate the boundaries within which tax measures fall outside the jurisdiction of arbitral tribunals, thereby safeguarding states' autonomy in matters related to taxation while providing a degree of certainty and predictability for foreign investors. Older IIAs have broad carve-out provisions, while newer carve-outs have specific policies. However, it is a settled principle that a mere absolute tax carve-out in a treaty would not exempt the jurisdiction of the Tribunal. It is up to the tribunal to decide whether it has jurisdiction over the claim, and certain tribunals have held that the challenged measure was not a tax and went to hold measures as expropriation.[29]

The issues with regard to the specificity and predictability of arbitral decisions present a concern for both the States and the Investors. This has led to the alteration of the underlying dynamics of IIA rulemaking[30] and further emphasises the growing significance of arbitral interpretation.

Tribunals have also extensively relied on the underlying notion of the bonafide intention of State action. Therefore, in the examination of cases relating to taxation measures constituting expropriation, the Tribunals have exercised deference. The principle of presumption of validity of taxation measures, as laid down in Renta 4 v. Russia,[31] requires that the point of inception of enquiry lies in bona fide state action in the public interest. This principle has been adopted and applied in subsequent cases.[32] The tribunals, in the face of such deference, have attempted to characterise measures as not 'tax', bringing them outside the scope of protection as guaranteed under the treaties.

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29 International Investment Agreements and Their Implications for Tax Measures: What Tax Policymakers Need to Know - A Guide Based on UNCTAD's Investment Policy Framework for Sustainable Development, 2021.

30 *supra* note 1.

31 *See* Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. Russian Federation, SCC Case No. 24/2007, Award, 20 July 2012.

32 *See* Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, SCC Case No. 63/2015, Award, 15 February 2018, para 580.

The tribunals have also relied upon the "exceptions to the exceptions" which are provided in the Investment Agreements. If an investor is successful in proving the expropriation of the investment in violation of the treaty, the tax carveout would fall short of State protection. The carveout provisions may further be subject to provisions related to 'fair and equitable treatment' and 'expropriation', yet the mere presence of discrimination or taking over by the State will not amount to a violation of the rights of the investor.[33] The threshold[34] that has been set by the Tribunals is high enough to safeguard the Sovereign right.

Contrarily, arbitration tribunals have also attempted to come up with an exhaustive definition of what amounts to a tax. The tribunal in the Occidental dispute, the respondent state, claimed that the impugned measure was protected as it was a "matter of taxation", which fell under the exception provided under the treaty. The Tribunal, while dismissing the argument, proceeded to draw reference to the domestic mechanism of Ecuador. Although "taxation" is generally interpreted in accordance with international law, the Tribunal[35] placed a significant emphasis on considering the domestic characterisation of a measure. The tribunals are playing in an active part in determining whether a particular measure constitutes a 'tax' in the first place.

Although Tax Carveouts have been introduced to limit arbitrary State action while effectively safeguarding sovereign rights, the determinative role of the arbitral tribunals in the recent past has brought forth new elements of concern.

DOMESTIC COURTS v. ISDS FOR TAXATION ISSUES

The ISDS mechanism is contended to constrain sovereignty, especially in developing countries, due to the rights granted to private parties, which are alien to the WTO dispute settlement mechanisms. However, the recent increase in the number of investor-state disputes involving developed countries contradicts this contention.

The modern Investor-State Dispute Settlement system was introduced to foster investments in developing nations and provide protection for business investors who intended to invest in those nations. The ISDS mechanism was designed to protect businesses from biased state powers and provide a neutral platform for arbitration.[36] However, the system that was brought into place to eliminate the "home-court advantage" of the host states is often found riddled with incredibly high

33 *See* Burlington Resources Inc v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012.
34 *Ibid.*
35 Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11 (award rendered on October 5, 2012).
36 Haley Sweetland Edwards, Shadow Courts: The Tribunals That Rule Global Trade, Columbia Global Reports, 144 (2016).

costs, biased arbitrators, and challenges to access.[37] The shortcomings of the ISDS intensify in matters of taxation as the sovereign power of the host nation is challenged.

The advocates of ISDS propound that policymakers and domestic courts discriminate against foreign investors. Membership in UNCITRAL promises a proper representation of the various geographic regions and their socio-economic landscapes, thereby providing a neutral platform for inclusive international dispute resolution. The presence of observer delegates representing intergovernmental organisations, arbitral institutions, and civil society organisations provides an additional dimension to the inclusiveness of the dialogue. The expertise in the commercial sphere, analytical skills, trends analysis and suggestions from the experts of commercial expertise and experience nudge the organisation to rational decisions.

Investors are now consistently challenging the host governments' laws and regulations that reduce their expected profits as a result of the increased number of awards for the expropriation of future profits.[38] The opposition to the system of ISDS was explicitly expressed regarding the provisions of ISDS provided for in the Trans-Pacific Partnership Agreement. By virtue of this agreement, a special dispute resolution process was introduced, which empowered the corporations to challenge domestic laws that could adversely impact 'their expected profits'. The US authorities contended that such a provision confers power upon the UN and the World Bank to review and prescribe taxpayer compensation, encroaching upon the nation's sovereignty. It is also widely argued that the system undermines the rule of law, interferes with environmental and health policies, and exposes taxpayers to liability.[39]

The primary concern expressed by host countries with opting for ISDS over domestic courts lies in the increased number of cases that challenge measures taken in good faith for the furtherance of public policy. The challenged measures include the ones introduced to ensure that host countries benefit from the investments through fiscal or economic linkages.[40] This concern has attracted much scrutiny from the European Union, which considers ISDS to be 'contrary to the national interest'. As a response to the common finding that ISDS provisions are unconstitutional due to the "waiver of

[37] Lindsay Hollis Jones, Investor-State Dispute Settlement: A Flawed International Legal System (Master's thesis, Harvard University Division of Continuing Education 2022).

[38] U.N. Conference on Trade and Employment, Final Act and Related Documents, U.N. Doc. E/CONF.2/78 (March 24, 1948), available at https://docs.wto.org/gattdocs/q/UN/ECONF2/78.PDF.

[39] Patricia Ranald, The Trans-Pacific Partnership Agreement: Reaching behind the border, challenging democracy, 26(2) ECON. & LAB. REL. REV. 241, 242 (2015).

[40] Mobil v. Canada; Occidental v. Ecuador; Federal Elektrik Yatirim v. Uzbekistan.

sovereign jurisdiction"[41], nations like Ecuador, Argentina, Bolivia and Venezuela are withdrawing from the ICSID Convention.[42]

CONCLUSION:

The Interplay between ISDS and taxation measures as a form of expropriation turns out to be a complex interrelated relationship hinging on municipal and treaty law. Considering both, the conclusion can be reached that, a taxation measure first would need to pass the jurisdictional challenge excluding the presence of a carve-out or the tribunal should rule it is an expropriation measure not amounting to a taxation measure but masquerading as a taxation measure in case of the existence of a carve out. Further on, other reservations also have to be met as countries like India do not seek to enforce Investment Arbitration Awards due to various reservations. In conclusion, regardless of whether there exists carve outs or not, Arbitral Tribunals have devised a variety of standards to test what would constitute an expropriation regardless of the name, hence ensuring the protection of the investor's investment.

[41] Michelle C. Perez, *Trading Goods for Bad: Is Public Policy Undermined by Investor-State Dispute Mechanisms?*, 49 The University of Miami Inter-American Law Review 132, 169 (2018).
[42] Diana Marie Wick, The Counter-Productivity of ICSID Denunciation and Proposals for Change, 11 J. INT'L BUS. L. 239, 242 (2012)