CRITICAL ANALYSIS OF COMPREHENSIVE ECONOMIC COOPERATION AGREEMENT BETWEEN THE REPUBLIC OF INDIA AND THE REPUBLIC OF SINGAPORE

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I. INTRODUCTION

The topic of International Investment Law is rapidly becoming more popular due to explosive growth of international investment agreements ["**IIAs**"], a general term that refers to bilateral investment treaties, regional investment treaties and investment protection provisions of free trade agreements.[1]

Signed in 2005, the Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore ["**CECA**"] is one such International Investment Agreement which is the cornerstone of trade and investment ties between India and Singapore and has been entered into by both the countries to bring mutual benefits. CECA has widened the scope of business between both countries.

The Agreement mainly aims to strengthen and enhance the economic, trade and investment cooperation between India and Singapore with emphasis on other aspects such as establishment of transparent, predictable and facilitative investment regime. It also seeks to liberalise and promote trade in goods in accordance with Articles XXIV of the General Agreement on Trade and Tariffs and Article V of the General Agreement on Trade in Services respectively, including promotion of mutual recognition of professions.[2]

Both nations, through the agreement, have agreed to improve the efficiency and competitiveness of their respective manufacturing and services sectors, including joint exploitation of commercial and economic opportunities in non-parties. The agreement also focuses on facilitating and enhancing regional economic cooperation and integration, in particular to form a bridge between India and the Association of Southeast Asian Nations ["**ASEAN**"] region and serve as a pathfinder for the India-ASEAN free Trade Agreement.[3]

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[1] KRISTA N. SCHEFER, INTERNATIONAL INVESTMENT LAW 1 (Edward Elgar Publishing, Inc. 2013).
[2] Comprehensive Economic Cooperation Agreement (India-Singapore) (signed 29th June, 2005) Chapter 1, Article 1.2.

[3] *Id*. Article 1.2.

The reason behind stating the objectives of CECA is that most tribunals interpret a treaty by invoking Article 31 of the Vienna Convention on the Law of Treaties ["**VCLT**"]**.** [4] The object and purpose of a treaty is among the primary guides for interpretation listed in Article 31 of VCLT, and the object and purpose are often sought in the preamble of an investment treaty.[5] In CECA, objectives have been specifically mentioned in addition to preamble.

The task of interpreting investment treaties is rendered difficult, mainly by two factors:

i. The generality and vagueness of many terms used in their texts such as 'fair and equitable treatment', 'expropriation and measures tantamount to expropriation', exceptions and defences to investment which are rarely defined in text of treaty and which may be interpreted differently by reasonable persons.
ii. Factual and legal complexity of investment transactions and relationships to which investment treaties are applied.[6]

As a result of these complexities, this article will examine three key provisions of CECA namely National Treatment, Expropriation and Exceptions and Defences to highlight difficulties that may arise in its interpretation.

II. NATIONAL TREATMENT

Non-discriminatory treatment, which is the essence of international investment law and is regulated by international investment treaties, has two basic forms:

i. First known as "national treatment" which requires the host States to treat foreign investors and foreign investments no less favourably than they treat their own national investors and investments.
ii. Second known as "most favoured-nation treatment" which demands that host countries should treat investments and investors covered by the treaty no less favourably than they treat other foreign investors or investments.

As economic and business activity is a competitive process, economic actors constantly seek to gain advantage over their competitors and to remove advantages that their competitors may have over

[4] Article 31(1) provides: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'
[5] RUDOLF DOLZER AND CHRISTOPH SCHREUR, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 29 (CPI Group (UK) Ltd. 2008).
[6] JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 155 (CPI Group (UK) Ltd. 2010).

them. The rationale underlying national treatment standards is to place all economic actors in an equal position on the assumption that such equal treatment will promote competition and economic growth.[7] National Treatment is a core obligation in the General Agreement on Tariffs and Trade ["**GATT**"] and its related treaties.[8] Also, human rights treaties[9] require countries to extend within their jurisdictions equal treatment to all similarly situated persons because there is often a protectionist tendency of governments to protect domestic investors and products from foreign competition and National Treatment attempts to neutralize such tendency.[10]

Based on the above principles, National Treatment provision in CECA states that "each party shall accord to the investors of the other party and their investments in relation to establishment, acquisition or expansion of investments in some specific sectors listed in annexures, treatment no less than it accords in like circumstances to its own investors and investments."[11]

Some treaties grant national treatment to just 'investments of the other party', some to 'investors of other party', but CECA extend the same protection to investments as well as investors. Also, articles specifying national treatment to investors and investments may be separate like in Article 1102 (1) and (2) of North American Free Trade Agreement ["**NAFTA**"] which has been a model for a number of free trade agreements provision on national treatment but CECA provide it in a single provision. While discussing 'national treatment' provision, it may seem that its meaning is uniform and constant across treaties, but it is not usually so as there are many variations in particular treaty texts and therefore, specific language of the text in question in a particular treaty has to be examined carefully.[12]

In examining National Treatment provision, there are some legal elements that must be assessed, such as whether or not the treatment was less favourable; the comparability of investors; when the obligation takes effect; and the applicability of any justification.[13] It is now necessary to analyse in more depth each of these elements:

A. NO LESS FAVOURABLE TREATMENT

[7] *Id*. at 274.
[8] Article III, General Agreement on Tariffs and Trade (GATT); Article XV General Agreement on Trade in Services (GATS); Marrakesh Agreement Establishing the World Trade Organization (1994), Annex IB, Annex IC.
[9] Article I, European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); Article 1(1) of Organization of American States, American Convention on Human Rights; Article 2 Universal Declaration of Human Rights (1948).
[10] AUGUST REINISCH, STANDARDS OF INVESTMENT PROTECTION 29 (Biddles Ltd., King's Lynn, Norfolk 2008).
[11] CECA, *supra* note 2, Chapter 6, Article 6.3(1).
[12] Salacuse, *supra* note 6, at p 276.
[13] Schefer, *supra* note 1, at p 291.

In the first place, the investor or investment must be subjected to 'treatment' by the host State. It includes both *de jure* and *de facto* treatment. It means that the host State may be held responsible for a failure to accord National Treatment on the basis of that either (a) the letter of its regulatory measures fails to accord equal treatment to a foreign investor or (b) the legislative regime itself draws no such distinction, but the manner in which the State operates in practice does.[14]

Where an investment agreement like CECA stipulates that investors and investments shall receive treatment 'no less favourable than that received by its own investors', the element of less favourable treatment becomes important. The fact that there need not be any benefit to direct competitors from actions of the host State does not prevent a claim of non-discrimination from being successful.[15]

The claimant must establish that the treatment that it has received fails the State's undertaking that it be 'no less favourable' than that accorded to a local investor. The expression "no less favourable" means equivalent to, not better or worse than, the best treatment accorded to the comparator.[16] Once the relevant comparator has been established, it does not matter if the class is very small, provided there is clear preferential treatment. There has to be similar situations for both parties as CECA makes a mention of 'like circumstances' where the treatment has been offered, but this requirement gives space to State governments to act arbitrarily to make regulations in public interest.[17]

CECA further goes on to refer that National Treatment that has to be accorded at local and regional level to investors and investments of other party shall be no less favourable than most favourable treatment accorded by that regional or local level in like circumstances to investors and investments of the party of which it forms a part.[18] Most Favoured Nation ["**MFN**"] though is a standard of treatment which has been a central pillar of trade policy for centuries, but the prevailing view is that a MFN obligation exists only when a clause in a treaty creates it. Therefore, there has been an express mention of most favourable treatment principle in the CECA. In the absence of a treaty obligation, parties to the agreement retain the possibility of discrimination in economic affairs. To provide MFN treatment under CECA should be understood to mean that an investor from a party to the agreement, or its investment, would be treated by the other party "no less favourably" with regards a given subject-matter than an investor from any other third country, or its investment.

B. COMPARABILITY OF INVESTORS:

[14] CAMPBELL MCLACHLAN, LAURENCE SHORE, AND MATTHEW WEINGER, INTERNATIONAL INVESTMENT ARBITRATION 338 (CPI Group (UK) Ltd 2007).
[15] Schefer, *supra* note 1, at p 301.
[16] Pope & Talbot Inc. v. Canada *Ad hoc* Tribunal UNCITRAL, 1976.
[17] Salacuse, *supra note* 6, at p 277.
[18] CECA, *supra note* 2, Article 6.3(3).

The relevance of the comparison must be proven in order to compare the treatment provided to the investors. To do this, claimant is required to show that it was in a like situation or like circumstance as a more favourably treated investor was.[19]

Identifying the correct or at least the most suitable comparator is the most difficult aspect. The determination of a suitable comparator is of its nature a fact-based inquiry and following elements have been identified as potentially relevant factors in identifying suitable comparator:

i. Identity of the economic or business sector;
ii. Extent of the competition between the investor and the comparators in the sale of its products or services and,
iii. Identity of legal and regulatory regime.[20]

Though CECA mention about foreign investor being given treatment no less than national investor but who would be the appropriate comparator in particular circumstances has not been specifically mentioned and gives scope to tribunal adopting either a narrow approach held in *Feldman v. Mexico*[21] whereby "like circumstances" was interpreted to refer to the same business or broad approach as was held in *Occidental v Ecuador*[22] to mean local producers in general. Therefore, if either party complains of wanting or differential treatment, it should have made a comparison with an appropriate party.

Likeness is a very flexible term, however. A wide view of likeness, i.e., requiring 'like' investors or 'like' investments be only moderately similar, would support many findings of 'like' investments. Thus, in similar economic sectors, if investors are treated differently, the less favoured investor could initiate a claim of discrimination. This broad view of likeness has been reflected in *Occidental v. Ecuador* case. A narrower concept of likeness would require greater showing of resemblance between investors or investments to conclude differential host treatment as violative of the obligations of non-discrimination.[23]

[19] Schefer (n 13), p 291.
[20] McLachlan, Shore and Weinger, *supra note* 14, at p 338.
[21] Feldman v. Mexico, Award, ICSID Case No. ARB(AF)/99/1.
[22] Occidental v. Ecuador, Award, ICSID Case No. ARB/06/11.
[23] Schefer, *supra* note 1, at 293.

To understand on a bare perusal of the provisions of an investment agreement as to what would be discriminatory treatment, the probable outcome would be the same view that was taken by the tribunal in *SD Meyers'* case:[24]

i. Whether the practical effect is to create a disproportionate benefit for nationals over non-nationals.
ii. Whether on its face, the contested measure appears to favour the host country's nationals over non-nationals protected by the treaty.

C. WHEN THE OBLIGATION TAKES EFFECT

An interesting issue concerning National Treatment which arises with respect to temporal scope of obligation is whether the State has an obligation to treat foreign investor as it does nationals prior to the investment itself or once the investment has been made? Though some States highly favour 'pre-entry' National Treatment provisions, others still limit the host's obligations to treatment of existing investments.

Contracting parties often make exemptions for sensitive sectors in IIAs with pre-entry national treatment obligations.[25] Similarly, CECA make a particular reference in Annex 6A (India's schedule of specific commitments) and Annex 6B (Singapore's schedule of reservations) to the sectors that have been reserved in which National Treatment has been assured by both parties to investment and investors of the other party.

In one important respect, CECA adopt a distinct line not shared by all investment treaties. That is its extension to the 'establishment' and 'acquisition' of investments. Many other investment treaties that include a National Treatment standard apply it only to the post establishment stage, covering both regulatory and contractual matters, leaving the host State to decide which investments to admit and on what terms. Under CECA, the National Treatment clause applies to the admission stage and has a much broader scope of practical application since many regulatory decisions that draw a distinction between nationals and foreigners are taken at the point of entry.[26]

It can be further ascertained from the wording of the provision 6.3(1), that "any subsequent establishment, acquisition or expansion of investments by an enterprise that is incorporated, constituted or set-up or otherwise duly organized under the law of a Party, and which is owned by

[24] SD Meyers Inc v. Canada, NAFTA Arbitration under UNCITRAL Rules, 2000.
[25] Schefer, *supra* note 1, at p 303.
[26] McLachlan, Shore and Weinger, *supra* note 14, at p 337.

an investor of the other party, shall also be regarded as an investment of the other party for the purpose of determining the applicable treatment to be accorded*"* meaning thereby, any subsequent actions of the parties in this context shall also be immune from any non-discriminatory treatment.

Also, the parties jointly agree that, at the time of any subsequent establishment, acquisition and expansion of investments, the enterprises shall be entitled to be accorded any better treatment which is available under the regime of that party. However, such better treatment accorded shall not be construed as an automatic addition to the commitments of parties scheduled in the respective schedules.[27]

The particular domains where treatment accorded to own investors and investments shall also be accorded to investors and investments of other party are management, conduct, operation, liquidation, sale and transfer of investments.[28]

D. JUSTIFICATIONS

In case of non-discrimination obligations, there is a broad recognition among arbitral tribunals that, in differentiating amongst investors, there are often strong public interests because States, after all, have a primary duty to their citizens. It is therefore expected from democratic governments to represent the interests of their people. Only in exceptional conditions, States can be prohibited from offering their nationals preferential treatment. It is because of these reasons National Treatment provisions are theoretically and practically complex. If there are exceptions in the BITs, it is possible to avoid the non-discrimination obligations because the tribunals are bound to apply such exceptions.[29] Exceptions have been discussed separately later.

E. INTENT

The important question that arises is whether discriminatory intent is relevant to judge the action of host government to favour the national? There are divergent views. For analysis of non-discrimination, intent is generally irrelevant. Although concepts of non-discrimination under customary international law required the claimant to prove the intention of host to discriminate to succeed but under modern investment law, absence of discriminatory intent is not going to save a discriminatory measure from condemnation by tribunals. Also, on the other hand, if existence of

[27] CECA, *supra* note 2, Article 6.3(1).
[28] *Id*. Article 6.3(2).
[29] Schefer, *supra* note 1, at 303.

intent to discriminate is demonstrated, it will not always result in an automatic finding of violation of the principle of non-discrimination.[30]

While the necessity of showing discriminatory intent on part of host State has been declined by many tribunals as an explicit test for claims of non-discrimination, if the difference in treatment can be shown to have reasonable basis, even that treatment which is not 'the same' can be accepted.[31] In *SD Myers,*[32] *Feldman,*[33]*Bayindir*[34] *and Corn Products*[35] case, Tribunals seem to have focused on the practical impact of the measure rather than on intent, whereas in *Genin v Estonia*[36]*,* Tribunal seemed to require discriminatory intent as a necessary perquisite for finding of discrimination.[37]

F. CONCLUSION

National treatment clause in CECA ensures that neither India nor Singapore make any negative differentiation between local and foreign investors and that position of foreign investor is promoted to the level accorded to own nationals making it conducive for investors to invest in either country on the guarantee that they will be given treatment at par with locals. Only exception is taxation sector in which a party is not obliged to extend to investors of other party the benefit of any treatment, preference or privilege resulting from international agreement or domestic legislation on taxation.

III. EXPROPRIATION

The seizure of assets by host country has been an archaic concern of all foreign investors because placing an asset in a foreign territory amounts to subjecting them under the jurisdiction of host country government. Those assets then become prone to host country's legislative and administrative acts, including expropriation, nationalization, dispossession and alteration of property rights.[38] Expropriation refers to an act of State taking away property having value from its owner. It, apart from violence towards the person of the investor, is also the most serious infringement of an investor's right that a state can accomplish, therefore, rules administering such actions are correspondingly vital.[39]

[30] *Id*. at p 302.
[31] *Id*. at p 301.
[32] SD Meyers Inc v. Canada, *supra* note 24.
[33] Feldman v Mexico, *supra* note 21.
[34] Bayindir v Pakistan, ICSID Case No. ARB/03/29.
[35] Corn Products International Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1.
[36] Genin v. Estonia, ICSID Case No. ARB/99/2.
[37] Dolzer and Schreur, *supra* note 5, at p 203.
[38] Salacuse, *supra* note 6, at p 313.
[39] Schefer, *supra* note 1, at p 167.

The host State's right to expropriate alien property has been accepted by classical rules of customary international law in consistence with the notion of territorial sovereignty.[40] Nevertheless, the right to expropriate is reiterated in numerous international law instruments, including almost all IIAs. It is necessary to examine both the nature of customary law rule on expropriation including elements to characterize an expropriation as 'legal' and treaty-based protections against regulatory or indirect expropriations.[41]

While expropriations or takings' can be of anyone's property, the expropriation of property becomes subject matter of international economic law only when the owner is foreign. The State's right to expropriate is restricted by conditions surrounding the object of expropriation and the process by which it is carried out.[42]

To measure the legality of expropriation, there are some commonly accepted requirements that need to be fulfilled. For example, Article 110 of NAFTA[43] and Article 13(1) of the ECT [44] provide that investments can be expropriated subject to following conditions:

i. Expropriation must be undertaken for a *public purpose;*
ii. It must be carried out in accordance with the principles of *due process*;
iii. It must be *non-discriminatory;*
iv. Investor must receive *compensation.*

CECA also recognizes that neither India nor Singapore shall take any measure of expropriation (including nationalization) against the investments of investors of the other party unless the measures are taken on a non-discriminatory basis, for a purpose authorized by law, in accordance with due process of law and against payment of compensation.[45]

Scope and meaning of the above requirements are defined as follows:

i. **Public Purpose**: The State must be acting in public interest to exercise its right to take ownership of a foreign investor's property. This requirement is difficult to adjudicate effectively for the simple reason that State is in a better position to determine what is in public interest than an international tribunal. The wide extent of modern States' regulation

[40] Dolzer and Schreur *supra* note 5, at p 98.
[41] Schefer, *supra* note 1, at p 168.
[42] *Id*. at p 169.
[43] North American Free Trade Agreement, 17 December 1992.
[44] The Energy Charter Treaty, 17 December 1994.
[45] CECA, *supra* note 2, Chapter 6, Article 6.5(1)

of their economies makes the scope of what could legitimately be considered a 'public purpose' severely far reaching. To prove violation of public interest element, investors need to show that the government took their property in retaliation or for personal enrichment of leaders of the host State.[46]

ii. **Due Process of Law:** There is a requirement of procedural fairness and protection of investor's rights throughout the expropriation period. The procedure adopted must be of such a nature to provide an affected investor a reasonable chance within reasonable time to assert its legitimate rights and have its claims heard.[47]

CECA provide for judicial review to an investor whose investment has been expropriated guaranteeing a right of access to the courts of justice or administrative tribunals or agencies of the party making the expropriation to seek review of the expropriation measure or valuation of the compensation that has been assessed.[48] It is crucial for a fair procedure. Though this is an option for aggrieved investor for resolving investor-state disputes but this may pose a variety of problems for foreign investors:

a) First, local courts may lack judicial independence and might be subject to the control of the host government, depriving the investor of an impartial forum. Moreover, local courts often have a heavy backlog of cases and inefficient procedures that deny expeditious justice and make obtaining a final judicial determination difficult.

b) Second, even if the judiciary is independent, it may nonetheless harbour prejudice towards foreign investors, as the courts of the State of Mississippi demonstrated in NAFTA case of *Loewen Group, Inc v United States.*[49]

c) Third, local courts may not have the expertise to apply complex principles of international law to complicated foreign investment transactions. Even if courts have such expertise, domestic law may limit or prohibit them from adjudicating their State's international commitments.[50]

iii. **Non-discrimination:** This element prohibits host States from treating certain investors unfavourably in comparison to other investors. Host State shall never have regard to personal characteristics of investors while expropriating properties. Discrimination of foreign investors on basis of their race or nationality is prohibited under international investment law.[51]

[46] Schefer, *supra* note 1, at p 170.
[47] *Id*. at p 177.
[48] CECA, *supra* note 2, Article 6.5(4).
[49] Loewen Group Inc v. United States, ICSID Case No. ARB(AF)/98/3.
[50] Salacuse, *supra* note 6, at p 397.
[51] Schefer, *supra* note 1, at p 180.

iv. **Compensation:** The measure of compensation has been by far the most controversial, but now, nearly all expropriation cases before tribunals follow the treaty-based standard of compensation in accordance with fair market value. This means full or adequate compensation.[52] Rather than leaving the interpretation of the standard of compensation solely to the discretion of arbitrators, many investment treaties define the terms in detail and provide instructions for their application.[53]

CECA also provides that payment of compensation shall be prompt, adequate and effective giving effect to "Hull Formula of Compensation". Compensation is required to be equal to fair market value of the expropriated investment immediately before the expropriation or impending expropriation became public knowledge. Also, compensation is required to carry interest from the time of expropriation to the time of payment.[54] The requirement of 'prompt' compensation means 'without any delay' so that investor does not have to wait for years for payment of lost investment and 'effective' compensation means that payment is to be made in a 'convertible currency'[55] to allow money to flow back out of country.

While compensation for legal expropriation is governed by treaty provisions, it is not so in case of illegal expropriation. It is regulated by principles of customary international law as illustrated by *Chorzow Factory* case, which requires that the offending state should, as far as possible, restore to the investor the situation that would have existed before illegal expropriation took place. Lost profits and any increase in enterprise value following expropriation will also be taken into account, unlike in legal expropriation.[56]

A. INDIRECT EXPROPRIATION

Investment treaties use a range of synonyms for the term expropriation including 'nationalisation', 'deprivation' and dispossession and the provision on expropriation use different phrases including 'indirect expropriation', 'measures tantamount to expropriation' and 'measure having effect equivalent to expropriation to signify that the provision is applicable to measures analogous to direct expropriation'.[57]

[52] Dolzer and Schreur *supra* note 5, at p 100.
[53] Salacuse, *supra* note 6, at p 353.
[54] CECA, *supra* note 2, Article 6.5(2).
[55] Dolzer and Schreur, *supra* note 5, at p 101.
[56] Salacuse, *supra* note 6, at p 354.
[57] JONATHAN BONNITCHA, SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES 233 (Clays, St Ives plc. 2014).

As expropriation can be either direct or indirect, CECA refer to both types of expropriation. This can be ascertained by provision of CECA, which explicitly lays down that expropriation provision is to be interpreted in accordance with the understanding of parties on expropriation as set out in exchange of letters forming an integral part of CECA.[58] CECA include not only direct expropriation but also measure or series of measures equivalent to direct expropriation without formal transfer of title or outright seizure. However, the action or series of actions by a party should interfere with a tangible or intangible property right or property interest in the investment to constitute an expropriation. The annexure further provides that expropriation has been included in the agreement to reflect the customary international law concerning the obligations that the States have.

There may be situations in which host States enact certain measures that decrease the benefits investors gain from their investments without actually changing or cancelling investors' legal title to their assets or diminishing their control over them and such measures amount to indirect expropriations. The reasons behind not expropriating directly and shifting to regulatory actions by host States are manifold, for example, the want for foreign capital makes State unwilling to take drastic and conspicuous steps of openly seizing foreign property. Further, any such official acts to seize title or control of a foreign investor's property will draw negative publicity and are likely to cause serious damage to the reputation of a State as a site of foreign investment.[59]

A typical characteristic feature of indirect expropriation is that there is denial of existence of expropriation by State and justifies its actions as legitimate exercise of its regulatory or 'police powers' thereby rejecting the investor's claim of compensation. Though there is a paucity of a clear and distinct line between valid regulation and illegal indirect expropriation but in ascertaining whether a regulatory action by a host State represents an indirect expropriation, tribunals look primarily to its effects on investment rather than to the form of actions of the State or government's intention in making it.[60]

The use of the phrase 'a measure or series of measures taken by a party that has an effect equivalent to direct expropriation or nationalization' in CECA also falls within a different category of expropriatory acts. It can be viewed in two different ways. First being, somehow broader and more expansive than simple indirect expropriation. It could be intended to add to the meaning of the prohibition, over and above the reference to indirect expropriation and so to broaden it. This view

[58] CECA, *supra* note 2, Article 6.5(7).
[59] Salacuse, *supra* note 6, at p 325.
[60] *Id*. at p 326.

was also held in *Waste Management*[61] case. On the other hand, 'measures equivalent to expropriation' can also be viewed as a concept co-extensive with that of indirect expropriation as was held by the tribunal in *Pope & Talbot*[62] case whereby it means nothing more than 'a measure equivalent to nationalization or expropriation.'

Though, the effect of the measure upon the economic benefit and value as well as upon the control over the investment is the key question to decide whether an indirect expropriation has taken place[63], but CECA have an exception to it stating that although a measure or series of measure by a party has an adverse effect on the economic value of an investment, it alone does not establish that expropriation has occurred. The extent to which the measure or series of measure interferes with distinct, reasonable, investment-backed expectations and the character of measure including inter alia the intent behind the measure, objectives, purpose and degree of nexus between the measure and outcome or effects that form the basis of the expropriation claim are some other factors that determine whether expropriation has occurred in addition to case by case, fact-based inquiry.[64]

CECA has also been fairly specific in defining the nature of investment-backed expectations. They must be 'distinct' and 'reasonable' to be considered by a tribunal in determining whether a government measure amounts to indirect expropriation.

The existence of legitimate expectations on the part of investor is an issue that has recently received increasing attention. It is debatable whether the concept of legitimate expectations is part of general principles of law. Though legitimate expectations play an important role in interpretation of fair and equitable treatment but they have penetrated the law administering indirect expropriations. The legal framework offered by the host State will be an important source of expectations on the part of investor[65] and national rules need to be obeyed by investors like any other economic activist.

In case of long-term projects, there is a direct agreement between the investor and host State which identifies the limits and gaps of State interference in agreement rights. Issues regarding violation of legitimate expectations are raised when the actions of the host State are such as to have an adverse

[61] Waste Management, Inc v. United Mexican States, ICSID Case No. ARB(AF)/00/3.
[62] Pope & Talbot Inc v. The Government of Canada, *Ad hoc* Tribunal UNCITRAL, 1976.
[63] Dolzer and Schreur, *supra* note 6, at 112.
[64] CECA, *supra* note 2, Annex 3.
[65] Dolzer and Schreur, *supra* note 5, at 115.

effect on the investor, where the investor may claim that the host State has violated legitimate expectations provided at the beginning of the investment.[66]

CECA uphold public welfare objectives such as health, safety and the environment and any regulatory action taken by a party in this context does not constitute measures having an effect equivalent to nationalization or expropriation. However, such measures are required to be taken only in rare circumstances. Even the Tribunal in *Methanex v. United States*[67] held that Californian ban on gasoline addictive MTBE due to environmental and public health reasons did not constitute expropriation.

Therefore, an important question that arises in determining whether a government's measure amounts to indirect expropriation or not is whether the measure is reasonably proportional to the purpose which the government seeks to achieve? A probable factor for this examination would be the impact of the measure on foreign investor versus impact on host country nationals and if it is found that foreign investor had to bear excessive amount of burden imposed by the measure then there is lack of proportionality.[68]

It becomes important to quote the jurisprudence of European Court of Human Rights on the proportionality test,

> "A measure depriving a person of his property shall not only pursue a legitimate aim in public interest but there must also be a reasonable relationship of proportionality between means employed and the aim sought to be realised and a balance will not be found if an individual had to bear excessive burden*"*.

This test developed by ECHR has also had an impact on tribunals while applying treaty provisions to governmental measures amounting to indirect expropriation. Even in *Tecmed v Mexico,* it was held that in addition to negative financial impact of regulatory measure on foreign investment, the proportionality of such measure to public interest protected and protection granted to investments shall be considered.[69]

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[66] 'Investors Legitimate Expectations and The Interest of Host State in Foreign Investment' <https://pdfs.semanticscholar.org/68e7/1e51a7ea0a165679975e35a9082517be3a7b.pdf> (last visited 21 December,2017)
[67] Methanex v. United States, (2005) 44 ILM 1345.
[68] Salacuse, *supra* note 6, at 342.
[69] *Id*. at 342.

Conclusion*:* CECA, like other treaties and agreements, ensures that expropriation cannot take place until four basic conditions are fulfilled, thereby taking care of the investors. The condition of compensation applies even when expropriating assets of an enterprise in which other party owns shares to safeguard interest of owners of such shares. CECA is different in the context that unlike other treaties providing for investor-state arbitration only to avoid disputes, CECA allow the parties to have recourse to local courts also for resolution of disputes ensuring compliance of due process of law element. The exception to expropriation that any measure taken in public interest such as health, safety and environment does not amount to expropriation, safeguards interest of host State thereby maintaining a balance between rights of investor and host State.

IV. EXCEPTIONS AND DEFENCES TO INVESTMENT PROTECTION

As the interdependent economic relationships of States have increased, there has also been an increase in number of their international obligations. The number of investment treaties, both bilateral ["**BITs**"] and multilateral ["**MITs**"] have skyrocketed since the late 1980s, increasing from 385 in 1990 to 2,495 in late 2005.[70]

On one hand, for seeking the benefits of foreign investment, a State contemplates or agrees to abide by international obligations regarding the treatment that will be meted out to the investors and investments during long years of their existence in the territory of host State but on the other hand, those same States wish to retain maximum amount of freedom to enact legislation and regulations during the same period in order to pursue their perceived national interests in an uncertain future. For this reason, exceptions are included in nearly all investment treaties to protect certain important interests from the coverage of treaty and allow the contracting States to uphold their ability to exercise legislative and regulatory authority in that area.[71]

Such exceptions may have been drafted either narrowly restricting the application of a specific treaty provision to a particular circumstance or transaction or may have been drafted broadly to exempt a specified class of persons, transactions, or situations from the application of all investment treaty provisions.[72] An example of later category is 'denial of benefits' clause in CECA, allowing the contracting States to deny the benefits of the investment to an investor which is an enterprise of other party either having no substantial business operations in the territory of the other party or

[70] P MUCHLINSKI, F ORTINO, C SCHREUER, OXFORD HANDBOOK OF INVESTMENT LAW 460 (CPI Antony Rowe, Chippenham 2008).
[71] Salacuse*, supra* note 6, at p 376.
[72] *Id*. at 377.

where the investors of denying party own or control the enterprise. Such circumstances have to be established by the denying party.[73]

The reason behind inclusion of such a clause is twofold. First, it unambiguously carves out a class of 'investors' that would otherwise be entitled to protections under the treaty.[74] Second, such clauses address concerns about nationals, legal entities in particular of the home State that seek to lodge treaty claims but have no connection to the home State other than the simple fact of their incorporation. It was in the diplomatic protection context, the clause of 'denial of benefits' arose to exclude 'enemy companies' from the possibility of obtaining espousal.[75]

There may be exceptional circumstances in which a country's national interests are at stake and, hence, contracting parties are exempt from observing core treaty obligations. Such exemptions are provided for in the treaties/agreements.[76] CECA stipulate that "a party shall not be required to furnish any information, the disclosure of which and nothing shall prevent a party from taking any action it considers necessary for the protection of its essential security interest."[77] Such exception clauses can be interpreted to have the reasonable aim of giving host countries the legislative and regulatory autonomy to deal with threats to important national interest. On the other hand, their existence in treaties raises the risk that they will be invoked in unjustified circumstance by host countries in order to avoid their legal obligations and thwart the justified expectations of investors.[78]

The use of the term "protection of essential security interest" in CECA is vague and general because what is included in the term is the essential question that arises for consideration e.g. whether a State facing difficult economic challenges can justify the concealment of important information or take any action on the ground that it was necessary to protect its essential security interest?[79] Because the agreement does not elaborate on or explain what is meant by 'essential security interest' the content of provision has to be found elsewhere. With respect to essential security interest, it is appropriate to look in customary international law defence of necessity.[80]

The question now is whether national security is a matter of subjective determination. If there is a use of express words in a treaty, it indicates that a subjective determination is conclusive. In its absence, the tribunal should hold that there must be objective factors justifying the invocation of

[73] CECA, *supra* note 2, Chapter 6, Article 6.9(1)(a),(b).
[74] Salacuse, *supra* note 6, at p 377.
[75] McLachlan, Shore and Weiniger, *supra* note 14, at p 212.
[76] Salacuse, *supra* note 6, at p 378.
[77] CECA, *supra* note 2, Article 6.12(1)(a)(b).
[78] Salacuse, *supra* note 6, at p 379.
[79] *Id.* at p 379.
[80] Muchlinski, Ortino & Schreuer *supra* note 70, at p 496.

national security defence. The India-Singapore Comprehensive Economic Cooperation Agreement (2005) though containing a subjective determination formula, points out instances of national security that are relevant, but does not include circumstances brought about by economic crisis. National security in this agreement is confined to military threats. These circumstances include protection of fissionable and fusionable materials, actions in time of war or emergency in international relations, action relating to production of arms and ammunitions and action in protection of essential infrastructure.[81]

For the understanding of security exceptions, CECA make a reference to the exchange of letters. It provides that the decision on a security exception by a party is 'non-justiciable' and 'it shall not be open to any arbitral tribunal to review the merits of such a decision.'[82] This is absolute, but confines the exception of national security to limited circumstances which involve a military threat or activity involving violence against State. Clearly, there is no basis in the treaty which recognizes the circumstances in which the exception of national security can be invoked to include within its ambit exception to economic crisis unless the crisis sparks off threats to infrastructure or interferes with armaments manufacture or affects any of the activities mentioned in the provision.[83]

CECA further empower the contracting parties to pursue its respective obligations under the United Nations Charter for maintenance of international peace and security and for this purpose, States can take 'any action'. This allows States to exercise unfettered right, thereby expanding the scope of the exception clause.[84]

Exceptions that may be invoked on grounds of 'public order' or 'essential security' raise a pertinent yet unresolved question that whether such provisions should be construed as importing customary international law defences such as necessity or whether they should be viewed as creating separate treaty-based defences.[85] The two work differently. The treaty defence is a 'threshold requirement'. If that applies, the substantive obligations under the treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been breach of those substantive obligations.[86] The 'CMS, Enron, LG&E and Sempara' tribunals have held

[81] M. Sornarajah, INTERNATIONAL LAW ON FOREIGN INVESTMENT (Cambridge University Press 2010), 459.
[82] CECA, *supra* note 2, Article 6.12(3), (4).
[83] Sornarajah, *supra* note 81, at p 460.
[84] CECA, *supra* note 2, Article 6.12(1)(c).
[85] Muchlinski, Ortino & Schreuer, *supra* note 70, at p 493.
[86] CMS Gas Transmission Company v. Argentine Republic ICSID Case No. ARB/01/8.

different views. Lack of direction in a treaty should be read to import the customary international law provisions.[87]

Sometimes it becomes necessary to focus on specific language of the exception provision known as "self-judging nature of exception clause" to avoid any controversy that may arise out of treaty interpretation and application. CECA use the phrase 'which it considers', giving rise to inference that the exception clause is self-judging. It is necessary to state that even if the language of exception clause is self-judging, it does not imply that host State may invoke it at its unfettered discretion.[88] Also, Article 31 of the VCLT provides that States have a duty to carry out their treaty obligations 'in good faith.'[89]

Under customary international law, the situation of possible or unavoidable damage to the alien during a period of serious disorder and of possible range of protection by the host State has long engaged arbitral tribunals. The principle of non-responsibility of the host State for extraordinary events of social strife, which result in physical action against the asset of foreign investor is however qualified by duty of the host State to employ due diligence to the extent feasible and practicable under the circumstances, both before the event and while it unfolds. The burden of proof lies on the claimant to show negligence on part of the host State but no claim will be accepted if the host State proves that foreigners had received the same treatment as nationals of the host State.[90]

ILC Articles on State Responsibility, which reflect the customary international law, provide for situations beyond the control of host States under the following articles: Force Majeure (Article 23), Distress (Article 24), Necessity (Article 25). The general notion of these concepts is that they allow a State to act in a manner not in conformity with existing obligations of either customary or treaty law.[91]

A question with regard to international obligation is who should judge the extent and nature of an obligation and whether State has complied with it? This is a particular problem with respect to exceptions to obligations, for example, national security exception that is self-judging. It is difficult to expect from a State to be objective in ascertaining the existence of a state of necessity when such a defence would absolve it from liabilities that are harsh and taxing. Necessity may not be invoked

[87] Muchlinski, Ortino, & Schreuer, *supra* note 70, at p 498.
[88] Salacuse, *supra* note 6, at p 381.
[89] Vienna Convention on the Law of Treaties (signed 23 May 1969), entered into force 27 January 1980.
[90] Dolzer and Schreur, *supra* note 5, at p 183.
[91] *Id.* at p 184.

by a State unless it establishes that violating its obligation 'is the only way for a State to safeguard an essential interest against a grave and imminent peril'.[92]

It is therefore for tribunal or court applying an investment treaty to determine whether contracting State has invoked an exception clause in good faith. Even the CMS Tribunal in interpreting Article XI of the Argentina-US BIT clarified that it was the tribunal's task to ascertain whether the requirements of Article XI were fulfilled and the tribunal relied on the *Gabcikovo*[93] case, in which ICJ also held with respect to the requirements of the customary international law defence of necessity that 'the State concerned is not the sole judge of whether those conditions have been met'.[94]

A review should therefore extend beyond a mere determination that necessity or security exception was invoked in good faith and should include a substantive review to examine whether a state of necessity or emergency meets the conditions laid down by customary international law and treaty provisions and whether or not it is capable to preclude wrongfulness.[95]

The parties to India-Singapore Comprehensive Economic Cooperation Agreement mutually agree to undertake measures in public interest whereby "either party or its regulatory and judicial bodies are permitted to adopt, maintain or enforce and take any measure respectively that is in public interest including measures to meet health, safety or environmental concerns". With environmental concerns rising throughout the world, CECA can be perceived to have given host country room to legislate on matters relating to natural environment. Other areas of concern include health and safety of public.

The phrase 'consistent with chapter' would seem to mean that the measure in question shall be taken on a non-discriminatory basis and that investment shall be conducted in an environmentally sensitive manner.[96] The measures will not amount to violate fair and equitable standard, if fairness is understood in the context of the situation. The rapidly increasing law on environmental and human rights standards affects consideration of liability under investment treaties. They constitute obligations in general international law and investment treaties have to be read in the context of

[92] Muchlinski, Ortino and Schreuer, *supra* note 70, at p 503.
[93] Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997.
[94] Gebhard Bucheler, Proportionality in Investor-State Arbitration 213 (CPI Group (UK) Ltd 2015).
[95] Muchlinski, Ortino and Schreuer, *supra* note 70, at p 504.
[96] Salacuse, *supra* note 6, at p 385.

these obligations and whenever any conflict arises between treaty obligations and these general obligations, a tribunal will have to settle the dispute in an appropriate manner.[97]

V. CONCLUSION

For exception clauses, with the wording similar to that of India-Singapore CECA, the process of interpretation is likely to establish proportionality as an appropriate tool to determine whether the action of State is covered by non-precluded measure clause.[98]

Also, there are many defences accommodated in CECA, making investment protection weaker. However, necessity as a defence may not always be available to parties because its standards are high in itself and that they are extraordinarily difficult to satisfy. Strong defence will be required by both parties to justify the circumstances precluding wrongfulness.

The inclusion of exception provisions in CECA does not in effect lead to a level of protection lower than that guaranteed by rules of international law, particularly customary law to the investment and investors of either party.

[97] Sornarajah, *supra* note 81, at p 472.
[98] Bucheler, *supra* note 94, at p 250.