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Constitutional Right to Property in Changing Times: The Indian Experience

ABSTRACT:

The constitutional right to property has undergone a significant change since India's independence. In the past few decades, the guarantee of property for both alien and domestic right holders went for considerable dilution to sanction the unrestrained power of eminent domain. The arbitrary expropriation of property was justified in the then social and political context of a nascent state. However, since India embarked on the path of liberalization with the policy of promoting international trade and foreign investments, there appeared a progressive and selective modification if its legal regime on property rights to favour alien property and corporate interests. Part of the policy shift involved guarantee and strengthening of the legal environment for protection of foreign property and investment. India's international commitments under the WTO Agreements and several investment protection treaties guaranteed capital and IP exporting states safe and secure property rights in the host state – India, much beyond the existing protection for citizen's property. Remedies for breach and standard of compensation for expropriation, direct or indirect, were judged by international rules and practices, beyond the control of local courts. To the extent that international expropriation and compensation rules provide foreign investors and IPR holders with stronger rights than India's laws, they are also likely to provide them with stiffer property rights. In addition, change was evident in the nature of ownership of expropriated property. Nationalization (state ownership), which was the primary character of expropriations, was replaced by 'corporate' ownership with no respect for public purpose or just compensation. The recent stints of compulsory acquisition of land for SEZ underline the 'reverse-discrimination' or double standards perpetrated by the Indian state. The paper attempts to highlight this paradox in India's property rights regime in the changing global context. The paper argues for a constitutional rethinking on right to property, in the post liberalization context, considering the new social and political realities, particularly from the viewpoint of individual private owners whose identity and livelihood are attached to the property.

1. INTRODUCTION

The legal and political history of the rise and fall of property rights in India is well documented. After decades long tussle over state's power of eminent domain, the right to property stand relegated from a fundamental right to a

constitutional right. The fundamental right to "acquire, hold and dispose of property" envisaged under Article 19(1)(f) and Article 31 of the Constitution of India was diluted and replaced by Article 300A through an amendment in 1978.[1] Article 300A provides that the state could expropriate, nationalize or acquire private property provided the legislature has established a 'law' for the same. The amendment, in other words, broadened the state's power of compulsory acquisition of private property for 'public purposes' or for a 'company' and decide on the appropriateness of compensation. Most importantly, the Parliament ensured immunity for state's arbitrary exercise of power of 'taking' from judicial review and constitutional remedies. The exercise of eminent domain and the constitutional consistency of laws sanctioning expropriation were justified, rightly so, in the general social and political context of India. Such measures were felt necessary for a newly independent state with the majority of its population underprivileged, the need for agrarian reforms, and in the light of the constitutional mandate embedded in the preamble and the directive principle of state policy.[2]

Since the early 1990s, India embarked on the path of liberalization, granting market access for foreign trade and investment. India entered extensively into bilateral and multilateral agreements and committed itself to several international obligations. The obligations under the World Trade Organization (WTO) Agreement[3] and commitments under investment protection treaties[4] necessitated India to alter its laws conducive for providing a safe, secure and attractive legal environment for foreign private property, both tangible and intangible.[5] Breach of India's contractual and treaty-based obligations and the compensation thereof are judged not by the Indian courts, rather by specialized international arbitral tribunals such as the International Centre for Settlement of Investment Disputes (ICSID), the WTO Dispute Settlement Body (DSB) or numerous other private international arbitration institutions. The standard of determining legality of breach and quantum of compensation are based on rules and jurisprudence of which are murkier and tilted towards a 'prompt, adequate and effective compensation' standard set by

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1 The Constitution (Forty-fourth Amendment) Act 1978 (came into force on 20 June 1979).

2 See The Constitution of India 1950, Part IV – Directive Principles of State are Policy, arts 36 to 50. The Directive Principles are 'fundamental in the governance of the country.' The Supreme Court of India has referred to these principles as the 'conscience' of the Constitution, intended to ensure 'distributive justice' for removal of inequalities and disabilities and to achieve a fair division of wealth amongst the members of the society. *Pathumma and Others v. State of Kerala and Ors.* [1978] 2 SCC 1.

3 Agreement Establishing the World Trade Organization 1994 <www.wto.org/english/docs_e/legal_e/04-wto.pdf>. accessed 20 April 2011.

4 The common type of investment protection treaties are: Bilateral Investment Treaties (BITs) and FTAs); Preferential Trade and Investment Agreements (PTIA); Free Trade Agreements (FTA) etc. See generally, United Nations Conference on Trade and Development, 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking' (2007) United Nations, Geneva 1-157 <http://www.unctad.org/en/docs/iteiia20065_en.pdf> accessed 31 April 2011; Prabhash Ranjan, 'Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion' (2009) 26(2) J Int Arb 219-243.

5 In the case of *Entertainment Network India Ltd. (ENIL) v. Super Cassette Industries Ltd. (SCIL)* [2005] (Civil Appeal no. 5114) the Supreme Court noted that 'the ownership of any copyright like ownership of any other property must be considered having regard to the principles contained in Article 19(1)(g) read with Article 300A of the Constitution, ...'

western practices. The manifest shift towards protection of foreign rights and interests impose considerable limitation on India's policy space and control over foreign capital and property.[6] In addition, the trend seems to confer owners of foreign property/interests additional or higher level of protection than those provided under domestic laws. In other words, the international and transnational obligations claim supremacy over the dictates and priorities of national legislations.

This scenario presents a serious anomaly. India seems to progressively and selectively modifies its legal regime on property rights to suit the interest of foreign capital and corporate interests, affording higher protection than those enjoyed by the citizens under the Indian Constitution. To the extent that international expropriation rules and remedies provide alien investors and intellectual property right-holders with stronger rights and protection than the Constitution and laws of India, they are also likely to provide them with greater property rights.[7] The paradox in India's approach towards private property seems conspicuous in the context of the compulsory land acquisition for Special Economic Zones (SEZ) and other 'developmental' projects. The state appears to extensively use eminent domain to expropriate land to serve private commercial interests, both foreign and domestic. The new policy, couched in the language of 'development', appears to disregard 'public purpose' and go beyond the state's authority sanctioned by the Constitution in general and Part III and Part IV, in particular. Time is ripe for a serious introspection, particularly in the changing political and economic context and the underlying constitutional spirit and goals, which redefined constitutional status of property rights since 1970s.

This paper invites a debate on individual's property rights in India in the changing global context. The paper in the first and second part analyses the legal framework for protection of alien investments and intellectual property in host countries. In the third section, the paper examines the constitutional framework for the protection of property rights in India from a historic perspective and identifies the social and political context that led to its demise as a fundamental right. Part four attempts to highlight the contradictions in the current legal framework for land acquisition and double standards in India's policy towards protection affording higher protection foreign investors and intellectual property owners vis-à-vis Indian citizens. The paper argues that the current legal and policy framework in India guarantees higher protection for alien property, whereas the status and treatment of Indian citizen's property rights remained static since 1978. The paper urges for a constitutional rethinking on the protection of private property rights in India, in the post liberalization context, considering the new

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6 Chimni notes that 'the TCC seeks the adoption of international economic laws which facilitate the *globalization of production and finance* through creating and protecting global property rights, codifying the rights of transnational corporations, and limiting the economic autonomy of sovereign states.' BS Chimni, 'Prolegomena to a Class Approach to International Law', (2010) 21 EJIL 57–82, 71. See also B.S. Chimni, 'International Institutions Today: An Imperial State in the Making' (2004) 15 EJIL 1, 2; B.S. Chimni, 'The World Trade Organization, Democracy and Development: A View from the South' (2006) 40 JWT 1.

7 Matthew C. Porterfield, 'International Expropriation Rules and Federalism' (2004) 23(1) Stan Envtl L J. 43-62

social and political realities, particularly from the viewpoint of citizens whose identity and livelihood are attached to the property.

2. EXPROPRIATION AND FOREIGN INVESTMENT PROTECTION

The recent years have seen an explosion of bilateral agreements for investment protection between states. Known commonly as Bilateral Investment Treaties (BITs), Free Trade Agreements (FTAs) and Regional Economic Integration Agreements, the declared intend of these agreements is to create such favourable conditions which could foster greater investments by the private investors from developed countries in the territory of the developing countries. As per the recent estimate there are more than 2800 such agreements currently in force.[8] For instance, India has concluded BITs with 68 countries.[9] Bulk of these agreements is concluded between developed and developing countries.[10] Devised to promote one-way flow of capital, the agreements cater to developed countries' attempt to *protect* their foreign investments and insulate the same from the host country legal process.[11]

Often seen as a response against expropriations, BITs guarantee 'minimum standard' of protection for foreign investments in the territory of developing countries, i.e., not less than similar protection afforded to their own nationals.[12] In principle, the foreign owners are given 'the protection accorded to private rights of nationals, provided that this protection involves the provision of compensation for any taking.'[13] The agreement ensures foreign investments fair and equitable treatment, full and constant legal security, and 'prompt, adequate, and effective' compensation for expropriation.[14] In addition, BITs 'consciously seek to approximate

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8 There are 2600 BITs and 250 other trade agreements with investment provisions. See UNCTAD, 'Recent Developments in International Investment Agreements (2008 – June 2009)' (2009) 3 IIAM (UNCTAD/WEB/DIAE/IA/2009/8) <http://www.unctad.org/en/docs/webdiaeia20098_en.pdf> accessed 24 March 2011. See also Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements' in Karl P. Sauvant and Lisa E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flow* (OUP, New York 2009) 3.

9 According to UNCTAD, the total number of Bilateral Investment Treaties concluded by India (as on 1 June 2010) <http://www.unctad.org/sections/dite_pcbb/docs/bits_india.pdf> accessed 18 March 2011.

10 40 percent of BITs are concluded between developed and developing countries. UNCTAD, *World Investment Report* (2007) 17. See also Andrew T. Guzmán 'Explaining the Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties That Hurt Them' (1989) *JeanMonnet Paper* (26 August 1997) <http://centers.law.nyu.edu/jeanmonnet/papers/97/97-12.html> accessed 12 December 2011.

11 *Vandevelde* (n 8) 15.

12 ibid 13. Foreign investment has been defined 'the transfer of tangible and intangible assets from one country into another for the purpose of use in that country to generate wealth under the total or partial control of the owner of the assets' in M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, Cambridge 1994) 4.

13 Ian Brownlie, *Principles of Public International Law* (4th ed., OUP, Oxford 1990) 532.

14 Nearly all of the 91 BITs concluded by UK the standard of compensation payable to a foreign investor whose property has been expropriated or nationalized is to be judged against the classic Hull formula. The UK-India BITs (1995), Art 5 uses the term 'fair and equitable

in the developing, capital-importing state the minimal legal, administrative, and regulatory framework that fosters and sustains investment in industrialized, capital-exporting states.'[15] In other words, for capital-exporting states BITs offer their investors vital insurance against expropriation or other arbitrary treatment.

Part of this trend is the proliferation of investment guarantee agencies and multilateral dispute resolution mechanisms to serve and support foreign capital and investment. The most popular among them are the Multilateral Investment Guarantee Agency (MIGA)[16] and the Overseas Private Investment Corporation (OPIC) of the US Government, which guarantee protection against political risks in developing countries. The function is supplemented by multiple institutions like International Centre for Settlement of Investment Disputes (ICSID) established with a view to settle disputes between the investor and the host state[17] and other private international arbitration institutions, such as the American Arbitration Association (AAA), International Chamber of Commerce (ICC), Paris, London Court of Arbitration (LCA).[18] The BITs often include provisions granting jurisdiction to one of these institutions the proceedings of which are usually secret. The 1958 New York Convention ensures smooth enforcement of arbitral awards using domestic legal system.[19]

Any claim or breach of contractual or treaty obligations shall have recourse to the aforementioned international tribunals, bypassing the national judicial process.[20] In other words, the investor could initiate the compulsory dispute settlement process agreed under investor-state contract. The international tribunals shall determine the 'applicable law' based on which the lawfulness of expropriation and compensation thereof shall be determined. The investor could also advance a claim for compensation against investment guarantee agencies,

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compensation' amounting to 'genuine value'. See N. Jansen Calamita, 'The British Bank Nationalizations: An International Law Perspective' (2009) 58(1) ICLQ 119-149 at 125.

15 Robert D. Sloane and W. Michael Reisman, 'Indirect Expropriation and its Valuation in the BIT Generation' (2004) 74 *BYIL* 115, 118; also in *Boston Univ. School of Law Working Paper No.* 06-43, <http://ssrn.com/abstract=943430> accessed 23 September 2011.

16 MIGA another wing of the World Bank provides insurance for companies investing in its developing member countries in the form of guarantees against political risk. Since its inception in 1988, MIGA has issued guarantees worth over $21 billion for over 600 projects in 100 developing countries <http://www.miga.org/whoweare/index.cfm> accessed 22 February 2012.

17 ICSID is an arbitration forum established in 1966 to facilitate the settlement of disputes between governments and foreign investors in the hope that such a facility would help foster greater international investment flows.

18 Gloria Miccoili, 'International Commercial Arbitrartion' <http://www.asil.org/erg/?page=arb> accessed 1 February 2013.

19 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) (entered into force on 7 June 1959). As on date, including India there are 146 parties to the Convention. The Convention entered into force on October 11, 1960. See UNCTAD, 'List of Contracting States and other Signatories of the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards' (UNCITRAL 2009) <http://www.uncitral.org> accessed 30 November 2009.

20 Government of India, 'Bilateral Investment Promotion and Protection Agreement (BIPA)' *Business.Gov.in, Business Knowledge Recourse online* <http://business.gov.in/doing_business/bipa.php> accessed 19 March 2011.

which in turn could initiate recovery proceedings against the host state under the legal framework provided by BITs. The BITs act as a protective umbrella insulating foreign investments and contracts from host governments' actions.[21] In other words, the investment protection treaties not only limit the role of host state's right in regulation of foreign investment, in particular, the exercise of the power of *eminent domain* but also deny the legitimate role of the national judicial system.[22] The belief that foreign investment aid economic development has prompted most states to be more accommodating in terms of regulatory constrains towards foreign investments.[23] In fact, since the 1970s developing economies have shifted from their approach from rigorous regulations to one of 'more flexible and pragmatic approach aimed at facilitating and speeding up foreign investment inflows.'[24]

2.1 Conditions for lawful expropriation

The right of a state to expropriate property is well entrenched in international law.[25] However, views are divergent over the scope and limit of such a power and quantum of compensation to be paid in such eventuality.[26] Considered as a corollary of sovereign power, expropriation may be considered lawful or unlawful depending on the context and situation. Expropriation is lawful or legitimate only if the host state acts on a non-discriminatory basis, for public purpose and with adequate compensation.[27] For instance, the World Bank Guidelines on foreign investment[28] and the United Nations General Assembly (UNGA) resolutions[29]

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21 *Sloane & Reisman* (n 15).

22 B. S. Chimni, 'Third World Approaches to International Law: a Manifesto' (2006) 8 *Intl. Com. L Rev.* 3 at 12.

23 *Sornarajah* (n 12) 91. See also Michael S. Minor, 'The Demise of Expropriation as an Instrument of LDC Policy, 1980-92' (1994) 25(1) JIBS 177-188.

24 Report of the United Nations Centre on Transnational Corporations, Third Survey p. 57 in *Sornarajah* (n 12) 91.

25 G.C. Christie, 'What Constitutes a Taking Under International Law' (1962) 38 BYIL 307. See also *Certain German Interests in Polish Upper Silesia (Germany v Poland)* [1926] PCIJ Rep Series A. No. 7 and *Norwegian Shipowners Claims (Norway v U.S.)* (1922) I RIAA 307. See also 'International law permits [a state] to expropriate foreign-owned property within its territory for a public purpose and against the payment of adequate and effective compensation'. *Compañia del Desarrollo de Santa Elena,S.A. v Costa Rica* [2000] ICSID Case No. ARB/96/I.

26 *US v Sabbatino* [1964] 374 US 398. see Ibrahim Shihata, *MIGA and Foreign Investment* (Dordrecht, Boston, Lancaster 1988) 234.

27 *Sornarajah* (n 12) 277. See also Lucy Reed, Jan Paulsson, Nigel Blacka, *Guide to ICSID Arbitration* (Kluwer Law International 2004) 53.

28 World Bank Guidelines on Treatment of Foreign Direct Investment 1992 <http://italaw.com/documents/WorldBank.pdf> accessed 20 November 2011.

29 'Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.' Louis Henkin, Richard

stresses on the public purpose, non-discrimination nature of lawful expropriation, coupled with compensation for a lawful taking.[30] A similar set of criteria needs to be fulfilled in the North American Free Trade Agreement (NAFTA)[31] to make expropriation lawful: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with the due process of law; and (d) on payment of compensation.[32]

Such conditions are invariably found in most investment protection treaties for determining the lawfulness of expropriation by host states. Often investment treaty provisions includes an 'umbrella clauses' which act as a broad legal framework for protection of all foreign investors and interests (including investment, IPRs) from unwanted host state interventions.[33] The 'umbrella clause', it has been said, could elevate any breach of simple state-investor contract to the status of a breach of international law obligation,[34] i.e., 'a violation of such a contract becomes a violation of the BIT.'[35]The 'treaties may … elevate contractual undertakings into international law obligations, by stipulating that breach by one state of a contract with a private party from the other state will also constitute a breach of the treaty between the two States.'[36] The umbrella provision, in other

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Pugh, Oscar Schachter and Hans Smit, *International Law* (2nd ed., St. Paul, Minnesota 1987) 1111.

30 Guideline VI.1, The World Bank Guidelines on Legal Treatment of Foreign Investment <http://italaw.com/documents/WorldBank.pdf> accessed 22 January 2012.

31 NAFTA Art. 1110 (1).

32 NAFTA Article 1110 (1), subparagraph 2- 6, provides that compensation must: be 'equivalent to the *fair market value* of the expropriated investment immediately before the expropriation took place;' *be paid without delay*; be fully *realizable*; include *interest*; and be freely *transferable* <http://www.nafta-sec-alena.org> accessed 1 May 2011.

33 For as standard umbrella clause, see Article 13 of Switzerland-India BIT 1997 which provides: *'Each Contracting Party shall observe any obligation it may have entered into with regard to an investment of an investor of the other Contracting Party. …'* Similar language in an umbrella clause, see the Germany-India BIT 1995 and Denmark-India BIT 1995. See Katia Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements' (2006) *OECD Working Papers on International Investment No. 2006/3*, 11 <http://www.oecd.org/dataoecd/3/20/37579220.pdf> accessed 22 March 2011.

34 See Prosper Weil 'Problèmes relatifs aux contrats passés entre un Etat et un particulier' (1969-III) 129 *Recueil des Cours* 132; F.A. Mann 'British Treaties for the Promotion and Protection of Investments' (1981) 52 *British Yearbook of International Law* 241 at 246 in OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD 2008) 107. *See also* Alan Redfern, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2005) 498.

35 C. Schreuer, 'Travelling the BIT Route: of Waiting Periods, Umbrella clauses and Forks in The Road' (2004) JWI 231-256. See also R. Dolzer and M. Stevens *Bilateral Investment Treaties* (Kluwer Law, 1995) 81-82. See Tribunal decisions in *Sempra Energy International v. Republic of Argentina* (Decision on Objections to Jurisdiction) [2005] ICSID Case No ARB/02/16, para 100-101; *Noble Ventures, Inc v. Romania* [2005] ICSID Case No ARB/01/11; *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. the Argentine Republic* (Decision on Liability) [2006] ICSID Case No ARB/02/1, paras.169-175.

36 I. Shihata, 'Applicable Law in International Arbitration: Specific Aspects in Case of the Involvement of State Parties' in I. Shihata and J.D. Wolfensohn (eds.), *The World Bank in a Changing World: Selected Essays and Lectures,* Vol. II (Brill Academic Publishers, Leiden 1995) 601.

words, may have the effect of suitability altering the national legal regime and make private contracts subject to the rules of international law.[37]

Most recent investment protection treaties afford protection beyond the outright or direct expropriation of foreign property. It also covers other circumstances where certain acts of states could be construed as meeting the conditions of expropriation. In other words, an act of state which has the effect of rendering property rights so useless that it will be deemed to have expropriated would come under this category.[38] These practices are often known as *creeping* or *indirect* expropriation.[39] The lack of clarity in defining indirect expropriation has often imposed additional onus on host government's regulatory control over foreign investment.[40] Explaining the scenario, the tribunal in *Phillips Petroleum Co. v. Iran* held that a deprivation of property may be effected by 'a series of concrete actions rather than by any particular formal decree' may as well constitute expropriation. [41]

NAFTA, for instance, bring within its scope not only direct takings, but *indirect* expropriations and measure *tantamount to expropriation.*[42] The NAFTA Tribunal in *Metalclad Corp vs. Mexico* noted that:

> Expropriation under NAFTA includes not only open, deliberate and acknowledged taking of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably to the expected economic benefit of property, even if not necessarily to the obvious benefit of the host State.[43]

Similarly, the ICSID panel in *Compañia del Desarrollo de Santa Elena, S.A. v. Costa Rica* emphasized the 'ample authority for the proposition that property has

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37 UNCTAD, *Bilateral Investment Treaties in the mid-1990s* (UN, New York 1998) 56.

38 *Sloane & Reisman* (n 15) 119-120. The underlying premise of this argument is that ownership involves a bundle of rights and the curtailment of any part of the bundle of rights amount to expropriation under law. *Sornarajah* (n 12) 294. However, does not usual means non-discriminatory regulatory measures for the common good of the society.

39 The term 'creeping expropriation' is defined as state action which seeks 'to achieve the same result by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned', Restatement (Third) of the Foreign Relations Law of the United States, 712(1) (1986). See Bryan W. Blades, 'The Exhausting Question of Local Remedies: Expropriation Under NAFTA Chapter 11' (2006) 8 Or. Rev. Int'l L. 31. The US's FTA with many countries provides explicit criteria to determine indirect expropriation.

40 See generally, Jan Paulsson, 'Indirect Expropriation: Is the Right to Regulate at Risk?' (2006) 3(2) TDM; L. Yves and Stephen L. Drymer, 'Indirect Expropriation in the Law of International Investment: I know it when I see it, or Caveat Investor' (2004) 19(1) FILJ 293-327; Vaughan Lowe, 'Regulation or Expropriation?' (2002) 55 CLP 447.

41 *Phillips Petroleum Co. v Iran*, (1989) 21 Iran-US CTR 79 at p. 115-16, in *Sloane & Reisman* (n 15) 120.

42 Fortier, L. Yves, 'Caveat Investor: The Meaning of 'expropriation' and the protection afforded investors under NAFTA' 20(1) *News from ICSID / International Centre for Settlement of Investment Disputes,* 10 in Ibrahim Shihata, *MIGA and Foreign Investment* (Martinus Nijhoff Publishers, Dordrecht 1988) 242.

43 *Metalclad Corp vs. Mexico* [2000] NAFTA ILM 408. See also *TECMED vs. Mexico* [2003] ICSID Case no. ARB (AF)/00/2.

been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property.' [44]

The Indian Government's involvement with the controversial Dabhol power plant investment has been categorized as a case of indirect expropriation. Several arbitration proceedings were initiated by the US and European investors against India, in relation to alleged losses arising out of their financing of the failed Dabhol power plant project.[45] The Indian government's action, specifically the use of the Indian judicial system to contravene contractual requirements was considered to satisfy OPIC's definition of total expropriation.[46] The Governments of India and the US have successfully negotiated a settlement regarding these claims. India settled these claims out of public glare fearing negative fallout on its image as an investment friendly destination for foreign capital. In short, the concept of indirect expropriation or creeping expropriation has become an established feature of international law on state responsibility towards aliens.[47]

2.2 Standard of compensation for expropriation

Oscar Schachter notes that "apart from the use of force, no subject of international law seems to have aroused as much debate – and often strong feelings – as the question of the standard for payment of compensation when foreign property is expropriated."[48] What must be the appropriate level of compensation for expropriation that the host state should pay? What rules and standards would apply for determining compensation? State practice and scholarship are divided on the issue and there exist no universally accepted principle. The developed countries have always maintained the official position of "prompt, adequate and effective" compensation tantamount to 'full' compensation.[49]

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44 *Compañia del Desarrollo de Santa Elena, S.A. v Costa Rica* [2000] ICSID Case No. ARB/96/I, 439 ILM 1317, 1330, para. 77 in *Sloane & Reisman* (n 15) 120.

45 Claims were made by GE, Bechtel, and a string of foreign banks involved in the financing of that project. See 'India faces 6 new investment treaty claims in relation to Dabhol investment' *INVEST-SD News Bulletin* (November 14, 2003) and 'Bechtel and GE mount billion dollar investment treaty claim against India' *INVEST-SD News Bulletin* (September 26, 2003).

46 Preeti Kundra 'Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons' (2008) 41 VandJTransnatl 907 at 935. The Export-Import Bank and the Overseas Private Investment Corporation (OPIC) were critical sources of funding and loan guarantees. An AAA tribunal ruled in September 2003 that the Government of India was liable for the expropriation of investments made by GE and Bechtel in the failed Dabhol project. Following this ruling, OPIC settled two insurance claims lodged by GE and Bechtel, as well as separate claims lodged by Enron (the majority investor in the project) and Bank of America (which financed part of the investment). After paying out these claims, OPIC turned its sights to recovering the sums from the Government of India.

47 *Sloane & Reisman* (n 15) 122.

48 Oscar Schachter, 'Compensation for Expropriation' (1984) 78 AJIL 121.

49 'Prompt' means that the compensation must be paid at or before the time of taking or that provision has been made for its subsequent determination, with interest at compensatory rates from the time of taking. 'Effective' means that the payment must be made in realizable

Known popularly as the "Hull formula," it was proposed by the US Secretary of State, Cordell Hull to the Mexican Government in 1938.[50] The developing countries official position has ranged from one extreme of no compensation (for which there not much support),[51] to the generally accepted view that 'appropriate' compensation must be paid.[52]

The 1962 UNGA resolution on Permanent Sovereignty over Natural Resources states that '…. the owner shall be paid appropriate compensation, in accordance with rules in force in the State taking such measures in the exercise of its sovereignty and *in accordance with international law*.'[53] Since then, the term 'appropriate' compensation has come to mean a standard that is lower than the traditional Hull Rule. [54] A later UNGA resolution in 1975, however, stated that:

> nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, *it shall be settled under the domestic law of the nationalizing State and by its tribunals*....[55]

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exportable form; payment in nonconvertible currency, unmarketable bonds is not effective. 'Adequate' means that the owner must be compensated for the full value of the property of which he has been deprived, which in the case of an ongoing business will normally be going-concern value.' Bruce M. Clagett, 'Present State of the International Law of Compensation for Expropriated Property and Repudiated State Contracts' in The Southwestern Legal Foundation (ed.), *Private Investors Abroad*, (Dallas 1989) 12-13. See also C. F. Amerasinghe, 'Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice' (1992) 41 ICLQ 23; Orrego Vicufia, 'The International Regulation of Valuation Standards and Processes: A Reexamination of Third World Perspectives' in Richard B. Lillich (ed.), *The Valuation of Nationalized Property in International Law,* vol. 3 (University Press of Virginia 1975) 131-148.

50 Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2001).

51 'Calvo doctrine' advocated that the intervention of the states of foreign nationals in disputes resulting from the taking of property by their host states was a violation of the territorial jurisdiction of the latter states. This position has been traditionally maintained by Latin American countries and is generally reflected in the UN Charter of Economic Rights and Duties of States. See *Shihata* (n 42) 234

52 *Sornarajah* (n 12) 208-209. The draft TNC code of conduct and the AALCC Model 'B' BITs refers to the formula of 'appropriate' compensation. Peter Muchlinski, 'The Framework for the Investment Protection: The content of BITs' in Karl P. Sauvant and Lisa E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flow* (Oxford University Press New York 2009) 62.

53 UNGA Res 1803 (XVII) on Permanent Sovereignty over Natural Resources (PSNR) 1962 adopted by 87 votes to two, with twelve abstentions an the part of ten Communist states and Ghana and Burma)

54 Andrew T. Guzmán, 'Explaining the Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties That Hurt' (1997) *The Jean Monnet paper* 26 August 1997 <http://centers.law.nyu.edu/jeanmonnet/papers/97/97-12.html> accessed 3 September 2012.

55 *Emphasis added*. UNGA Res 3281 on the Charter of Economic Rights and Duties (UN Doc A/9631, 1974), reprinted in 14 ILM 251 (1975) at art. 2(2)(c). Adopted by a majority of 120 states over the objection of 6 industrialized countries (and with the abstention of 10 others). See *Shihata* (n 42) 238. See also UNGA Res 3201 on New International Economic Order (UN Doc A/9559, 1974).

The resolutions reflect the rejection of Hall formula by the majority of states as binding customary law and place the host country government in full control.[56] Shihata, however, does not rule out Hull formula altogether, but notes that this 'should not exclude the possibility that in certain situations full compensation with the three characteristics described in the Hull letter could be the most appropriate compensation to be imposed by a Court of law under the circumstances of a specific case.'[57] In Schachter words, '... when a dispute over compensation for a particular taking reaches a court or arbitral tribunal, the property owner is quite likely to get fair market value and a satisfactory award even though the magic words of the Hull formula are not invoked.'[58]

In the context of BITs, the behavior of the developing countries is in stark contrast from their official position. Although developing countries as a group have been a persistent objector to the Hull formula, they have signed hundreds of BITs that incorporate obligations equivalent to the Hull formula or much greater protection. The approach was that of accepting Hull formula or higher standards for compensation, nullifying the independence and control that developing countries fought hard to protect.[59] Though, there is also an ongoing debate on the role of BITs in formation of customary international law, the current trend has influenced the development of a jurisprudence based solely on BITs practiced by international courts and arbitration tribunals.

The evidence from practices of international courts and arbitration tribunals show a trend predominately towards recognizing 'full' compensation standard. In the famous *Chorzow Factory* case, the ICJ laid down a duty on the expropriating state to effect restitution in kind or, if this is impossible, payment of a sum corresponding to the value which restitution in kind would bear together with the award."[60] This case was cited as authority for claims ranging from full compensation to just compensation.[61] However, *Charzow* was a case of "unlawful" expropriation and the Court suggested that a "lawful" expropriation require 'payment of fair compensation'[62] *Restitutio in integrum* could be the basis for calculating damages

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56 'At the domestic level, the Hull rule is today a 'maximum standard' which is not fully observed in the major capital-exporting countries.' Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' (1981) 75 AJIL 553 at 569.

57 Shihata was noting the view adopted by the U.S. Court of Appeals for the Second Circuit in *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F2d 875, 892 (2d Cir. 1981). After declaring that the Standard of 'appropriate compensation' would 'come closest to reflecting what international law required,' the Court added that an "appropriate compensation requirement would not exclude the possibility that in some cases full compensation would be appropriate.' *Shihata* (n 42) 238.

58 Oscar Schachter, 'Compensation cases – Leading and Misleading' (1985) 79 AJIL 420, 421.

59 Sornarajah explains the behaviors thus: '[K]nowing the confused state of the law (on compensation), [countries] entered into such treaties so that they could clarify the rules that they would apply in case of any disputes which may arise between them.' See *Sornarajah* (n 12) 233.

60 Case *Concerning the Factory at Chorzow (Ger. v. Pol.)* (Merits) [1928] PCIJ (ser. A) No. 17, 3 at 47. Such payment should cover 'the just price of what was expropriated' and 'the value of the undertaking at the moment of dispossession, plus interest to the day of payment.'

61 *Sornarajah* (n 12) 379.

62 *Case Concerning the Factory at Chorzow* (n 60) 46

in case of unlawful expropriation.[63] The Court, in contrast, in a similar instance also observed that full compensation for expropriation could be made a 'prerequisite of international cooperation in the economic and financial fields.'[64]

The obvious trend among the international arbitration tribunals is to award full compensation.[65] For instance, the Iran-United States Claims Tribunal, in particular, has stated on several occasions that under customary international law 'full' compensation should be awarded.[66] Similar trend is evident from the awards of ICSID arbitrations. In *AGIP v. Congo*[67] and *Benvenuti et Bonfant v. Cango*[68] the ICSID held Congo to indemnify for loss as well as future profits lost because of expropriation.[69] One of the ICSID arbitrators in *Mihaly International Corporation vs. Sri Lanka* arbitration, went to the extent of observing that pre-investment expenditure must also to be included in the 'investment' for compensation, notwithstanding the fact the proposed investment project failed to materialize and was ultimately abandoned.[70] The private arbitration tribunals have consistently favored a standard that supports investor's interest.

The revival of 'prompt, adequate and effective' standard could be found in the Energy Charter Treaty 1994. Article 13 of the Charter contains a provision akin to that found in NAFTA on expropriation. However, the Charter departs in the context of compensation by stating that expropriation must be 'accompanied by the payment of prompt, adequate and effective compensation.'[71] Similar provision could be found in the World Bank Guidelines on Legal Treatment of Foreign Investment 1992,[72] which was to serve as an important step in the progressive development of international practice in investment area.[73] The Guideline lays down that 'compensation for a specific investment taken by the State will … be

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63 *Sornarajah* (n 12) 408.

64 *Anglo – American Oil Company* [1952] ICJ Report 93 at 151.

65 *Delgoa Bay* case – the award included future profits also. See also *Schufeldt* claims, *Sornarajah* (n 12) 381.

66 *American International Group, Inc. and American Life Insurance Co. v. Islamic Republic of Iran and Central Insurance of Iran* [1984] 23 ILM 1. See *Shihata* (n 42) 241.

67 [1982] 21 ILM 726.

68 [1982)] 21 ILM 740.

69 *Sornarajah* (n 12) 384.

70 In the ICSID Arbitration in *Mihaly International Corporation vs. The Government of Sri Lanka* [2002] Case no. ARB/00/2, one of the arbitrator observed that 'the ICSID should be available to those who are encouraged to embark on large scale expensive private foreign investment infrastructure projects.' A Rohan Perera, 'Current Trends in International Investment Agreements – New Legal Challenges for Developing Countries' in AALCO, *Commemorative Essays in International Law* (New Delhi 2006) 116 <http://www.aalco.int/publicationsnew/index.htm> accessed 18 March 2011.

71 Energy Charter Treaty 1994, art. 13 (d). See also Thomas W. Waelde, *The Energy Charter Treaty: an east-west gateway for investment and trade* (Kluwer Law International 1996).

72 Almost all countries present in the meeting of the Development Committee 1992 supported explicitly the adoption of the Guideline. See Ibrahim Shihata, *Legal Treatment of Foreign Investment: The World Bank guidelines* (Martinus Nijhoff Publishers 2003) 143. Guidelines on the Treatment of Foreign Direct Investment has been listed as 'binding instrument' in the official website of the WTO. See <http://www.wto.org/english/news_e/pres96_e/pr057_e.htm> accessed 24 March 2011.

73 Development Committee, *Communiqué of the Development Committee*, in Presentations to the 44th Meeting of the Development Committee 108 (1992). See *Shihata* (n 72).

deemed 'appropriate' if it is adequate, effective and prompt.'[74] Compensation will be deemed 'adequate' if it is based on the 'fair market value'[75] of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known. Determination of the 'fair market value' will be acceptable if conducted according to a method agreed by the state and the foreign investor or by a tribunal or another body designated by the parties. Compensation shall include interest and has to be made effectively, i.e. in freely convertible currency based on the market rate of exchange existing for that currency on the valuation date or in any other currency accepted by the investor, and prompt, i.e. without undue delay or, in case of established foreign exchange stringencies, by payment in installments within a period which will be as short as possible not exceeding five years from the time of the taking.

In short, a resurgence of Hull formula both at the multilateral and bilateral level is evident. The provisions in Energy Charter and the World Bank Guidelines reiterate the growing acceptance of Hull formula in dealing with expropriation of foreign property.[76] Indeed, the host states committing to such international standards, has the effect of guaranteeing higher level of protection and compensation for alien rights and interests. The host states exercise of eminent domain must meet international standard followed by full compensation. Any inconsistent practice would result in expropriation unlawful, resulting in higher than full compulsion. On the contrary, use of eminent domain against Indian citizen's property seldom needs to meet these conditions. Indeed, the Indian Constitution allows unrestricted power of eminent domain and does not distinguish between alien and citizen's property. However, the Government of India seems to pursue two distinct policies in terms of property rights, one sanctioned by its international commitments and the other of total arbitrariness under the Land Acquisition Act and similar legislations. At the international stage, India continues to espouse 'appropriate' compensation for expropriation determined by the host state. Quite the reverse, in practice, India by accepting BITs and FTAs obligations have accepted 'full' compensation standard.

3. PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

Another area where property rights have witnessed considerable intensification on a global scale is in 'intellectual property'.[77] The World Intellectual Property

74 Expropriation and unilateral alterations or termination of contracts, Guideline IV.2, *The World Bank Guidelines on Legal Treatment of Foreign Investment*. See also *World Bank Guidelines* IV.7 and 8.

75 World Bank Guideline IV.4. Such compensation shall amount to the fair market value of the Investment expropriated with interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

76 B.S. Chimni, 'Prolegomena to a Class Approach to International Law' (2010) 21 EJIL 57–82 at 71.

77 For the purposes of TRIPs Agreement, the term 'intellectual property' refers to Copyright and Related Rights, Trademarks, Geographical Indications, Industrial Designs, Patents, Layout-

Organization (WIPO) provides for a comprehensive regime for IP protection. The real thrust, however, came with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (TRIPs).[78] The TRIPs Agreement guarantee 'minimum standard' of protection for all intellectual property and mandates a remarkably efficient protection and enforcement regime within national jurisdictions. While the states are free to offer higher protection, the 'minimum standard' in itself was much higher level than the pre-TRIPs regime in most developing countries.[79] The TRIPs goes beyond its provisions and mandates compliance with other intellectual property conventions.[80] Moreover, unlike WIPO conventions, the presence of a strong WTO DSU makes implementation and enforcement of TRIPs effective.[81]

International protection and enforcement of IPRs *per se* have been the major concern of developed countries whose nationals/multinational corporations (MNCs) own majority of the registered IP. It was their concern over the global dimension of misappropriation of IP that prompted developed countries to include TRIPs in the negotiating agenda and successfully push through the Agreement on TRIPs during the Uruguay Round of trade negotiations.[82] The TRIPs Agreement tends to favour IP owners, against any state intervention. This is more obvious in the context of 'patents' the protection of which has a wide socio-economic dimension. The legal regime under TRIPs Agreement significantly expands the protection for patent holder's rights. For instance, TRIPs confer on the patent owner exclusive rights,[83] and prevent third parties from making, using, selling, or importing of the patented products.[84] On the other hand, the responsibilities of the patent holder and the regulatory control of the host governments have been considerably watered down.[85] The Government's power to tamper with the 'exclusive rights' of

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Designs of Integrated Circuits, Protection of Undisclosed Information. The Agreement on Trade Related Intellectual Property Rights 1994 (The TRIPs Agreement).

78 The TRIPs Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, (signed in Marrakesh, Morocco on 15 April 1994).

79 See Rajeev Dhawan, Lindsay Harris & Gopal Jain, 'Whose Interest? Independent India's Patent Law and Policy' (1990) 32 JILI 429; Rajeev Dhavan et.al., 'Power without Responsibility: On Aspects of the Indian Patents Legislation' (1991) 33 JILI 1. Rajeev Dhavan and Maya Prabh, 'Patent Monopolies and Free Trade: Basic Contradiction in Dunkal Draft' (1995) 37 JILI 194. Sudip Chaudhuri, 'TRIPS Agreement and the Amendment of Patents Act in India' (2002) 37(32) EPW 3354-3360.

80 In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967). Article 2, TRIPS Agreement. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. Article 9, TRIPs Agreement.

81 The universal membership enjoyed by WTO makes its impact global. There are 153 Members as on 1 May 2011 <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed on 4 April 2011.

82 V.G. Hedge, 'Intellectual Property Rights and Asian-African States' in AALCO, *Commemorative Essays in International Law* (New Delhi 2006) 133.

83 TRIPS Agreement, art. 27.1.

84 TRIPS Agreement, art. 26.

85 Biswajit Dhar and Niranjan Rao, 'Dunkel Draft on TRIPS: Complete Denial of Developing Countries Interest' (1992) 27 EPW 275. Sudip Chaudhuri, 'Dunkel Draft on Drug Patents: Background and Implications' (1993) 28(36) EPW 1861-1865.

the owner is restricted to exceptional circumstances, 'provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner….'[86]

The flexibility known as 'compulsory licensing' i.e., unauthorized use of the IP is limited to exceptional circumstance, permitted under stringent conditions. The scope and duration of compulsory licensing must be strictly limited to the purpose for which such unauthorized use has been authorized.[87] Any deviation would amount to breach of TRIPs provisions. Further, in all circumstances, such compulsory licensing shall be followed by adequate remuneration to the IP holder. For instance, under the Indian Patent Act when the government allows compulsory license to make, use or sell the patented technology without the consent of the patent owner – the patent owner shall continue to have rights over the patent, including a right to be paid royalty for authorized use.[88] The TRIPs Agreement does not define 'adequate remuneration,' however, determining adequate remuneration in each case, shall 'taking into account the economic value of the authorization.'[89] In India, such amount shall be determined by the authorities, keeping in view the nature of invention, its utility, expenses incurred in maintaining patent grant, etc.[90] These requirements can only be waived in case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.[91] Compulsory licensing, in that sense, is different from expropriation were the ownership in the property shifts.

The legitimacy of granting compulsory licencing or the continued existence of circumstances, or the adequacy of remuneration, shall be subjected to judicial review or other independent review by a distinct higher authority, with an authority to order prompt and effective provisional measures.[92] The TRIPs Agreement also mandates that any decisions on the merit of the case shall be based on reason.[93] The procedures for enforcement of IPRs must be *fair* and

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86 TRIPS Agreement, art. 30. See also TRIPS Agreement, art.13.

87 Article 84, Patent Act: An application to the Controller for grant of compulsory license on patent on any of the following grounds, namely: (a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or (b) that the patented invention is not available to the public at a reasonably affordable price, or (c) that the patented invention is not worked in the territory of India.

88 Indian Patent Act, s. 83.

89 TRIPS Agreement, art. 31 (h).

90 WTO, Compulsory licensing of pharmaceuticals and TRIPs, <http://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm> accessed 19 March 2011.

91 See Article 31, TRIPS Agreement and Section 92, Patents Act 1970. The TRIPS Agreement does not specifically list the reasons that might be used to justify compulsory licensing. However, the Doha Declaration on TRIPS and Public Health confirms that countries are free to determine the grounds for granting compulsory licenses. India has included public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency. The Patents Act 1970 s 92 (3).

92 TRIPS Agreement, art. 31 (i) and (j). See also TRIPs Agreement, art. 41 (4). Review must also be guaranteed in case of revocation/forfeiture of a patent. Review must also be guaranteed in case of revocation/forfeiture of a patent.

93 TRIPS Agreement, art. 41. See also TRIPs Agreement, art. 42.

equitable. The procedure shall not designed to create unnecessarily complication or costly or cause undue delays. The state must also notify the WTO Council for TRIPs of the grant of the license and its conditions. Although the notifications by importing and exporting members do not need approval by the WTO, the mechanism is subject to an annual review by the Council for TRIPS where India's practices could be openly challenged by any Member. The existence of judicial scrutiny, in addition to the international scrutiny, of any interference by the host government, enables higher protection and enforcement of IPRs.

India as a founding member of the WTO has fulfilled all stipulations in the TRIPs Agreement. India has from time to time adopted new legislations or amended existing legislations such as the Patent Act and the Copyrights Act to achieve the stipulated level of protection.[94] The major beneficiaries of these amendments are the foreign IP owners who control more than two-third of the registered IP in India.[95] The Patent Act 1970 was amendment thrice, which includes narrowing the scope of compulsory licensing by deleting the 'public interest' requirement under section 97 of the unamended 1970 Patent Act.[96] Instances where the Indian IP law has fallen short, the WTO has ensured India's prompt compliance. For instance, India was forced to bring into effect the Patents (Amendment) Act, 1999 with retrospectively from 1st January, 1995.[97] This amendment was the consequence of the WTO DSB adverse decision in *India – Patent* case which compelled India to amend the Act with retrospective effect.[98] The dispute was initiated in the WTO by the US over the question whether India has provided adequate protection for pharmaceutical and agricultural chemical products or has an adequate mailbox system, as required under the TRIPs

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94 See also The Trade Marks Act 1999, Design Act 2000, Geographical Indication Act 2000.

95 During the year 2008-09, the total number of patents granted was 16,061 out of which only 2,541 were granted to Indian applications. Of the total patents of 30,822 in force as on 31 March 2009, only 6,158 patents are held by Indians. See Annual Report of office of the Controller General of Patents, Designs, Trade Marks and Geographical Indications, 2008-09 <http://www.ipindia.nic.in/> accessed on 20 July 2011.

96 The first amendment was through an ordinance which was issued on 31st December 1994. Another ordinance was issued in 1999 when the first Ordinance ceased to operate after six months. The second amendment to the 1970 Act was made through the Patents (Amendment) Act, 2002 (Act 38 0f 2002). The third amendment to the Patents Act 1970 was introduced by the Patents (Amendment) Act 2005. The third amendment to the Patents Act 1970 was introduced through the Patents (Amendment) Ordinance, 2004 which was replaced by the Patents (Amendment) Act 2005 which was brought into force from 1-1-2005. See 'History of Indian Patent System' <http://www.ipindia.nic.in/ipr/patent/patents.htm> accessed on 20 June 2011.

97 The Amendment was designed to provide filing of applications for product patents in the areas of drugs, pharmaceuticals and agro chemicals though such applications were to be examined only after December 2004 (mail-box system) when the flexibility given to developing countries under the TRIPs agreement ends. Meanwhile, the applicants could be allowed Exclusive Marketing Rights (EMR) to sell or distribute these products in India, subject to fulfilment of certain conditions.

98 WTO, *India: Patent Protection for Pharmaceutical and Agricultural Chemical Products,* Report of the Appellate Body and Panel (19 December 1997) WT/DS50/AB/R and (5 September 1997) WT/DS50/R. For a critical analysis of this case, see R. Rajesh Babu, 'Interpretation of the WTO Agreements, Democratic Legitimacy and Developing Nations' (2010) 50(1) IJIL 45-90.

Agreement. The mailbox system in TRIPs was to accept patent applications made even though they could not be granted until the appropriate patent regimes had been instituted.[99]

India argued in vain that WTO Members 'are free to determine how best to meet their obligations under the TRIPs Agreement within the context of their own legal systems.'[100] India also contended that 'administrative instructions' are a 'means' consistent with Article 70.8(a) of the TRIPs Agreement and they are legally valid in Indian law. The Appellate Body upheld the panel's finding that India's method for receiving such patent applications was inconsistent with Article 70.8(a) of the TRIPs Agreement. According to the Appellate Body '... the United States put forward evidence and arguments that India's 'administrative instructions' pertaining to mailbox applications were legally insufficient to prevail over the application of certain mandatory provisions of the Patents Act.'[101] The Appellate Body concluded that it had 'reasonable doubts' that the 'administrative instructions' would prevail over the mandatory provisions of the Patents Act if a challenge were brought in an Indian court.'[102] The Appellate Body also found that India failed to fulfill that obligation to pass legislation to establish a system of exclusive marketing rights, with effect from 1 January 1995.[103] The experience is evidence of strong enforcement regime designed to implement WTO covered agreements, including the TRIPs obligations.

The practice relating to compulsory licensing is also reveling. As noted above, the TRIPs Agreement and the Patent Act does provide the state with freedom to determine the *grounds* upon which such compulsory licenses or unauthorized use can be granted. This offers the state, some domestic policy space for regulating IP for public interest.[104] However, the comprehensive procedural requirements set out in TRIPs Article 31 have left the flexibilities with limited field of practical

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99 The measure at issue was (i) India's 'mailbox rule' – under which patent applications for pharmaceutical and agricultural chemical products could be filed; and (ii) the mechanism for granting exclusive marketing rights to such products.

100 WTO, *India: Patent*, Report of the Appellate Body (n 98) para 59.

101 ibid para. 74.

102 ibid. Neither the Panel nor the Appellate Body considered it relevant that, between 1 January 1995 and 15 October 1997, India had received over 1,924 mailbox applications and that none had been rejected or invalidated. WTO, India's Statement at the DSB Meeting, *Minutes of the DSB Meeting held on 27 January 2000* (WT/DSB/M/40, 16 January 1998) 5.

103 This was with respect to Article 70.9 of the TRIPs Agreement. See also *India – Patent Protection for Pharmaceutical Products,* a case filed by EC, where the WTO Panel concluded that 'India has not complied with its obligations under TRIPs Article 70.8(a) because it has failed to establish a sound legal basis for adequately preserving novelty and priority in respect of applications for product patents in respect of pharmaceutical and agricultural chemical inventions during the transitional period to which it is entitled under Article 65 of the TRIPS Agreement; and that India has not complied with its obligations under Article 70.9 of the TRIPS Agreement because it has failed to establish a system for the grant of exclusive marketing rights. WTO, *India: Patent Protection for Pharmaceutical and Agricultural Chemical Products,* Report of the Panel (24 August 1998) WT/DS79/R, para. 9.1.

104 Henning Grosse Ruse-Khan, 'Policy Space for Domestic Public Interest Measures Under TRIPs' *South Centre Research Paper* No. 22, July 2009, 21 <http://www.southcentre.org/ARCHIVES> accessed 21 March 2011.

application.[105] In other words, although theoretically, India could employ compulsory licensing, the practices are now circumscribed by a legal framework that 'imposes strict conditions and procedural requirements for such issuance.'[106] To quote one of the commentators:

> Indeed, Article 31 does impose many new procedural or substantive conditions. Under the new rules, each grant of a compulsory license must be considered on a case-by-case basis. The government must first make efforts to obtain a voluntary license. The patent holder must receive 'adequate remuneration.' Production must be predominantly for the domestic market. The license must be non-exclusive. Judicial review must be afforded for any decisions related to the compulsory license. And finally, the 'scope and duration' of the license must be 'limited to the purpose for which it was authorised,' and must be liable to termination if the reasons underlying that authorization cease to exist....These new rules certainly narrow the opportunity for countries to grant compulsory licenses...[107]

Predictably, India has never used the option of compulsory licensing for unauthorized use of IPRs.[108] On the contrary, India has spared no effort towards granting higher protection for IPRs, including discriminating information among the public on the need for protecting the IP.[109] The only exception was in the context of pharmaceutical inventions submitted between 1999 and 2005, which will be subject to an automatic compulsory license to generic companies if the generic companies were producing the said drug prior to 2005 and continue to produce the drug after the issuance of the patent. Apart from this instance, compulsory license for patents has never been granted in India.[110]

This token flexibility is further constrained by the provisions in the BITs and FTAs. Most BITs and FTAs require developing countries to undertake commitments beyond those in TRIPs.[111] Known as TRIPs-plus or TRIPs-plus-plus obligations,

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105 ibid 22.

106 Daniel Gervais, *The TRIPs Agreement: Drafting Analysis and Negotiating History* 165 (1998) at 368 in *Patent Exclusions, Exceptions & Limitations,* ITSSD Comments Concerning Document (SCP/13/3) <http://www.wipo.int/export/sites/www/scp/en/meetings/session_14/studies/itssd_2.pdf>.

107 ibid.

108 On 12 March 2012, the Controller General of Patents, Designs and Trademarks authorized for first time a compulsory license was granted against a patented drug Nexavar, or sorafenib, produced by Bayer to Natco Pharma, an Indian company. The Controller General invoked the provision which states that a compulsory license may be granted if an invention is not available to the public at a 'reasonably affordable price.' Vikas Bajaj and Andrew Pollack, 'India Orders Bayer to License a Patented Drug' *The New York Times* (12 March 2012) <http://www.nytimes.com/2012/03/13/business/global/india-overrules-bayer-allowing-generic-drug.html> accessed 13 March 2012.

109 For instance, the Government of India, Ministry of Human Resource Development under the scheme of Intellectual Property Education, Research and Public Outreach (IPERPO) has established and funding 18 IPR Chairs in various universities and institutes <http://copyright.gov.in/frmlistiprchair.aspx> accessed 25 February 2012.

110 NATCO Pharma a generic drug maker may initiate the compulsory licensing process in India if voluntary licensee is not granted to make a version of Pfizer's maraviroc HIV pill. See *Economic Times* (Kolkata, 5 January 2011) <http://articles.economictimes.indiatimes.com/2011-01-05/news/28426847_1_natco-pharma-pfizer-hiv-patients>.

111 Sangeeta Shashikant, 'More countries use compulsory license, but new problems emerge' *TWN Info Service on Health Issues No. 4*, Geneva, 19 May 2005 <http://www.twnside.org.sg/title2/health.info/twninfohealth004.htm> accessed 19 March 2011.

these provisions 'constrain flexibilities and undermine the balance of rights in the TRIPs Agreement.'[112] The TRIPS-plus obligations are aimed at increasing the level of IP protection for the right holders beyond what is stipulated in the TRIPs Agreement. For instance, in the proposed India-EU FTA, the EU wants to include IPR issues like Regulatory Data Protection or Data Exclusivity. Regulatory Data Protection is a TRIPs-plus provision, and its inclusion will delay the launch of generics.[113] Introducing such provisions could further restrict the use of compulsory licenses, and totally immune the IP from government interventions.

In short, 'intellectual property' majority of which are owned or controlled by the foreign interests is granted near absolute protection in India. IP cannot be 'expropriated' for public purpose or any other purpose, except for national emergency or other circumstances of extreme urgency, which must terminate as soon as such event pass. Moreover, irrespective of granting of compulsory licensing or government use in case of emergency, the ownership remains with the patent owner, and only the monopoly of the owner over IP is affected. With strong remedial mechanisms in place, any violation of these stipulations would attract national and international enforcement action. In addition to special tribunals and access to higher judiciary at the national level, additional recourse may rest with international tribunals or the WTO dispute settlement system as the IP right owner deems to pursue.

4.RIGHT TO PROPERTY IN INDIA

The constitutional right to property in India was envisaged by the framers basis on the Constitution of the United States (US) 1787.[114] Article 19(1)(f) of the Constitution of India as it stood before 1978 lays down that 'every citizen has the individual right to acquire, to hold and dispose of property.'[115] The Constitution Article 31 also guarantees that 'no person shall be deprived of his property save by the authority of law' and set the boundaries on the power of *eminent domain*.[116] Couched in positive and negative language, both provision assurances right to property, for 'citizens' and 'persons' respectively, similar to the fifth and fourteenth amendments to the US Constitution. The right, however, are subject

112 'China, India to raise concerns at WTO about 'TRIPS-plus' measures' ACTA' *Intellectual Property Watch* 3 June 2010 <http://www.ip-watch.org/weblog/2010/06/03/china-india-to-raise-concerns-at-wto-about-%E2%80%9Ctrips-plus%E2%80%9D-measures-acta/> accessed 13 April 2011.

113 'Data Exclusivity still key hurdle to India-EU FTA' *Business Standard* (Kolkata, 27 January 2011).

114 The Constitution of the United States 1787, Fifth Amendment – Trial and Punishment, Compensation for Takings. 'No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.'

115 The Constitution of India, art. 19(1)(f) as it stood before the 44th Constitutional Amendment.

116 The Constitution of India, art. 31(1) as it stood before the 44th Constitutional Amendment.

to limitations prescribed in the respective provisions.[117] Reasonable restrictions could be imposed in the enjoyment of property rights for 'public interest', and private property could be forcefully acquired by state only for 'public purpose'.[118]

The first two decade of constitutional right to property was eventful. Since the Constitution came into force in 1951, Article 19(1) (f) and Article 31, the two articles which guaranteed fundamental right to property, became the subject of constant and contentious judicial interpretations and parliamentary interference. The tussle fought both in the floor of the Parliament and in the Supreme Court centred on the scope of individual's right to property vis-à-vis the power of eminent domain. The Constitution (Forty-fourth Amendment) Act 1978 ended the debate when the Parliament repealed the right to property from Part III of the Constitution.[119] A similarly worded provision on right to property *albeit* relegated in status, was included in Article 300A, which provides that 'no person shall be deprived of his property save by the authority of law.'[120] The amendment reduced the status of right to property to that of a statutory right.[121] In other words, under the current constitutional framework, the legislature could deprive property rights by enacting a 'law' for compulsory acquisition.[122] Neither fair compensation nor 'public purpose' remains an essential perquisite for expropriation of property. Payment of compensation at market value is mandated only for compulsory acquisition of land under *personal cultivation*.[123] Land acquisition laws cannot be held void on the ground that it is inconsistent with or takes away any of the rights conferred by Articles 14 or 19 of the Constitution of India.[124] The Constitution

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117 V.R. Ramachandran, *The Law of Land Acquisition and Compensation* (8th edn, Eastern Book Company 2000) 7.

118 See The Constitution of India, arts. 19(6) and 31(2).

119 The Constitution of India, arts. 19(f) (Right to Property) and Article 31 (Compulsory acquisition of property) Repealed by the Constitution (Forty-fourth Amendment) Act 1978, *section 2 and* 6 (*w.e.f.* 20-6-1979).

120 Part XII: 'Chapter IV – Right to Property, 300A of the Constitution of India: Persons not to be deprived of property save by authority of law – no person shall be deprived of his property save by authority of law.'

121 On the debate, see generally, The 44th Amendment – right to property no longer a fundamental right, in H. M. Seervai, *Constitutional Law of India* Vol. II, (3edn, Universal Law Publishers 1983) 1072-92; K. K. Mathew, 'Basic Structure and Fundamental Right to Property' (1978) 2 SCC 65. Jaivir Singh, '(Un)Constituting Property: The Deconstruction of the 'Right to Property' in India' (2005) *Centre for the Study of Law and Governance Working Paper Series* JNU, New Delhi, CSLG/WP/04-05. Jaivir Singh, 'Separation of powers and the erosion of the 'right to property' in India' (2006) 17(4) Constit. Polit. Economy 303-324.

122 Articles 31A, 31B and 31C, Constitution of India.

123 See The Constitution of India, art. 31A (1). In case of a land 'held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land…unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof. This paragraph was inserted by the Constitution (Seventeenth Amendment) Act 1964, s. 2.

124 Article 31C first part provides that '[n]otwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV (Directive Principles of State Policy) shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19; ….' in *Minerva Mills v. Union of India* [1980] AIR SC 1787, only those laws which seek to implement or give effect to Articles 39 (b) or (c) shall be validated.

forbids judicial interference and any arbitrary actions sanctioned by the 'law' shall be immune from the scrutiny of courts, denying recourse to due process.[125]

A background on the context that led to the demise of property rights would permit us to judge the status of property rights in the current socio-economic context.[126]

4.1 A prelude to the demise of right to properly

The concept of eminent domain[127] i.e., the power of a government to take away private property by force for public use, is well entrenched in the constitutional practice of nation states.[128] It is an essential attribute of state sovereignty[129] and has special importance in the socialization context.[130] Most modern constitutions, at the same time, recognize certain limitations in the exercise of eminent domain. As Cooley notes, the concept is founded on

> the superior claims of the whole community over an individual citizen but is applicable only in those cases where private property is wanted for public use, or demanded by the public welfare and that no instance is known in which it has been taken for the mere purpose of raising a revenue by sale or otherwise and the exercise of such a power is utterly destructive of individual right.[131]

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125 Article 31C second part provides that '... no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.' In *Kesavananda Bharati* vs. *The State of Kerala* [1973] Supp. SCR 1, the Supreme Court held the provisions in italics to be invalid.

126 The Constitution (Forty-fourth Amendment) Act, 1978, s. 2 and s. 6 (came into force on 20 June 1979).

127 The earlier understanding of the concept was that: '[t]he property of subjects belongs to the state under the right of eminent domain; in consequence the state, or he who represents the state, can use the property of subjects, and even destroy it or alienate it, not only in cases of direct need [ex summa necessitate], which grants even to private citizens a measure of right over others' property, but also for the sake of the public advantage . . . .' Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (1646) 807 (Francis W. Kelsey trans., Clarendon Press, Oxford 1925) in A.W.B. Simpson, 'Constitutionalizing the Right of Property: The U.S., England and Europe' (2008) 31(1) Uni Hawai'i L Rev 4.

128 The doctrine is based on the following Latin maxims: *Salus Populi est Suprema Lex* (Welfare of the People is the highest Law), and *Necessita Public Major est Quam* (Public Necessity is Greater than Private Necessity). See Sackman and Van Brunt (eds), *Nichols on Eminent Domain* Vol. 1 (3rd edn, Matthew Bender and Co, New York 1950) 2, where 'eminent domain' is defined as 'the power of the sovereign to take property for public use without the owner's consent.'

129 *Coffee Board, Karnataka v. Commissioner of Commercial Taxes* [1988] 3 SCC 263 at 369. The Supreme Court noted that 'It is trite knowledge that eminent domain is an essential attribute of sovereignty of every state and authorities are universal in support of the definition of eminent domain as the power of the sovereign to take property for public use without the owner's consent upon making just compensation.'

130 See, John P. Frank, Book Review: *Nichols on Eminent Domain* by Van Brunt; Sackman Brunt' (1951) 51(6) Col L Rev 795-800 at 795 <http://www.jstor.org/stable/1119263> accessed 19 March 2011.

131 Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* Vol. II (4th Ed. Boston: Little Brown & Co 1878) 113.

More specifically, state needs to satisfy three prerequisites for a legitimate exercise of eminent domain – a 'law' authorizing expropriation; the 'public purpose' requirement; and 'just compensation'. In addition, judicial review over state's action provides a check on any abuse of power of eminent domain. A classic example is the Fifth Amendment of the US Constitution which provides that 'no person shall be … deprived of life, liberty, or *property*, without *due process of law*; nor shall *private property* be taken for public use, without *just compensation*.'[132] In other words, lawful 'taking' of property must be for 'public purpose', requires the owner of any appropriated land entitled to reasonable compensation, usually defined as the fair market value of the property with recourse to due process.

Following the US Constitution, Article 31 (1) of the Constitution of India assures protection against deprivation of property except by 'authority of law,' with a deliberate omission of the 'due process' clause.[133] Clause 2 of Article 31, informs of the state's power to acquire property for 'public purpose,' provided 'due compensation' is given to the affected party.[134] Thus, the Constitution of India, as initially conceived in line with the US Constitution, warrants satisfaction of three prerequisites i.e., the 'authority of law' (the law being fair and reasonable), 'public purpose'[135] and 'compensation', to be satisfied for legitimate exercise of *eminent domain*.[136] Article 32 of the Constitution guarantees access to judicial review through a writ in the highest court. These constitutional boundaries on the power of eminent domain set the background for the long drawn legal tussle between the two branches of government – the Parliament and the Judiciary – for years to follow until 1978 when the status of right to property was finally put to rest.

The Parliament and the judiciary differed widely in their understanding on the nature and scope of fundamental right to property. The tussle began with judicial challenges over the land reform and *zamindari* abolition laws, passed by the Parliament and the state legislatures to promote agrarian reforms and engineer economic, social and political change within the country. To effectuate some of the Directive Principles of State Policy[137] and establish a socialistic pattern of society, the Parliament felt imperative to carry out land reforms and redistribution

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132 *Emphasis added*. See also Fourteenth Amendment – Citizenship Rights. '1. … No State shall … deprive any person of life, liberty, or property, without due process of law, ….' US Constitution 1787.

133 P. K. Tripathi, 'Right of Property after 44th Amendment Better Prosecuted Than Ever Before' (1980) AIR J 49.

134 This provision has its roots in Government of India Act 1935, s 299 (2).

135 Public purpose has been defined to include a purpose in which the general interest of the community as opposed to the particular interest of individuals is vitally and directly concerned. *State of Bihar v. Kamashwar Singh* [1952] SCR 869. The court also noted that laws calculated to advance public welfare as formulated in the directives in arts. 38 to 49 is public purpose.

136 See generally, *Chiranjit Lal Chowdhary v. Union of India* [1951] AIR SC 41, 54; *State of Bihar v. Kameshwar Singh* [1952] AIR SC 252. See also Samaradditya Pal and Rama Pal (eds), *M.P. Jain – Indian Constitutional Law*, vol II (6th edn, LexisNexis Butterworth's Wadhwa, Nagpur 2010) at 1803.

137 The Constitution of India, Part IV.

of wealth.[138] The Court was faced with two competing rights, the power of the state to acquire property, and the individual's fundamental right to property. The court adopted a restrictive view on the state's power of compulsory acquisition and inclined towards protecting the right to property and payment of adequate compensation.[139] The result was a series of decisions were the Supreme Court declared unconstitutional several laws and pursuant state actions, in particular, in view of Articles 14, 19 and 31 of the Constitution.[140]

To overcome the impediment created by the apex court, the Parliament initiated a series of amendments, starting with the Constitution (First Amendment) Act, 1951, barely fifteen months since the Constitution was adoption. The Parliament justified that the dilatory litigations over the validity of agrarian reform measures have delayed their implementation affecting large numbers of people.[141] To secure the constitutional validity of *zamindari* abolition and land reform laws, two new articles – Articles 31A and 31B were incorporated along with a new Ninth Schedule.[142] The intent of Article 31A was to declare that land reform 'laws' shall not be called into question on the ground of its consistency with Part III – fundamental rights. Article 31B added another level of protection by created an umbrella called the 'Ninth Schedule' – to insulate land reform laws from judicial action.[143] The Amendment added thirteen state laws to the Ninth schedule ostensibly to keep them beyond any challenge from courts.[144] In the

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138 More specifically, Article 39 mandated the State direct its policy towards securing inter alia, (*b*) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; and (*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

139 *Jain* (137) 1803.

140 *Sir Kameshwar Singh (Darbhanga) v The Province of Bihar* AIR 1950 Patna 392. *Dwarkadas Srinivas v The Sholapur Spinning and Weaving Company Ltd.* [1951] AIR Bombay 86. *State of West Bengal v. Mrs. Bela Banerjee* [1954] AIR SC 170, *Karimbil Kunhikoman v The State of Kerala* [1962] (1) SCR 829.

141 Statement of Objects and Reason by Jawaharlal Nehru, appended to the Constitution (First Amendment) Bill, 1951 which was enacted as the Constitution (First Amendment) Act, 1951, <http://indiacode.nic.in/coiweb/amend/amend1.htm> accessed 20 May 2011.

142 ibid.

143 If any of the Acts and Regulations is incorporated in the Ninth Schedule, the same shall not be void even of it is inconsistent with, or takes away or abridges any of the rights conferred by Part III, and place those laws above judicial challenges. See The Constitution of India, art. 31B. There are around 284 legislations which has be incorporated under the protective umbrella of the Ninth Schedule <http://lawmin.nic.in/coi/coiason29july08.pdf> accessed 22 January 2012.

144 More laws were added to the Ninth Schedule through 4th, 17th and 29th Amendment Acts; 34th Amendment (17 Acts); 39th Amendment (38 Acts); 42nd Amendment (64 Acts); the 47th Amendment (14 Acts), 66th Amendment (55 Acts); 75th Amendment Act, 1994 has been passed by the parliament, which includes Tamil Nadu Act providing for 69 percent reservation for backward classes under the Ninth Schedule. An addition of 27 more Acts to the Schedule by made by the 78th Amendment Act of 1995 raising the total to 284. See Sushanth Salian, 'History of the Removal of the Fundamental Right to Property' Centre for Civil Society <www.ccsindia.org/policy/rule/studies/wp0041.pdf> accessed 23 May 2011.

words of the Supreme Court, Article 31-B represents novel, innovative and drastic technique of amendment and immunity from judicial review.[145]

The Supreme Court, however, continued to attribute wide meaning to clauses (1) and (2) of Article 31 of the Constitution, imposing severe constrain on the state's power to expropriate private property paying nominal compensation.[146] Though Article 31 does not qualify the term 'compensation' with 'just' or 'adequate' as in the US Constitution, the Court interpreted that compensation must be 'just equivalent' of what the owner had been deprived of and that it was a justiciable matter which the courts could adjudicate upon.[147] To overcome the interpretative hurdles, the Parliament amended Article 31 in several respects with the primary intent to place such 'laws' above challenge from courts and 're-state more precisely the State's power of compulsory acquisition and requisitioning of private property ….'[148] Since the Constitution's Fourth Amendment, the Court has shown a less rigorous approach towards compensation than found in *Bella Banerjee's* case. The new formula supported a compensation which was far less than market value, provided the principles to determine compensation were not arbitrary.[149] The Court, it seems, finally have come in terms with the government policy on private property rights.

But this letup did not prevent the Supreme Court from preventing the parliament's amending power from abridging fundamental rights in subsequent cases. Several land reform laws were struck down on the ground that the provisions of those Acts were violative of Articles 14, 19 and 31 of the Constitution and that the protection of Article 31A was not available to them.[150] This led to another

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145 *N. B. Jeejeebhoy v. Asst. Collector, Thane,* [1965] AIR SC 1096.

146 For instance, in *State of West Bengal v. Bella Banerjee* [1954] AIR SC 170, the amount of compensation payable for compulsory acquisition was made unjustifiable. See also *State of W.B v. Subodh Gopal* [1954] SCR 587. The US and England courts also follows a similar approach in terms of interpretation of right to property. See *Ramachandran* (n 117) 8.

147 *State of West Bengal v. Bella Banerji*, [1954] AIR SC 170. On the requirement of just compensation, see also *Chairanjit Lal Chowdhry v. Union of India* [1951] AIR SC 41, at 51 and *State of Bihar v. Kameshwar Singh* [1952] AIR SC 252; *Union of India v. Metal Corporation of India Ltd*. [1967] AIR SC 634.

148 The Constitution of India, Article 31 (2): '…no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate". Statement of Objects and Reasons appended to the Constitution (Fourth Amendment) Bill, 1954 which was enacted as the Constitution (Fourth Amendment) Act, 1954 <http://indiacode.nic.in/coiweb/amend/amend4.htm> accessed 23 March 2011. As Justice Douglas of the US Supreme Court summarised: '…India, like America, ranked property rights high among the fundamental rights of man. What effect the 1955 Amendment will have remains to be seen. If Parliament by law appropriates private property for nominal compensation, the spectre of confiscation would have entered India contrary to the teaching of her outstanding jurists.' Justice William O. Dougles 'Tagore Law Lecture' delivered on July 1955 (Eastern Law House Publishers, 1955) 224-25, in *Ramachandran* (n 117) 19-20.

149 See *Vajravelu Mudliar v. Special Deputy Collector* [1956] AIR SC 1017 in *Jain* (n 136) 1822.

150 The Supreme Court in *Kochunni vs State of Madras* [1960] AIR 1080, did not accept the plea of the state that Article 31(1) after amendments gave an unrestricted power to the state to deprive a person of his property. It held that Article 31(1) and (2) are different fundamental rights and that the expression 'law' in Article 31(1) shall be valid law and that it cannot be valid law unless it amounts to a reasonable restriction in public interest within the meaning of Article 19(5).

round of amendments to clarify, consolidate and strengthen the Parliament's amending power, including Part III – fundamental rights.[151] The unbridled power bestowed on itself was challenged before the Supreme Court in the landmark *Golaknath's* case.[152] There, the petitioner questioned the validity of the First, Fourth and Seventeenth Amendments of the Constitution on the ground that they abridged the scope of the fundamental rights. The Supreme Court, by a narrow margin, held that the Parliament has no power to amend the Constitution to take away or abridge the fundamental right of the people.[153]

The Parliament attempted to cure the damage caused by the decision in *Golaknath*'s case through the Constitution (Twenty-fourth Amendment) Act, 1971. The Amendment added a new sub-section (1) in Article 368, which granted absolute power on the Parliament to amend any part of the Constitution. The follow-up Constitution (Twenty-fifth Amendment) Act in 1971, amended the word 'compensation' in Article 31(2) and replaced by the word 'amount', primarily to dilute the consequence of 'just equivalent' interpretation given to 'compensation' in *Bella Banerjee* and other cases. The immediate reason for the Parliament to introduce this amendment was to mitigate the effect of the decision in the *Bank Nationalization* case,[154] wherein the Supreme Court by ten to one declared that the Constitution guaranteed right to compensation, that is, the equivalent in money of the property compulsorily acquired.

> [Compensation] is the basic guarantee. The law must therefore provide compensation, and for determining compensation relevant principles must be specified; if the principles are not relevant the ultimate value determined is not compensation.
>
> The broad object underlying the principle of valuation is to award to the owner the equivalent of his property with its existing advantages and its existing potentialities. Where there is an established market for the property acquired the problem of valuation presents little difficulty. Where there is no established market for the property, the object of the principle of valuation must be to pay to the owner for what he has lost, including the benefit of advantages present as well as future, without taking into account the urgency of acquisition, the disinclination of the owner to part with the property, and the benefit which the acquirer is likely to obtain by the acquisition.[155]

The Court reiterated its power to review the adequacy as well as the relevancy of the principles for determining compensation. The Court also held that a law which seeks to acquire or requisition property for a public purpose should also satisfy the requirements of Article 19 (1) (f) of the Constitution.

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151 The Constitution (Seventeenth Amendment) Act, 1964 by which the state extended the scope of Article 31-A and Ninth Schedule.

152 *Golaknath vs State of Punjab* [1967] AIR SC 1647, 2 SCR [1967] 762 (the first fundamental rights case).

153 The court reversed its own earlier decisions upholding the power of Parliament to amend all parts of the Constitution including Part III relating to fundamental rights. To avoid complications, the Court ordered prospective overruling, that all the amendments made by the Parliament up to the date of the judgment were and would continue to be valid.

154 *R.C Cooper v. Union of India* [1970] (2) SCC 298.

155 *Rustom Cavasjee Cooper vs Union of India*, [1970] SCR (3) 530, 539. See also *State of West Bengal vs. Bella Banerji* [1954], where the Supreme Court interpreted the word 'compensation' simplicitor as full compensation i.e. market value of the property on the date of acquisition.

The validity of twenty-fourth, twenty-fifth and twenty-ninth constitutional amendments was challenged in the famous *Kesavanada Bharathi case* (*Fundamental rights* case).[156] The Supreme Court by a narrow majority laid down the concept of 'basic structure', i.e., the Parliament in exercise of its constituent power under Article 368, cannot amend certain provisions, the amendment of which would alter the fundamental character of the Constitution.[157] In other words, the Parliament could abridge any part of the Constitution, whereas, the amending power does not extend to damage or destroy any of the essential features of the Constitution.[158] The Court, however, upheld the constitutional validity of all property related amendments, thereby negating the status of property right as 'basic feature' of constitution.[159] Nevertheless, the right to receive an 'amount' was considered as fundamental right.[160] This was reiterated in the *Indira Nehru Gandhi v Raj Narian* case,[161] which paved the way for the removal of property as a fundamental right.[162] The Parliament, however, through the Forty-second Amendment Act sought to expand the scope of Article 31C by extending it to any law giving effect to the policy of the state towards securing 'all or any of the principles laid down in Part IV' and that is how the Article reads today.[163] The Parliament did the final blow to the private property rights through the Forty-fourth amendment which finally repealed Article 19(1)(f) from Part III, completing the demise of right to property as a fundamental right.

4.2 Property rights: current state of play

The constitutional right to property as it stands today imposes minimal restrain on the power of state against compulsory 'taking' of property without adequate compensation. Since the decisions in *Kesavanada Bharathi* and *Indira Nehru Gandhi v Raj Narian*, the apex court has upheld the right of the State to expropriate under Article 300-A, and restrained itself not to entertain any discussion on adequacy of

156 *Kesavananda Bharati v. State of Kerala* [1973] AIR SC 1461. The petitioners had challenged the validity of the Kerala Land Reforms Act 1963, along with the 24th, 25th and the 29th amendments.

157 See also *Indira Nehru Gandhi v. Raj Narain* [1975] AIR SC 2299); *Minerva Mills Ltd. v. Union of India* [1980] AIR SC 1789; *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd*. (AIR 1983 SC 239); *L. Chandra Kumar v. Union of India* [1997] AIR SC 1125.

158 The amendment of Article 368(4) excluding judicial review of a constitutional amendment was unconstitutional. The amendment of Article 31C containing the words 'and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy' was held invalid.

159 K. K. Mathew, 'Basic Structure and Fundamental Right to Property' [1978] 2 SCC 65.

160 *Kesavananda Bharati v. State of Kerala* [1973] AIR SC 1461, 1606.

161 *Indira Nehru Gandhi v Raj Narian* [1975] Supp SCC 1.

162 Jaivir Singh, '(Un)Constituting Property: The Deconstruction of the 'Right to Property' in India' (2004) *CSLG Working Paper Series*, Jawaharlal Nehru University, CSLG/WP/04-05, 17.

163 But this attempt was frustrated by *Minerva Mills v. Union of India* [1980] AIR SC 1787, and the above freedom now stands restricted only to laws seeking to give effect to Articles 39 (b) or (c).

compensation.[164] In *Bhim Singhju v. Union of India*, the Court upheld the adequacy of compensation of Indian Rs. Two lakhs for a property worth Indian Rs. Two crores.[165] The Court through Justice Krishna Iyer observed:

> Full compensation or even fair compensation cannot be claimed as a fundamental right by the private owner and that short of paying a 'farthing for a fortune' the question of compensation is out of bounds for the courts to investigate.[166]

The decision summarise the status of property rights, and the Indian political and intellectual community appeared satisfied by the arrangement.[167]

The principal instrument for compulsory land acquisition was the colonial legislation, the Land Acquisition Act of 1894.[168] Both parliament and state legislatures (with suitable modifications) have made extensive use of the Land Acquisition Act to expropriating large tracts of land holding for public purpose and for companies. The Act indeed provides a caveat that individuals whose property is taken over have a right to receive compensation. However, the discretionary power and ambiguities in the Act are often misused by the executive to serve private interests.[169] For instance, under the Act a declaration to the effect that the land is required for a 'public purpose' or for a Company shall be conclusive evidence that the land is indeed for a public purpose or for a company, as the case may be.[170] The District Collector shall direct the acquisition of the land, who shall have the power to receive objections and determine the value and compensation for the land. The amount of compensation awarded could be challenged in the civil court. The Act provides the civil court with clear direction in determining compensation, including matters to be ignored while computing compensation.

This Act is complimented by several special legislations. The legislation which is worth special mention is the SEZ Act 2005.[171] The SEZ policy unraveled in 2000 states that 'with a view to overcome the shortcomings experienced on account of the multiplicity of controls and clearances; absence of world-class infrastructure, and an unstable fiscal regime and with a view to attract larger foreign investments in India.'[172] The Act sanctions acquisition of agriculture and

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164 *Jilubhai Nanbhai Khachar v. State of Gujarat* [1995] AIR SC 142.

165 *Bhim Singhju v. Union of India* [1981] AIR SC 234).

166 ibid 239.

167 A central law, with state amendments, the Act has been amended periodically with substantial amendments being made in 1984.

168 The Land Acquisition Act 1894, a colonial legislation and the basis of land acquisition in India, provides that the state could acquire land in any locality if needed or is likely to be needed for any public purpose or for a company by paying compensation based on the market-value of the land determined by the Collector of that region.

169 ibid, s. 3(f). The term 'public purpose' is not defined in the Act, though such 'public purpose' is illustrated by heads such as provision of land for village sites, planned development, public offices, education, health and other schemes sponsored by the government, to name a few.

170 ibid, art. 6(1) and (3), Declaration of intended acquisition.

171 The Special Economic Zones Act 2005 (No. 28 of 2005).

172 Special Economic Zones in India <http://www.sezindia.nic.in/about-introduction.asp> accessed 12 November 2011.

non-agriculture land for 'economic development' which has the potential of displacing large number of people.

5. CHANGING DIMENSIONS OF PROPERTY RIGHTS

The India's policy towards private property was justified in the political, social and economic context of the time. The Constitutional amendments which over time water down the status of property rights were justifiable in the context of directive principles of state policy which mandated securing equitable distribution of wealth. A survey of the earlier experience on expropriation reveals that most acquisitions were for larger national or public interest in line with the directive principles of state policy, which justified measures involving land reforms, *zamindari* abolition and for national development goals. Similarly, the majority of acquisitions were in the nature of nationalization, meaning, state ownership of the expropriated property. However, the gradual shift in policy since the 1990s has raised questions on the nature of expropriation and ownership. Increasingly, in the recent years, the state seems to exercise it power of eminent domain to serve private commercial interests, both foreign and domestic, contrary to the long established understanding of 'public interest' requirement and eminent domain.

India's external commitments under the WTO and other bilateral and multilateral treaties has by implication, necessitated modification of the domestic regime to guarantee safe, secure and attractive legal environment for protection of IP and foreign capital entering India. The superimposing international regime limit the exercise of eminent domain against alien property since the repercussions and reputational cost of such action shall be heavy owing to the internationalization of protection and remedy. Providing a stronger and safer investment environment for foreign capital or domestic commercial interests is *per se* not problematic. However, the policy becomes questionable when the same results in *de facto* discrimination against individual property owners, whose security and identity are conceded in favour of commercial interests. International rules and constitutional principles demands *de facto* and *de jure* non-discrimination treatment in the application of laws, rules or regulations. However, the conscious shift in India's policy towards commercial interests seems to discriminate nationals and confers higher protection for owners of foreign and domestic commercial interest and property.

In other words, the select modification of India's legal regime tantamount to granting higher property rights and protection to private business interests. The paradox and arbitrariness in India's approach towards Indian private property owners are palpable in the land acquisition policy under Special Economic Zones (SEZ). The SEZ policy sanctions demarcation of land as foreign territory for the purposes of trade operations, duties and tariffs, with across-the-board tax holiday to companies. Land, cultivable and non-cultivable, is compulsorily acquired mostly from farmers to establish SEZ which are owned and operated by a private company. While SEZs economic sustainability is debatable, its social and political impact is ostensible from the controversies, protests and violence which marred

land acquisition for SEZ in India.[173] Protests against acquiring agricultural land, internal displacement, loss of livelihood, inappropriate compensation had been the main reasons for these protests. [174] Although the Land Acquisition Act means acquiring land for some public purpose by the government as authorized by the law, the state seems to misuse its power under the Act to acquire land from farmers and ordinary citizens only to be given back to private corporate promoters and developers, both foreign and indigenous. Challenged as land grabbing policy, the state seems to justify the same in the name of 'economic development' for the nation and the people.[175] However, the constitutional spirit and international law demand the exercise of eminent domain for a public purpose, as opposite to private purpose. The Parliament and the executive branch seem to negate the underlying rational for granting such discretionary power in a democratic constitution.

Indeed, any compulsory acquisition of land must satisfy 'public purpose.'[176] So long as the public purpose subsists, the exercise of the power of eminent domain cannot be questioned. Public purpose or public use is thus the key criteria in determining the legality of compulsory 'taking'. In other words, legitimate use of eminent domain depends on the question whether the land has been acquired for public purpose or which has been or is being put to use for the said purpose. But what constitute 'public purpose' or public interest is indeterminate. The definition changed with time and context. The Black Law Dictionary, for instance, defines public purpose as 'a public purpose or public business has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all the inhabitants or residents within a given political division, as, for example, a state, the sovereign powers of which are exercised to promote such public purpose or public business.' [177] The US courts seem to share a similar definition of public purpose.[178]

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173 Few instance of unrest among the local population against land acquisition are: Protest against SEZ in Raigad against land acquisition by Reliance in Greater Mumbai and Indiabulls; Successful protest in Singur and Nandigram (West Bengal) against SEZs and displacement; Protest against Reliance SEZ in Jhajjar, Haryana; Protest against land acquisition for Trident SEZ in Barnala Punjab etc.

174 'Ugly side of land acquisition in India' <http://business.rediff.com/slide-show/2010/may/31/slide-show-1-ugly-side-of-land-acquisition-in-india.htm> accessed 20 May 2011.

175 The Government has given formal approval to 439 SEZs, which covers a total area 220,000 hectare (550,000 acres) as on 2008. Estimates show that close to 114,000 farming households (each household on an average comprising five members) and an additional 82,000 farm worker families who are dependent upon these farms for their livelihoods, will be displaced. Formal approvals granted in the Board of Approvals after coming into force of SEZ Rules <http://www.sezindia.nic.in/writereaddata/pdf/ListofFormalapprovals.pdf> accessed 3 May 2011.

176 *His Holiness Kesavananda Bharati vs. State of Kerala* [1973] Supp. 1 SCR 1.

177 *Black Law Dictionary* (West Publishing, 1990).

178 A 'public purpose' has been defined as that which 'has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation.' See *Gaylord v Gaylord City Clerk* [1966] 378 Mich 273, 300, quoting *Hays v Kalamazoo,* [1947] 316 Mich 443, 454. See *County of Wayne v. Edward Hathcock and others*, Michigan Supreme Court (July 30, 2004).

The Indian judiciary has taken its own approach towards defining public purpose. In *State of Bihar v. Kameshwar Singhi,* the Supreme Court explained that the:

> expression 'public purpose' is not capable of a precise definition and has not a rigid meaning. It can only be defined by a process of judicial inclusion and exclusion. In other words, the definition of the expression is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs. The point to be determined in each case is whether the acquisition is in the general interest of the community as distinguished from the private interest of an individual.[179]

It must 'include an object in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned.'[180] The purpose of such a land acquisition law must 'directly and vitally subserve public interest.'[181] In other words, there must be a direct correlation between land acquisition and public purpose, barring which the acquisition may become illegal. The question then is whether compulsory acquisition of land for SEZ schemes establishes the correlation? Can the definition of 'public purpose' broader to include absolute transfer of property to private entities for private use?

Indeed, 'public purpose' or 'use' requirement is no absolute bar against transfer of expropriated property to private entities. The prohibition is against transferring expropriated property to private entities for a *private* use.[182] In the US, the courts have held that economic development qualified as a valid public use under both the Federal and State Constitutions.[183] However, this 'public use' requirement must be supported by the need to determine, first, whether the takings at issue were 'reasonably necessary' to achieve the intended public use and, second, whether the takings were for 'reasonably foreseeable needs'.[184] In *County of Wayne v. Edward Hathcock* case, the Michigan Supreme Court held that of private land could be constitutionally transferred by the state to a private entity only if it involved "public necessity of the extreme sort otherwise impracticable.'[185] 'The exercise of eminent domain for private corporations has been limited to those enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving.'[186] In addition, the transfer is consistent with the

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179 *State of Bihar v. Kameshwar Singh* [1952] AIR SC 252, 259.

180 *Somawanti v. State of Punjab* [1963] 2 SCR 774; *Bhim Singhji v. Union of India* [1981] 1 SCC 166.

181 ibid.

182 See *Hawaii Housing Authority v. Midkiff* [1984] 467 U. S. 229 at 245 (A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.)

183 ibid and *Berman* v. *Parker* [1954] 348 U. S. 26.

184 *Susette Kelo v. City of New London*, *Connecticut,* US Supreme Court, No. 04.108 (June 23, 2005).

185 *County of Wayne v. Edward Hathcock and others*, Michigan Supreme Court (July 30, 2004).

186 Dissenting judgment of Justice Ryan in *Poletown Neighborhood Council v Detroit*, [1981] 410 Mich. 616, 675-676 at 678 in *County of Wayne v. Edward Hathcock and others* Michigan

constitution's 'public use' requirement only when the private entity remains accountable to the public in its use of that property. The Court further noted that:

> This Court disapproved condemnation that would have facilitated the generation of waterpower by a private corporation because the power company "will own, lease, use, and control" the water power. In addition, [we] warned, "Land cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the *use* of the public, *independent of the will of the corporation taking.*[187]

The Court further stated that:

> Every business, every productive unit in society, does … contribute in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a *private entity seeking its own profit might contribute to the economy's health is to render impotent the constitutional limitations* on the government's power of eminent domain.[188]

Unfortunately, the exercise of eminent domain in India seems to undermine all these assumptions and pursue on an altogether different logic determined by consideration not permitted by the concept of 'public interest'. Indeed, India did practice a different brand of 'public interest' with socialist inclinations. However, port-liberalization India has moved away from the much cherished socialistic principles, as is evident from the policy shift. Despite the shift, India seems to continue land acquisition clinging on to principles that was justified in a historical context and time. The transfer of expropriated property to private entities for private use strike at the root of the constitutional edifice on which the arbitrary power sanctioned under *eminent domain* is justified in a democratic context. The power has been transgressed and misused often resulting in displacement and loss of livelihood for meager land-holders. The impact of such a dispossession often falls heavier on the marginalized segment and tantamount to denial of economic and social security. The state as the guarantor of individual's property rights has now emerged as the prime violator.

Part of the reason for the current state of affairs is the assumption that the final determination as to what constitute 'public purpose' rests with the Parliament and the Executive branch. Despite observations by the court that '[public interest] can only be defined by a process of judicial inclusion and exclusion', the Executive continues to have a sway in defining public interest. The limits imposed on judicial review add to the drawback. The leeway has been used to broaden the scope of 'public interest' to suit vested interest and legitimize excesses. The judiciary on its part has supported the assumption and shown deference to the legislative and executive determination and judgment.[189] In *Somawanti v. State of Punjab*, the

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Supreme Court (July 30, 2004). Justice Ryan listed 'highways, railroads, canals, and other instrumentalities of commerce' as examples of this brand of necessity.

187 Dissenting judgment of Justice Ryan in *Poletown Neighborhood Council v Detroit* [1981] 410 Mich. 616, 675-676, 678 citing *Berrien Springs Water-Power Co v Berrien Circuit Judge,* [1903] 133 Mich 48, 51, 53. The opinion become majority view in *County of Wayne v. Edward Hathcock and others* Michigan Supreme Court (July 30, 2004).

188 *Emphasis added*. ibid. *County of Wayne v. Edward Hathcock and others*, Michigan Supreme Court (July 30, 2004) 45.

189 *Jain* (n 136) 1831.

Court noted that 'whether the purpose for which land was needed was a public purpose or not was for the Government to be satisfied about and *the declaration of the Government would be final* subject to one exception, namely that where there was a colourable exercise of the power the declarations would be open to challenge at the instance of the aggrieved party.'[190] In *Laxman Rao Bapurao Jadhav v. State of Maharashtra* the Court reiterated this point and observed that 'it is for the State Government to decide whether the land is needed or is likely to be needed for a public purpose and whether it is suitable or adaptable for the purpose for which the acquisition was sought to be made. The mere fact that the authorized officer was empowered to inspect and find out whether the land would be adaptable for the public purpose, it is needed or is likely to be needed, does not take away the power of the Government to take a decision ultimately.'[191]

The government's insensitivity in addressing the problem is evident from the Rehabilitation and Resettlement Bill 2009 and the Land Acquisition Amendment Bill 2009 which attempts to reintroduce certain fairness in the acquisition process.[192] Both Bills seeks to secure the monetary and livelihood interest of the people displaced by land acquisition purchases or any other involuntary displacement and attempts to address the lacunas and arbitrariness in the land acquisition.[193] The Bills were introduced owing to pressure from people's movements and civil society groups. However, there is a great deal of opposition against the bills in its current form. The major opposition has been about Bill's clearly endorsement of the view that 'private purpose' implying corporate and private commercial interests, is synonymous with 'public' purpose.[194] The only positive development is the passing of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. This landmark legislation deals with protection of marginal and tribal communities over their rights to forestland. This Act, it is believed, would mitigate the historical injustice committed against forest dwellers and recognize their property rights. Since then attempts have been made to reinitiate the Bills with further modifications. However, these piecemeal

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190 *Somawanti v. State of Punjab* [1963] 2 SCR 774. See also *Scindia Employees' Union v. State of Maharashtra & Others* [1996] 10 SCC 150, where the court observed that publication of declaration under Section 6 is conclusive evidence of public purpose. However if acquisition would not serve any purpose, or where it was for a 'private purpose', it could be challenged as being 'colorable'.

191 *Laxman Rao Bapurao Jadhav v. State of Maharashtra* [1997] 3 SCC 493. See also *The State of Karnataka & Another v. Shri Ranganatha Reddy & Another* [1977] 4 SCC 471; *Daulat Singh Surana & Others vs. First Land Acquisition Collector & Others* Appeal (civil) 6756 of 2003 (13 November 2006) <http://judis.nic.in/supremecourt/chejudis.asp> accessed 4 December 2011.

192 Bill no. 98-C of 2007. The Bill was initially introduced in 2007 and was passed by the Lok Sabha on 25th February 2009. Bill was preceded by Cabinet approval for the National Resettlement and Rehabilitation Policy in October, 2007 a response to the popular opposition to the takeover of agricultural land for the creation of SEZs.

193 Bill no. 97 of 2007. The Land Acquisition (Amendment) Bill was introduced by the government. It was passed in the Lok Sabha on 25th February 2009 but was not cleared by vote in the Rajya Sabha.

194 D. Bandyopadhyay, 'Why We Must Oppose the Land Acquisition (Amendment) Bill of 2009' Vol. XLVII (35) *Mainstream* (August 15, 2009) <http://www.mainstreamweekly.net/article1586.html> accessed 4 December 2011.

amendments to the existing Act shall neither restore right to property as was known earlier, nor put an end to state's arbitrariness. Only a change in the constitutional status of property rights with an effective remedial mechanism could restore the balance for the 'citizens' of India.

Indeed, state is not the only instrumentally though which the 'citizens' interest could be protected. The judiciary as the constitutional interpreter could play a signification role in redefining property rights in the changing context. Though, judicial attempt to check arbitrariness of laws sanctioning compulsory acquisition had limited success, the Court has shown an inclination towards declaring unconstitutional 'laws' which are blatantly unreasonable. For instance, the Supreme Court in the *Maneka Gandhi* case held that each and every provision of the Constitution had to be interpreted in a just, fair and reasonable manner. Therefore, any law depriving a person of his property shall have to do so in a reasonable manner. Similarly, in *I.R. Coelho vs. State of Tamil Nadu*, the court also held that the ninth schedule does not guarantee absolute protection for laws, and its validity could be tested in the context of basis structure.[195] Further, judiciary has attempted to read into fundamental rights some aspect of property rights. In *Bhim Singh v. UoI* case, the Supreme Court took recourse to Right to Equality (Reasonableness) under Article 14 for invalidating certain aspects of the urban land ceiling legislation.[196]In *ENIL v. Super Cassette Industries Ltd. (SCIL)*, on the other hand, the Court referred the right to property not just a constitutional right or statutory right but also a human right.[197] Whether human rights have equal status of fundamental rights in constitutional parlance is worth exploring.

In a Public Interest Litigation (PIL) filed in the Supreme Court in 2009 it was argued that the very purpose (abolish *zamindaris* system and distribution of land among landless peasants) for which the right to property was relegated in 1978 is not no longer relevant. Harish Salve, arguing for the petitioner, pointed out that having achieved the purpose, the government should now initiate fresh measures to put right to property back in the fundamental rights.[198] An apex court bench presided over by the Chief Justice said that such a right was inconsistent with the principle of socialism enshrined in the preamble of constitution. While the rational of the judgment is debatable, the PIL has certainly contributed towards remind the debate on property rights in the changing global context. Indeed, time is ripe for policy makers to acknowledge the need to restore right to property

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195 *I.R. Coelho (Dead) By Lrs vs State of Tamil Nadu & Ors*, [1976] Supreme Court, Appeal (civil) 1344-45 of 1976 (judgment dated on 11 January, 2007).

196 *Bhim Singh v. Union of India* [1981] 1 SCC 166.

197 Justice S. Sinha noted that 'an owner of a copyright indisputably has a right akin to the right of property. It is also a human right .... Property rights vis-'-vis individuals are also incorporated within the 'multiversity' of human rights. *Entertainment Network India Ltd. (ENIL) v. Super Cassette Industries Ltd. (SCIL)* [2005] Civil Appeal no. 5114, para 76.

198 Salve also said that 'It is an irony that the very same enactments that were aimed at ameliorating the lot of the poor and underprivileged are now being used to take away their lands to be handed over to the rich, including large corporations and foreign conglomerates.' Satya Prakash, 'Restore fundamental right to property: PIL' *Hindustan Times* New Delhi, February 27, 2009 <http://www.hindustantimes.com/Restore-fundamental-right-to-property-PIL/Article1-384640.aspx> accessed 26 April 2011.

as a Fundamental Right to ensure protection of elementary and basic proprietary rights of poor Indian 'citizens' against compulsory land acquisition. In some of the recent decisions, one finds reverberation of the concern over arbitrary exercise of *eminent domain*.[199]

6. CONCLUDING OBSERVATIONS

While the relationship between property rights and civil liberties should not be casually overlooked, one must acknowledge the correlation between property and social identity, dignity, livelihood and sense of belonging, particularly for those people whose life for generations are permanently attached to land.[200] Until few decades ago in many parts of the world, ownership of property determined a person's social standing, right to vote, and most other civil rights. Compulsory acquisition of property or land rights, where rural or urban, tribal or indigenous, cannot be justified even in the supreme of social justice initiatives, let alone the current trend of state sponsored 'development policies' to serve corporate India. Indeed, for many Indians, property rights assume more value than some of the fundamental rights guaranteed under Part III. Fundamental rights, such as right to life, liberty and equality may also become meaningless without a guarantee of properly rights. Furthermore, land acquisition has the tendency to exacerbate inequality and lower trust in the state.[201]

It is the context and time that justified relegation of fundamental right to properly in the first few decades of India's independence. Since then time has changes, and the change in scenario warrants serious introspection by both the Parliament and judiciary. The debate is now 'commercial vs. individual interests', not any more 'public vs. individual interests'. India's policy today espouses stronger protection for alien and domestic business interests and investments, than its indigenous population. The obligations under WTO and other multilateral and bilateral investment treaties ensure that such higher standard of protection and compensation remain. The internationalisation of protection of property rights has ensured that the local judicial system give way for international adjudication based on rules and standards internationally recognised. Neither the Indian constitutional framework nor the socialistic outlook defended by the Indian parliament and judiciary would deter international tribunals in providing a higher

199 The Allahabad High Court has quashed acquisition of nearly 600 hectares of land in two villages in Greater Noida. The Greater Noida Authority, allegedly using loopholes in the Land Acquisition Act, acquired 15,000 hectres of land at dirt cheap rates and sold it to developers. Around 200 cases are scheduled to come up for hearing in the next few days. See 'Greater Noida: HC scraps land acquisition' *Headlines Today* Greater Noida, July 19, 2011 <http://indiatoday.intoday.in/site/story/allahabad-hc-annuls-land-acquisition-near-greater-noida-village/1/145464.html> accessed 26 April 2011.

200 Freeman, identity is 'what we know and what we feel. It is an organizing framework for holding together our past and our present and it provides some anticipated shape to future life' in M. Freeman, ' The new birth right?: Identity and the child of the reproductive revolution' (1996) 4 Int'l J Children's Rts 273-297 at 290.

201 Pratap Bhanu Mehta, 'It's land, stupid' *The Indian Express* (Delhi, August 2010) 8.

remedy not guaranteed for its own people. In the process, India has weakened its power to exercise eminent domain by yielding to international commitments, which guarantee the safety and security for foreign investments and intellectual property. Institutions such as the MIGA and OPIC could use its coercion power to ensure the guarantee that the host governments meet their international obligations at all times.

Such discriminatory policy and double standards in the application of eminent domain call into question the legitimacy of the compulsory taking of land and presents a reasonable argument for higher constitutional protection for citizens. The commercial interest that dominates the current acquisition policy needs to be overcome with a justification purely driven by genuine 'public interest.' This could be achieved only by rethinking the role of state in the context of eminent domain and the fundamental right to livelihood, economic security and identity. This does not mean the state's power of eminent domain must be curtailed significantly. The state's interference with individual property must be reserved for instances where it is imperative in the general public good. The problematic area has been the use of eminent domain for private commercial interest. In a welfare state, ensuring equitable distribution of wealth demands intelligible exercise of such power with proper check and balance. The present social-economic context, were liberalization has made privatisation of all aspects of governance, guaranteeing private rights shall go a long way in securing most of the fundamental rights enshrined in Part III, without compromising the directives under Part IV of the Constitution. If the current trend is to continue, the social legitimacy of capital as an instrument of development could be put at risk. The circumstance that justified arbitrary acquisition has come to pass and changing context demands change in laws to redefine properly rights in India.

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