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## But Is It Just? The Inability for Current Adjudicatory Standards to Provide “Just Compensation” for Creeping Expropriations

Shain Corey

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**BUT IS IT JUST? THE INABILITY FOR CURRENT  
ADJUDICATORY STANDARDS TO PROVIDE  
“JUST COMPENSATION” FOR CREEPING  
EXPROPRIATIONS**

*Shain Corey\**

*In hopes of promoting foreign direct investment, the world has experienced an influx of bilateral investment treaties over the past twenty years. One protection these treaties afford to foreign investors is the guarantee of “just compensation” if the host government expropriates their investment, either directly or indirectly. Extensive jurisprudence exists discussing how a tribunal determines “just compensation” in cases of expropriation; however, these methods have historically revolved around valuing direct expropriations. While tribunals use these same methods to value indirect expropriations, analysis of these adjudications, particularly in the cases of a creeping expropriation, result in inconsistent and unpredictable outcomes.*

*This Note considers two areas—timing and methodology—that have led to these inconsistent rulings. The Note first discusses the current international standards used in these areas and then looks at alternative methods suggested by scholars to address the resulting inconsistencies. It concludes by arguing that in cases of creeping expropriations, tribunals should implement some variation of these alternative methods in order to produce more consistent outcomes.*

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## INTRODUCTION

The fundamental economic problem of scarcity is a longstanding issue that society has tried to address.<sup>1</sup> Given the world's limited resources and society's unlimited wants, it is vital to maximize material and human capital wherever possible.<sup>2</sup> Many individuals propose globalization strategies as a means to address scarcity concerns. One method is to entice investors to enter a foreign country and use their superior skills and knowledge to maximize production in a certain sector of the economy.<sup>3</sup> This method is particularly beneficial when private actors from developed countries enter developing countries.<sup>4</sup> In the end, developing countries gain knowledge and skills to produce more efficiently and to better utilize limited resources.<sup>5</sup> In return for bringing knowledge and training into the country, the foreign investor receives additional profits by increasing its capital base thanks to new market access.<sup>6</sup> Thus, both sides benefit from this direct foreign investment arrangement, and society puts its scarce resources to better use.

However, investor uncertainty over entering a country with unfamiliar laws and practices limits the amount of foreign direct investment (FDI) that takes place.<sup>7</sup> In addition to encountering foreign business practices and laws, there is often concern over regulatory uncertainty in a developing country and the possibility that the foreign government will unfairly take away the investment from the investor.<sup>8</sup> The ability to create an investment environment that rids the investor of these concerns, therefore, can more fully promote FDI and the economic benefits it brings.

One effort to create this type of investment environment has been the mass proliferation of investment treaties between countries.<sup>9</sup> While some of these treaties involve multiple countries, the vast majority have been bilateral investments treaties (BITs) between two countries.<sup>10</sup> There have been over 2,750 BITs signed between countries, with 2009 seeing more

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1. See WILLIAM J. BAUMOL & ALAN S. BLINDER, *MACROECONOMICS: PRINCIPLES AND POLICY* 20–21 (9th ed. 2004).

2. See *id.*

3. See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS* 371 (2d ed. 2010).

4. See *id.*

5. See *id.* at 372.

6. See *id.*

7. See Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 *WORLD DEV.* 1567, 1567 (2005).

8. See Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance* 1–2 (Ill. Law and Econ. Working Papers Series, Paper No. LE06-027, 2006).

9. See Manuel A. Abdala & Pablo T. Spiller, *Damage Valuation of Indirect Expropriation in International Arbitration Cases*, 14 *AM. REV. INT'L ARB.* 447, 447 (2003).

10. See Ginsburg, *supra* note 8, at 16–17; see also Mariana Pargendler, *State Ownership and Corporate Governance*, 80 *FORDHAM L. REV.* 2917, 2971 (2012) (“To encourage foreign direct investment, governments typically enter into such commitments by signing bilateral investment treaties providing for international arbitration to resolve disputes.”).

than one new BIT per week.<sup>11</sup> The primary purpose of BITs is to provide safeguards for the investments of citizens from one country that are located in the territory of the other country.<sup>12</sup> These safeguards include rules governing the host state's treatment of the investments and the establishment of dispute resolution mechanisms.<sup>13</sup> The language and protections of BITs are mostly uniform,<sup>14</sup> with one central protection being the guarantee of compensation in the event of expropriation by the host country.<sup>15</sup> This protection encompasses both direct and indirect expropriations.<sup>16</sup> Direct expropriations have historically been the most common form of expropriation, where the host government physically takes control of the asset from the foreign investor.<sup>17</sup> However, there has recently been a large increase in the number of indirect expropriations, particularly creeping expropriations.<sup>18</sup> A creeping expropriation occurs when the host country institutes a series of acts that, when aggregated, have the equivalent effect of depriving the owner of any benefit from the investment while not directly taking the asset from the foreign investor.<sup>19</sup>

A large amount of case law, particularly arbitration case law, addresses providing compensation for expropriations.<sup>20</sup> The consensus under

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11. See U.N. Conference on Trade & Dev., *World Investment Report 2010: Investing in a Low-Carbon Economy*, at 81, U.N. Doc. UNCTAD/WIR/2010 (July 22, 2010) (stating eighty-two BITs were signed in 2009 with 2,750 signed in total). The United States recently entered into BITs with Rwanda and Uruguay. See Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, Feb. 19, 2008, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset\\_upload\\_file743\\_14523.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf); Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uruguay, Nov. 4, 2005 [hereinafter U.S.-Uruguay BIT], available at [http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset\\_upload\\_file748\\_9005.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file748_9005.pdf).

12. See Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 52 (2005) ("A BIT is an agreement between two Sovereigns that safeguards the investments made by investors from each country in businesses or projects located in the other's territories.").

13. See Kenneth J. Vandavelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469, 469-70 (2000) ("In general, the agreements protect investment by investors of one state in the territory of another state by articulating substantive rules governing the host state's treatment of the investment and by establishing dispute resolution mechanisms applicable to alleged violations of those rules.").

14. See CHOW & SCHOENBAUM, *supra* note 3, at 383.

15. See W. Michael Reisman & Rocio Digon, *Eclipse of Expropriation?*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 27, 27-28 (Arthur W. Rovine ed., 2008).

16. See IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW ¶¶ 3.52-53 (Loukas Mistelis ed., 2009).

17. See *id.* ¶ 3.03; *Dictionary of Trade Terms*, SICE, [http://www.sice.oas.org/dictionary/IN\\_e.asp](http://www.sice.oas.org/dictionary/IN_e.asp) (last visited Oct. 20, 2012).

18. See CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 8.02 (Loukas Mistelis et al. eds., 2007).

19. See *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, ¶ 17 (June 2, 2000), 15 ICSID Rev. 214 (2000) (Hight, Arb., dissenting); W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115, 123 (2004).

20. See Reisman & Digon, *supra* note 15, at 27-28.

international law arising from these cases is that the host country must provide “just compensation” to the foreign investor in the event of an expropriation.<sup>21</sup> However, most international legal principles concerned with how to determine “just compensation” were designed to provide compensation for direct expropriations.<sup>22</sup> While direct expropriations were at one point in time the primary mode of expropriation, this is rarely the case today.<sup>23</sup> The much more common, contemporary expropriation issue involves indirect and creeping expropriations.<sup>24</sup> Unfortunately, the principles of international law addressing how to determine “just compensation” do not easily apply to these forms of expropriation.<sup>25</sup> Attempting to apply these principles to creeping expropriation cases has resulted in several inconsistencies across adjudicatory bodies.<sup>26</sup>

This Note discusses the difficulties in applying current international law and BIT standards to determine “just compensation” when a creeping expropriation occurs. In particular, two issues have led to this problem: temporal inconsistencies in deciding when to value the investment and difficulties in applying typical valuation methods.<sup>27</sup> Inconsistent application of the law undermines the purpose of BITs, which is to provide a structured environment that entices FDI.<sup>28</sup> In addition to discussing how current standards for determining adequate compensation are unsuitable for creeping expropriations, this Note looks at alternative possibilities for determining how and when to value the taken asset. Implementation of these alternative methods may provide more adjudicatory consistency when determining “just compensation.” Increased consistency would then ideally result in more effective protection by BITs, increased foreign investment, and greater global economic development.

Part I of this Note provides a thorough discussion of BITs and the benefits they provide, with an emphasis on the protection against expropriations without compensation. It then shifts towards a discussion of the “just compensation” standard and the ideologies developed around what satisfies it. Next, Part II discusses the inconsistencies that have arisen by attempting to apply the current standards for determining “just compensation” to incidences of creeping expropriation. It first shows the conflicts that have resulted from the current “moment of expropriation” standard in determining the point in time in which to value the expropriated asset. It then discusses the difficulties in applying various accepted valuation methods to creeping expropriations. Part III considers alternative strategies that scholars have suggested to address these temporal and

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21. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712(1)(c) (1987).

22. See *infra* Part II.A.2, II.B.2.

23. See MCLACHLAN ET AL., *supra* note 18, ¶ 8.02.

24. *Id.*

25. See *infra* Part II.

26. See *infra* Part II.

27. See *infra* Part II.

28. See *supra* notes 7–10 and accompanying text.

methodological issues. Finally, Part IV asserts the need to implement some type of change to current practices. It argues that each method proposed in Part III would help to alleviate some of the inconsistencies that currently exist, even if they do not completely resolve the problem. Moreover, this Note proposes alternative solutions that would also provide more consistency in trying to determine “just compensation” for creeping expropriations.

### I. THE TRENDY TREATY’S COMPENSATION PROTECTION

This Note begins by providing a general background on BITs and the current international law standards for providing compensation in response to expropriations. Part I.A explains the history of BITs, their general structure, and their purpose. Part I.B then discusses expropriations and the international compensation standards developed in response to them. Finally, Part I.C concludes by briefly discussing how the nature of international courts and arbitral tribunals contribute to the question of determining “just compensation.”

#### A. *The Trendy Treaty: Why BITs Have Become So Popular*

This section looks at the history of BITs and discusses reasons for their recent popularity. It begins by discussing the global prevalence of BITs and then details the structure and common provisions found in them. Finally, this section discusses the benefits that BITs offer a country and its citizens, giving some indication as to why countries enter into these types of treaties.

#### 1. The Global Proliferation of BITs

Though they have existed for over fifty years, mass implementation of BITs only began in the 1990s. The Federal Republic of Germany and the Islamic Republic of Pakistan signed the very first BIT in 1959.<sup>29</sup> Like this first BIT, many subsequent agreements were originally signed between a “developed” country and a “developing” one,<sup>30</sup> although it is also common to have BITs signed between two “developed” or two “developing” countries.<sup>31</sup> Following a boom in the late 1990s and early 2000s, dozens of

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29. See CHOW & SCHOENBAUM, *supra* note 3, at 383.

30. See Amnon Lehavi, *The Global Law of the Land*, 81 U. COLO. L. REV. 425, 449 (2010) (“BITs were being typically signed between a developed country—the exporter of capital—and a developing one, so that BIT provisions were mainly placing constraints on the latter.”); Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT’L LAW. 655, 656 (1990).

31. See Salacuse, *supra* note 30, at 658–59. For a list of BITs signed by each country, see *ICSID Database of Bilateral Investment Treaties*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main> (last visited Oct. 20, 2012) [hereinafter *ICSID List of BITs*]; *Country-Specific Lists of Bilateral Investment Treaties*, U.N. CONFERENCE ON TRADE & DEV., <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1> (last visited Oct. 20, 2012) [hereinafter *UNCTAD List of BITs*]. Please note

countries have signed some form of bilateral investment treaty.<sup>32</sup> Many countries have signed multiple BITs, including the United States (48), Germany (147), China (128), and Russia (71).<sup>33</sup> While the contents and protections of BITs are mostly uniform, several attempts to make a broad based multilateral investment treaty between many nations have been unsuccessful.<sup>34</sup> Although some multilateral investment treaties do exist—the North American Free Trade Agreement<sup>35</sup> (NAFTA), for example—the dominant approach has been to sign bilateral treaties.<sup>36</sup>

## 2. The Structure and Protection of BITs

BITs are a popular global investment tool because they provide benefits to both the host<sup>37</sup> state and the foreign investor.<sup>38</sup> For the most part, the protections of BITs are identical,<sup>39</sup> and they “tend to resemble each other in their purpose and content.”<sup>40</sup> This is a result of their being derived from a limited number of common sources.<sup>41</sup> The 2012 U.S. Model BIT<sup>42</sup> serves as a good example of a typical BIT because it contains the five substantive provisions generally found in most BITs: national treatment, most favored nation status, fair and equitable treatment, full protection and security, and protection from expropriation without compensation.<sup>43</sup>

The first provision, national treatment, provides that no signatory to the BIT may treat a foreign investor less favorably than it would a domestic investor in like circumstances, or treat a foreign-owned investment less favorably than a domestically owned investment.<sup>44</sup> The most favored nation provision promises investors from signatory states treatment that is as good as, or better than, treatment given to investors from nonsignatory states.<sup>45</sup> Countries often combine the next two provisions, fair and

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that each organization only lists BITs that governments provide to them, and therefore both sources must be considered when determining all BITs that a State has entered into.

32. See U.N. Conference on Trade & Dev., *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, at 3, U.N. Doc. UNCTAD/ITE/IIA/2007/3 (Sept. 2007), available at [http://www.unctad.org/en/docs/iteiia20073\\_en.pdf](http://www.unctad.org/en/docs/iteiia20073_en.pdf).

33. See *ICSID List of BITs*, *supra* note 31; *UNCTAD List of BITs*, *supra* note 31.

34. See Edna Sussman, *A Multilateral Energy Sector Investment Treaty: Is it Time for a Call for Adoption by All Nations?*, 44 INT'L LAW. 939, 959 (2010).

35. Whereas BITs solely focus on investments, NAFTA is a treaty addressing both investments and trade.

36. See Ginsburg, *supra* note 8, at 16–17.

37. In this Note, the word “host” will refer to the member country of the bilateral investment treaty that holds the invested asset within its geographical territory.

38. See *infra* Part I.C.

39. See CHOW & SCHOENBAUM, *supra* note 3, at 383.

40. MCLACHLAN ET AL., *supra* note 18, ¶ 2.05.

41. These sources include BIT drafts produced by the Organisation for Economic Co-operation and Development (OECD) and a private group led by Abs and Shawcross in 1959. See *id.*

42. U.S. MODEL BILATERAL INVESTMENT TREATY (2012), [hereinafter U.S. MODEL BIT], available at <http://www.state.gov/documents/organization/188371.pdf>.

43. See MCLACHLAN ET AL., *supra* note 18, ¶ 2.20.

44. See, e.g., U.S. MODEL BIT, *supra* note 42, art. 3.

45. See, e.g., *id.* art. 4.

equitable treatment and full protection and security, into one “minimum standard of treatment” provision.<sup>46</sup> This provision requires member countries to provide justice in criminal, civil, and administrative adjudicatory proceedings that satisfies due process, and guarantees the same degree of police protection and security as is required by international law.<sup>47</sup> The last provision is protection from expropriation without just compensation.<sup>48</sup> This protection covers both direct expropriation of an individual’s investment, where the State “deprives a private person of his or her property,”<sup>49</sup> and indirect expropriation, which is a more generalized version of creeping expropriation where a host country incidentally interferes with the use of property to the point that the interference significantly deprives the owner of using the investment.<sup>50</sup> The forms of expropriation and the appropriate remedy for expropriatory acts are discussed in further detail below.<sup>51</sup>

BITs also provide signatories and investors with several adjudicatory options.<sup>52</sup> Most have some variety of forum clause that allows for proceedings in national courts or for international arbitration through neutral organizations such as the International Centre for Settlement of Investment Disputes (ICSID) or the International Chamber of Commerce (ICC).<sup>53</sup>

### 3. The Reason Countries Enter into BITs

There are several reasons why a country may desire to enter into a BIT with another country. Not only are there benefits to the country as a sovereign nation, but the individual citizens of the country also benefit through their capacity as foreign investors.

#### *a. Benefits to the Host Country*

BITs provide numerous benefits to host countries, particularly developing ones. The primary reason that a country enters into a BIT is the

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46. *See, e.g., id.* art. 5.

47. *See, e.g., id.*

48. *See, e.g., id.* art. 6.

49. MARBOE, *supra* note 16, ¶ 3.03.

50. *See Metalclad Corp. v. United Mexican States*, ICSID Case No. Arb(AF)/97/1, Award, ¶ 103 (Aug. 30, 2000), 16 ICSID Rev. 168 (2001) (“[E]xpropriation under NAFTA includes . . . covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”). Although NAFTA is not a BIT, most general principles of BITs, including principles of expropriation, also apply to NAFTA and other multilateral treaties. *See* LUKE ERIC PETERSON, RIGHTS & DEMOCRACY, HUMAN RIGHTS AND BILATERAL INVESTMENT TREATIES 22 (2009), <http://www.law.utoronto.ca/documents/ihrp/LukePetersonReport.pdf>.

51. *See infra* Part I.B.

52. *See* Franck, *supra* note 12, at 54 (“Investors now regularly bring investment claims, in part because this direct action lets investors choose where they will bring their claims.”).

53. *See id.*

hope of attracting increased FDI, which may result in new sources of capital, new technology from investors, new jobs and training that increase human capital, and greater access to international markets.<sup>54</sup> Increases to FDI, and subsequent increases in capital assets, allows for free flowing capital, which improves productivity and accounts for the majority of economic growth in non-Western countries according to some economic models.<sup>55</sup> Whether BITs do in fact promote additional FDI is beyond the scope of this Note,<sup>56</sup> but a survey conducted by the United Nations Conference on Trade and Development (UNCTAD) showed that investors rank BITs as an important factor in investment decision making.<sup>57</sup> A country that has entered into BITs is therefore sending a signal to investors that they offer an investment environment with desirable benefits.<sup>58</sup> This signal may serve as a great advantage to developing countries, which are continually competing against each other for the investment of developed nations.<sup>59</sup>

BITs may also provide positive benefits to the host country's image. The protections provided by BITs may represent that investors are getting a better bargain for an investment that would have occurred anyway.<sup>60</sup> Moreover, entering into BITs may portray the country as "modern" because "BITs became 'the thing to do' for developing countries in the 1990s."<sup>61</sup> Additionally, while BITs do limit the legislation a country can implement, they serve as an incentive to prevent either current governments or future

54. See Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT'L L. REV. 451, 453 (2008).

55. See Vandeveld, *supra* note 13, at 478–79 (discussing the Liberal Economic Model's predictions of FDI impacts on non-Western countries).

56. Empirical studies have come to conflicting conclusions on this issue. Compare Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite*, WORLD BANK'S DEV. RES. GROUP (June 2003), [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/09/23/000094946\\_03091104060047/additional/105505322\\_20041117160010.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/09/23/000094946_03091104060047/additional/105505322_20041117160010.pdf) (finding minimal impact of BITs on FDI), and Jennifer Tobin & Susan Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* (Yale Law Sch. Ctr. for Law, Econ. & Pub. Policy, Research Paper No. 293, 2005), available at <http://ssrn.com/abstract=557121> (finding a very weak relationship between BITs and FDI), with Peter Egger & Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, 32 J. COMP. ECON. 788 (2004), available at <http://www.sciencedirect.com/science/article/pii/S0147596704000526> (finding BITs exert a significant positive effect on outward FDI).

57. See Sussman, *supra* note 34, at 953 (citing U.N. Conference on Trade & Dev., *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, at 51–52, U.N. Doc. UNCTAD/DIAE/IA/2009/5 (Sept. 2009), available at [http://www.unctad.org/en/docs/diaeia20095\\_en.pdf](http://www.unctad.org/en/docs/diaeia20095_en.pdf)).

58. See Ginsburg, *supra* note 8, at 19 (“[O]ne might see the BIT as a signal, either to foreign investors or to domestic audiences, that the government plans to pursue a liberal economic policy.”).

59. See Stiglitz, *supra* note 54, at 490.

60. See Ginsburg, *supra* note 8, at 20.

61. *Id.* at 19.

regimes from committing actions that break previous promises, making these promises more credible.<sup>62</sup>

*b. Benefits to Foreign Investors*

BITs also provide several benefits to foreign investors. First, they provide a level of security to enter new markets by alleviating the fear of unfairly losing one's investment, particularly in countries where the fear of expropriation had previously deterred a significant level of investment.<sup>63</sup> A similar benefit is that BITs provide protection from discrimination or unfair treatment in comparison to domestic investors.<sup>64</sup>

Third, BIT protections increase the likelihood that investors will maintain control over their investment.<sup>65</sup> FDI is desirable to many investors because it offers them not only the opportunity for a return on an investment but also managerial control over that investment.<sup>66</sup> Control provides investors unique opportunities to increase their return by possessing decision-making authority over matters such as production costs.<sup>67</sup> Because of the BIT, an investor's control over the asset is protected from injurious actions by the current government or any future governments.<sup>68</sup> In essence, BITs serve as an insurance policy in the event of unfavorable government actions.<sup>69</sup>

A fourth benefit that BITs provide to foreign investors is access to courts and the ability to bring claims against the host country on their own.<sup>70</sup> Previously, if an investor had a cause of action against the host country, she needed to rely on her home government to espouse the claim on her behalf.<sup>71</sup> BITs removed this requirement and allowed the investor to bring the claim at her own cost.<sup>72</sup> Ideally, this allows for more expedient resolutions and higher quality claims.<sup>73</sup>

While countries enter into BITs to take advantage of many benefits that increase the possibility of FDI, benefits from BITs also extend to the

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62. See Stiglitz, *supra* note 54, at 490–91.

63. See Ginsburg, *supra* note 8, at 3.

64. See LUKE ERIC PETERSON, FRIEDRICH-EBERT-STIFTUNG, *BILATERAL INVESTMENT TREATIES—IMPLICATIONS FOR SUSTAINABLE DEVELOPMENT AND OPTIONS FOR REGULATION 2* (2007), available at [http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin\\_Peterson.pdf](http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf).

65. See Vandavelde, *supra* note 13, at 473.

66. *Id.*

67. See *id.* at 473–76 (discussing two ways that production costs may be reduced through control).

68. See Ginsburg, *supra* note 8, at 11; see also Stiglitz, *supra* note 54, at 490–91 (arguing that BITs increase the cost of abrogating prior promises to protect foreign investors).

69. See Stiglitz, *supra* note 54, at 465.

70. See PETERSON, *supra* note 50, at 16; see also Ginsburg, *supra* note 8, at 2 (stating BITs offer a novel right that allows “private investors to bring suit against a sovereign state”).

71. See MCLACHLAN ET AL., *supra* note 18, ¶ 1.03.

72. See Ginsburg, *supra* note 8, at 11–12.

73. See *id.*

citizens of these countries, particularly when they act as foreign investors. Of the various benefits that BITs provide to investors, the most important one may be protection against expropriation without compensation. This Note now provides a deeper look at this topic.

### *B. The Concern of Expropriation and BIT's Powers Against It*

This section introduces the concept of expropriation and presents how BITs support the victims of expropriation by guaranteeing compensation. First, it discusses expropriation in general and then focuses on indirect expropriation specifically. Next, it explains the “just compensation standard” prescribed by BITs in response to an expropriation. This section then provides a history of the two competing ideologies on what this standard means. Finally, it introduces the practical means of achieving “just compensation” through asset valuation.

#### 1. Expropriation and Its Many Forms

While the definition of an expropriation tends to vary, the general concept of expropriation is clear: an expropriation is a governmental taking of property for which compensation is required.<sup>74</sup> However, expropriation is a broad category in which several different actions may fall.<sup>75</sup> As mentioned previously, the most well-known form of expropriation is a direct expropriation.<sup>76</sup> The concept of a direct expropriation is similar to eminent domain in the domestic setting.<sup>77</sup> The government assuming control does not automatically mean that it has expropriated the asset, though. This conclusion is warranted only when “the owner [i]s deprived of [the] fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.”<sup>78</sup> Thus, a temporary taking does not necessarily mean that there was an expropriation.

An asset that is not directly expropriated falls into the category of an indirect expropriation. This form of expropriation occurs when the host country takes measures (often through regulatory means) that, while not taking title of the asset from the foreign investor, typically have an equivalent effect.<sup>79</sup> Essentially, the host country’s actions have rendered

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74. See MCLACHLAN ET AL., *supra* note 18, ¶ 8.03.

75. See *id.*

76. See *supra* note 17 and accompanying text.

77. Eminent Domain consists of “[t]he inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking.” BLACK’S LAW DICTIONARY 601 (9th ed. 2009).

78. *Tippetts v. TAMS-AFFA Consulting Eng’rs of Iran*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1984).

79. See Catharine Yannaca-Small, “*Indirect Expropriation*” and the “*Right to Regulate*” in *International Investment Law*, in INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE 43, 46–47 (2005), available at <http://www.oecd.org/dataoecd/11/53/40077899.pdf>; cf. PETERSON, *supra* note 50, at 14 (discussing a growing concern over how to define “indirect expropriation” so that some regulatory measures that have an impact on the profitability of an investment are permissible and not deemed expropriations).

the rights to the investment so useless that the host country is deemed to have expropriated it.<sup>80</sup> In addition to the word “indirect,” the international investment community also often refers to this form of expropriation as “de facto,” “disguised,” “constructive,” or that the measures taken are “tantamount” to an expropriation.<sup>81</sup> Joseph Stiglitz provides a fairly straightforward example of an indirect expropriation that may clarify this concept:

[E]very country can take actions that decrease the value of an asset—so much so that they are tantamount to expropriation. For example, an individual has beachfront property on which he plans to build a house. The government decides that there is a public good in ensuring that the beachfront remains pristine, and therefore decides that no house can be built upon it. However, it leaves the individual as the owner; he can prevent others from trespassing on his property. But his use of the property is so circumscribed that the value of the land has been greatly diminished.<sup>82</sup>

This example portrays how a single act by the host country can make an asset valueless to the owner despite retaining legal title to the asset.

Since many governmental actions have a positive net social benefit despite hurting some parties, it is unclear what constitutes an indirect expropriation versus a legitimate government action. The United States, as shown in the United States-Uruguay BIT, declares that determining whether an action constitutes an indirect expropriation requires a case-by-case, fact-based inquiry.<sup>83</sup> Some factors to consider include the economic impact of the government action, the degree to which the action interferes with investment-backed expectations, and the character of the government action.<sup>84</sup>

While any indirect expropriation is troublesome, a more problematic form is a creeping expropriation. A creeping expropriation is a specific type of indirect expropriation where a series of acts deprive the investor of her investment only when the effects of those acts are aggregated.<sup>85</sup> If one or two events in the series can be determined as the factors that destroyed the investment’s value, then it may be misleading to deem this a “creeping expropriation.”<sup>86</sup> The tribunal in *Siemens A.G. v. Argentine Republic*<sup>87</sup> reiterated this concept when it stated:

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80. See U.N. Conference on Trade & Dev., *Taking of Property*, at 2, U.N. Doc. UNCTAD/ITE/IIT/15 (Jan. 2000), available at <http://unctad.org/en/docs/psiteiitd15.en.pdf> (“Certain governmental measures may not involve an actual physical taking of property, but may still result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor.”); G.C. Christie, *What Constitutes a Taking Under International Law?*, 38 BRIT. Y.B. INT’L L. 307, 311 (1962).

81. See MARBOE, *supra* note 16, ¶ 3.51; Yannaca-Small, *supra* note 79, at 47.

82. See Stiglitz, *supra* note 54, at 513.

83. See U.S.-Uruguay BIT, *supra* note 11, Annex B.

84. See *id.*

85. See Reisman & Sloane, *supra* note 19, at 123.

86. See *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 114 (May 29, 2003), 19 ICSID Rev. 158 (2004); *Compañía*

By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.<sup>88</sup>

For example, consider an individual who owns a rubber plant in a foreign country. The plant is operating profitably, but then the foreign government institutes several policy measures that affect all economic activity. The first measure reduces the number of hours an employee may legally work per week to thirty-eight hours and overtime is no longer permitted. As a result, the plant owner must reduce total hours of production. Several months later, a second policy measure puts a cap on plant emissions, which forces the owner to reduce the quantity of rubber produced. A year later, the State then requires the owner to increase the social security contributions it makes for its employees, further reducing revenues. Each measure on its own is not enough to significantly harm the plant owner, but when all three are combined it is no longer profitable to continue operating the rubber plant. Thus, while the individual owner is still in physical possession of the facility, the various policy measures made the investment worthless.

Policy makers may argue that such measures are necessary to protect the public interest; however, one can see the potential grounds to argue that a creeping expropriation has occurred. Because creeping expropriations are distinct in that they occur gradually over time, they cause unique adjudicatory problems given the current state of international law, particularly in the realm of valuation and the related issue of timing.<sup>89</sup> Moreover, while direct expropriations have become rather rare in recent years, international courts and tribunals are beginning to see a higher prevalence of indirect expropriation claims.<sup>90</sup>

Whether dealing with direct or indirect expropriation, it is important to note that governmental intent is less important than the effects of the act on

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del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Final Award, ¶ 76 (Feb. 17, 2000), 15 ICSID Rev. 169 (2000); Reisman & Sloane, *supra* note 19, at 123.

87. ICSID Case No. ARB/02/8, Award, (Feb. 2007).

88. *Id.* ¶ 263.

89. See Reisman & Sloane, *supra* note 19, at 125–27; *infra* Part II.

90. See MARBOE, *supra* note 16, ¶ 3.51; cf. Peter B. Rutledge, *TRIPS and BITS: An Essay on Compulsory Licenses, Expropriation, and International Arbitration*, 13 N.C. J.L. & TECH. ONLINE 149 (2012) (arguing for the use of arbitration panels in patent disputes because the issuance of some compulsory patent licenses could constitute an indirect expropriation).

the foreign investor.<sup>91</sup> International law requires compensation for the act when the host state interferes with the use of an investment or deprives the owner of the fundamental rights of ownership, no matter if it intended this result or not.<sup>92</sup> As this Note shall now explain, BITs explicitly state this international law requirement.

## 2. The Guarantee of Compensation for Expropriation

One of the common BIT safeguards is protection from expropriation without compensation.<sup>93</sup> BITs typically include this protection as its own provision, as seen in the 2012 U.S. Model BIT.<sup>94</sup> Article 6(1) of this document states:

### Article 6: Expropriation and Compensation

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).<sup>95</sup>

The above passage makes three points. First, expropriations are lawful as long as four elements are satisfied.<sup>96</sup> In general, BITs and customary international law do not prohibit countries from expropriating foreign investments as long as the taking occurred for a public purpose, on a nondiscriminatory basis, in accordance with due process of law, and compensation was provided.<sup>97</sup> The *Third Restatement of Foreign Relations Law of the United States* also recognizes the lawfulness of expropriations as long as these elements are satisfied.<sup>98</sup>

91. See *Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225–26 (1986); Christie, *supra* note 80, at 311 (“[A] State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention.”).

92. See *Tippetts*, 6 Iran-U.S. Cl. Trib. Rep. at 225.

93. See *supra* note 48 and accompanying text.

94. U.S. MODEL BIT, *supra* note 42.

95. *Id.* (footnote omitted).

96. *Id.*

97. See REPUBLIC OF S. AFR., BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW: GOVERNMENT POSITION PAPER 40 (2009), available at <http://www.png.org.za/files/docs/090626trade-bi-lateralpolicy.pdf>; see also MARBOE, *supra* note 16, ¶ 3.05 (discussing the role of compensation as one of the four elements that makes an expropriation lawful versus unlawful); Yannaca-Small, *supra* note 79, at 45.

98. Section 712 of the *Restatement* asserts: “A state is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation . . . .” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712(1) (1987).

Next, the Model BIT states that this rule requiring all four elements be satisfied for a lawful expropriation applies to both direct and indirect expropriations.<sup>99</sup> Because of this standard, it is generally viewed that most indirect or creeping expropriations have to be considered unlawful.<sup>100</sup> By the very nature of indirect expropriations, though, one of the four elements is usually missing, typically the accompaniment of compensation or due process of law elements.<sup>101</sup> It is unsettled, however, whether tribunals should alter damages awards based on if the asset was lawfully or unlawfully expropriated.<sup>102</sup>

Additionally, while BITs explicitly state that they protect against uncompensated indirect expropriations, they typically provide only general definitions of what is an expropriation, making it difficult for adjudicators to determine when a legal act has occurred versus an illegal expropriation.<sup>103</sup> Some countries state that governmental acts designed to address legitimate public welfare concerns, such as health, safety, land reform, and environmental issues, do not constitute expropriations either directly or indirectly.<sup>104</sup> However, if there is evidence that the government implemented these policies in bad faith or on a discriminatory basis then a court or tribunal may nonetheless find an expropriation.<sup>105</sup> The issue over when an act crosses the line and becomes expropriatory, especially in the context of indirect expropriation, continues to be a lively and heavily contested debate that is beyond the scope of this Note.<sup>106</sup>

A third important point shown in both the U.S. Model BIT and the *Restatement* is that a host country is required to provide “just

99. U.S. MODEL BIT, *supra* note 42, art. 6; *accord* MARBOE, *supra* note 16, ¶ 3.53.

100. *See* MARBOE, *supra* note 16, ¶ 3.54.

101. *See* Sedco, Inc. v Nat’l Iranian Oil Co., 10 Iran-U.S. Cl. Trib. Rep. 180, 206 n.42 (1986) (Brower, Arb., concurring) (“By definition it is difficult to envision a *de facto* or ‘creeping’ expropriation ever being lawful, for the absence of a declared intention to expropriate almost certainly implies that no contemporaneous provision for compensation has been made. Indeed, research reveals no international precedent finding such an expropriation to have been lawful.”).

102. *See* MARBOE, *supra* note 16, ¶¶ 3.75–77; SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 65–69 (2008); *cf.* McLACHLAN ET AL., *supra* note 18, ¶ 9.67.

103. *See* McLACHLAN ET AL., *supra* note 18, ¶ 8.03.

104. *See* CANADA MODEL BILATERAL INVESTMENT TREATY annex B.13(1)(c) (2004), [hereinafter CANADIAN MODEL BIT], available at [http://italaw.com/documents/Canadian\\_2004-FIPA-model-en.pdf](http://italaw.com/documents/Canadian_2004-FIPA-model-en.pdf); U.S. MODEL BIT, *supra* note 42, annex B; LUKE ERIC PETERSON, FRIEDRICH-EBERT-STIFTUNG, SOUTH AFRICA’S BILATERAL INVESTMENT TREATIES: IMPLICATIONS FOR DEVELOPMENT AND HUMAN RIGHTS 24 (2006), <http://library.fes.de/pdf-files/iez/global/04137-20080708.pdf> (stating that governments often argue that BIT provisions on expropriation must not prejudice a government’s power to regulate the economy in a good-faith and nondiscriminatory manner).

105. *See* CANADIAN MODEL BIT, *supra* note 104, annex B.13(1)(c).

106. For a brief introduction to this debate see, for example, Michael G. Parisi, *Moving Toward Transparency? An Examination of Regulatory Takings in International Law*, 19 EMORY INT’L L. REV. 383 (2005); Yannaca-Small, *supra* note 79, at 43–72.

compensation” in response to an expropriation.<sup>107</sup> The policy behind this rule is sensible because without compensation an expropriation acts as a nonvoluntary transfer of resources from a private owner to the public, and the possibility of this occurring with no recourse creates a disincentive to invest.<sup>108</sup>

However, what satisfies “just compensation?” This question essentially breaks down into two different inquiries: (1) What is the proper *standard* of compensation; and (2) What is the proper *method* of compensation?<sup>109</sup> While the next section discusses the state of the law regarding the first question, the answer to the second question is unclear as it pertains to creeping expropriation. Parts II, III, and IV address this second question in detail.

### 3. The Principle of Full Compensation and Competing Ideologies to Satisfy It

The first step to conclude what satisfies “just compensation” requires determining the proper standard of compensation. Case law has served as an initial guide in answering this question, but efforts to further refine the case law saw the emergence of two competing ideologies—the Hull Formula and Calvo Doctrine—that jockeyed for global acceptance for much of the twentieth century.

#### a. *The Full Compensation Principle*

International law provides a starting point to determine the appropriate standard to provide “just compensation.” International law holds that the proper standard for compensation must be to put the investor in the position he would have been in but for the expropriatory event.<sup>110</sup> The *Factory at Chorzów*<sup>111</sup> (*Chorzów Factory*) initially laid out this rule, which holds that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>112</sup> The Tribunal in *Amoco*

107. See *supra* notes 94–98 and accompanying text; cf. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

108. See Ginsburg, *supra* note 8, at 9.

109. See Peter C. Choharis, *U.S. Courts and the International Law of Expropriation: Toward a New Model For Breach of Contract*, 80 S. CAL. L. REV. 1, 36 (2006) (“Only a few U.S. courts have even considered the issue of the amount of compensation necessary to negate a finding of expropriation, and when they have, they overwhelmingly focused on the standard of compensation. *McKesson* is one of the few cases actually to calculate damages . . .”).

110. See *Am. Mfg. & Trading v. Zaire*, ICSID Case No. ARB/93/1, Award, ¶ 6.21 (Feb. 1997), 5 ICSID Rep. 14 (2002) (“[The question] is how the Tribunal should proceed to assess the amount of compensation or indemnification required by international law in order to restore to AMT the conditions previously existing as if the events had never occurred or taken place.”).

111. (*Ger. v. Pol.*), Judgment, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

112. *Id.* at 47.

*International Finance v. Iran*<sup>113</sup> noted that this principle is still the reigning law despite the case being almost sixty years old.<sup>114</sup> Therefore, under international law, a country provides “just compensation” when the *Chorzów Factory* standard of full compensation is satisfied.

*b. Competing Compensation Standards: The Hull and Calvo Ideologies*

While the general consensus is that the *Chorzów Factory* standard must be satisfied to provide “just compensation,” there are two competing ideologies as to what level of compensation meets this standard. These ideologies are identified as the Hull Formula and the Calvo Doctrine, respectively.<sup>115</sup> The Hull Formula is considered a pro-investor standard whereas the Calvo Doctrine is a pro-host state or pro-developing country standard.<sup>116</sup>

The Hull Formula stems from disputes between the United States and Mexico over expropriation of U.S.-owned agricultural property and oil fields following the Mexican Revolution of 1910–1920.<sup>117</sup> It was in the context of these expropriations that U.S. Secretary of State Cordell Hull argued that countries that expropriate property are required to provide just compensation that is “prompt, adequate and effective.”<sup>118</sup> Many BITs, particularly German and American treaties have elaborated on the meaning of these adjectives.<sup>119</sup> “Prompt” tends to mean that interest shall accrue from the date of expropriation and is included in any agreement or award of compensation.<sup>120</sup> “Adequate” is usually defined as the “fair market value” or “market value” before the expropriation occurred, and excludes any changes in value resulting from knowledge of the expropriation before it occurred.<sup>121</sup> Lastly, “effective” means that the compensation must be in a medium that is freely usable or convertible by the investor.<sup>122</sup> The

113. 15 Iran-U.S. Cl. Trib. Rep. 189 (1987).

114. *See id.* ¶ 191 (“In spite of the fact that it is nearly sixty years old, [*Chorzów Factory*] is widely regarded as the most authoritative exposition of the principles applicable in this field, and is still valid today.”).

115. *See* Vicki L. Been & Joel C. Beauvais, *The Global Fifth Amendment: NAFTA’s Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine* 15–16 (N.Y.U. Ctr. for Law & Bus., Working Paper No. CLB-02-06, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=337480](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=337480).

116. *See* Ginsburg, *supra* note 8, at 5–6.

117. *See* Hilary Heilbron, *Assessing Damages in International Arbitration: Practical Considerations*, in *THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION* 445, 458 (Lawrence W. Newman & Richard D. Hill eds., 2d ed. 2008); Tali Levy, *NAFTA’s Provision for Compensation in the Event of Expropriation: A Reassessment of the “Prompt, Adequate and Effective” Standard*, 31 *STAN. J. INT’L L.* 423, 424–29 (1995) (providing a detailed history of Hull’s communications with Mexico over this issue).

118. Ginsburg, *supra* note 8, at 6.

119. *See* CHOW & SCHOENBAUM, *supra* note 3, at 386.

120. *See id.*

121. *See id.*

122. *See id.*

definition of “prompt, adequate, and effective” favors developed countries since they are more likely to export capital than import it.<sup>123</sup>

Capital importing countries, typically developing ones, attempted to dispute the Hull Formula as the proper standard for just compensation under international law.<sup>124</sup> Carlos Calvo, an Argentine jurist, formulated the standard that these states desired.<sup>125</sup> Calvo argued that international law only requires countries to give aliens rights that are equal to those given to its citizens.<sup>126</sup> Therefore, the proper standard for compensating expropriation is merely the equivalent of national treatment,<sup>127</sup> which may warrant a lower level of compensation than the Hull Formula requires.

While developed countries supported the Hull Formula, most developing nations supported the Calvo Doctrine, and through resolutions in the 1960s and 1970s, the United Nations chose to side with Calvo.<sup>128</sup> In 1962, the U.N. General Assembly adopted the Resolution on Permanent Sovereignty over Natural Resources,<sup>129</sup> which allowed for nationalization of foreign-owned property as long as the nationalizing country provided “appropriate compensation.”<sup>130</sup> This standard was an attempt to find middle ground between developed and developing countries,<sup>131</sup> because the ambiguity provided by the word “appropriate” allowed for some to argue that less than full compensation was permitted under certain circumstances.<sup>132</sup> However, the Hull Formula was rejected outright in 1974 when the General Assembly adopted the Charter of Economic Rights and Duties of States.<sup>133</sup> Article 2(c) of this resolution maintained the “appropriate compensation” standard but went on to state that “[i]n 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.”<sup>134</sup> This resolution therefore explicitly adopted Calvo’s national treatment standard over Hull’s standard.

Hull proponents did not take this defeat lying down, though. Six developed countries, including the United States, rejected Article 2.<sup>135</sup> Moreover, during this same period developed countries began signing BITs

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123. See Ginsburg, *supra* note 8, at 6.

124. See Kaj Hober, *Investment Arbitration in Eastern Europe: Recent Cases on Expropriation*, 14 AM. REV. INT’L ARB. 377, 386 (2003).

125. See Been & Beauvais, *supra* note 115, at 15–16.

126. See *id.* at 15.

127. See *id.*

128. See Yannaca-Small, *supra* note 79, at 44 n.1.

129. G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/RES/1803 (Dec. 14, 1962), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/193/11/PDF/NR019311.pdf?OpenElement>.

130. *Id.* at 15.

131. Yannaca-Small, *supra* note 79, at 44 n.1.

132. See RIPINSKY & WILLIAMS, *supra* note 102, at 73.

133. G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9946 (Dec. 12, 1974), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement>; see Yannaca-Small, *supra* note 79, at 44 n.1.

134. *Charter of Economic Rights and Duties of States*, *supra* note 133, at 52.

135. See Been & Beauvais, *supra* note 115, at 16.

with developing countries.<sup>136</sup> They used this opportunity as a means to reinstall the Hull Formula, and by the 1980s most countries had converged on a single model for BITs containing Hull's "prompt, adequate, and effective" language.<sup>137</sup>

*c. The Current Prowess of Hull and the Lingering of Calvo*

It is understandable why the consensus amongst BITs is to embrace the Hull Formula. Given that the primary purpose of BITs is to promote foreign investment, it is reasonable to adopt the compensation standard that best achieves this end by favoring investors.<sup>138</sup> Moreover, capital-exporting states drove the movement to enter BITs, and they understandably sought to have the language of these treaties be in terms most favorable to their citizens.<sup>139</sup> These countries thus utilized BITs as a means to provide their citizens with stronger protections than international law was willing to recognize through the Calvo Doctrine.<sup>140</sup>

The mass proliferation of BITs utilizing the Hull Formula has caused some commentators to declare the Calvo Doctrine, and therefore the debate over the proper standard to determine just compensation, dead.<sup>141</sup> In addition to the BITs signed by developed countries, several BITs between Latin American countries (the strongest proponents of the Calvo Doctrine) and between other developing countries embrace the Hull Formula.<sup>142</sup> Examples include the BIT between Argentina and El Salvador,<sup>143</sup> between Ethiopia and Sudan,<sup>144</sup> and between the Russian Federation and Turkey.<sup>145</sup>

However, there is evidence of continued use of Calvo's national treatment standard, indicating that the debate is not yet over.<sup>146</sup> First, it is argued that the national treatment ideology is visible in several Latin American countries based on constitutional interpretations of BITs and legislative measures taken in response to them.<sup>147</sup> Second, advocates argue

136. *See id.* at 17; Ginsburg, *supra* note 8, at 8.

137. *See* Ginsburg, *supra* note 8, at 8.

138. *See* McLACHLAN ET AL., *supra* note 18, ¶ 9.09.

139. *See* Salacuse, *supra* note 30, at 661.

140. *See* Levy, *supra* note 117, at 437.

141. *See* Wenhua Shan, *From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 NW. J. INT'L L. & BUS. 631, 631 n.1 (2007).

142. *See* MARBOE, *supra* note 16, ¶ 3.16.

143. Agreement Regarding the Promotion and Reciprocal Protection of Investments, Arg.-El Sal., art. 7, May 9, 1996, available at [http://www.unctad.org/sections/dite/ia/docs/bits/argen\\_elsalvador\\_sp.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/argen_elsalvador_sp.pdf).

144. Agreement on the Reciprocal Promotion and Protection of Investment, Eth.-Sudan, art. 4, Mar. 7, 2000, available at [http://www.unctad.org/sections/dite/ia/docs/bits/ethiopia\\_sudan.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/ethiopia_sudan.pdf).

145. Agreement Regarding the Promotion and Reciprocal Protection of Investments, Russ.-Turk., art. 6, Dec. 15, 1997, available at [http://www.unctad.org/sections/dite/ia/docs/bits/russia\\_turkey.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/russia_turkey.pdf).

146. *See* Wenhua Shan, *Is Calvo Dead?*, 55 AM. J. COMP. L. 123, 141-42 (2007).

147. *See generally* Shan, *supra* note 141, at 631.

that a lower standard for “just compensation,” at least in terms of indirect expropriation, may be appropriate.<sup>148</sup> Joseph Stiglitz argues that a country should be permitted to pass regulations that it believes in good faith will improve economic efficiency even if there are ancillary effects on income distribution.<sup>149</sup> The requirement to compensate those who are adversely affected may incentivize the country not to implement these regulations at the expense of economic efficiency or to the detriment of its citizenry as a whole (such as environmental regulations that lead to indirect expropriations).<sup>150</sup> Irmgard Marboe similarly points out that use of the Hull formula may limit a country’s sovereign right to regulate the use of property with regard to environmental or social standards.<sup>151</sup> If tribunals deem a country’s regulations to cause indirect expropriations then the country may face high financial burdens through large damages awards.<sup>152</sup> Such high compensation awards can pose a problem for relatively small countries,<sup>153</sup> and the inability for countries to meet this burden may warrant a standard below the Hull Formula when providing compensation.<sup>154</sup>

#### 4. Achieving “Just Compensation” by Determining the Asset’s Value

As discussed above, despite the continued debate between the Hull Formula and Calvo Doctrine, the vast majority of BITs explicitly state Hull’s “prompt, adequate, and effective” standard as the appropriate benchmark for providing just compensation.<sup>155</sup> In addition to this language, most BITs provide further guidance and state that the amount of compensation is determined through the notion of asset valuation.<sup>156</sup> Though various terms are used, the majority of BITs state that proper value is given by providing “fair market value.”<sup>157</sup> Many other BITs use terms

148. See, e.g., MARBOE, *supra* note 16, ¶¶ 3.11–13; OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 324 (1991); Stiglitz, *supra* note 54, at 514–15.

149. See Stiglitz, *supra* note 54, at 514–15 (arguing that BITs intrude on the rights of a country to self-governance).

150. See *id.* (providing theoretical reasons for why a country should be able to adopt regulations without compensating those adversely affected).

151. See MARBOE, *supra* note 16, ¶¶ 3.11–13.

152. See *id.* ¶ 3.13.

153. See *id.* ¶ 3.12. (citing *CME Czech BV (The Netherlands) v. Czech Republic*, Final Award on Damages, (Mar. 14, 2003), 9 ICSID Rep. 264 (2006) (separate opinion of Arbitrator Brownlie)).

154. See SCHACHTER, *supra* note 148, at 324 (stating that the standard for “appropriate” or “just” compensation leaves considerable latitude to an arbiter or the parties in negotiation, and that some governments maintain that it would not be inappropriate or unjust to reduce the amount of compensation in some circumstances).

155. See *supra* note 137 and accompanying text.

156. See RIPINSKY & WILLIAMS, *supra* note 102, at 79.

157. See MCLACHLAN ET AL., *supra* note 18, ¶ 9.12; RIPINSKY & WILLIAMS, *supra* note 102, at 79; see also, e.g., U.S.-Uruguay BIT, *supra* note 11; Agreement on the Promotion and Protection of Investments, S. Kor.-S. Afr., art. 5, July 7, 1995, available at [http://www.unctad.org/sections/dite/ia/docs/bits/korea\\_southafrica.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/korea_southafrica.pdf); Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. 4(1), Nov. 14, 1991 [hereinafter U.S.-Argentina BIT], available at [http://www.unctad.org/sections/dite/ia/docs/bits/argentina\\_us.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/argentina_us.pdf).

such as “market value,” “actual value,” “genuine value,” and “just value,” but these are generally seen as equivalents of each other.<sup>158</sup> International law also recognizes fair market value as the common valuation standard to provide “just compensation.”<sup>159</sup> In *Vivendi v. Argentina*,<sup>160</sup> the tribunal found “fair market value” to be equivalent to the applicable BIT’s term of “actual value.”<sup>161</sup> Similarly, the tribunal in *McKesson Corp. v. Islamic Republic of Iran*<sup>162</sup> held that proper compensation is “full value,” which is usually the “fair market value.”<sup>163</sup> Additionally, the *Restatement* affirms these opinions, stating that “there must be payment for the full value of the property, usually ‘fair market value’ where that can be determined.”<sup>164</sup>

While the consensus finds that “just compensation” is met by providing the fair market value, there is limited authority that customary international law allows for less than market value in some circumstances.<sup>165</sup> For example, Professor Oscar Schachter argues that for BITs which do not use the term “fair market value,” but simply refer to “just” or “equitable” compensation, a large-scale expropriation such as land reform or environmental regulations might allow for less than market value compensation to prevent overly burdening the host country.<sup>166</sup>

In summary, international law and investment treaty law generally conclude that a tribunal has awarded “just compensation” when the *Chorzów Factory* standard (i.e., providing full compensation that wipes out all consequences of an illegal act) is satisfied.<sup>167</sup> While there are competing ideologies as to the level of compensation needed to meet this standard, the leading view found in the majority of BITs is Hull’s “prompt, adequate, and effective” standard.<sup>168</sup> Moreover, the practical means of determining an

158. See CHOW & SCHOENBAUM, *supra* note 3, at 386; RIPINSKY & WILLIAMS, *supra* note 102, at 183; see also BLACK’S LAW DICTIONARY, *supra* note 77, at 675 (defining fair market value).

159. See RIPINSKY & WILLIAMS, *supra* note 102, at 79; see also, e.g., SEDCO, Inc. v. Nat’l Iranian Oil Co., 10 Iran-U.S. Cl. Trib. Rep. 180, 193 (1986) (Brower, Arb., concurring); INA Corp. v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 373, 378–79 (1985).

160. *Compañía de Aguas Del Aconquija S.A. v. Argentine Republic (Vivendi v. Argentina)*, ICSID Case No. Arb/97/3, Award (Aug. 20, 2007).

161. See *id.* ¶ 8.2.10.

162. 116 F. Supp. 2d 13 (D.D.C. 2000), *aff’d in part sub nom. McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001), *vacated in part*, 320 F.3d 280 (D.C. Cir. 2003).

163. See *id.* at 36.

164. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. (d) (1987).

165. See LUKE ERIC PETERSON & ROSS GARLAND, RIGHTS & DEMOCRACY, BILATERAL INVESTMENT TREATIES AND LAND REFORM IN SOUTH AFRICA 13 (2010), available at <http://www.business-humanrights.org/Links/Repository/1001485>.

166. See SCHACHTER, *supra* note 148 at 324.

167. See *supra* notes 110–14 and accompanying text.

168. See *supra* notes 116–54 and accompanying text.

appropriate value calls for a valuation method that determines the fair market value of the asset.<sup>169</sup>

### C. *The Role of Arbitral Tribunals and International Courts*

Having discussed the proper standard to determine “just compensation” under international law, this Note now addresses the question of what is the proper method for determining “just compensation” with respect to creeping expropriation. Yet, before discussing this issue in Parts II–IV, it is worth briefly considering the role the adjudicatory process has played in complicating what constitutes “just compensation” for creeping expropriation.

It is generally accepted that expropriation of a foreign investor’s asset “is a matter of international law and not of national law.”<sup>170</sup> Therefore, expropriation claimants can bring their claims in several different forums depending on the language of the relevant BIT.<sup>171</sup> Such forums include national courts, international courts, and more commonly one of several international arbitration arenas.<sup>172</sup> These diverse forums have led to adjudicators reaching different results under nearly identical textual treaty rights.<sup>173</sup>

Part of this problem is a result of the arbitral adjudication process.<sup>174</sup> Tribunals commonly hold arbitrations behind closed doors, the resolution (and often the dispute itself) is kept secret, appeals are limited, and many decisions are not published.<sup>175</sup> While investor-state arbitrations have been publicized much more than other types of arbitrations, providing a greater amount of precedent available for tribunals to consider,<sup>176</sup> there are still a rather minute number of published decisions dealing with creeping expropriation. Additionally, only a small portion of these cases even discusses how to determine the appropriate remedy when a creeping expropriation has occurred. Lastly, arbitration does not follow the doctrine of *stare decisis*,<sup>177</sup> meaning that all tribunal decisions are nonbinding

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169. *See supra* notes 155–66 and accompanying text. This Note discusses the numerous valuation methods used in practice in Part II.B.1, below, although as Part II.B.2 discusses, these are not necessarily the most appropriate methods.

170. MARBOE, *supra* note 16, ¶ 3.04.

171. *See supra* note 53 and accompanying text.

172. *See supra* note 53 and accompanying text; *see also* Rutledge, *supra* note 90, at 161 (“Over the last two decades, the number of BIT arbitrations has skyrocketed. Indirect expropriation claims have become an increasingly popular theory to advance in such arbitrations.”).

173. *See* Franck, *supra* note 12, at 55–56.

174. *See* Stiglitz, *supra* note 54, at 540–41 (arguing that the dispute resolution process for arbitral tribunals falls short of the “best practices” found in the legal systems of Western democracies).

175. *See* Rutledge, *supra* note 90, at 161–62; Stiglitz, *supra* note 54, at 541.

176. *See* Franck, *supra* note 12, at 74 & nn.105–06 (“[I]nvestment treaty arbitration has no fewer than three websites, a new Westlaw database dedicated to publishing awards and organizations dedicated to obtaining and distributing information about awards.”).

177. *See* W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1908 (2010).

anyway.<sup>178</sup> Each of these factors makes it difficult to build upon any form of precedent or resolve contradicting decisions.<sup>179</sup> Additionally, arbitrators typically resort to expert opinions in valuing damages, but are not obligated to rely on any particular view or opinion.<sup>180</sup> Rather, the tribunal can make the award based on its own understanding of the different valuations presented.<sup>181</sup>

Other adjudicatory issues arise from problems inherent in BITs and the issue of creeping expropriation, which is what Part II of this Note examines. BITs invoke ambiguous terms<sup>182</sup> that, coupled with no doctrine of stare decisis and a lack of published decisions, allow different arbitration panels to reach opposite, yet binding, conclusions.<sup>183</sup> Similarly, reaching agreement as to whether a series of events has resulted in an indirect expropriation giving rise to state responsibility (let alone at what moment in time the taking officially occurs) is a difficult decision that has resulted in adjudicatory discrepancies.<sup>184</sup> These problems may be part of the reason why there is inconsistency in successfully determining what equates to “just compensation” in situations of creeping expropriation. Part II discusses such inconsistencies and explains how they arose through difficulties in applying current standards to creeping expropriations.

## II. FITTING A SQUARE PEG INTO A ROUND HOLE: APPLYING CURRENT INTERNATIONAL LAW STANDARDS TO CREEPING EXPROPRIATIONS AND ITS INCONSISTENCIES IN PROVIDING JUST COMPENSATION

Most BITs state that providing “just compensation” is achieved upon awarding the fair market value of the asset. Part II examines the difficulties that have arisen in trying to properly accomplish this task in cases of creeping expropriation. These difficulties have arisen for two reasons. Part II.A considers the first, which is the difficulty of determining a moment in time to value the asset. Part II.B then considers the problems surrounding the use of various valuation formulas when calculating fair market value.

### A. *Temporal Inconsistencies in Determining When to Value the Investment*

This section focuses on temporal issues that have arisen in cases trying to determine the moment at which a creeping expropriation happens. It begins by discussing international law’s current “moment of expropriation”

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178. See BLACK’S LAW DICTIONARY, *supra* note 77, at 1537 (“The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.”).

179. See Stiglitz, *supra* note 54, at 541.

180. See Abdala & Spiller, *supra* note 9, at 448.

181. See *id.*

182. This Note’s effort to discern and clarify the ambiguous term “just compensation” serves as an immediate example of this problem.

183. See Stiglitz, *supra* note 54, at 541.

184. See Burns H. Weston, “Constructive Takings” Under International Law: A Modest Foray into the Problem of “Creeping Expropriation,” 16 VA. J. INT’L L. 103, 105–06 (1975).

standard to determine the time an asset is valued and then discusses the inconsistent results that have occurred when trying to apply this standard to creeping expropriations.

### 1. The “Moment of Expropriation” as the Current Timing Standard

In order to provide an appropriate remedy, a trier of fact must determine the value of the expropriated asset. Otherwise, the tribunal will be unable to tell the actual value the foreign investor has lost. A key component to the valuation process is the moment in time in which to determine the asset’s value.<sup>185</sup> There are several reasons why the valuation date is significant. First, an asset’s value fluctuates constantly over time.<sup>186</sup> Value changes as new information becomes available, whether the information is systematic or idiosyncratic, and investors price in this new information.<sup>187</sup> Second, valuation methods ignore all changes to the investment’s value subsequent to the valuation date.<sup>188</sup> Third, for investments with a limited life span, adjusting the date of valuation alters the remaining profitable life the investment has.<sup>189</sup> Thus, the date chosen to value the asset may have large ramifications on the size of the investor’s award.<sup>190</sup>

Under current standards, valuation is done at the “moment of expropriation.”<sup>191</sup> The language of most BITs considers the moment of expropriation as the point in time immediately before the expropriation took place.<sup>192</sup> International law also supports this view, which the tribunal in *Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*<sup>193</sup> expressed by stating that “[t]he expropriated property is to be evaluated as of the date on which the governmental ‘interference’ has deprived the owner of his rights or has made those rights practically useless.”<sup>194</sup> The *Restatement on Foreign Relations Law* also supports this proposition.<sup>195</sup>

The World Bank guidelines on the treatment of FDI<sup>196</sup> offers further support by stating that “[c]ompensation will be deemed ‘adequate’ if it is

185. See MARBOE, *supra* note 16, ¶ 3.250.

186. See *id.*

187. See RIPINSKY & WILLIAMS, *supra* note 102, at 243.

188. See *id.* (using *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28 2007), as an example).

189. See *id.*

190. See *id.*

191. See Reisman & Sloane, *supra* note 19, at 128.

192. See, e.g., U.S. MODEL BIT, *supra* note 42, art. 6(2)(b) (“[Compensation shall] be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place . . . .”); CANADIAN MODEL BIT, *supra* note 104, art. 13(2) (“Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place . . . .”).

193. ICSID Case No. ARB/96/1, Award (Feb. 17, 2000), 15 ICSID Rev. 169 (2000).

194. *Id.* ¶ 78.

195. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. (d) (1987).

196. 2 WORLD BANK, LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT: REPORT TO THE DEVELOPMENT COMMITTEE AND GUIDELINES ON THE TREATMENT OF FOREIGN DIRECT INVESTMENT (1992), available at <http://www-wds.worldbank.org/servlet/WDS>

based on the fair market value 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.”<sup>197</sup> This quote also states the one exception to this rule under some treaties, which is that if knowledge of the expropriation was public prior to the act of expropriation, then the moment of valuation is the time immediately before the decision to take the asset became known publicly.<sup>198</sup> Historically, the “moment of expropriation” rule has made sense because it seems obvious that the valuation date for an expropriation should be the moment that the expropriation occurs and the investor’s asset is lost.<sup>199</sup>

However, choosing a specific moment of expropriation is not easily applied to situations of creeping expropriation, where the deprivation does not occur at one particular instant.<sup>200</sup> Because creeping expropriation involves a series of acts or omissions that only deprive the investor of his asset when aggregated, the exact moment of expropriation will rarely be identifiable.<sup>201</sup>

W. Michael Reisman and Robert D. Sloane explain that an unclear moment of expropriation can lead to a windfall for either the investor or the host country depending on when the tribunal decides that the moment of expropriation occurred.<sup>202</sup> If a tribunal selects a moment of expropriation earlier on in the series of acts, then the investor may receive a windfall.<sup>203</sup> An earlier date may cause the tribunal to assess the asset prior to some acts that reduced the value, but were nonetheless lawful.<sup>204</sup> Here, the investor will receive compensation from the host state for lost value resulting from acts outside those deemed expropriatory. To better understand this point it

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197. *Id.* art. IV(3) (emphasis added).

198. See U.S.-Argentina BIT, *supra* note 157, art. 4 (“Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier . . . .”); see also Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Russ., art. 3(1), June 17, 1992, available at [http://www.unctad.org/sections/dite/ia/docs/bits/usa\\_russia.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/usa_russia.pdf) (“Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known . . . .”); Agreement for the Promotion and Protection of Investments, U.K.-Pan., art. 5(1), Oct. 7, 1983, available at [http://www.unctad.org/sections/dite/ia/docs/bits/uk\\_panama.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/uk_panama.pdf) (“[C]ompensation shall amount to the fair value which the investment expropriated had immediately before the expropriation became known.”); 2 WORLD BANK, *supra* note 196, art. IV(3) (“Compensation will be deemed ‘adequate’ if it is based on the fair market value 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.”). But see U.S. MODEL BIT, *supra* note 42, art. 6(2) (“The compensation referred to in paragraph 1(c) shall . . . not reflect any change in value occurring because the intended expropriation had become known earlier . . . .”).

199. See MARBOE, *supra* note 16, ¶ 3.253.

200. See *id.* ¶ 3.278.

201. See Reisman & Sloane, *supra* note 19, at 133.

202. See *id.* at 144.

203. See *id.*

204. See *supra* note 188 and accompanying text.

is important to remember that many legal regulatory acts can reduce an asset's worth without obligating the state to provide compensation, such as a daily emissions cap that causes a reduction in overall output.

Using similar logic, one sees that a later expropriation date may provide a windfall to the host country. Because the initial acts of the expropriatory series gradually reduce the property's value,<sup>205</sup> the state gets away with not paying for some of the effect that its expropriatory acts had on the asset. In both scenarios, one of the parties receives a windfall from the creeping expropriation, which undermines the purpose of providing for protections against expropriations in the first place.<sup>206</sup>

Therefore, in matters of creeping expropriation, the point in time that the tribunal selects as the "moment of expropriation" can have large ramifications on the award given. Indeed, the court in *SEDCO Inc. v. National Iranian Oil Co.*<sup>207</sup> recognized this fact and the importance of determining a proper moment of expropriation since, "the value of the shareholders' expropriated interest may change dramatically during the surrounding time."<sup>208</sup>

Another consideration that adds to this issue is that many investors will incur additional expenses trying to rescue or fortify an investment that has been hindered by a regulatory act that, unbeknownst to the investor at the time, is the beginning of an expropriation.<sup>209</sup> In response to an injurious government action, many investors rationally use additional capital to support the investment.<sup>210</sup> This is particularly the case in situations where government officials provide assurances that further acts are unlikely to occur.<sup>211</sup>

One may argue that using additional capital in response to an initial injurious act, with the possibility of further acts to come, is simply a business risk that investors assume. However, one might also argue that compensatory awards for the expropriation should consider these additional costs. Otherwise, the incentive is for individuals to limit their capital investment since attempting to keep it afloat only further hurts the investor's chances of receiving a full recovery down the line.<sup>212</sup>

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205. Cf. Reisman & Sloane, *supra* note 19, at 144 (discussing how some investors attempt to rescue their investment because an initial act has hindered the investment but not made it entirely valueless).

206. *See id.* (stating that the goal of BITs would be ill-served by a policy that rewards creeping expropriations).

207. 9 Iran-U.S. Cl. Trib. Rep. 248 (1985).

208. *Id.* at 278.

209. *See* Reisman & Sloane, *supra* note 19, at 144.

210. *See id.*

211. *See id.*

212. *See* Vance R. Koven, *Expropriation and the 'Jurisprudence' of OPIC*, 22 HARV. INT'L L.J. 269, 277 (1981) ("Since it is the value of the foreign enterprise at the date of expropriation that is compensable, the more stoically the foreign enterprise hangs on in the face of host government interference, the more it hurts its chances of recovering the full value of its business.").

## 2. Cases Addressing the Temporal Issue

Several creeping expropriation cases evidence the difficulty in choosing a specific “moment of expropriation” when considering their inconsistent conclusions. Some tribunals decide that the moment of expropriation occurs near the beginning of the expropriatory acts. In *SEDCO*, the U.S.-Iran Claims Tribunal concluded that the “moment of expropriation” was an act earlier on in the process of depriving SEDCO of its investment.<sup>213</sup> SEDCO owned 50 percent of a joint venture called Sediran to operate land drilling rigs in Iran.<sup>214</sup> Sediran had multiple contracts with the National Iranian Oil Company (NIOC);<sup>215</sup> however, disagreements between the NIOC and SEDCO led the NIOC to deny SEDCO access to Sediran’s funds in the fall of 1979.<sup>216</sup> In November of 1979, Iran then appointed its own temporary directors to replace the current Sediran directors.<sup>217</sup> Nine months later, Iran took full control of Sediran under the Protection and Development of Iranian Industries Act.<sup>218</sup>

Despite SEDCO not losing full control of the company until this final act, the tribunal found that the second act of inserting temporary managers was the moment of expropriation and must serve as the date of valuation. The tribunal concluded, “When, as in the instant case, the seizure of control by appointment of ‘temporary’ managers clearly ripens into an outright taking of title, the date of appointment presumptively should be regarded as the date of taking.”<sup>219</sup>

The tribunal in *Amoco* also found the moment of expropriation to be earlier on in the process.<sup>220</sup> In this instance, Amoco entered into a joint venture with the National Petrochemical Company (NPC), an Iranian subsidiary of NIOC, to explore offshore oil fields.<sup>221</sup> The joint company was named Khemco.<sup>222</sup> Due to the turbulent political climate from the Iranian Revolution, NPC publicly announced that it would try to buy out Amoco in April 1979.<sup>223</sup> One month later the NPC chairman stated that Amoco expatriates who had previously left the country for safety were no longer permitted to return, and in June he stated that NPC would manage the sale of all products.<sup>224</sup> NPC then unilaterally took over the operations

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213. See *SEDCO, Inc. v. Nat’l Iranian Oil Co.*, 9 Iran-U.S. Cl. Trib. Rep. 248 (1985).

214. See *id.* at 259–60.

215. See *id.* at 266.

216. See *id.* at 276–77.

217. See *id.* at 277.

218. See *id.* at 264–65.

219. *Id.* at 278; cf. *Starrett Hous. Corp. v. Islamic Republic of Iran*, 4 Iran-U.S. Cl. Trib. Rep. 122, 154 (1983) (“There can be little doubt that at least at the end of January 1980 the Claimants had been deprived of the effective use, control and benefits of their property rights . . . [b]y that time the Ministry of Housing had appointed [a] Temporary Manager . . .”).

220. See *Amoco Int’l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987).

221. See *id.* ¶¶ 28–29.

222. See *id.*

223. See *id.* ¶¶ 52–57.

224. See *id.* ¶ 61.

of Khemco in July of 1979.<sup>225</sup> Similar to the outcome in *SEDCO*, the Iranian government directly expropriated Khemco on January 8, 1980.<sup>226</sup> The tribunal concluded, however, that this was not a case of a direct expropriation despite the Iranian government's actions.<sup>227</sup> Rather, the expropriation was a process that "officially" occurred when NPC took over the operations of Khemco in July 1979.<sup>228</sup> In reaching this date, the tribunal stated that "the date to be considered for the valuation of such compensation will be the date at which measures definitively took effect, rather than the date of the final decision of nationalization."<sup>229</sup> In both of these instances, the tribunal chose the "moment of expropriation" to be earlier in the series of actions.

The ILC Articles on Responsibility of States for Internationally Wrongful Acts<sup>230</sup> also supports the view of placing the "moment of expropriation" as the first incident in the series. Article 15(1) of this treaty states that "[t]he breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."<sup>231</sup> The Article then goes on to state that "[i]n such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series."<sup>232</sup> Therefore, when a wrongful deprivation takes place through a series of acts, Article 15(1) may consider the expropriation to be when the first act occurs.

Conversely, there are other tribunal decisions that chose the moment of expropriation to be near the end of the regulatory acts. The tribunal in *International Technical Products v. Iran*<sup>233</sup> made such a decision. In this case, the plaintiff claimed ownership of an apartment building in Tehran that a bank expropriated through the approval and participation of the Iranian government.<sup>234</sup> The tribunal questioned the specific role certain governmental agents played in the taking of the building, but it ultimately held:

Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into more or less irreversible deprivation of the property rather than on the beginning date of the events.<sup>235</sup>

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225. *See id.* ¶¶ 62–67.

226. *See id.* ¶ 72.

227. *See id.* ¶¶ 180–81.

228. *See id.* ¶ 181.

229. *Id.*

230. G.A. Res. 56/83, 53d Sess., U.N. Doc. A/RES/56/83 (Jan. 28, 2002), available at <http://www.undemocracy.com/A-RES-56-83.pdf>.

231. *Id.* art. 15(1).

232. *Id.* art. 15(2).

233. 9 Iran-U.S. Cl. Trib. Rep. 206 (1985).

234. *See id.* at 230.

235. *See id.* at 240–41.

The tribunal in *Tippetts v. TAMS-AFFA Consulting Engineers of Iran*<sup>236</sup> had a similar holding. This case concerned another Iranian joint venture where the U.S. engineering company Tippetts, Abbett, McCarthy, Stratton (TAMS) partnered with Aziz Farmanfarman and Associates (AFFA) to form TAMS-AFFA that would perform architectural and engineering services on the Tehran International Airport in August 1975.<sup>237</sup> Work stopped in early 1979 because of the Iranian Revolution.<sup>238</sup> In July 1979, the Iranian government appointed a temporary manager to TAMS-AFFA.<sup>239</sup> TAMS made several attempts in January and February 1980 to correspond with TAMS-AFFA about continuing work on the airport but never received a response.<sup>240</sup> Additionally, TAMS-AFFA ceased all communications with TAMS by December 1979, including announcing the venture's finances.<sup>241</sup> Despite the appointment of temporary managers in July of 1979, the tribunal determined that the series of events did not result in an expropriation until March 1, 1980.<sup>242</sup> Unlike the first several cases, these decisions determined that the moment of expropriation is more appropriate near the end of the series of acts.

As these cases show, because the prevailing standard is to decipher a specific moment of expropriation to serve as the time of valuation, tribunals have found themselves handcuffed with attempting to choose a moment of expropriation that is not readily discernible.<sup>243</sup> Not only has this problem led to inconsistent decisions, but it is also still unclear how future tribunals should decide the point in time at which to value the expropriated asset.

Nevertheless, it is worth noting that there is not a large debate over the temporal issue that these cases portray. In fact, the Reisman and Sloane article discussed above is the only major article attempting to address this problem.<sup>244</sup> This may indicate either that tribunals are not concerned with this issue, or that an alternative method to determine when to value an expropriated asset does not seem as efficient. Vance R. Koven implied that there might not be a better alternative when he wrote that “[f]or ‘creeping’ expropriation . . . determining the date on which ‘an action’ created that result is an absurd exercise, but one of extreme importance because of the principles of compensation at work in the Contract.”<sup>245</sup>

#### *B. Difficulties in Applying the Many Methods of Valuation*

This section considers the second difficulty in attempting to provide “just compensation.” Tribunals have used numerous different valuation formulas

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236. 6 Iran-U.S. Cl. Trib. Rep. 219 (1984).

237. *See id.* at 220.

238. *See id.* at 224.

239. *See id.*

240. *See id.* at 225.

241. *See id.*

242. *See id.* at 225–26.

243. *See* Reisman & Sloane, *supra* note 19, at 143.

244. *See supra* note 202 and accompanying text.

245. Koven, *supra* note 212, at 277.

when calculating fair market value, and this fact has contributed to the problem of inconsistent adjudicatory awards. It first discusses the various valuation methods that tribunals consider acceptable to use and then examines how application of these different methods to creeping expropriations has created inconsistent outcomes.

### 1. Acceptable Valuation Methods

The only thing that may be more important than the point in time at which to value an asset is the valuation method used. While BITs, international law, and the *Restatement* generally state that fair market value is the appropriate means for determining “just compensation,” all are essentially silent as to the valuation method that should be used to determine fair market value.<sup>246</sup> In general, tribunals see fair market value as the price at which the investment would change hands in an open and unrestricted market between a willing buyer and seller, absent compulsion, and with the parties having reasonable knowledge of the facts.<sup>247</sup> This basic premise, though, does not explain what tools to use in deciding the price a hypothetical buyer and seller should reach.<sup>248</sup> Case law has shown that, depending on the facts, courts and tribunals may use one of several different valuation methods to provide fair market value.<sup>249</sup>

There are a few preferred choices for asset valuation. The first valuation method used in determining fair market value is examining existing markets for the asset under consideration.<sup>250</sup> Unfortunately, there is not a readily liquid market for many types of foreign investments.<sup>251</sup> In *Amoco*, for example, the tribunal commented that determining what a willing buyer and seller would pay when the market does not actually exist makes the concept of determining “fair market value” ambiguous.<sup>252</sup> The tribunal went on to state that in such instances they must utilize alternative methods of valuation, even if they cannot reach a legitimate market value.<sup>253</sup>

Several such alternative valuation methods exist. The most popular method is Discount Cash Flow (DCF) analysis.<sup>254</sup> This form of analysis uses historical profitability to predict future cash flows and then discounts these flows back to present value.<sup>255</sup> Some tribunals choose instead to use

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246. See Choharis, *supra* note 109, at 41–42; see also RIPINSKY & WILLIAMS, *supra* note 102, at 183 (“Investment treaties use the term ‘fair market value’ (FMV) without defining it.”).

247. See *INA Corp. v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 373, 380 (1985).

248. See RIPINSKY & WILLIAMS, *supra* note 102, at 185.

249. See, e.g., James W. Weller, Note, *International Parties, Breach of Contract, and the Recovery of Future Profits*, 15 HOFSTRA L. REV. 323, 327 (1987).

250. See Abdala & Spiller, *supra* note 9, at 454.

251. *Id.* at 454–55.

252. See *Amoco Int’l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, ¶ 219 (1987).

253. See *id.* ¶ 220.

254. See McLACHLAN ET AL., *supra* note 18, ¶ 9.28; Heilbron, *supra* note 117, at 468–69.

255. See *McKesson Corp. v. Islamic Republic of Iran*, 116 F. Supp. 2d 13, 22 (D.D.C. 2000), *aff’d in part sub nom. McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d

the Direct Capitalization method, which is similar to DCF analysis but relies less on income projections several years into the future and other speculative elements.<sup>256</sup> A third method examines “comparable” firms as a proxy to value the expropriated asset.<sup>257</sup> Each of these methods, however, requires the asset to have a “going concern value,” which generally refers to the principle that a willing buyer would pay a premium for the asset under the belief that the asset has future profitability.<sup>258</sup>

If the investment is not a going concern, or there is not enough historical information to properly project future cash flows,<sup>259</sup> then tribunals cannot properly utilize these main valuation options (hereinafter referred to as “top tier methods”) and will look to alternative valuation methods.<sup>260</sup> This other group of methods includes using (1) the “book value,” or net value if one was to sell only the bare physical assets, (2) the “replacement value,” or the amount needed to undertake a similar venture at this point in time, (3) the “liquidation value” or amount a party would receive if all of the assets were liquidated less any outstanding liabilities that the enterprise has, and (4) the amount of capital actually invested prior to expropriation (hereinafter referred to as “second tier methods”).<sup>261</sup>

## 2. Difficulties in Applying These Methods to Creeping Expropriation

Arbitral tribunals have considered and utilized all of the above valuation methods in cases of expropriation and they currently serve as the range of acceptable methods under international law. Yet, using these numerous techniques leads to conflicting results.<sup>262</sup> For example, one author stated that tribunals almost invariably use a method that treats the asset as a going concern,<sup>263</sup> where a premium is placed over the asset’s book value (a

1101 (D.C. Cir. 2001), *vacated in part*, 320 F.3d 280 (D.C. Cir. 2003); Abdala & Spiller, *supra* note 9, at 457–58.

256. *See McKesson Corp.*, 116 F. Supp. 2d at 22; *see also* MCLACHLAN ET AL., *supra* note 18, ¶ 9.51. In *McKesson*, the tribunal chose to apply the DCAP method as opposed to DCF given the circumstances of the case. *See McKesson Corp.*, 116 F. Supp. 2d at 36.

257. *See Abdala & Spiller*, *supra* note 9, at 458–59.

258. *See Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 893 (2d Cir. 1981).

259. The imprecise means of determining future cash flows and lost profits has generated much controversy, particularly because the sums involved with predicting lost profits can be enormous. At times this has made tribunals reluctant to award lost profits. *See* MCLACHLAN ET AL., *supra* note 18, ¶¶ 9.13–28.

260. *See Heilbron*, *supra* note 117, at 469; *see also* *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 119–22 (Aug. 30, 2000), 16 ICSID Rev. 168 (2001) (stating that the tribunal must use the actual investment to determine fair market value because of an inability to determine going concern value); *Chase Manhattan Bank*, 658 F.2d at 893 (refusing to consider a bank branch as a going concern because of the difficulty of predicting the premium value a buyer would pay considering the economic instability of Cuba following its revolution).

261. *See* WORLD BANK, *supra* note 196, art. IV(6); Abdala & Spiller, *supra* note 9, at 453–59; Heilbron, *supra* note 117, at 459, 469; Reisman & Sloane, *supra* note 19, at 139 (citing *Amoco Int’l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987)).

262. *See infra* notes 264–65 and accompanying text.

263. *See Heilbron*, *supra* note 117, at 469.

second tier valuation method) to account for lost future profits.<sup>264</sup> Thomas Merrill states that as a result, valuations using these methods, like DCF analysis, will produce larger awards, which the foreign investor presumably prefers.<sup>265</sup> Likewise, second tier methods would produce lower awards, which the host state presumably prefers.<sup>266</sup>

Merrill also argues that these methods do not translate well to investments taken via a creeping expropriation.<sup>267</sup> Valuation methods that rely on variables such as going concern value, the worth of physical assets, and declared tax value are tailored toward expropriations where the host country takes full possession of the property.<sup>268</sup> Merrill notes that when the government does not take possession of property, but merely diminishes its value through its actions, these factors are less important.<sup>269</sup> As an example, if the host country expropriates an asset such as a factory through nationalization, the value of the equipment taken is vital to provide proper compensation. Several of the valuation methods discussed above (DCF, DCAP, book value, replacement value, liquidation value) consider the value of this equipment. However, if the expropriation results merely from a series of regulations that no longer allows the factory to operate, then the investor is still in control of the equipment. The deprivation did not occur through having the equipment taken away, but from no longer being able to use the equipment productively. In this situation, it likely does not matter that the valuation methods consider equipment value in the calculations.

Additionally, these valuation methods become more speculative when a tribunal is dealing with a series of acts that caused the deprivation rather than a singular direct taking. Joseph Stiglitz has argued that numerous factors influence market value, so it is difficult to determine how much diminution in value is attributable to the expropriatory acts and how much is attributable to other factors.<sup>270</sup> For example, suppose that the people of a country are pushing for a green movement and advocate that consumers use more environmentally safe products. Simultaneously, the government passes a new tax on consumers who dispose of pollutants, and both of these factors independently reduce the demand for toxic waste dumps. An assessor valuing a toxic waste dump would be required to determine what percentage of the loss in market value is a result of the tax and what percentage is a result of the citizens' grass roots movement. Not only is trying to make this determination speculative but the valuation methods discussed above are not equipped to even consider such a problem.<sup>271</sup>

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264. See *Chase Manhattan Bank*, 658 F.2d at 893.

265. See Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 114 (2002).

266. See *id.*

267. See *id.* at 110, 115.

268. See *id.* at 115.

269. See *id.*

270. See Stiglitz, *supra* note 54, at 533.

271. See *id.* for a simpler example upon which this one was based.

This becomes even more complex if one must consider whether a decline in value was a derivative result of a regulatory act. For example, assume that there was no green movement or tax on disposing of pollutants, but rather a tax on consumers purchasing goods that produce toxic waste. If there was a decrease in demand for toxic waste dumps the assessor must determine to what degree it was caused by consumers purchasing less toxic waste producing goods as a result of the tax, a change in consumer preference to goods that do not produce toxic waste for other reasons, or a change in consumer preference to use alternative waste dumping methods. This shows how the decline in demand for toxic waste dumps could have resulted from several other factors besides the government's regulatory act on consumers and how the process of attributing cause can be complex and difficult.

As Part II explained, international law's current doctrine for determining "just compensation" for expropriation under BITs is not well suited to the more narrow area of creeping expropriation. Tribunals analyzing BITs and international law have developed a specific standard for determining the valuation date and a series of acceptable valuation methods, but these both are tailored towards compensating direct expropriations. This is understandable given the much older history of direct expropriation,<sup>272</sup> but a framework that now creates unpredictable results for the most common form of expropriation undermines the primary purpose of having BITs.<sup>273</sup> Part III provides some alternative methodologies that may be more applicable to indirect (and in particular creeping) expropriations.

### III. ALTERNATIVE TEMPORAL AND VALUATION METHODS SPECIFICALLY FOR CREEPING EXPROPRIATIONS

This part discusses several suggestions proposed by scholars that would increase consistency amongst adjudications of indirect expropriations. Part III.A proposes alternative strategies to address the temporal issue and why these strategies might reduce the inconsistencies that the current doctrine produces. Part III.B then suggests alternative valuation methods that attempt to deal with the problems that current valuation strategies create.

#### A. *Alternatives to Selecting a "Moment of Expropriation"*

International law and most BITs establish that tribunals should value expropriated assets at the "moment of expropriation."<sup>274</sup> This is a straightforward method for direct expropriations; however, as explained above, this method becomes complicated when there is no clearly demarcated moment.<sup>275</sup> Although several scholars recognize the concerns

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272. See Merrill, *supra* note 265, at 110.

273. See Reisman & Sloane, *supra* note 19, at 144.

274. See *supra* notes 191–98 and accompanying text.

275. See *supra* notes 200–45 and accompanying text.

over the current “moment of expropriation” ideology,<sup>276</sup> there are few suggestions for alternative methods.<sup>277</sup>

Reisman and Sloane make the most well-known suggestion. They propose that in situations of creeping expropriation the valuation date should be separated from the expropriation date.<sup>278</sup> Separating the two moments would distinguish the question of liability from the question of damages and work in preventing either party from attaining some sort of windfall.<sup>279</sup> These authors suggest that rather than having a bright line for the exact moment of valuation, the tribunal should choose any date within the series of events that would provide a fair market value sufficient to make the investor whole.<sup>280</sup> Irmgard Marboe also offers an alternative method, which is a tweaked interpretation of Reisman and Sloane’s suggestion.<sup>281</sup> Under her interpretation, the moment of expropriation should be the end of the series of acts while the moment of valuation should be at the beginning.<sup>282</sup>

### B. Alternative Valuation Methods

While arbitral tribunals and international courts have utilized numerous different valuation methods depending on the facts of the case,<sup>283</sup> each method is more applicable to valuing an asset that the host country has completely and directly taken from the investor.<sup>284</sup> In efforts to address creeping expropriation, methods that are analogous to, but slightly different from, the current standards have been proposed.

Thomas Merrill suggests adapting two methods that U.S. case law has adopted to address partial regulatory takings.<sup>285</sup> Since creeping and indirect expropriations do not actually take physical possession of the assets there is essentially only a partial deprivation.<sup>286</sup> The acts only deprive the investor of the opportunity to benefit from the investment.<sup>287</sup> Merrill states that this is analogous to regulatory takings, which is a subcategory of eminent domain under U.S. constitutional law.<sup>288</sup> Given that fact, tribunals can apply current U.S. jurisprudence for regulatory takings to cases of creeping expropriation.<sup>289</sup>

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276. See Reisman & Sloane, *supra* note 19; see also MARBOE, *supra* note 16, ¶¶ 3.278–287; RIPINSKY & WILLIAMS, *supra* note 102, at 245–48.

277. See *supra* notes 244–45 and accompanying text.

278. See Reisman & Sloane, *supra* note 19, at 148.

279. See *id.* at 150.

280. See *id.*

281. See MARBOE, *supra* note 16, ¶ 3.284.

282. See *id.*

283. See *supra* notes 246–61 and accompanying text.

284. See *supra* notes 264–72 and accompanying text.

285. See Merrill, *supra* note 265, at 120–28.

286. See *supra* note 79 and accompanying text.

287. See *supra* note 79 and accompanying text.

288. See Merrill, *supra* note 265, at 120–21.

289. See *id.* at 121.

Merrill's first suggested method is the U.S. partial takings model.<sup>290</sup> This method takes a snapshot of the fair market value of the property (under the book value method)<sup>291</sup> prior to the regulatory actions, then takes a second snapshot after the acts, and awards the difference in value.<sup>292</sup> Such a procedure shifts the focus of the valuation process from determining what the host government physically took—which the valuation methods are generally more suited for<sup>293</sup>—to what the investor has lost. Rather than providing the investor with the fair market value of the asset, he is only receiving the value that he lost as a result of the host country's actions.<sup>294</sup>

Merrill's second suggestion is based off the Public Utility Model.<sup>295</sup> This model is similar to the DCF method; however, it requires two separate calculations of the going concern value (the expected market return).<sup>296</sup> The going concern value is first calculated for the investment after the various governmental acts.<sup>297</sup> A second going concern calculation is then done for a hypothetical firm in a competitive market with the same level of risk and absent the governmental actions.<sup>298</sup> The award granted is then the difference between these two values.<sup>299</sup> Utilizing this method would ideally make the investor as whole as she would have been if acting in a competitive market where the expropriatory acts never occurred.<sup>300</sup>

#### IV. THE NEED FOR NEW METHODS TO DETERMINE “JUST COMPENSATION” AND THE SUITABILITY OF SUGGESTED ALTERNATIVES

The final part of this Note argues that a change to current practices is needed, and it considers whether the suggested alternatives can effectively help make this change. Part IV.A discusses why different methodologies are necessary to better provide “just compensation” for creeping expropriations. Part IV.B considers the benefits and drawbacks of implementing the alternative methods discussed in Part III for addressing the temporal issue, suggests possible tweaks to the proposed methods, and introduces a new solution using multiple “moments of expropriation.” Part IV.C then discusses the suggested alternative valuation methods from Part III and argues for either their use or the use of regression analysis for valuation purposes.

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290. *See id.*

291. *See id.* at 126.

292. *See id.* at 122–24.

293. *See supra* notes 270–71 and accompanying text.

294. *See Merrill, supra* note 265, at 122.

295. *See id.* at 124.

296. *See id.* at 126.

297. *See id.*

298. *See id.*

299. *See id.*

300. *See id.* at 127.

A. *The Current Standards for Determining “Just Compensation” for Creeping Expropriations Need To Be Altered*

The inconsistencies resulting from using current international legal standards in cases of creeping expropriation have undermined the primary purpose of BITs.<sup>301</sup> BITs are implemented as an attempt to induce additional FDI in the signatory countries,<sup>302</sup> which they arguably do by offering several protections including the promise of “just compensation” when a host country expropriates an asset.<sup>303</sup> Unfortunately, under the current international legal standards, there is no clear guidance to help tribunals determine when an expropriated asset should be valued.<sup>304</sup> Moreover, tribunals can freely choose between a multitude of valuation formulas, each of which alters the amount of compensation awarded.<sup>305</sup> Because of these ambiguities, foreign investors will likely be less confident that BITs will actually provide the protections they claim to.

Reduced confidence in BITs has the consequential effect of diminishing the level of FDI a host country would otherwise receive. These problems arise from the fact that creeping expropriations deprive investors of their asset in a completely different manner than direct expropriations do,<sup>306</sup> yet adjudicatory bodies still attempt to provide compensation using the same methods in both situations. Implementing alternative standards aimed to specifically address the way creeping expropriations affect investments should address the problem. If they can diminish the inconsistencies across tribunal decisions then the result should be increased FDI in the countries that signed the BIT.

Moreover, it should not be difficult to begin implementing alternative methods given the lack of binding precedent in this field.<sup>307</sup> The vast majority of BIT adjudications take place through arbitration, which does not have the doctrine of *stare decisis* binding future tribunals to the methodologies of past ones.<sup>308</sup> Additionally, there is minimal published case law discussing the methods to determine “just compensation” in cases of creeping expropriation. A lack of extensive historical support for the current international standards may mean that the international community would be more open to adopting newer methodologies, particularly if they result in awards that are more consistent across tribunals. Assuming that the international legal community would be receptive to implementing alternative methods, one must select an alternative that addresses the timing and calculation problems.

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301. *See supra* note 273 and accompanying text.

302. *See supra* note 54 and accompanying text.

303. *See supra* notes 43–50 and accompanying text.

304. *See supra* notes 185–245 and accompanying text.

305. *See supra* notes 246–71 and accompanying text.

306. *See supra* notes 74–89 and accompanying text.

307. *See supra* note 178 and accompanying text.

308. *See supra* note 177 and accompanying text.

*B. The Suitability of the Proposed “Moment of Expropriation” Alternatives*

The few proposed alternatives to the current “moment of expropriation” standard involve separating the valuation and expropriation date.<sup>309</sup> The strongest suggestion is Reisman and Sloane’s proposition that upon finding that a creeping expropriation has occurred, the tribunal should choose any date over the course of events that best provides a fair market value.<sup>310</sup> This standard offers several benefits. First, this method eliminates the rule of linking the moment of valuation with the moment of expropriation—a rigid rule that is clearly applicable to direct expropriations, but creates unavoidable complications for indirect ones. Second, eliminating the requirement to choose a specific moment of expropriation allows the tribunal to consider the appropriate valuation date on a case-by-case basis while avoiding the risk of one party receiving some sort of unearned benefit.<sup>311</sup> Reisman and Sloane’s method also seems more appropriate than Marboe’s interpretation, which places the moment of expropriation at the end of the series of acts and the moment of valuation at the beginning.<sup>312</sup> Under Reisman and Sloane’s method, the moment of expropriation would merely serve as a conclusion that an expropriation took place, while the moment of valuation serves as the pertinent date. However, making the valuation date always at the first act exacerbates the central problem of one party receiving an undeserved windfall.<sup>313</sup>

The major drawback to Reisman and Sloane’s method, however, is the concern that valuation inconsistencies will persist because each tribunal can arbitrarily choose a specific valuation date. This new method may provide more possible days upon which the valuation can occur than the current method, but it still ultimately allows the tribunal to select a valuation moment either too early or too late in the expropriation process.

An alternative solution to the moment of expropriation problem could be utilizing a series of valuations at numerous dates as opposed to one specific date. The asset could be valued several times during the series of expropriatory events, either at proportionate intervals, or at the beginning and end of each act up until the expropriation claim is made or the series of acts is over. The result would be a series of valuations that show how the regulatory acts creating the expropriation diminished the asset’s value over time. The tribunal could then consider these different valuations and reach a middle ground, perhaps by averaging the valuations or using some other formula that the tribunal thinks will produce a just outcome.

The major drawback to this solution is the heavy resources likely required. Doing a proper valuation, no matter the method used, requires time and money. Consequently, trying to do multiple valuations multiplies the cost and time needed.

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309. *See supra* note 278 and accompanying text.

310. *See supra* note 280 and accompanying text.

311. *See supra* notes 202–06 and accompanying text.

312. *See supra* note 282 and accompanying text.

313. *See supra* notes 202–06 and accompanying text.

However, this approach could rectify the issues that the current standard creates.<sup>314</sup> Attempting to choose a particular moment of expropriation in cases of creeping expropriation seems illogical given that none of the acts alone amount to a taking of property.<sup>315</sup> Rather, the problem with creeping expropriation is that an investor loses the ability to profit off her asset over time.<sup>316</sup> This timing approach attempts to account for this fact. In cases of creeping expropriation, the investor is still able to gain from the investment to some degree during the expropriatory process, and likewise the government is not depriving the investor of her entire asset throughout the process.<sup>317</sup> Compensating at a level considered a “middle ground” for this partial deprivation works towards eliminating any potential windfalls to either side and accounts for the fact that throughout the expropriation process the host country did not completely inhibit the investor from benefiting off the investment.

*C. The Suitability of the Proposed Valuation Method Alternatives*

In regards to methods of valuing an expropriated asset, Merrill offered two alternatives when creeping expropriation is involved.<sup>318</sup> His first suggestion was based off the U.S. partial takings model, where there are two snapshots taken of the assets value, with the difference being awarded as compensation.<sup>319</sup> This method is better suited for creeping expropriations than the current methods because it shifts the focus from the overall value of the asset to the value the investor lost.<sup>320</sup> The unique aspect of creeping expropriations is that the investor still maintains physical possession of the investment.<sup>321</sup> Rather than losing the physical value of the asset, it is the inability to use the investment—in other words a loss of benefit—that harms the investor.<sup>322</sup> While the current valuation methods focus on physical value, the partial takings method focuses on lost value.<sup>323</sup> Additionally, this method may also address the temporal problem because it considers to what degree the acts deprived the investor of his investment over time instead of at one point in time. The major drawback to this method, though, is its reliance upon determining the book value at two different times.<sup>324</sup> Implementing this method therefore means that the valuation would not account for any potential lost profits or for a lost opportunity, two components that usually produce larger awards.<sup>325</sup>

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314. *See supra* notes 253–58 and accompanying text.

315. *See supra* notes 85, 200–01 and accompanying text.

316. *See supra* note 189 and accompanying text.

317. *See supra* notes 87–89 and accompanying text.

318. *See supra* notes 290, 295 and accompanying text.

319. *See supra* notes 290–92 and accompanying text.

320. *See supra* note 293 and accompanying text.

321. *See supra* notes 79–80 and accompanying text.

322. *See supra* notes 79–80 and accompanying text.

323. *See supra* notes 283–94 and accompanying text.

324. *See supra* notes 291–92 and accompanying text.

325. *See supra* notes 264–65 and accompanying text.

Merrill's other suggested method is a variation of the U.S. Public Utility Model, where the going concern value is determined for the investment as well as a hypothetical investment in a competitive market and absent the expropriatory actions.<sup>326</sup> Using this method will allow a tribunal to examine the direct impact each action causing the expropriation had on the investment, helping to address the speculation concern that the diminution in value resulted from some other act besides the governmental ones.<sup>327</sup> This method may also better consider the loss in opportunity that a creeping expropriation causes but that traditional valuation methods do not take into account.<sup>328</sup> On the other hand, some tribunals may find having to make these calculations with a hypothetical firm too speculative. Moreover, determining a value for a hypothetical investment in a competitive market may undervalue the investor's loss if the investment existed in a noncompetitive market or if the investor possessed market power.

A third alternative may be to utilize regression analysis to determine how much loss is attributable to each act by the host country. Conducting several regressions where each holds all but one variable constant could achieve this end. This type of analysis would allow the tribunal to determine the effect that each act of the creeping expropriation had on diminishing the asset's value, and therefore help to eliminate the speculation concern without relying on a hypothetical firm as the Public Utility Method necessitates.

#### CONCLUSION

Addressing the problem of economic scarcity and attempting to maximize the use of the world's limited resources is a central task as globalization continues. One popular means to increase economic efficiency is promoting FDI that can bring new tools into a productively inefficient area. A major tool that countries use to induce this investment is bilateral investment treaties, partly because of the expropriation protections they provide. These provisions protect an investor from having their asset unwillingly taken away from them, both directly and indirectly, without "just compensation." This Note has shown, however, that judicial attempts to provide "just compensation" in the context of creeping expropriations have produced inconsistent results.

Current adjudicatory standards for determining when and how to value an expropriated asset partly cause this inconsistency because they are designed for direct expropriations rather than indirect ones. The current standard of choosing a specific "moment of expropriation" is not easily discernible for creeping expropriations and can lead to a windfall for one of the parties. Likewise, the various methods of valuation that tribunals use

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326. *See supra* notes 295–99 and accompanying text.

327. *See supra* notes 270–71 and accompanying text.

328. *See supra* notes 267–69 and accompanying text.

are best suited for expropriations where the host country has actually taken the asset, not where the harm is a loss of opportunity.

This Note has explored and proposed alternative methods geared towards creeping expropriation. These approaches may lead to more consistent determinations of what amounts to “just compensation” for cases of creeping expropriation. Suggested methods include separating the moment of expropriation from the valuation date or determining compensation from multiple valuation dates, and using refashioned valuation methods to better account for a loss of future opportunities even though physical possession of the asset persists. By improving consistency across compensatory awards for creeping expropriations, tribunals can improve the benefit that BITs provide foreign investors and host countries. This result will ultimately increase confidence in investing abroad, which further promotes FDI and helps to alleviate the ongoing problem of economic scarcity.