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مقارنة وتحليل المصادر التنظيمية بموجب قانون حماية المستثمرين لتمويل المشاريع في المملكة المتحدة والولايات المتحدة الأمريكية ، باستخدام قوانين وتشريعات القضايا ذات الصلة

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الملخص

شهدت صناعة تمويل المشاريع نموًا سريعًا بشكل متزايد خلال السنوات القليلة الماضية ، نظرًا للكفاءة التي يمكن من خلالها تمويل مشاريع البناء الكبيرة باستخدام هذه الطريقة. تركز النمو في هذا المجال بشكل خاص على تطوير المنتجات مثل الهند والصين حيث سهّل تمويل المشاريع بناء مدن وبنية تحتية جديدة. تركز القليل من الأبحاث نسبياً على دور تمويل المشاريع في الغرب ، على الرغم من أن الولايات المتحدة والمملكة المتحدة لا تزالا مصادر مهمة لتمويل المشروع.

الهدف من هذا البحث هو تحليل نظام تشريع حماية المستثمرين الموجود داخل المملكة المتحدة والولايات المتحدة الأمريكية ، مع التركيز بشكل خاص على مدى فعالية أنظمة التشريعات السائدة في كلا البلدين في حماية المستثمرين من تهديد مصادرة. وتم مقارنة مفصلة بين نظامي التشريع. من أجل تحقيق هذا الهدف ، وتم مناقشة تفصيلية للأنظمة المختلفة لتشريعات تمويل المشاريع في كل من المملكة المتحدة والولايات المتحدة ، وسيتبع ذلك تقييم لمستوى حماية المستثمرين الذي يتم تقديمه في كلا البلدين ، وتحليل مدى فعالية مثل هذا التشريع في توفير الحماية من المصادرة. وسيتم إجراء ذلك من خلال تحليل كل من القانون المحلي والدولي ، والسوابق القضائية ذات الصلة.

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Comparison and Analysis of Regulatory Expropriation under Project Finance Investor Protection Legislation under UK and USA, using Relevant Case Laws and Legislations

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ABSTRACT

The project finance industry has been growing at an increasingly rapid rate during the past few years, due to the efficiency with which large scale construction projects can be funded using this method. Growth within this area has been concentrated particularly within developing products such as India and China where project finance has facilitated the construction of new cities and infrastructure.[1] Relatively little research has concentrated on the role of project finance in the West, even though the US and the UK remain important sources of project finance. The aim of this essay is to analyse the system of investor protection legislation which exists within the UK and the USA, with a particular focus on the extent to which the systems of legislation which prevail in both countries is effective in protecting investors from the threat of expropriation. The essay will conduct a detailed comparison between the two systems of legislation. In order to achieve this aim, the essay will conduct a detailed discussion of the different systems of project finance legislation in both the UK and the US, which will be followed by an evaluation of the level of investor protection which is offered in both countries, and an analysis of the extent to which such legislation has been effective at providing protection from expropriation. This will be conducted by an analysis of both domestic and international law, and relevant case law.

The results of the essay find that there are significant areas of ambiguity in both UK and US law concerning investor protection – in the UK, this is due to the fact that there is a considerable overlap between the contents of different bilateral investment treaties, UK domestic law, and the provisions of European Union treaties. Research also suggests that there are areas in which both UK and US law on investor protection deviates from international law, such that it is unclear what circumstances constitute expropriation.

1 TO & GY, The oil and gas year 2010 (Wiley & Sons 2010) 14

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Introduction

Alexander defines project finance as a process by which an economic unit is financed such that the assets of the economic unit play the role of collateral.[2] All of the cash flows which arise as a result of the use of the economic unit are used in order to repay the lenders for the project loan. It is most common for such a mode of financing to be used in order to provide funding for large scale construction projects, most commonly within developing countries, where the construction of infrastructure such as toll roads, power plants and desalination plants are more common.[3] The attractiveness of project finance as a funding option stems from the fact that it enables large amounts of capital to be accumulated, thus enabling a greater amount of risk diversification to be achieved in projects where several companies are involved. [4]

The reason for selecting the United Kingdom as one of the key countries to be featured in this essay is due to the fact that it attracts the largest amount of project finance in Europe; this is reflected in the fact that the total value of the project finance projects which took place in the UK in 2009 came to represent approximately 21 per cent of all new projects which were conducted within Western Europe, with a total of 678 investment projects being conducted.[5] Indeed, statistics suggest that the largest foreign investors who participate in such projects in the UK originate from the US (funding 243 projects), subsequently followed by French, German and Indian investors.[6] The majority of the project finance which takes place in the UK is conducted in the form of private finance (PFI) initiatives which constitute a partnership between the private sector and the public sector, where public sector projects are funded by the private sector.[7]

The significance of project finance in the UK is demonstrated by the fact that this industry is currently the focus of up to 15 per cent of government investment; the scale of project finance within the UK is also reflected in the fact that the total capital value of the 700 infrastructure investments which were embarked upon from 1992 to

2 A. J. Alexander, 'Shifting title and risk: Islamic financing as a vehicle for global projects with Western partners' [2010] Michigan Journal of International Law 32 (3) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666063> accessed 27 March 2012

3 TO & GY, The oil and gas year 2010 (Wiley & Sons 2010) 14

4 J. Eaglesham, 'PM told PFI industry needs £4bn' (Financial Times, 15 February 2009) <http://www.ft.com/cms/s/0/641c1eca-fbb6-11dd-bcad-000077b07658.html#axzz1LH9kGpZC> accessed 27 March 2012

5 J. Eaglesham, 'PM told PFI industry needs £4bn' (Financial Times, 15 February 2009) <http://www.ft.com/cms/s/0/641c1eca-fbb6-11dd-bcad-000077b07658.html#axzz1LH9kGpZC> accessed 27 March 2012

6 J. Kelsey, Serving whose interests? The political economy of trade in service agreements (Routledge Cavendish 2008) 145

7 Peter Nevitt & Frank Fabozzi, Project financing (7th edn American Educational Systems 2000) 81

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2006 came to GBP 49 billion.[8] Statistics suggest that the US is an even more significant target for project finance projects than the UK, with the total value of project finance initiatives taking place in the US coming to almost double that of the UK.[9] Research which has been conducted by Esty suggests that the majority of project finance in the US is within the energy sector, with most of the foreign investors in such projects originating from Western Europe.[10]

1- An overview of project finance legislation in the UK

An overview of English law reveals that there is no formal legislative framework concerning project finance in England; rather, project finance regulations are primarily regulated by European Commission legislation; specifically, the public procurement rules of the European Commission and the European Commission Public Sector Procurement Directive 2004/18.[11] Despite the absence of a formal regulatory framework, however, there do exist various non-statutory principles which govern project finance initiatives. Research which has been conducted by Global Legal Group states that such projects are simply regulated according to the prevailing principles of English law, although it is highlighted that there are various pieces of legislation which have been amended in order to address issues which are related to tax legislation, insolvency, pensions and construction concerning project finance.[12] Such legislative amendments have focused mostly on the conduct of private finance initiatives, they relate in particular to the regulation of the process of certifying primary care trusts, hospitals and local care trusts.[13] Particular legislation concerning the regulation of PFI projects is also prevalent concerning projects which take place within the transport sector, where legislation stipulates that statutory authorisation (namely, the acquisition of compulsory purchase powers and planning authorisation) has to be obtained before such a project can be put into practice.[14]

1.1 An overview of investor protection in the UK

The key risks which are faced by project finance investors in the UK include risks which are associated with the performance of the project in which they are investing;

8 Peter Nevitt & Frank Fabozzi, Project financing (7th edn American Educational Systems 2000) 85

9 Benjamin C Esty, Modern project finance: a casebook (John Wiley & Sons 2003) 21

10 Benjamin C Esty, Modern project finance: a casebook (John Wiley & Sons 2003) 26

11 Global Legal Group, 'A practical insight to cross border PFI/PPP Projects work' (The International Comparative Legal Guide to PFI/PPP Projects 2007 2007) <http://www.iclg.co.uk/khadmin/Publications/pdf/1033.pdf> accessed 27 March 2012

12 Global Legal Group, 'A practical insight to cross border PFI/PPP Projects work' (The International Comparative Legal Guide to PFI/PPP Projects 2007 2007) <http://www.iclg.co.uk/khadmin/Publications/pdf/1033.pdf> accessed 27 March 2012

13 G. D. Vinter & G. Price, Project finance: a legal guide (Sweet & Maxwell Ltd. 2006) 98

14 J. Harrison, 'The protection of foreign investment: United Kingdom National Report' [2010] International Academy of Comparative Law <http://www.law.ed.ac.uk/bacl/files/harrison.%20foreign%20investment.pdf> accessed 27 March 2012

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risks associated with the completion of the project (namely, whether the project will be completed on time and to the required budget); risks related to the design and the construction of the project; and risks which are related to financial, tax and accounting aspects of the project.[15] Research which has been conducted by Harrison suggests that there is no legislative framework within English law which is specifically focused on the protection of foreign investors who are involved in UK based project finance; rather than a specific piece of legislation, the regulations which protect investors in this environment are dispersed across different pieces of legislation.[16] Furthermore, the amount of protection which is afforded to different investors is far from uniform and depends to a great extent on the investors country of origin, since the level of protection varies significantly depending on the bilateral investment treaty which the UK has with that country.[17] Despite the variation in level of investor protection which is available, however, it is a statutory requirement for the protection which is afforded to each investor to comply with the provisions of the 1991 model Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of X for the Promotion and protection of Investments.[18] However, despite the requirement for investor protection to comply with these principles, Higgins criticises UK law in this area by arguing that the way in which the UK ensures that the obligations which it has to enact as a signatory to various international treaties is dualist in nature, and therefore, unless the investor protection provisions which are contained within bilateral investment treaties have actually been implemented by statute, they are unlikely to be effective.[19]

1.2 Regulations against expropriation

The UK law states that the expropriation of the assets which are owned by foreign assets is only allowed if such expropriation is non-discriminatory and has a clear public purpose; in such cases, it is stated that compensation must be provided to the investor.[20] While there is no legislation which relates specifically to the expropriation of the assets of project finance

15 TO & GY, The oil and gas year 2010 (Wiley & Sons 2010) 16

16 J. Harrison, 'The protection of foreign investment: United Kingdom National Report' (International Academy of Comparative Law 2010) <http://www.law.ed.ac.uk/bacl/files/harrison.%20foreign%20investment.pdf> accessed 27 March 2012

17 Foreign and Commonwealth Office, 'Bilateral Investment Treaties' [2009] <http://www.law.ed.ac.uk/bacl/files/harrison.%20foreign%20investment.pdf> accessed 27 March 2012

18 Model Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of X for the Promotion and Protection of Investments (UK Model BIT 2009) <http://www.unctad.org/sections/dite/iia/docs/Compendium//en/69%20volume%203.pdf> accessed 27 March 2012

19 R. Higgins, 'United Kingdom', in F. Jacobs & S. Roberts (eds.) The effects of treaties in domestic law (Sweet Maxwell 1987) 2

20 UK Model BIT (n 7) art 5

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investors, this process is governed by the European Convention on Human Rights which states that all such expropriations should only be conducted in the public interest.[21] The level of compensation which is provided to investors is determined on the basis of the value of the investment before expropriation – in cases where a dispute arises between the foreign investor and the UK government, the investor has the right to initiate an settlement procedure, as outlined within Article 8 of the UK's Model Bilateral Investment Treaty.[22] All cases of dispute are generally heard by the Court of Arbitration of the International Chamber of Commerce or by the International Centre for the Settlement of Disputes, although the precise method in which such a dispute is settled depends on the terms of the specific investment treaty that the UK has with the investor's home country.[23]

1.3 The effectiveness of the UK's regulations against expropriation

Indeed, the lack of uniformity in the way in which disputes concerning expropriation are handled has been one of the key areas of criticism concerning the UK's handling of the expropriation of international investors.[24] As is demonstrated by research conducted by Price,[25] the different provisions which are contained within bilateral investment treaties means that the way in which disputes are handled can vary dramatically, with certain treaties stating that specific dispute settlement arenas should be used aside from the International centre for the Settlement of Disputes.[26] The selection of different fora for hearing disputes has a marked effect on the settlements which are arrived at since different dispute settlement arenas are located in different jurisdictions and therefore are regulated differently, with the result that the complicated way in which disputes concerning expropriation are settled are 'sheer chaos'.[27]

Another criticism which has been made concerning the amount of protection which is provided by the UK to investors from expropriation is that, while the expropriation which is conducted by the UK government is ostensibly in line with the principles which are identified within international law, they are highly ambiguous. There is

21 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (adopted 4 November 1950) 213 UNTS 221
22 UK Model BIT (n 7) art 8
23 A. D. F. Price, Financing international projects (International Labour Organisation 1995) 18
24 J. Kurtz, 'The delicate extension of the most favoured nation treatment to foreign investors: Maffezini v. Kingdom of Spain', in T. Weiler (ed.) International Investment Law and Arbitration: Leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (Cameron May 2004) 24
25 A. D. F. Price, Financing international projects (International Labour Organisation 1995) 18
26 A. D. F. Price, Financing international projects (International Labour Organisation 1995) 21
27 S. Manciaux, 'The Notion of Investment: New Controversies' [2009] Journal of World Trade and Investment 443

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considerable ambiguity in the way in which the issue of compensation is discussed in the case of expropriation.[28] In particular, while it is stated that such compensation should be related to the total value of the investment prior to the expropriation, Tanega and Sharma argue that the calculation of this value is subject to a significant number of assumptions which may cause the calculation of such a value to be substantially understated.[29] Furthermore, research which has been conducted by the Organisation for Economic Cooperation and Development (OECD) states that the UK regulations concerning expropriation fails to distinguish between regulatory actions which are compensable and non-compensable.[30] The OECD stipulates that certain acts of expropriation which are related to issues such as consumer protection, environmental protection, land planning, securities and antitrust do not require investors to receive compensation from the government, since expropriation in these cases is deemed to be 'essential to the efficient functioning of the state'.[31] The fact that the UK fails to clearly outline which cases of expropriation would result in compensation being provided, and those which would not, mean that there is a risk that the UK government may be able to manipulate the alleged reason for expropriation so that it is classified as being essential to the functioning of the state and therefore non-compensable.[32] This is expanded upon by Yescombe who argues that the failure to draw a line between expropriation which can be legitimately classified as being non-compensable and those cases of expropriation which do not fall into this category increases the risk that the expropriations which are conducted within the UK will be increasingly arbitrary in nature.[33]

Despite the aforementioned ambiguities, the UK investor protections against expropriation have been praised for the fact that they do protect investors in cases of both direct and indirect expropriation. While direct expropriation features most prominently within the research literature, investors also face the risk of indirect expropriation, such as creeping expropriation which is defined by UNCTAD as the 'slow and incremental encroachment on one or more of the ownership rights of a

28 J. Kurtz, 'The delicate extension of the most favoured nation treatment to foreign investors: Maffezini v. Kingdom of Spain', in T. Weiler (ed.) International Investment Law and Arbitration: Leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (Cameron May 2004) 24

29 J. Tanega & P. Sharma International Project Finance, A Legal and Financial Guide to Bankable Proposals (John Wiley & Sons 2010) 72

30 Edward Yescombe Principles of project finance (Academic Press 2002) 34

31 J. Harrison, 'The protection of foreign investment: United Kingdom National Report' (International Academy of Comparative Law 2010) <http://www.law.ed.ac.uk/bacl/files/harrison.%20foreign%20investment.pdf> accessed 27 March 2012

32 J. Tanega & P. Sharma International Project Finance, A Legal and Financial Guide to Bankable Proposals (John Wiley & Sons 2010) 75

33 Edward Yescombe Principles of project finance (Academic Press 2002) 38

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foreign investor'.[34] The fact that the UK's Model Bilateral Investment Treaty states that the protection which is afforded to project finance investors from expropriation should also include any measures 'having effect equivalent to nationalisation or expropriation' suggests that the scope of investor protection from expropriation is relatively broad.[35]

2- An overview of project finance legislation in the US

The way in which project finance is regulated within the US is either determined by the law of the state in which the project is taking place, by the law of the state in which a minimum of one of the parties involved in the project is organised, or by the law of a state with an advanced commercial legal system.[36] As research which has been conducted by Echevarria indicates,[37] there are no pieces of legislation which specifically deal with the regulation of project finance, and with the protection of project finance investors; rather, the level of protection which is afforded to investors who are involved in project finance can vary significantly depending on the provisions which are contained within the bilateral investment treaty which has been established between the investor's country of origin and the US.[38]

2.1 An overview of investor protection in the US

Despite the fact that the US has no specific pieces of legislation which are dedicated to the protection of project finance investors, it is required to comply with the principles of investment protection which are contained within the North American Free Trade Agreement (NAFTA), of which the US is a signatory.[39] In particular,

34 Model Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of X for the Promotion and Protection of Investments (UK Model BIT 2009) <http://www.unctad.org/sections/dite/iia/docs/Compendium//en/69%20volume%203.pdf> accessed 27 March 2012

35 U.K. Model Bilateral Investment Treaty [2005] Art 5

36 Andrew Paul Newcombe, 'Regulatory expropriation, investment protection and international law: when is government regulation expropriatory and when should compensation be paid?' [1999] <http://italaw.com/documents/RegulatoryExpropriation.pdf> accessed 27 March 2012

37 John D. Echeverria, 'Foreign investor litigation against the United States under NAFTA and other international investment agreements' [2003] <http://www.law.georgetown.edu/gelpi/research_archive/trade/IntlInvest.pdf> accessed 27 March 2012

38 Howard Mann & Konrad von Moltke, 'Protecting investor rights and the public good: Assessing NAFTA's Chapter 11' [2003] Background paper to the ILSD Tri-national policy workshops < http://michelbeauregard.homestead.com/casestudymidtermnaftabackground_en.pdf> accessed 27 March 2012

39 John D. Echeverria, 'Foreign investor litigation against the United States under NAFTA and other international investment agreements' [2003]

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Chapter Eleven of the NAFTA outlines the investment protection principles to which the US is expected to adhere – one of the key principles of Chapter Eleven is that in the case of a dispute concerning project finance, an investor should not attempt to seek redress from its own national state, but rather, they should 'submit to the jurisdiction of domestic courts'.[40] However, despite the fact that the US is expected to comply with the principles of investor protection which are outlined in NAFTA, critics argue that the ambiguity of some of the provisions which are contained in

NAFTA increases the latitude with which these principles can be implemented in the US.[41] For example, Chapter Eleven of NAFTA stipulates that the protection which is afforded to foreign investors in the US should be free from any discriminatory treatment based on their country of origin, under Article 1102.[42] However, as Sornarajah points out,[43] there is no information provided in NAFTA concerning what such discriminatory treatment could consist of – for example, there is no clarification concerning whether this discriminatory treatment should consist of a difference in effect or a difference in law.[44] Secondly, it is a requirement of NAFTA that the US should treat all foreign investors in a 'accordance with international law, including fair and equitable treatment and full protection and security'.[45] Again, there is no further clarification which defines what such treatment should consist of, and the vagueness of this provision has caused a number of disputes to emerge. [46] Thirdly, Article 1106 of NAFTA states that signatories to NAFTA are prohibited from the imposition of performance requirements on foreign investors – in other words, it is not possible for states to impose certain rules concerning the operation of a particular foreign investment, regardless of whether domestic investors are expected to comply with these rules.[47] Specifically, it is stated that signatory governments are prohibited from requiring a project finance investor to use certain technologies; to employ

<http://www.law.georgetown.edu/gelpi/research_archive/trade/IntlInvest.pdf> accessed 27 March 2012

40 Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)

41 M. Sornarajah, The international law on foreign investment (Cambridge University Press 1994) 89

42 D.S. Macdonald, 'Chapter Eleven of NAFTA: What are the Implications for Sovereignty' (1998) 24 Can.-U.S. L.J. 281.

43 M. Sornarajah, The international law on foreign investment (Cambridge University Press 1994) 91

44 Howard Mann & Konrad von Moltke, 'Protecting investor rights and the public good: Assessing NAFTA's Chapter 11' [2003] Background paper to the ILSD Tri-national policy workshops < http://michelbeauregard.homestead.com/casestudymidtermnaftabackground_en.pdf> accessed 27 March 2012

45 NAFTA [1994] Art. 1105

46 D.S. Macdonald, 'Chapter Eleven of NAFTA: What are the Implications for Sovereignty' (1998) 24 Can.-U.S. L.J. 281.

47 NAFTA [1994] Art. 1106

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specific people; to generate certain flows of foreign exchange on the basis of their volume of exports or imports; to export a certain proportion of their produced goods; and to use a specific amount of domestic goods or services in their operations.[48] Fourthly, Chapter 11 also stipulates that foreign investors should be protected against expropriation; in particular, it is stated that any regulation which is imposed by the government on the host country and which has an impact on the reasonable expectation of profit of the foreign investor thus constitutes an instance of expropriation which needs to be compensated by the government.[49]

Despite the fact that the US is expected to ensure that the protection that it provides to its investors comply with the principles which are outlined within NAFTA, in actual fact the provisions concerning foreign investment which are contained within the US free trade agreements and the revised model bilateral investment treaty which was established by the US in 2004 diverge in certain areas from the provisions which are contained within NAFTA.[50] The disparity between these provisions has been attributed to the US government's perception that some of the claims which were filed by foreign investors for violations of NAFTA Chapter 11 were 'frivolous', such that the provisions which were agreed upon within the US Model Bilateral Investment Treaty consist of adjustments to the NAFTA provisions.[51] However, the lack of uniformity in the extent of protection which is provided to foreign investors, and the fact that there is some divergence between the provisions contained within the US free trade agreements and the provisions which are contained within NAFTA means has introduced 'confusion' and 'lack of clarity' in the level of protection which are afforded to foreign investors working on project finance in the US.[52]

2.2 Regulations against expropriation in the US

As alluded to above, one of the elements of protection which are provided to project finance investors under Article 1107 of NAFTA is protection against expropriation. The key aspects of the regulations against expropriation are that any expropriation which is conducted by the US government must be for a public policy purpose and must involve compensation to be made to the investor, these requirements are similar

48 D.S. Macdonald, "Chapter Eleven of NAFTA: What are the Implications for Sovereignty" (1998) 24 Can.-U.S. L.J. 281.
49 NAFTA [1994] Art. 1107
50 Gilbert Gagne & Jean Frederic Morin, 'The evolving American policy on investment protection: evidence from recent FTAs and the 2004 Model BIT' [2006] J Int Economic Law 9(2) 357
51 Gilbert Gagne & Jean Frederic Morin, 'The evolving American policy on investment protection: evidence from recent FTAs and the 2004 Model BIT' [2006] J Int Economic Law 9(2) 359
52 Andrew Paul Newcombe, 'Regulatory expropriation, investment protection and international law: when is government regulation expropriatory and when should compensation be paid?' [1999] <http://italaw.com/documents/RegulatoryExpropriation.pdf> accessed 27 March 2012

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to the regulations against expropriation which are observed by the majority of countries within the OECD.[53]

However, the regulations concerning expropriation have been criticised for their vagueness – in particular, it is unclear exactly what constitutes an expropriation, and when the US government is expected to provide compensation to investors.[54] Particular controversy about the expropriation regulations have arisen with reference to instances of government action which are taken in order to protect the public from environmental hazards; could the establishment of stringent environmental standards, which would affect the profitability of companies, constitute expropriation such that compensation would have to be paid to the affected companies?[55] While the consensus among researchers appears to be that Article 1110, which stipulates that the exercise of 'police powers' by a country (which refers to a situation in which a country acts in a non-discriminatory manner in order to ensure the protection of public goods such as public health, general public welfare and the environment) does not constitute expropriation, and therefore the implementation of environmental standards does not constitute an expropriation, this has arguably created more ambiguity about exactly what *does* constitute expropriation. Some researchers argue that, in order for a government action to be considered to be an expropriation, it should result in a significant reduction in the value of the investment, as outlined within Article 1110 of NAFTA.[56] However, this Article fails to articulate how significant such a reduction in value should be before it can be considered to be an expropriation.

This lack of clarity about expropriation is reflected in recent case law. In the case of Glamis Gold v United States,[57] for example, the Canadian company, Glamis Gold, which had acquired gold mining rights in California, claimed that the US had expropriated its investment by implementing a series of regulations which deprived Glamis Gold of the full value of its investment through the introduction of

53 Andrew Paul Newcombe, 'Regulatory expropriation, investment protection and international law: when is government regulation expropriatory and when should compensation be paid?' [1999] <http://italaw.com/documents/RegulatoryExpropriation.pdf> accessed 27 March 2012

54 Howard Mann & Konrad von Moltke, 'Protecting investor rights and the public good: Assessing NAFTA's Chapter 11' [2003] Background paper to the ILSD Tri-national policy workshops < http://michelbeauregard.homestead.com/casestudymidtermnaftabackground_en.pdf> accessed 27 March 2012

55 Andrew Paul Newcombe, 'Regulatory expropriation, investment protection and international law: when is government regulation expropriatory and when should compensation be paid?' [1999] <http://italaw.com/documents/RegulatoryExpropriation.pdf> accessed 27 March 2012

56 NAFTA [1994] Art. 1110

57 Glamis Gold v United States [2009] (UNCITRAL rules)

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unfavourable land use conditions which created significant delays in the project. However, the claim was rejected on the grounds that the reduction in value of the company's investment was not severe enough to be considered to be a regulatory taking as outlined within Article 110.

This arguably reflects an instance in which the lack of concision within Article 110 to stipulate exactly how severe a decrease in value of an investment project should be before it can be considered to be an expropriation resulted in confusion. Another piece of case law which demonstrates the lack of clarity concerning expropriation is Methanex v United States (3 August 2005).[58] Methanex, a Canadian producer of methanol, accused the California state of expropriation because it required Methanex to include a gasoline additive called MTBE within its products in order to reduce environmental pollution. However, after discoveries that MTBE could be a carcinogen, the use of MTBE was banned. Methanex argued that this banning caused it severe economic harm and argued that, rather than being based on a desire to protect the environment and public health, it was instead motivated by a desire to protect domestic ethanol suppliers. Methanex's claim was rejected on the grounds that the California government's decision to ban the substance was based on substantial scientific evidence and could therefore not be construed as a step taken to protect domestic suppliers. This reflects the confusion which exists about whether a regulation which is imposed by the government constitutes an action which is taken in order to protect public welfare, and is therefore considered to be a regulatory taking, or whether it consists of an unjustified expropriation which is conducted in order to protect domestic industry. The lack of clarity concerning the definition of expropriation means that there is a greater possibility that the US government may take advantage of this lack of concision in order to impose economically harmful regulations on foreign investors, and that foreign investors may be tempted to initiate frivolous lawsuits against the US government.

3- Key points of comparison and the relative effectiveness of each system of regulation

The analysis of the regulations concerning expropriation which are contained within the legislation addressing the protection of foreign project finance investors pertaining to each country suggest that, while there are weaknesses in this area, one of the key strengths is that the extent of investor protection which is provided in the case of expropriation is relatively broad. Specifically, within the investor protection legislation which relates to both countries, it is stipulated that investors should be protected from both direct and indirect forms of expropriation. Hence, as Gagne and

58 Methanex v United States [2005] (UNCITRAL rules)

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Morin argue,[59] it is unlikely that investors within both countries would be the victim of forms of indirect expropriation such as creeping expropriation. However, despite the breadth of investor protection in this respect, in both the US and the UK, there is a severe lack of clarity concerning the precise definition of expropriation. As was demonstrated within the aforementioned case law, there is a lack of clarity between compensable and non-compensable forms of expropriation i.e. when a step which is taken by the government for the public good requires compensation to be paid to the foreign investors who are affected, and when a step is taken by the government in order to protect public welfare such as in the case of environmental protection, constituting a 'regulatory taking', without the need for compensation to be provided. This lack of clarity has resulted in considerable confusion among investors about under exactly which circumstances they would be entitled to compensation.[60] In the NAFTA legislation with which the US is expected to comply, for example, it is not made clear the extent to which the value of an investment needs to be reduced by before the imposition of a government regulation can be considered to be an expropriation.

Another key weakness which has been identified in the case of both the UK and the US is a lack of uniformity in the extent of protection which is provided to investors from different countries.

This is due to the fact that the protection which is provided to investors in both countries is dependent on the provisions which are contained within the bilateral investment treaties which exist between the host country and the investor's country of origin. As a result, there are a number of instances in which the particular provisions which are included within these bilateral investment treaties, and within specific free trade agreements, diverge from the principles which are contained within the international legislation to which the US and the UK are signatories. This overlapping and divergence between different pieces of legislation gives rise to substantial confusion and uncertainty among foreign investors about the nature of their protection. In the UK, this is exacerbated by the fact that different bilateral investment treaties contain different provisions concerning the way in which investor disputes should be settled, with different dispute settlement arenas being used. In the US, too, research has identified a disparity in some of the provisions contained within the US free trade agreements and NAFTA.

59 Gilbert Gagne & Jean Frederic Morin, 'The evolving American policy on investment protection: evidence from recent FTAs and the 2004 Model BIT' [2006] J Int Economic Law 9(2) 357

60 Andrew Paul Newcombe, 'Regulatory expropriation, investment protection and international law: when is government regulation expropriatory and when should compensation be paid?' [1999] <http://italaw.com/documents/RegulatoryExpropriation.pdf> accessed 27 March 2012

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One of the most effective ways of dealing with these issues would be to establish an international legislative framework which would ensure that all project finance investors in all countries were entitled to the same level of investor protection from expropriation. This could also be accompanied by increased precision within the prevailing legislation in order to ensure that there is a clearer definition of what constitutes an expropriation and what constitutes a non-compensable regulatory taking. Further to the introduction of a single harmonised legislative framework pertaining to investor protection from expropriation, the establishment of a single forum for hearing and deciding upon investor disputes would be useful, since it would dispense with the differences in the manner of handling such disputes which are likely to arise from differences in jurisdiction. The formulation of a harmonised international legislative framework relating to investor protection, which would override the investor protection provisions relating to expropriation which are contained within individual free trade agreements, would help to increase investor certainty about the type of investor protection which they will receive and is thus likely to result in an increase in the amount of foreign investment received by the US and the UK overall.

Conclusion

The research which has been conducted in this paper suggests that the level of investment protection which is provided to project finance investors within the US and the UK is far from uniform, and differs substantially depending on the contents of the bilateral investment treaty which exists between the host country and the investor's country of origin. This lack of uniformity also extends to the settlement of disputes which is likely to also vary depending on the terms of the treaty. Furthermore, there appears to be considerable differences in the provisions which exist concerning investor protection within the particular free trade agreements of such countries, and the principles of international legislation to which they are signatories. With respect to the issue of expropriation in particular, there is a significant lack of clarity concerning what constitutes expropriation, and what constitutes a regulatory taking; in the case of the US at least, this can be attributed to a lack of concision which is contained within the NAFTA legislation about the extent to which the value of an investment has to be reduced before it can be considered to be an expropriation. The lack of regulatory consistency in this area may result in an decline in the amount of project finance development which takes place in developing countries, since the risks of expropriation may outweigh the benefits of risk diversification which are associated with such projects.

It is clear that further research needs to be conducted before it is possible to draw any rigorous conclusions, and before any useful recommendations can be made as to improvements which can be made to the existing legislative framework in both countries. In particular, it is recommended that further case studies are conducted into the situation regarding the protection of project finance investors from expropriation,

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in order to ascertain whether the problems of ambiguity and lack of uniformity which have been identified are specific to the UK and the US are whether they are a more general issue. It would also be useful to combine the secondary research which has been conducted in this paper with primary research, in the form of a series of semi structured interviews which could be conducted with a sample of project finance investors from each country. Such research would make it possible to ascertain the extent to which the lack of clarity within the legislation affects the decisions of project finance investors to invest in a certain country.

Such research may also make it possible to formulate a number of recommendations for improvement as to how the existing legislative framework concerning investor protection in different countries could be improved. The recommendations for improvement which would be obtained from conducting such primary research would arguably be highly effective in reducing the level of uncertainty which is faced by investors when making decisions related to project finance, and would thereby help to increase the overall level of project finance investment which is received by the UK and the US, thus having a positive contribution to the economic growth of both countries. Furthermore, given that the highest growth rates of project finance are within developing countries, as outlined in the introduction, it may be worthwhile to evaluate the protection which is afforded to investors in developing countries against the risk of expropriation, and to assess whether this differs significantly from the protection which is provided to investors in the UK and the US.

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