HULL FORMULA AND STANDARD OF COMPENSATION FOR EXPROPRIATION IN POSTCOLONIAL STATES

HULL FORMULA DAN STANDAR KOMPENSASI DARI EXPROPIASI DI NEGARA-NEGARA POSKOLONIAL

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ABSTRACT

The contentious issue dealt with economic sovereignty for host states after decolonisation process is foreign investment protection from expropriation by newly independent states. Hull formula has been widely used as an international law standard for compensation of expropriation. However, this standard has perceived as an unfair treatment from the former coloniser to its former colony. Even there has been an assumption that the existence of this standard is merely to protect and to maintain the economic dominance of developed states and their multinational companies in the Third World. This issue will be viewed through critical legal studies methodology, to assess the extent to which the 'hull formula' standard compatible to current need of postcolonial states. It would contribute to conceptual understanding and to attempt to reformulate the international standard of expropriation based on justice and fairness in postcolonial context.

Keywords: Hull Formula, Standard of Compensation, Postcolonial States, International Law.

ABSTRAK

Setelah progam dekolonisasi negara-negara jajahan, salah satu isu yang mencuat dalam hukum internasional adalah perlindungan investasi asing dari nasionalisasi negera negara baru merdeka. Dalam hal ini hull formula yang mulanya didesain oleh negara Amerika terhadap Mexico, digunakan sebagai standar kompensasi dari nasionalisasi. Dari perspektif negara negara poskolonial standar ini dianggap tidak adil, bahkan standar ini digunakan hanya untuk memperkuat dominasi negara negara penjajah di bekas jajahannya. Dengan menggunakan metodologi kajian hukum kritis, tulisan ini ingin mengkaji sejauhmana relevansi hull formula untuk diterapkan dalam konteks negara-negara poskolonial. Tulisan ini diharapkan dapat berkontribusi untuk pemahaman konsep tentang standar kompensasi terhadap nasionalisasi di negara negara poskolonial, dan dapat membuka wacana merumuskan kembali standar secara lebih fair dan adil dari perspektif negara postkolonial.

Kata Kunci: Hull Formula, Standar Kompensasi, Negara Negara Poskolonial, Hukum Internasional.

INTRODUCTION

The type of retrospective remedies awarded in investment disputes typically provides for prospective relief in the form of compensation. This position stems from the so-called *Hull Formula* that has evolved into an accepted standard in any Bilateral Investment Treaties (BITs), providing that *prompt*, *adequate* and *effective* compensation is the most appropriate form of relief in an investment dispute. Developing countries have also been willing to sign on to BITs providing for compensation, because BITs offer an opportunity to negotiate and offer concessions to a potential investor in competition and hopefully at the exclusion of other potential hosts. Most BITs also requires that state-to-state disputes be settled by consultations, failing which it is submitted for arbitration. The arbiter renders a decision, which may include a compensation award. Hence, the standard for compensation is an attempt to protect the economic interests of the foreign investors[1].

Historically, a first major challenge to this rule comes with the Russian Revolution of the year 1917, when "national treatment" of expropriated foreigners lost all its meaning as nationals could be expropriated without the payment of any compensation. In order to counter this new danger, a minimum standard of compensation was defined on an international level and opposed to the national treatment rules. The best-known definition of this minimum standard which is still the most extensive one in scope was made by the United States Secretary of State *Cordell Hull*, who in 1938 confronted with the expropriation of United States property in Mexico, required "prompt, adequate and effective compensation".

After 1945, the Hull-formula was repeatedly accused, especially by the newly independent states, as not being an adequate expression of the international minimum standard. The last occasion when something like a compromise was found between industrialised countries and the developing world was the UN General Assembly Resolution 1803 (XVII) of December 14, 1962 on Permanent

[1] See Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, Hague Academy, Collected Courses, Vol. 269 (1997), p. 379.

Sovereignty over Natural Resources[2], which by requiring the payment of "appropriate compensation in accordance with the rules in force in the state taking, such measures in the exercise of its sovereignty and in accordance with international law". This still gave a real substance to the minimum standard of compensation, and though somewhat ambiguously limited the discretional powers of the State by linking it to the international rules. This linkage is no longer present in the resolution on Permanent Sovereignty over Natural Resources of 1973 (UN GA Res. 3171(XXVIII). In Art. 2 (2) of the Charter of Economic Rights and Duties of 1974 (UN GA Res. 3281 (XXIX)) it is finally stated a formula according to which "appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent."[3]

So it can be seen that the former colony states has attempted to Escape from the Hull formula in international law forum like the United Nations general Assembly. However, the resistance of the former coloniser has insisted to protect and receive a full compensation based on Hull formula standard.

DISCUSSION

1) Hull Formula: Protection of Foreign Investors or Host States?

A State that does not know any protection of property in the worst case would not be obliged to grant any protection for the expropriation of foreign interests. In the voting procedures, Western industrialised countries showed abstention or even outright opposition to

[2] See article 2 (1) of the 1974 Charter of Economic Rights and Duties of States: "Every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities."

[3] See Article 2 (2) of the Charter of Economic Rights and Duties of States.

these new rules and therefore these provisions cannot be seen as the expression of a new *opinio jurist*[4] in this area.

The hull formula to some extend has brought an input in many bilateral treaties. The standard of compensation would require, at the least, the payment of *full value* of the property that had been taken over. The developing countries have collectively articulated the standard of 'appropriate compensation". This standard would be flexible that would permit to take into account factors such as the profit made by the foreign investor, the duration of the period during which profits were made and similar factor in assessing the compensation.[5]

There are many drafting variations in standards as a explanation of *prompt* in hull formula, such as a standard of valuation being "the fair market value of the expropriated Investment Immediately before the expropriatory action was taken or become known".[6]

In the British treaties after formula of compensation was followed by:

> Such compensation shall include market value of the investment expropriated immediately before the expropriation become public knowledge, shall include interest at a normal commercial rate until date of payment, shall be made without delay, be effectively realisable and be freely transferable.[7]

Standard of valuation indicates an obligation to pay *full compensation*.[8] There are wide variations in the statement relating compensation. Sometimes it is used the "hull formula", "Just", "Compensation equivalent to the investment expropriated" or without using any qualifying adjective, such as "Compensation which shall be effectively realisable". However, there is much uncertainty about what could amount to "Just compensation" or "Appropriate compensation" less or full compensation? Just compensation may very well amount to less

[4] In Latin word, from *opinio juris sive necessitates* (whether the opinion of law is compulsory), an essential element of custom. *Opinio Juris* requires that custom should be regarded as state practice amounting to a legal obligation, which distinguishes it from mere usage, See Martin, Elizabeth A (ed.), 2002, *A Dictionary of Law*, Fifth Edition, Oxford University Press, p. 346.

[5] Sornarajah, M., 1994, *The International Law on Foreign Investment*, Cambridge University Press ,p. 254.

[6] *Ibid*., p. 257.

[7] *Ibid*.

[8] See Texaco v. Libya case (1977) 53 I.L.R. 389; (1978) 17 I.L.M 1

than "Full" compensation (or adequate compensation as meaning full compensation in hull formula)[9]. The meaning of adequate often expresses in the sense of full compensation was required by international law[10] is would be controversial to some extent. The exceptional circumstances such as, tangible assets or land, lost of profit can be tended to be less compensation than full compensation as highlighted by Amerasinghe.[11]

Yet, the debate of this issue derived from the ambiguity of concept of state's sovereignty over natural resources, the bargaining strength and strategies which much to do with these variations[12]. The high risk countries and large capital investor commonly intent to use hull formula in their treaties, despite it is understood as a very high standard.

The guideline to use the formula of " appropriate" compensation preferred by developing states instead of Hull formula of prompt, adequate and effective compensation which preferred by the developed states. But there is a redefinition of 'appropriate' compensation to mean "prompt, adequate and effective.[13] Adequate compensation is defined as fair market value, therefore, the hull formula was defined as appropriate compensation.

The ranges of possibilities are still flexible such as partial compensation or a gift from investor to the host states as pay back of their profit that they have received. In some degree, hull formula demand full compensation[14], hence, appropriate compensation can be equivalent to just compensation instead of hull formula. The terms "prompt" and "effective" meant that compensation must be paid without delay and in a freely convertible currency. Only a few

[9] See a complete explanation in Amerasinghe, Issues of Compensation For the Taking of Alien Property in the Light of recent Cases and Practice, *International and Comparative Law Quarterly*, Vol. 41 January 1992, p.22-65.

[10] See Brandon, 1960, *Recent Measures To Improve the International Investment Climate*, Journal Public Law, Vol. 9, p. 130.

[11] Amerasinghe showed the uncertainty of standard for compensation since variety of circumstances. *Ibid*.

[12] Sornarajah, M, 1994, *Op.Cit*., p. 253-260

[13] Sornarajah, *Ibid*., p. 220.

[14] See Cases such as the Delagoa Bay Railway case, the Spanish zones of Morocco Case, the Sabla Claim and the Selwyn Case, see Amerasinghe, *Op.Cit*., p. 36.

treaties admit a payment over a period of time in case of exceptional balance of payment problems.[15]

In addition, it can be argued that the standard of hull formula cannot be used for expropriation with appropriate reasons such as decolonisation, violation of contract, or criminal sanction for violation of state's law and regulation, such as drug trafficking, environmental damages, and social problem such as consumer protection. The effective compensation means that the payment of compensation is in convertible currency. This domain will be justified by domestic tribunal whether or not the foreign investor would receive a full compensation.

The controversy regarding to whether the hull formula requires the payment of "prompt, adequate and effective" for lawful or unlawful expropriation and whether it represents the customary international law standard is being debatable. In the restatement of the foreign relation law of the United States, it is simply mentioned as "just compensation", yet in the *Chorzow Factory case*[16] used "payment of fair compensation" and in many other cases mentioned "just compensation".

Somehow, hull formula 1938 regarded as a traditional standard which still vary in its application. Mendelson stated that *full* is essential element of the formula with omitted *prompt* and *effective.* However Oscar Schaachter highlighted the using *just* and *fair* compensation is merely in the particular cases.[17] And then is just compensation is an obligation of international law or merely moral standard.[18]

[15] S. Sacerdoty, 1997, *Bilateral Treaties and Multilateral Instrument on Investment Protection*, In Hague Academy, Collected course, vol. 269 , p.401.

[16] Charzow Factory case, 1928 PCIJ, se. A, No. 17.

[17] See comprehensively explanation in Agora, 1985, *What Price Expropriation?, Compensation for expropriation: The Case Law, The American Journal of International Law*, Vo. 79, p. 414 – 422.

[18] See Oscar Schachter, 1984, *Editorial Comment, Compensation for expropriation*, The American Journal of International Law, Vo. 78, p. 121-129.

The using of hull formula in many bilateral treaties signify the shortcoming of developing states to attract investment in one hand and to maintain permanent sovereignty on the other hand. So it is a dilemma for developing countries in facing Hull formula as a standard for compensation due to the lack of their economic and political bargaining in the world order.

Essentially, the using hull formula as standard for compensation is an unfair rule based on four reasons. Firstly, it would be brought to justification that nationalisation or expropriation in international law is absolutely unlawful,[19]therefore, it has to be compensated. Secondly, the standard is too high and strict, so it does not give any concession to the host state to consider other appropriate compensation based on their limited capacity as new born states. Thirdly, it tends to breach the permanent sovereignty of state as it is firmly recognised in international law. Fourthly, it is an assumption that economic interest would be a new form of colonisation of the west.

The prompt, adequate and effective compensation has been a magic word to threat the host state to not expropriate the foreign investment without a full compensation. Consequently, the benefit of investment barely felt by host state, unless, the strict social oriented agreement regarding the process of investment was previously made by both parties. The development of the compensation standard to be suitable to the current era is required because the law has changed in accordance with current international situation[20]. The failure

[19] Modern BITs and NAFTA prohibit the treaty parties from expropriating an investment, unless the expropriation is conducted for a public purpose, in a non-discriminatory manner, upon hull formula etc. See Gary H.Sampliner, *Arbitration of Expropriation Cases Under U.S. Investment Treaties –A Threat to Democracy or the dog that did not bark?,* ICSID Review, Foreign Investment Law Journal, Vo. 18 Number 1 Spring 2003, p. 5.

[20] See Sornarajah, 1979, *Compensation for Expropriation: The Emergence of New Standards,* Journal World Trade Law, Vol. 13, 108, p.123-131.

to establish a new international legal framework will open a new problem[21] for the developing countries due to the interest of the developed countries[22] in shaping the world order. [23]

The Hull formula is a traditional compensation standard which is much influenced by political and economical of the developed countries[24]. It was reflected from the Bretton Wood system that failed during 1945. Milan Bulajic concerned that the struggle for the establishment of the economic sovereignty represents a continuation of the process of decolonisation in the economic sphere[25], and the negation of domination of neo-colonialism in international economic relations".[26]

2) International Standard of Compensation for Expropriation

Article 2 (c) of the Charter of Economic Right and Duties of State mentioned that "Each state has the right to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state consider pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of nationalizing state and by its

[21] For instance: the new law of the sea regarding 200 miles Exclusive Economic Zone substantially diminished the Common Heritage of Mankind, see Milan Bulajic "A Changing World Calls for International Economic Law" in Peter Sarcevic and Hans Van Houtte, (Ed.),1990, *Legal Issues in International Trade*, Martinus Nijhoff, London, p. 4

[22] World economic issues are decided by a directorate of the United State, Germany, and Japan, see Huntington, S. P.,1993, *The Clash of Civilization ?*, *Foreign Affairs*, 72, No.3. Also see more comprehensive explanation in Michael Byers and Georg Noite (Ed.), 2003, *United States Hegemony and the Foundation of International Law*, Cambridge University Press.

[23] In mapping the world order, there are the developing countries dominated 70 % of world population, whereas 20 % is least developed countries and 10 % is developed countries. This unbalancing has been an issue of debate. It certainly shows The gap between the rich and the poor, industrially developed and developing countries. See Milan Bulajic "A Changing World Calls for International Economic Law" in Peter Sarcevic and Hans Van Houtte (Ed.), 1990, *Legal Issues in International Trade*, Martinus Nijhoff, London., p.1.

[24] See Chimni, B.S., 1993, *International Law and World Order: A Critique of Contemporary Approaches,* Sage Publications India Put Ltd., p. 11-13.

[25] See Ruppert, Mark, 2000, *Ideologies of Globalization, Contending Visions of a New World Order*, Routledge, London & New York, p. 154-155.

[26] *Ibid.*

tribunal, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means".

The issue of expropriation and compensation should be settled by law of nationalizing state unless agreed by all states concerned to use other peaceful means. The OECD countries has rejected the article due to regarded as a violence of International Law as reflected in UN Resolution 1803 (XVII) 14 December 1962 regarding " Permanent sovereignty over natural resources. This resolution dealt with customary International Law which requires an appropriate compensation for nationalizing country. This resolution also conceived to limit the choice of law in dispute settlement of forums[27].

Seid Hohenveldern said that the right to nationalise foreign property is the nature of the demand for absolute sovereignty[28] that do not need to take into account to other interests even written in an agreement. The word 'all circumstances that the state considers pertinent' has emerged to two opinions. *First*, *Girvan theory*, this theory highlights that a nationalizing state can counter claim to seek compensation due to suffering effects during colonisation period. *Second, Allende theory,* this theory said that a state can minimizes the compensation for nationalization of the foreign investment which has gained excess profit.[29] Although Carreau criticizes that provision admitted the sovereignty of state, [30] Reinhard interprets this provisions as a sign to use International Law, however this contention opposed by Verwey and Schrijver that nationalizing states still has a right to decide the meaning of 'pertinent'.[31]

[27] Ernst U. Petersmann, 1985, "Charter of Economic Rights and Duties of States" in R.Bernarhardt (ed)., *Encyclopaedia of Public International Law*, Instalment 8, p.72-73.

[28] I. Seid Hohenveldern, *Op.cit.,* "General Course of Public International Law" 198, Recueil des Course (1986), p. 51

[29] I. Seidl Hohenveldern, *Ibid*., p.52.

[30] D. Carreau, 1986, Droit International, as quoted by I. Seid Hohenveldern, *Op.Cit*, p. 52.

[31] D. verwey and N.J Schrijver, 1984, "The Taking of Foreign Property under International Law: A New Legal perspective", 15 Ned, Yb, Int'l. Law, 44.

The developing countries showed that it is no real change in their behaviours concerning this standard. They continued to pay compensation for expropriated foreign property, even though the amount was often below the hull-standard, especially when larger nationalisation programmes were underway. An ever-increasing number of developing countries are also entering into bilateral agreement on investment protections. The last occasion in which the existence of a minimum standard on an international level was confirmed on a large scale was (or is, as the procedures are still ongoing) within the jurisprudence of the Iran-United States Claims Tribunal.[32]

In short, it seems that the world now is confronted with a situation in which the existence of a minimum standard for a compensation obligation in the case of expropriation measures can no longer be contested. The extent of this obligation, however, is still somewhat blurred. On the other hand, there are several bilateral investment treaties which lay down a very high standard of protection. There can be no doubt that a multilateral investment protection agreement would simplify this situation considerably and reduce the transaction costs in this area (for example with regard to the negotiating process, the dispute settlement procedures or other compliance measures) in a very consistent measure. However, the remaining issue is not to fully negate the protection of foreign investors, but in which way this ought to happen.[33]

Authorities and the government of the communist countries have consistently maintained that international law has no minimum standard, so it should be leaving to the domestic jurisdiction of states.[34] Foreign investors are subject to the laws of the host state

[32] Iran-US Claim tribunal proved that full compensation not always appropriate/ just compensation. See Amerasinghe, *Op.cit.*, p. 53.

[33] Peter Hilpold, The Multilateral Agreement on Investment Are the fears justified?, Eurac Research, Artikel2.htm on 4 June 2006

[34] See Makarczyk, (1998), *Principles of the New International Economic Order* ,Oxford Pergamon Press, p.232-239.

alone and have no protection through any external standards is a view which has much supported in the International Law as the Latin America case. [35] In early twentieth-century American writing on the issue to support the view that there is state responsibility for damages caused to the person of the alien or destruction of the property of the alien by state forces or as a results of negligence by the host state to provide protection. [36] The idea of foreign investment protection through the principles of state responsibility is a matter of later development. International law mandates national standards of treatment for foreign investor, which is the same standard of compensation as is given to the nationals of the states.

It is apologetic that there was a justification for the home state to intervene on behalf of their investor to claim compensation to the host state. The Latin American states have been persistent to objection to the formation of any customary practice in the area. [37] Borchard and Ralston as quoted by Sornarajah still concern to the local standard for protection foreign investment. The newly independent states of Africa and Asia have joined the Latin American states in denying that the principles of states responsibility for injuries to aliens extend to the protection of direct investment made by aliens. In this point there is no agreement between the developed and developing states as to what international law is. The issue come to international stage when two contracting parties persistent for their arguments, such as between the United States and the Latin America states. Therefore, the international minimum standard for the treatment of foreign investment is still needed. [38]

According to the charter of economic rights and duties of states, there has been mentioned that the right to state to regulate and exercise, supervise authority over foreign

[35] Sornarajah, M, *The International Law on Foreign Investment* (1994), Cambridge University Press, P.124

[36] *Ibid*.

[37] See also Orrego Vicuna, "The International Regulation of Valuation Standards and Processes: A Re-examination of Third World Perspective" in Lillich (1975) (Ed.), 3 *The Valuation of Nationalized Property in International Law* (1975), p. 131- 148.

[38] See a complete explanation in Sornarajah, *Ibid.,* p. 126-127.

investment within its national jurisdiction and *appropriate compensation* should be paid.[39] Obviously, there is no agreement of standard of compensation. And furthermore the charter implicitly supports the protection for foreign investment even though without explicitly states the exact measurement.

3) Hull Formula in Postcolonial States

The Hull Formula had been emerged since the dispute concerning the Mexican expropriations of American property. This stressed that the *prompt, adequate* and *effective* compensation must be paid to the foreign investor upon expropriation of their property. However, the standard had never been accepted by the Latin American states.[40] In other side the state responsibility for the foreign investment which was claimed by developed states with provided equal treatment to aliens in the economic sphere is difficult to be proved. Sornarajah gave the example of the anti-Japanese land law which forbid Japanese from buying real estate and Australia preventing non-whites entry (until 1970) into Australia for residence.[41]

An attempt to formulate a standard in international law for the right of investor which include as rights to property has not been adopted appropriately in international law. At the meantime, the discrimination treatment cannot be avoided between nationals and aliens as to ownership of real estate, the practice of the profession, employment, and state defence.

Basically, the expropriation is a conditional right, not an absolute right. Therefore, the expropriation is considered illegal if there are no appropriate reasons for it[42], and the consequence is a compensation. In adverse, if there are appropriate reasons, the host state no needs to pay any compensation. The ambiguity of identifying the status of expropriation will

[39] See The Charter of Economic Right and Duties of States 1974, Chapter II, art.2.
[40] Sonarajah, *Op.cit.*, p.129.
[41] *Ibid.*, p.129
[42] Compare with the opinion of Solely Arbitrator, Dupuy, in the Texas Overseas Petroleum Company Arbitration that decided the Libya expropriation was unlawful, See Amerasinghe, *Op.cit.*, p.38.

bring difficulties in formulating the standard of compensation such as hull formula. A satisfactory code of conduct must address on how foreign investors conduct be regulated in the host state and how the host states should treat the investors.

Expropriation occurs when a public agency takes property for a purpose deemed to be the public interest, even though the owner of the property may not be willing to sell it. The problem might be resolved for example by the existence of The Expropriation Compensation Board in the international level.[43]

The principle of international law as the trump card is reflected in Article 42(1) of the International Centre for the Settlement of Investment Disputes (ICSID) Convention. It is clear from numerous decisions of ICSID and other tribunals that, where national law provides less compensation than international law, the tribunal will apply international law. This article can be regarded partial to some extent due to disregard the interest and the sovereignty of host state.

The words which used to describe the standard of compensation under international law for expropriation are numerous and varied, such as; "prompt, adequate, and effective," in the words of the classic 1938 Hull doctrine; "equivalent," "fair," "just," "full," "reasonable" and "genuine value," in the word of other treaties. Despite the diversity of terms, however, one can see a growing consensus developed as expressed in treaties and in arbitral awards under treaties or customary international law, on a standard of 'fair market value' or its equivalent."

Under Article 52(1)(e) of the ICSID Convention, an award may be annulled if "the award has failed to state the reasons on which it is based." In the case of ICSID Additional Facility arbitrations, United Nations Commission on International Trade Law arbitrations, or

[43] See British Columbia, Expropriation Compensation Board, derived from http://www.ecb.gov.bc.ca/ On 1 June 2013.

other arbitrations that are similarly subject to the arbitration law of the place of arbitration, there may be grounds for the national courts to set aside awards under national law. In the United States, for example, it has been held that an international award, like a domestic award, is subject to being set aside by a US court for "manifest disregard of the law."

The international arbitration community is looking for awards that are not only reasoned, but well reasoned. They may have both grounds and means to challenge awards of damages that stray too far from that standard. Perhaps we are moving towards the day when damage awards are fully explained on the basis of sound law and sound economic evidence, and are therefore unassailable.[44]

The term 'nationalisation or expropriation' in postcolonial states is normally used by developed states to denote the fact that the standard of compensation will fall to be decided by the characterisation of the expropriation being characterised as either lawful or unlawful. For an expropriation to be lawful, it must satisfy two threshold requirements: (a) It must be for a public purpose. A nationalisation scheme easily satisfies this requirement as such schemes are implemented for the purpose of buttressing the State's economy. (b) The expropriation must not be due to the implementation of discriminatory policies.[45]

Such requirements was unfairly used during the context of post-colonisation, in which postcolonial states has a permanent right over colonial's property in their territories.[46] Despite international law has not yet clearly acknowledge that colonisation was a crime against humanity, as it was a double standard of colonialist's power which now becomes a driver of international law. [47] The promotion of third world approaches to international law (TWAIL)

[44] Holland & Knight, International Law Office, Arbitration-USA, on http://www.europeanlawoffice.com/ld.cfm?Newsletters__Ref=3355 on 1 June 2004

[45] See Patric J Smith, 'Determining the Standard Compensation for the Expropriation of Nationalised Assets: Themes for the Future', 23 Monash U. L. Rev. 159 1997, p. 159.

[46] In non-colonial context, this standard may be justifiable. See N. Jansen calamita, 'The British Bank Nationalizations: An International Law Perspective', 58 Int'l & Comp. L.Q. 119 2009.

[47] See for example,MYA Kadir, 'The Application of the Law of Self-Determination in Postcolonial Context: A

should be demonstrated to create a balance of domination of western approach to international law. [48]

CONCLUSION

The "hull formula", which was grown up in the context of Latin American states (Mexico), has not represented the standard of compensation for expropriation in the current International Law. The concept of Hull formula providing *prompt, adequate* and *effective* compensation will face problems regarding variety of nature and circumstances of expropriation as well as the ambiguity of concept itself. Moreover, the capability to invest was solely possessed by industrialised states. Hence, it merely represents the interest of developed states and their multinational companies in order to maintain the economic dominance in the rest of the world. The using hull formula as a standard for compensation might considered as an unfair rules based on four reasons. First, it will bring to justification that nationalisation or expropriation in international law is unlawful, therefore it has to be compensated. This will not really suitable to postcolonial context of expropriation, by which colonial related crimes was not counted. Second, the standard is too high and strict in comparison to the capacity of new born states, and it does not give any concession to the host state to consider other appropriate compensation standards. Third, it tends to breach the permanent sovereignty of states as firmly recognised in international law and lastly, it would have been concerned on an unbalance economic and political competition in leading to more fair and justice in the current international legal order.

Guideline', *East Asia Journal and International Law,* Vol 8, (1) 2016; and how such a postcolonial state faced domestic problem, see MYA Kadir, 'Revisiting Self-determination Conflict Settlements in Indonesia Context', *Indonesian Law Review*, Vol. 5 (2), 2015.

[48] This contest was clearly discussed in J T Gathii, 'War's Legacy in International Investment Law', 11 Int'l Comm. L. Rev. 353 2009; also seem MYA Kadir, ' The United Nations General Assembly Resolution (UNGAR) as a Source of International Law : Toward a Reformulation of Sources of International Law', Indonesian Journal of International Law, Vol.8, Number 2, January 2011, pp.275-290.

However the domination of former colonialist states to develop international law's norms, without fully taken into account the colonisation as a crime against humanity, and aspiration of postcolonial states, may create current unfairness treatment. While many postcolonial states remain divided and focused to their domestic issues, by which international law remains a political means of developed states.

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