

example, this draft Bill does not recognize farmer's right to sell his seed though this right is pivotal in the context of farmer's contribution to the production in Sri Lanka.

## Application of the Principle of Proportionality as a Tool for Investment Dispute Settlement

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### Abstract

Generally, foreign investment contracts are concluded mainly as long-term cross-border investments. As a result, unexpected non commercial risks, politically or legally, may arise during the period of its duration. To evade this fear, many bilateral and multilateral treaties are concluded with provisions on “no” expropriation without compensation and settlement through arbitration. This is because, nationalization or expropriation (directly or indirectly) of foreign property is the foremost governmental interference and it is considered as one of the most serious encroachments on property rights of foreign investor. Numerous tribunals and scholars have accepted that the host states could enjoy their sovereign rights in order to enhance socio-economic conditions, protect the environment and protect essential interest of the State during a state of emergency/economic crisis through adopting various regulatory measures. At the same time, host states are under compulsion to fulfil their contractual commitments which were given at the entry of investment. This situation makes it difficult for arbitrators to come to a conclusion whether regulatory measures tantamount to expropriation which prevent the use and enjoyment of the investors' property rights. In this regard, in order to come to a preferable solution, arbitrators try to apply the principle of proportionality as a method of investment dispute settlement particularly in expropriation cases. Thus, this principle has emerged as a tool in balancing different conflicts of interest in many legal orders and systems. Recently, ICSID arbitrators who seem to be attracted by the application of principle of proportionality have cited European Courts of Human Right (ECHR) and its case laws, and World Trade Organization (WTO) Jurisprudence. This principle has been

applied by ICSID tribunals after the *Tecmed v. The United Mexican State* award and subsequent arbitral awards such as *CMS v Argentina(2005)*, *LG&E v Argentina(2006)*, *Sampra v Argentina (2007)*, *Continental Casualty v Argentina (2008)*.

Further, the application of proportionality is considered as a desired method of resolving two different conflicts of interest. However, it is questionable how far the above perspectives have been taken into account effectively through the application of principle of proportionality. At the same time the principle of proportionality becomes important as it has treaty status and it is not a mere principle like others.

### Statement of Problem

The principle of proportionality is not a new phenomenon in international Law. Because of its practicability and flexibility, the proportionality principle is now widely spread in the field of human rights law, humanitarian law, criminal law and in the field of international trade through WTO laws. It plays a major role to determine the balance between two different conflicts of interests namely public interest and individual rights. According to Stone Sweet and Mathews (2008, pp. 76-77), the principle of proportionality consist of four tests such as ‘legitimacy’, ‘necessity’, ‘suitability’, and ‘balancing in the strict sense’. If the arbitrators satisfy these requirements, measures taken by the host state may be constitutional. However, there are doubts, whether arbitrators are in a position to analyze the legality of the governmental measures through applying criteria according to the particular treaty provision such as ‘public purpose’, ‘non-discrimination’, ‘due process’ and ‘compensation’ or the above mentioned four tests, or applying these two criteria at the same time to come to a preferable solution. Still, it is not clear how investment tribunals can justify their awards by applying these proportionality analyzing criteria in the investment disputes particularly in host states’ measures.

### Objectives of the Study

Therefore, this study tries to examine how the principle of proportionality is applied by arbitral tribunals to balance different conflicts of interests in the situation of expropriation of foreign property by host states. Further, this study will try to seek the answers for what is meant by the principle of proportionality, and compare and analyse this principle in the light of other jurisdictions such as ECHR and WTO jurisprudence. Furthermore, this study

will also analyze whether applying this principle as a tool for investment dispute settlement undermines the state sovereignty with recent decided case laws.

### Research Methodology

The necessary data and information for this research study is mainly collected through secondary sources. A number of published articles, books, journals, decided cases and international treaties have been used and analyzed to conduct this study. In addition, internet articles and web sites were also referred for this work. The major analytical method of the study is descriptive and qualitative.

## Tax Incentives and the Economic Development in Sri Lanka

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### Background and Objectives

The purpose of this paper is to analyze the effects of the use of tax incentives on economic development in Sri Lanka, based on a review of international best practices and some empirical evidence. Most of the countries offer direct and indirect tax incentives to encourage the development of the private sector, to improve their competitive position in today's global economy and to boost employment. Incentives that are capable of compensating for market failures are often seen as effective policy tools for achieving economic and social objectives, which are easy to be implemented.

Tax incentives can either be concessions, provisions or conditions made available to tax payers and aim to serve as motivators or encouragements that reduce the tax liability thereby lessening the tax burden on tax payers. Various types of tax incentives include exempted income, tax holidays, concessionary tax rates, reliefs, expenses, tax rebates, capital allowances, dividends and free zones, etc.