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INDIRECT EXPROPRIATION IN INVESTOR-STATE ARBITRATION

SOCIAL SCIENCES,
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VILNIUS, 2023

Mykolas Romeris University

MYKOLAS ROMERIS UNIVERSITY

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MYKOLO ROMERIO UNIVERSITETAS

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NETIESIOGINĖ EKSPROPRIACIJA INVESTUOTOJO – VALSTYBĖS ARBITRAŽE

Daktaro disertacija
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ACRONYMS AND ABBREVIATIONS

ARSIWA: UN Articles on State Responsibility for Internationally Wrongful Acts
ASEAN: Association of Southeast Asian Nations
BIT: bilateral investment treaty
CETA: Comprehensive Economic and Trade Agreement
CJEU: Court of Justice of the European Union
COMESA: Common Market for Eastern and Southern Africa
Convention: European Convention on Human Rights
CPTPP: Comprehensive and Progressive Trans-Pacific Partnership
EAC: East African Community
EC: European Commission
ECJ: European Court of Justice
ECHR: European Court on Human Rights
ECOWAS: Economic Community of West African States
ECT: Energy Charter Treaty
EU: European Union
FDI: foreign direct investment
FET: fair and equitable treatment
FTA: free trade agreement
GATT: General Agreement on Tariffs and Trade
ICC: International Chamber of Commerce
ICSID: International Centre for Settlement of Investment Disputes
ICSID Convention: Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA: international investment agreement
ISDS: investor – state dispute settlement
ITN: Investment Treaty News
MST: Minimum Standard of Treatment
MFN: most – favoured nation
NAFTA: North American Free Trade Agreement
OECD: Organisation for Economic Co-operation and Development
PCA: Permanent Court of Arbitration
RCEP: Regional Comprehensive Economic Partnership
SCC: Stockholm Chamber of Commerce
TFEU: Treaty on the Functioning of the European Union
UNCITRAL: United Nations Commission on International Trade Law
UNCTAD: United Nations Conference on Trade and Development
USMCA: United States–Mexico–Canada Agreement
VCLT: Vienna Convention on the Law of Treaties
WTO: World Trade Organization

INTRODUCTION

1. Research problem

It is common to begin studying a concept from its definition. This general truth does not work for indirect expropriation. The meaning of indirect expropriation and the protection afforded to international investors against indirect expropriatory conduct can rightly be said, […] to be *clearly ambiguous*.[1] This concept best defined through a negative – all the measures that substantially deprive foreign investors of their property rights and do not fall within the ambit of direct expropriation – or, to paraphrase the words of the legendary Y. Fortier and L. Drymer, "one knows it when one sees it".[2]

Expropriation as the State act against foreign investors has been known in international investment law for years. Previously, mostly due to nationalizations that took place in the 1970's and 1980's, the main type of expropriations was direct expropriation where the legal title of property was violated. However, today such cases are very rare and the absolute majority of them concern indirect expropriation.[3] It is usual for claims of indirect expropriation to be as high as hundreds of millions or even billions.

When this much is at stake, it could easily be assumed that a definition of 'indirect expropriation' can be provided without much difficulty. However, despite the constantly increasing number of cases concerning it, there is no precise definition of the concept or a list of measure that constitute it. As aptly summarized by the Tribunal in *Generation Ukraine v Ukraine* "[p]redictability is one of the most important objectives of any legal system. It would be useful if it were absolutely clear in advance whether particular events fall within the definition of an "indirect" expropriation. It would enhance the sentiment of respect for legitimate expectations if it were perfectly obvious why, in the context of a particular decision, an arbitral tribunal found that a governmental action or inaction crossed the line that defines acts amounting to an indirect expropriation. But there is no checklist, no mechanical test to achieve that purpose. The decisive considerations vary from case to case, depending not only on the specific facts of a grievance but also on the way the evidence is presented, and the legal bases pleaded. The outcome is a judgment, i. e. the product of discernment, and not the printout of a computer programme."[4]

Indirect expropriation occurs when a foreign investor is deprived of enjoying the

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1 L. Yves Fortier, Stepher L Drymer, "Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor", *ICSID Review- Foreign Investment Law Journal*, 19:2 (2004): 326.

2 Ibid.

3 Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protections and Regulatory Autonomy* (Cambridge University Press, 2015), 76.

4 Award of 2003 September 15 Generation Ukraine v Ukraine, ICSID Case No. ARB/00/9, para. 20.29.

benefits of its investment in violation of the rules defining the permissible legal expropriation. These criteria, which justify expropriation, are set out in investment treaties or legislation and serve as the main guidelines to arbitrators to begin the analysis of the potentially expropriatory measures. Lack of clear definition of indirect expropriation and thus lack of predictability being an obvious and important issue, modern investment treaties are constantly developing and including more and more criteria that shall be taken into account by the arbitrators. A comparison between 1996 Lithuania-Argentina BIT and 2011 Lithuania-India BIT is a good example. The former simply contains a statement that neither of the States shall nationalize, expropriate or take any other measures having the same effect unless it is for public purpose, non-discriminatory, in accordance with due process of law and a prompt, adequate as well as effective compensation is paid.[5] The latter on the other hand, is one of the 'modern generation' BITs and contains an additional annex dedicated solely to indirect expropriation which provides additional criteria such as economic impact, interference with reasonable expectations, the character of the measures and other.[6]

However, even though this non-exhaustive list does provide more certainty and serves as a guideline for arbitrators, it is not enough. Striking the right balance between the inventors' and States' interests remains a daunting task that the Tribunals are engaging into with each new case. As rightly explained by the *Saluka* Tribunal "[...]international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non – compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law."[7]

Over the time, several identifiable doctrines have developed. At the beginning of the indirect expropriation 'boom' the *sole effects* doctrine was often applied. According to it, indirect expropriation occurs whenever the rights of foreign investors to enjoy their property are violated regardless of the underlying reasons. The landmark case for this doctrine is *Santa Elena* where the Tribunal stated that regardless of how beneficial the new measure may be to the society as a whole, it has the exact same effect as other expropriatory acts and therefore constitutes indirect expropriation.[8]

Later, the *police powers* doctrine acquired an important place. According to it, it

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5 Lithuania-Argentina BIT (1996), checked 2021 October 4 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/103/download

6 Lithuania-India BIT (2011), checked 2021 March 6 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1574/download

7 Award of 2016 March 17 Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL Partial, para. 263.

8 Award of 2000 February 17 Compania del Desarrolo de Santa Elena and the Republic of Costa Rica, ICSID Case N. ARB/96/1, para. 72.

is an inherent power of State to regulate for the public interest, therefore, regulatory measures taken in the name of public interest cannot be considered as expropriatory act. However, strict application of the doctrine resulted in a backlash among foreign investors who felt that their investments abroad were not sufficiently protected and thus cross-border investments did or were likely to plummet. To mitigate the situation, the 'proportionality approach' emerged and took the spotlight. The aim of this approach is to find the middle ground and to strike the appropriate balance between the interests of foreign investors and States. The issue is that 'proportionality' as such is not a clearly defined concept, thus combined with the concept of 'indirect expropriation' may not lead far. The traditional proportionality analysis contains three steps: necessity, suitability and strict proportionality balancing (proportionality *stricto sensu*). However, tribunals tend not to follow this approach strictly and apply the steps selectively. In *Tecmed*, which was the first case that introduced the proportionality approach explicitly, the analysis was already methodologically flawed.

Indirect expropriation as the phenomenon of international law also triggers complex problems of how investors should be protected against violations of their rights in case of such wrongful action of the State. International investment law has been based on several basic investors' protection standards. These substantive protection standards which are usually guaranteed to foreign investors in international agreements include fair and equitable treatment (FET), full protection and security (FPS), most favorable nation (MFN), non-discrimination, umbrella clauses, transfer guarantees and others. One of the substantive standards is protection from indirect expropriation. In international law expropriation is permitted and is a prerogative accorded to all sovereign States. However, in order to be legitimate, it must comply with at least four customary requirements: expropriation must be for public purpose, in due process, non-discriminatory and a compensation to the foreign investor must be paid. Additional criteria may also be provided in the legal instruments. If any of these criteria is not complied with, expropriation should be deemed to be illegal. The vagueness of the mentioned standards triggers the problems what actual proportion is granted to the investors against indirect expropriation, and they should be applicable.

Another scientific problem related to investors' protection against indirect expropriation is how to protect their infringed rights. What are the procedural standards how investors should be protected against indirect expropriation? What are the damages suffered by the investor in such case? In order to encourage foreign investors to invest abroad, especially in under-developed States, a system of investment arbitration has been developed, which allows the investor to bring the dispute against the host State in international tribunals instead of submitting the dispute to State courts. It operates largely on bilateral investment treaties (BITs) or multilateral investment treaties often found in a form of broader cooperation treaties that also contain investment provisions (international investment agreements or IIAs). In practice, two or more States sign an international treaty which provides that a foreign investor will be able to sue the foreign State (also called host State) for breaches of that treaty. No involvement of the home State of the investor is needed. In the past, a foreign investor, seeking to

sue its host State, had to request diplomatic protection from its home State so that it would espouse the claim and sue the host State on the investor's behalf. For obvious reasons, such as potential political tensions, the system was not suitable to encourage trans-border investment.

An obvious limitation in the area of arbitration is lack of binding precedent or regulating institution that would oversee the coherence of the decisions. While the institutions such as International Centre of Settlement of International Disputes (ICSID), ICC (International Chamber of Commerce), LCIA (London Centre of International Arbitration) and others play an important role in promoting international arbitration, they only provide administrative services. The substantive legal part is an exclusive competence of the tribunals that are formed for each specific case. Unless the parties explicitly instruct the tribunal to take into account specific precedents, the tribunals are free to determine which, if any, precedents to follow. This naturally results in lack of coherence and predictability in the arbitral practice. As discussed in depth in this dissertation, while complete lack of coherence cannot be avoided in arbitration, there are ways to limit it.

What is more, the interpretative exercise of investment agreements often contains application of rather broad and general concepts such as customary international law or general principles of international law. The Tribunal in *Accession Mezzanine v Hungary* aptly summarized the current realities "[t]here are a few essential points to be made in this context. First, the interpretation and application of the BIT is governed by international law, as is any treaty, and the expropriation clause is, obviously, a key part of the BIT. Second, it may not be possible to consider the scope and content of the term "expropriation" in the BIT without considering customary and general principles of international law, as well as any other sources of international law in this area [. . .]. The BIT in this case, as in almost all cases, has no definition of "expropriation" within its text, nor does it contain guidelines that would assist the Tribunal in determining whether or not there has been a compensable taking of property". Expropriation has been and is now part of international law, and the change from dispute resolution under the system of diplomatic protection to investor-State arbitration has not modified that.

It is true that BITs have become the most reliable source of law in this area, as have the awards of ICSID, other investor-state tribunals acting under the UNCITRAL Arbitration Rules, and other modern-day tribunals, such as the Iran-U.S. Claims Tribunal, State practice, and writings of scholars. But that is not inconsistent with the continuing relevance of customary and general principles of international law, at least as to BIT obligations that are silent as to scope and content, as well as any other sources of international law with respect to expropriation."[9] Professor J. Viñuales rightly points out that it "reflects the tendency of tribunals to look at investment treaties as 'the most reliable source of law in this area' but, at the same time, it highlights that even for

9 Award 2013 January 16 Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezelo v Hungary, ICSID Case No ARB/12/3, Decision on Respondents Objection Under Arbitration Rule 41(5), paras 67–68.

questions that are addressed in investment treaties, such as expropriation, reference to customary law may still be necessary for interpretive purposes".[10]

Nowadays the ongoing changes in the dispute settlement between the State and investors face unprecedented challenges. After the landmark decision of the ECJ in *Achmea* case in which the court found that the arbitration clause in the international investment agreement between EU Member States is incompatible with the EU law, the protection of international investors against unlawful actions of the State has become as obscure as possible. Since EU law provides no other dispute settlement mechanisms for the State – investor disputes, the possible forums for such investment disputes, including indirect expropriation, remains unclear. In other words, the ECJ opened the vacuum in investment dispute settlement which has still not been filled up with concrete solutions how such disputes should be settled. This gap of protection of investors against unlawful actions of the State raises various problems in international investment law, such as how investors should protect their right in case of violation of their right to property? Which tribunals shall have jurisdiction to hear such disputes? Can or should the State courts be a possible forum to hear such disputes? These questions have been left unanswered after the *Achmea* judgment and everyone is still looking for the possible solutions in the legal doctrine. This post *Achmea* dispute settlement between the State and the investors in the EU Member States problem is analyzed in this thesis and the possible solution to this problem is also proposed.

The aim of this dissertation is to reveal the problems of regulation of this concept in international law and how the interests of the investors and States should be balanced in order to protect from indirect expropriation. This research seeks first to assess the concept of indirect expropriation and how the relevant substantive protection standards such as fair and equitable treatment (FET), are also relevant when trying to find clearer boundaries of the concept. The research analyzes the development of protection against indirect expropriation in international treaties with the special emphasis on the policy and protection to investor granted by the international investment protection treaties by the Republic of Lithuania. Also, the research deals with the procedural questions related to the actual protection of investors' rights in international investment law. One of the main problems which have emerged recently what are the possible settlement of State and investor disputes after the *Achmea* decisions in the EU. The procedural uncertainties left after this judgment are assessed in this work. To address this problem in detail the research also focuses on the possible application of the right to property established in the ECHR as protection against indirect expropriation.

The dissertation does not focus on the problems of indirect expropriation and protection of investors in the EU law. It focuses only on the sources of the public international law. The references for the EU law, such as the relevant case law of the CJEU (*Achmea* case) is important only for the analysis and presentation of the relevant problems in public international law.

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10 Jorge E Viñuales, "Too Many Butterflies? The Micro-Drivers of the International Investment Law System", *Oxford Journal of International Dispute Settlement*, 9 (2018): 649.

Furthermore, during the research and drafting process of this dissertation, the world faced an unprecedented challenge – the COVID 19 pandemic. It largely affected not only the society as a whole, but also the flows and dynamic of foreign investments and revealed the new trends in protection of investors against indirect expropriation. To protect public interests (public health) the States were forced to take measures drastically affecting property rights of foreign investors. The pandemic has slowed down the pace of treaty-making. As illustrated by Figure 1 taken from the annual UNCTAD Report, while at the end of 2020 2646 BITs were in force, only 21 new IIAs (6 BITs and 15 TIPs) were signed during that year and half of them were rollover agreements concluded by the United Kingdom following it leaving the European Union.[11] This signifies not only the likely reduction of cross-border investment, but also reduction of the likelihood of signature of new-generation BITs which usually include more detailed provisions on indirect expropriation.[12]

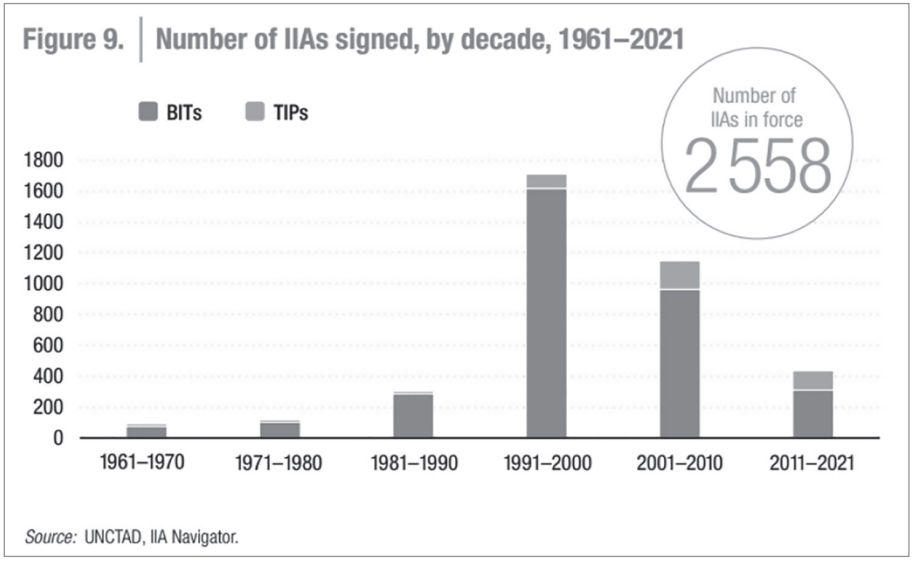

Figure 1: *IIA signing trends as of 2021*

As the same time, as illustrated by Figure 2 from the UNCTAD Report, the number of new ISDS cases in 2020 remained high. At least 68 new treaty-based cased are

11 CTAD Repot (2021), checked 2022 March 10 https://unctad.org/system/files/official-document/diaepcbinf2021d6_en.pdf.

12 UCTAD Report (2020), 94 checked 2021 October 8 https://unctad.org/system/files/official-document/wir2020_en.pdf

known to have been initiated.[13] Of course, the actual numbers are higher due to large number of arbitrations that remain confidential. In 2020 cases were initiated against 43 States, Peru and Croatia being the most frequent respondents.[14] The highest number of investors bringing cases against foreign States remains those from the US (10 Cases), the Netherlands (7 cases) and the United Kingdom (5 cases).[15]

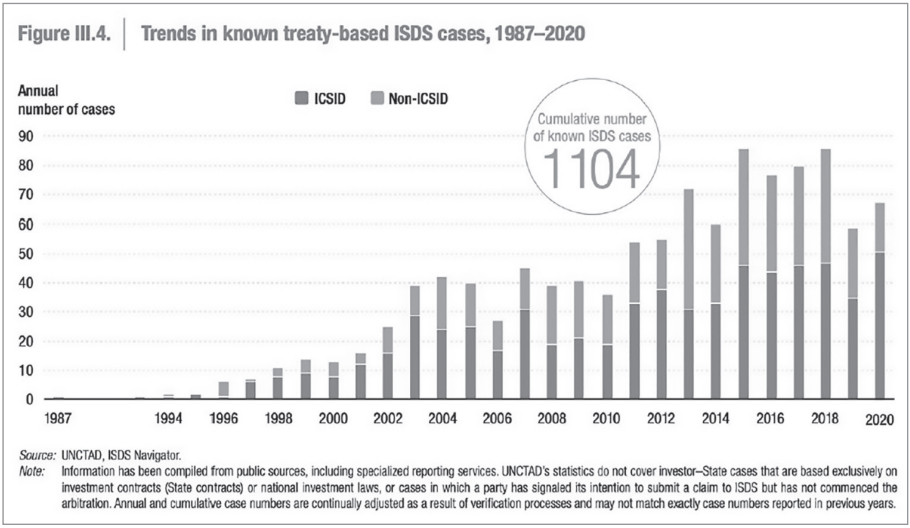

Figure 2: *ISDS trends as of 2020*

In addition to that, the process of modernization of the Energy Charter Treaty (ECT), one of the main instruments regulating investment in the energy sector, is currently ongoing. Several rounds of negotiations took place in the recent years. The aim of the process is to *inter alia* find definitions of "investor" and "investment", clarify the compensation mechanism, and, importantly, clarify substantive protection standards including expropriation. This naturally results in a situation where numerous tribunals are forced to interpret indirect expropriation provisions that, as agreed by numerous States participating in the modernization process, are not detailed enough. It is particularly interesting that despite these flaws, in 2020 the ECT was the IIA invoked most frequently.[16]

13 UNCTAD Report (2021), 122 checked 2022 March 5 https://unctad.org/system/files/official-document/wir2021_en.pdf p. 129.

14 Ibid., 129.

15 Ibid., 130.

16 Ibid.

2. Relevance

In 2002 Rudolph Dolzer, one of the leading commentators stated that "[i]t is not unreasonable to assume that the legal issues in the foreign investment context may, for the time being, be dominated by the definition of expropriation."[17] As confirmed by another leading commentator "this prophecy has materialized".[18]

The notion of indirect expropriation is a topic that ever since its introduction has never lost its relevance. Even today the international community is continuing to put effort in shedding light on it. The UNCITRAL Working Group 3 (WG III) is the international body under the auspices of the United Nations dealing with international investment law. In 2021 during the annual meeting one of the topics discussed was the notion of indirect expropriation. The aim was to address the uncertainties. For example, *Public Citizen*, a leading US civil society organization submitted to the WG III a recommendation in which it argued that "indirect expropriation" is one of the standards that has "proven dangerously elastic and favorable to foreign investors in a series of ISDS decisions in which governments have been ordered to pay compensation for non-discriminatory public interest policies" and thus recommended that IIAs must not grant investors rights beyond compensation for direct expropriation of real property. Terms providing "indirect expropriation" compensation rights and a guaranteed MST and related FET rights must be eliminated — as must enforcement mechanisms that empower foreign investors to avoid exhausting local remedies in domestic courts and instead bring claims in extra-judicial international arbitration venues.[19] The WG III continues to actively work on the issue.

The relevance of this research is revealed by the current international practice towards formation of policy of indirect expropriation in international and national law. As is seen, international organisations continue the pursuit for the development of the regulation of indirect expropriation. Furthermore, the emerging policy of States how to define indirect expropriation in the investment agreements should be assessed. As the concrete example of such policy development this research chose the Republic of Lithuania since in the recent years it has been involved in various disputes related to, *inter alia*, indirect expropriation and concluded new BITs which in more detail regulate the questions related to indirect expropriation and protection of investors' rights. Within the national context, the research is relevant to Lithuania because of its foreign policy objectives, one of which is to promote foreign investments. Lithuania consistently has been aiming to attract foreign direct and indirect investment. In the 17th annual agenda of the Government one of the aims is to promote foreign investment with

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17 Rudolf Dolzer, "Indirect Expropriations: New Developments?" *N.Y.U. Environmental Law Journal*, 64 (2002): 66.

18 L. Y. Fortier, L. Drymer, "ICSID Review", *Foreign Investment Law Journal*, 19(2) (2004): 293.

19 Recommendations for UN Working Group on Business and Human Rights (2021), checked 2022 January 5 https://www.ohchr.org/Documents/Issues/Business/WG/Submissions/CSOs/Public-Citizen-Recommendations-for-UN-Human-Rights-Working-Group.pdf

a particular emphasis on the US investors.[20] In its 18th annual agenda, the Government maintained the aim to attract more foreign investment. A particular emphasis is maintained on the US investors stating that "we shall aim to expand US investments into Lithuania's military, energetic and economic safety."[21] The US investors are among top-3 States by quantity whose investors bring indirect expropriation claims.[22] Therefore, it is likely that together with the increase of US investments, the number of indirect expropriation claims will also increase.

Moreover, there is a likelihood that Lithuania will be sued because of its decision to reduce tariffs for solar energy purchasing. Around a decade ago, Lithuania, due to economic circumstances, was forced to reduce the tariffs. While it has not been sued by foreign investors so far, other EU States that have taken similar or identical measures have. For example, Spain has had around 30 such cases so far and obtained unfavorable awards in the majority of them.

Lithuania is also currently a respondent in an ICSID arbitration. Claims that *inter alia* include a claim for expropriation were brought by *Veolia* corporation against the Republic of Lithuania.[23] Lithuania has initially submitted counter claims, however, following the *Achmea* ruling of the ECJ according to which intra-EU BITs are invalid, Lithuania withdrew its counterclaims and had submitted separate new claims largely based on these counterclaims to Lithuanian courts. The Supreme Court of Lithuania on 18 January 2022 found that, based on *Achmea* judgement, since Lithuania became a member of the European Union in 2004 the intra-EU BITs became invalid and therefore, the fact that an ICSID arbitration is currently ongoing cannot be perceived as an obstacle to engage with claims submitted to the courts of Lithuania.[24]

Another dangerous area is protection of national security interests through denial of licences to foreign investors. A good example is the recent decision by the Government to deny the renewal of the operating licence to *LiTak-Tak* based on the recommendation issued by the Lithuania's Coordinating Commission for the Protection of Objects Important for Ensuring National Security which declared that *LiTak-Tak*'s business was incompatible with the national security interests and denied the license to operate despite the fact that the company has already been operating in Lithuania for a long time. Following the decision, the Company was forced to shut down its operation in Lithuania and its main investors Valeriy Boguslavskiy and Sergiy Perevavov

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20 Lietuvos Respublikos užsienio reikalų ministerija, *XVII-osios Lietuvos Respublikos Vyriausybės programa (užsienio politikos dalis) atnaujinta 201 6m. gruodžio 13d*. (2016), checked 2020 April 18 http://www.urm.lt/default/lt/uzsienio-politika/naujienos-kalbos-publikacijos/LR-vyriausybes-programa-UP-dalis

21 Lietuvos Respublikos Seimas Nutarimas, dėl aštuonioliktosios Lietuvos Respublikos vyriausybės programos, 2020 m. gruodžio 11 d. Nr. XIV-72, Vilnius, punktas 263.1, checked 2021 October 15 https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/973c87403bc311eb8c97e01ffe050e1c

22 UNCTAD World Investment Report (2020): 130, checked 2021 April 8. https://unctad.org/system/files/official-document/wir2021_en.pdf

23 Veolia Environnement S.A. and others v. Republic of Lithuania (ICSID Case No. ARB/16/3).

24 Supreme Court of Lithuania, Judgement Civilinė byla Nr. e3K-3-121-916/2022, 18 January 2022.

have already issued a notice of intent to arbitrate at the ICSID under the UNCITRAL rules on 1 July 2021 which has launched the six-month cooling off period.[25] Protection of national security is a very sensitive matter, thus while this might be the first intent to arbitrate on this basis, it will likely not be the only one.

Lithuanian investors are also not shy of bringing investment arbitration disputes against foreign States.[26] In 2019 UAB Garsu Pasaulis initiated an arbitration at PCA based on UNCITRAL Rules. In 2020 Donatas Aleksandravicius initiated a case against the Kingdom of Denmark regarding a construction project.[27] The case was however discontinued. The submissions of the parties are not made public; however, it is likely to contain a claim for indirect expropriation. Moreover, in 2021 UAB Pavilniu Saules Slenis 14 and Modus grupe filed an ICSID claim against Belarus regarding a hotel construction project close to Vilnius airport.[28] Very recently Lithuanian nationals Vasilisa Ershova and Jegor Jeršov filed an ICSID arbitration claim under the ECT.[29]

Within the EU context, the topic is no less relevant. There have been ongoing negotiations with third parties regarding investment agreements. The European Commission has been leading negotiations with numerous third parties in order to achieve international investment agreements.[30] The European Commission has explicitly confirmed that all new treaties containing investment protection provisions should contain detailed provisions on indirect expropriation in order to guide the arbitrators when striking the balance between a non-compensable regulation and indirect expropriation. [31] The EU so far (August 2021) has signed 71 treaties with investment provisions (TIPs)[32], however, the provisions on indirect expropriation in all of them are far from uniform. For example, the EU-Vietnam Investment Protection Agreement that was signed in June of 2019 is accompanied by the whole Annex 4 on expropriation[33], while the EU-Singapore Investment Protection Agreement signed in October 2018 has

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25 Valeriy Boguslavskiy and Sergiy Perevavov v Lithuania, Notice of Intent (2021), checked 2022 January 8 https://jusmundi.com/en/document/other/en-litak-tak-v-republic-of-lithuania-notice-of-intent#other_document_20856

26 UAB Garsu Pasaulis v. The Kyrgyz Republic, PCA Case No. 2020-59.

27 Donatas Aleksandravicius v. Kingdom of Denmark (ICSID Case No. ARB/20/30).

28 UAB Pavilniu saules slenis 14 and UAB Modus grupe v. Republic of Belarus, ICSID Case No. ARB/21/2.

29 Vasilisa Ershova and Jegor Jeršov v. Republic of Bulgaria, ICSID Case No. ARB/22/29.

30 New Investment Protection Agreements, checked 2021 August 8 https://trade.ec.europa.eu/doclib/docs/2020/july/tradoc_158908.pdf

31 Europos komisija. *Investicijų apsauga bei investuotojų ir valstybės ginčų sprendimas pagal ES susitarimus,* (2013), checked 2021 August 9 http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_151988.pdf

32 UNCTAD International Investment Agreements Navigator, checked 2021 September 18 https://investmentpolicy.unctad.org/international-investment-agreements/groupings/28/eu-european-union-

33 EU-Vietnam Investment Protection Agreement signed on 30 June 2019 (not yet in force), checked 2021 March 9 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download

only the typical provision on indirect expropriation.[34]

The consequences of *Achmea* decision to the investors in Lithuania and other EU Member States also allow to argue that the possible venue for the disputes between the State and the investor may be the national courts. In such cases the problems of impartially and effective protection of investors' rights under international investment law may arise. Nevertheless, one may argue that the possible international protection standard against the violation of investors' rights, including against the indirect expropriation may be found in Article 1 of Protocol 1 of the ECHR which protect the right to property. The possible application of this right to property under the said article to the investments has not attracted much scholars' attention yet. However, the gap of protection of investors' rights after the *Achmea* decision may also allow to argue that such possibility becomes not illusionary, but relevant and the analysis of the application of such rights is needed.

Thus, it can be assumed that the need for scientific research of indirect expropriation is needed. This is evidenced not only but the relevant developments in the approach towards indirect expropriation, but also the international investment disputes and governmental policy of Lithuania and the European Union. In recent years, Lithuania has been involved in various disputes which to some extent also relate to expropriation. Though these disputes and their outcome may have a significant impact on the goals of the Government of the Republic of Lithuania to attract foreign investments, these problems have not been analyzed in Lithuanian legal doctrine and have attracted almost no attention yet.

3. Previous research

Investment arbitration has been attracting more and more attention in the last decades. However, the analysis of indirect expropriation in legal research is a rather new phenomenon. Until around a decade ago, indirect expropriation as one of the substantive standards was either analysed in forms of a book chapter or articles selecting a specific aspect of it. Nevertheless, while the publications dedicated solely to the topic of indirect expropriation used to be scarce, they recently began to multiply. Two monographs merit particular attention as they provide an exceptionally depth and full-rounded analysis of the concept of indirect expropriation. First, written in French by a French professor A. De Nantueil entitled "*L'Expropriation Indirecte en Droit International de L'Investissement*" and second written in English by Johanne M. Cox entitled "*Expropriation in Investment Treaty Arbitration*". The former provides a more philosophical analysis of the concept of indirect expropriation and its legal as well as philosophical foundations. The latter provides a more practical approach with plenty analysis of the treaty practice as well as jurisprudence. The two works are complimentary two each other and are relied upon heavily in this dissertation.

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34 EU-Singapore Investment Protection Agreement signed on 15 October 2018 (not yet in force), checked 2021 March 9 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download

Already in 2004 Jan Paulsson and Zachary Douglas began analyses of the concept of indirect expropriation in a book called "Arbitrating Foreign Investment Disputes".[35] In the chapter "Indirect Expropriation in Investment Treaty Arbitrations", the authors trace back to 1962 Professor Christie's works in which he found that "[i]t is evident that the question of what kind of interference short of outright expropriation constitutes a 'taking' under international law presents a situation where the common law method of base by case development is pre-eminently the best method, in fact probably the only method, of legal development."[36] The authors find that we are no closer to a precise definition of indirect expropriation since then. They essentially identify three points of controversy in decisions of investment tribunals on expropriation. First, the distinction between a factual taking attributable to the state that does not create international responsibility, on the one hand, and the breach of an obligation not to expropriate, on the other. Second, the nature of rights to property that can be the object of an indirect expropriation. Third, the test for a 'regulatory' expropriation. The authors based on case law analysis conclude that a possible basis for distinguishing between compensable and not compensable takings in a regulatory context is whether there is the frustration of the investor's legitimate expectations built on a reasonable reliance upon representations and undertakings by the Host State.[37] This "brief paper" as described by the authors themselves provide valuable ideas for further research that are taken into account in this dissertation.

In 2008 A. Reinisch edited a book on different standards of protection which contained a chapter on indirect expropriation entitled "Legality of Expropriations".[38] In the chapter he compared the legality requirement in various areas of international law with the legality requirement in IIAs and the interpretation given to the legality requirements in the practice of investment arbitration. It provides an in-depth analysis of each of the four criteria for legal expropriation. The author argues that despite the numerous additional issues that the tribunals deal with when analyzing whether State measures amount to expropriation, the four criteria is the core of every analysis. He also concludes based on the case-law that the tribunals engage into in a genuine investigation of whether the legality requirements are fulfilled. The only "public purpose" requirement may cause some difficulties since deference to States must be given, however, the invocations of States are usually not taken at face value.

In 2014 De Nantueil published a book "L'Expropriation Indirecte en Droit International de L'Investissement". According to A. De Nantueil neither the radical police powers doctrine, not the sole effects doctrine is the right approach to indirect expropriation. The main idea proposed by Professor De Nantueil is that not every

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35 Jan Paulsson, Zachary Douglas, *Indirect Expropriation in Investment Treaty Arbitrations, in Arbitrating foreign investment disputes* (Kluwer Law International, 2004): 145-158.

36 George C. Christie, "What Constitutes a Taking of Property under International Law?", *38 Brit YB Intl L* 307 (1962): 338.

37 Ibid. 158.

38 August Reinisch, *Legality of Expropriations* (Oxford University Press, 2008),171.

infringement of property rights amounts to indirect expropriation and thus there is no need to try to reinvent any new approached to indirect expropriation that would limit States' right to regulate. Instead, he proposes, the theory on indirect expropriation should focus on the *nature* of the violation of property rights. According to him, the only way to determine the nature of infringement, whether the infringement of rights is "normal" or "abnormal", one has to evaluate the character of the measure as the essential parameter of evaluation.[39] Professor's research concludes that currently the best way to ensure the equilibrium of rights of investors and States is to look at indirect expropriation in terms of the *nature* of the measure that results in infringement of property rights and not to "unreasonably complicate" the already obscure concept.[40] A. De Nantueil concludes that the concept of indirect expropriation as it is understood today reflects a satisfactory equilibrium between the interests of investors and those of States.[41] While the research on the concept of expropriation conducted by Professor A. De Nantueil is extremely thorough, the monograph was published in 2014, thus almost a decade ago. Many new significant developments occurred during this period and thus the research needs to be updated with new developments.

Gebhard Bucheler in his monograph "Proportionality in Investor-State Arbitration" published in 2015 analyses the concept of proportionality as a tool to balance the competing interests. He analyses in depth the roots of the principle of proportionality in invest arbitration and the development of it in arbitral jurisprudence. The author identifies that there are three factors to be taken into account before engaging into proportionality analysis: the rule of law, the risk of judicial law-making and the availability of a value system that is the core of the proportionality analysis. The author also provides a deep analysis from a purely public international point of view. He considers the role of general principles within the meaning of Article 38(1)(c) of the ICJ Statute and Article 31(3)(c) of the Vienna Convention on the Law of Treaties. While the monograph discusses the concept of proportionality in depth, its limited scope to only one approach to the expropriation analysis needs to supplemented with other approaches in order to obtain a holistic view.

Caroline Henckels in her book "Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy" published in 2018 provides a detailed study on how investment tribunals have been trying to balance the competing interests of foreign investors and host States. The author uses a comparative perspective and proposes a method that combines a proportionality analysis with an institutional approach as a standard of review. It is her belief that a modified proportionality analysis is the answer to the lack of coherence and certainty. Nevertheless, that affording due deference to host States would address the concerns of States that investment arbitration limits their autonomy to regulate.

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39 Arnaud De Nantueil, *L'Expropriation Indirecte en Droit International de L'Investissement* (Editions A. Pedone, 2013):583.

40 Ibid., 35

41 Ibid., 587.

Johanne M. Cox in her monograph entitled "Expropriation in Investment Treaty Arbitration" provides a thorough analysis on the concept of expropriation. Having in mind that it was published in 2019, the jurisprudence relied on by the author is relatively recent which makes it particularly relevant. What is particularly useful in the monograph is that the author analyzed a very large number is older and newer BITs. However, she did not take the opportunity to dwell deeper into their history and development which is discussed in this doctoral dissertation.

In Lithuania the most significant work on indirect expropriation is a sub-chapter in the monograph by Rimantas Daujotas *Tarptautinė Investicijų Teisė ir Arbitražas.*[42] The monograph covers the whole field of international investment law and thus the concept of indirect expropriation, only one of the substantive standards, in not analysed in depth. The author presents the concept of indirect expropriation through general overview rather than dwelling into details and analysing jurisprudence in detail. He also briefly presents the historical developments. There are also other Lithuanian others who have analyzed the general problems of investment disputes and protection of investor's property rights.[43]

Ying Zhu in the Article "Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?" published in Harvard Law Review provides an in-depth analysis of whether clarified indirect expropriation clauses are effective in preserving environmental regulatory space of host States.[44] The author has analyzed 118 international investment agreements and has concluded that indirect expropriation provisions in them can be grouped into three different models: (1) general environmental legislation affecting foreign investments; (2) specific environmental regulatory conduct targeting foreign investments; and (3) environmental rezoning regulation affecting land occupied by foreign investments. According to the author, a comparison among the three models shows that most of the treaties fail to identify, what *character* of an environmental measure should be considered in the determination of indirect expropriation and what kinds of *rare circumstances* can exempt legitimate regulations in the area of environmental protection from being considered expropriatory. One can only agree with these findings. Moreover, while Y. Zhu's scope of analysis is limited to environmental measures, the same conclusions are valid in other sectors. While clarified indirect expropriation clauses attempt to shed light on the concept of indirect expropriation, the generic terms applied in investment agreements leave a lot, if not too much, space for interpretation to investment arbitration tribunals.

To sum up, the previous research in the area of indirect expropriation have revealed that this are of investment law is highly debatable and raised various questions. There

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42 Rimantas Daujotas, *Tarptautinė Investicijų Teisė ir Arbitražas* (Vilnius, Eugrimas, 2015).

43 Inga Martinkutė, doctoral thesis „The Interplay between National Property Law and International Law on Investment Protection in Investment Arbitration" (National University of Singapore, 2019).

44 Ying Zhu, "Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?", *Harvard International Law Journal* 60(2) (2019):377-416.

is still no clear consensus in legal doctrine what is exactly indirect expropriation and how this concept should be defined. Also, the previous research in this area focused on the issues of proportionality of expropriation and under which circumstances this state actions is compatible with the standards of international law. However, the development of international investment law and the newly emerging questions of indirect expropriation still require substantial research in this area.

4. The purpose, tasks of the research and the defensive statements

The purpose of this research is to reveal and ascertain the standards of the protection of investors' rights in international investment law in case of indirect expropriation and propose scientific solutions to ensure effective protection of investors' rights against indirect expropriation.

To implement the purpose of the research, the following tasks shall be accomplished:

1. To identify and analyse the concept of indirect expropriation in international investment law and reveal the problems of the notion of an investment.
2. To analyse the expropriation clauses in investment treaties and other sources including the governmental policy and international investment treaties entered into by the Republic of Lithuania to establish what State measures constitute indirect expropriation;
3. To assess the development of international customary law related to indirect expropriation and the compensation mechanisms against such wrongful actions of the State;
4. To analyse the possible application of the right to property under the Convention as the investors' defense mechanism against indirect expropriation after *Achmea* decision and assess whether such defence is compatible with the relevant rules of customary international law;
5. To identify the current unsettled trends of customary international law in the development of protection against indirect expropriation in international investment law.

The author proposes two defensive statements in this dissertation:

1. The concept of indirect expropriation lacks clear and unanimous definition in international investment law and should be established by using inductive case-by-case approach.
2. The rights of investors violated by indirect expropriation may be effectively protected by applying the standards of the right to property established under the Convention and the case law of the ECHR.

5. Methodology

The research is guided by the philosophical doctrine of legal realism. Legal realism arose as a movement between 1920s and 1930s in the US.[45] It challenged the view that judges are rational decision-makers who apply strictly only legal rules to the case at hand. Relists suggested that judges as human beings make up their minds about the case before turning to the legal rules, that their personality, personal and policy views necessarily play a role in their decision-making.[46]

Legal realism plays a crucial role in arbitration.[47] The main difference from national or international court proceedings and arbitration is that the parties are free to choose the arbitrators that they wish to see on the panel and whose decisions they shall perceive as binding. The choice of arbitrators is not made in blind. The arbitrators are chosen because of their views on various issues, their publicly expressed views and previous decisions made in other cases. The is a belief that they will not change their views and remain consistent for the case at hand. Thomas Schulz, a professor and arbitrator, not bluntly argues that arbitrators often chose a position on certain legal issues, and it is no secret that they are chosen because of those radical positions. Despite the reputational benefits, there are clear economic incentives of being "picked and picked again".[48]

The research uses exclusively qualitative research methods.

The textual analysis method is the main method used in this dissertation. It is largely used to analyze the texts of international investment agreements as well as jurisprudence of arbitral tribunals, the two being the main source of the research.

The comparative method is also widely used. It is a particularly useful method to compare the texts of different investment agreements. The main text in all investment agreements is largely similar, especially when it comes to substantive protection standards. Therefore, each tweak inserted by the parties is of great importance to better understand the will of the parties. This, combined with the historical method often allows to also identify the reasons for the chosen particular language.

The case study method can also be found in this dissertation. It is particularly relevant in relation to the proportionality analysis which involves several steps. The case study method allows to demonstrate how these steps were followed in several selected cases and draw general conclusions from it.

Finally, the generalization method is applied in this research. In international law no State operates in a vacuum and all of them have social and economic ties, especially when it comes to cross-border investment. Generalization method allows to identify trends, such as new-generation BIT practice, and make informed guesses on the future developments.

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45 Vitalius Tumonis, "Legal Realism & Judicial Decision-making", *Jurisprudence* 19(4) (2012):1362.

46 Ibid.

47 Thomas Schultz, "Arbitral Decision-Making: Legal Realism and Law & Economics", *Journal of International Dispute Settlement*, 6 (2015):1.

48 Ibid., 18.

6. Structure of dissertation

The dissertation is divided into five main chapters.

The first chapter aims to flesh out the very concepts of indirect expropriation. It explains why even the very definition of indirect expropriation is problematic and how it differs from direct expropriation. Nevertheless, through the historical analysis method it sets out the history of legal efforts to codify the concept and reveals why even though the need for more clarity has been evident for decades it is still not fully defined to this day.

The second chapter covers analysis of the development of international investment treaty law. It focuses on the legal basis for investment disputes – the international investment agreements such as BITs and FTAs. It explains how this type of legal instrument came into existence and what are the typical expropriation clauses in them. The sub-chapter 3 develops on modern expropriation clauses that are becoming more and more prevalent in new-generation BITs. They are of crucial importance for bringing more coherence and predictability into the tribunals' decision making in the area of indirect expropriation. A special focus is given to the relevant international treaties entered into by the Republic of Lithuania. This chapter analyses the relevant provisions international investment treaties entered into by the Republic of Lithuania and what standards of the protection of investors are established in them. The special focus is given to the relevant provisions of indirect expropriation established in two international treaties, such as the BITs concluded with Turkey and India. The author analyses whether these new general BITs are compatible with the global standards of protection of investors rights against indirect expropriation.

The third chapter analyses and synthesizes the main jurisprudence that defines the concept of indirect expropriation. It first sets out the four customary law criteria for legality of expropriations (public purpose, non-discrimination, due process and compensation) and explains how each criterion has been interpreted by the tribunals. Then the three doctrines (sole effects, police powers and proportionality) applied by the tribunals and their effects are analysed. The requirements of substantiality and permanency that are crucial to find expropriation are analysed in more depth separately. Finally, the tangible result to a claimant for illegal expropriation – compensation, is examined.

The fourth chapter aims to suggest the possible to solution to the protection of investors in the Member States of the EU after *Achmea* decision. This chapter poses the questions whether the protection of investors against indirect expropriation can be provided by the national courts and direct application of Article 1 of 1 of the Convention. This possible solution to this legal gap problem has not been provided in the legal doctrine so far. This chapter explains how the position on indirect expropriation has developed in the case law of the ECHR. Article 1 of Protocol 1of Convention prohibits expropriation. The relevant case law of the ECHR serves as an important source of inspiration for numerous arbitral tribunals including that in the *James* case that is considered to be the first case explicitly introducing the principle of proportionality

into investor-State arbitration. This chapter addresses three fundamental question related to the possible direct application of the Article 1 of Protocol 1of the Convention in case of indirect expropriation: first, it answers whether investment may fall under the notion of property (possession) under the said article, second, it analyses whether this article may provide effective protection against indirect expropriation, third, it assesses whether the standards of compensation for the breach of this article are compatible with the international customary law related to the principle of full compensation against the wrongful acts of the State.

The fifth and final chapter analyses how all the research can be applied within the context of current issues which pose important questions whether the traditional rules of customary international law can meet the contemporaneous challenges in case of indirect expropriation. Two main issues have been identified during the course of the preparation of the dissertation – indirect expropriation and protection of public health (the COVID 19 pandemic) and the impact military actions in Ukraine in 2014 and elsewhere to the jurisdiction of arbitral tribunals to head the disputes related to indirect expropriation.

1. CONCEPT OF EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW

The analysis of indirect expropriation should be started by analysing what expropriation actually means in the contemporary international investment law. There is no one universal definition of what does the notion of expropriation actually means and this vagueness lead to the practical problems how to identify whether the expropriation has actually taken place. To reveal the meaning of this concept it is also needed to define the concept of protected investment, analyse the types of expropriation in international investment law. To reveal the meaning of these concepts the relevant international treaties and case law of the investment tribunals are assessed in this chapter.

1.1. Concept of protected investments

The first step in any expropriation analysis is determination of assets that are eligible to be expropriated.[49] Similarly for this research, the analysis of the concept of protected investments is also relevant since it directly relates to the objectives of this research. The explanation of the notion of protected investments allows to assess what objects are protected under international investment law against unlawful expropriation.

The object of protected rights can be anything having an economic value provided that it corresponds to the "investment" definition provided in the BIT or other investment instrument.[50] BITs usually provide so-called 'encompass-all' definition of an investment such 'claims to money or to any performance having an economic value'.[51]

The notion of protected investment has been also analyzed in the practice of international tribunals. The Tribunal in *Tokios Tokelės v Ukraine* found that the ordinary meaning of "every kind of asset" as an investment "for which "an investor of one Contracting Party" caused money or effort to be expended and from which a return or profit is expected in the territory of the other Contracting Party."[52] Similarly, according to an UNCTAD study, a treaty which states that "investment includes 'every kind of asset' suggest[s] that the term embraces everything of economic value, virtually without limitation."[53] It further develops that where a treaty contains language including "claims to money or any other claim under contract having an economic/a financial value," such a treaty provides an explicit textual basis for concluding that the

49 Ying Zhu, "Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?", *Harvard International Law Journal* 60(2) (2019):381.

50 Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2010): 23.

51 Article 1(1)(c) of German Model BIT (1991).

52 Award of 2004 April 29 Tokios Tokelės v. Ukraine Case No. ARB/02/18, para. 75.

53 UNCTAD, International Investment Agreements: Key Issues, United Nations, New York and Geneva, volume I, 2004

term 'investment' embraces all types of contractual rights.[54] What is more, the Tribunal in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan* has explicitly acknowledged that "the reference to 'every kind of asset' is '[p]ossibly the broadest' among similar general definitions contained in BIT's."[55] This broad definition acknowledges that the concept of 'investment' is dynamic and may evolve over time.[56]

Because the definition of investment is so vast, it is usually followed by a list of specific examples as to what constitute an investment. The lists contained in the BITs are usually non-exhaustive and therefore only serve as guidelines as to what falls under the scope of protection. A typical example is Japan-Cote D'Ivoire BIT which provides that the term "investment" includes inter alia tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.[57]

It is generally accepted that it is the substance of the transaction as opposed to its mere form that reveals whether any investment was made.[58] Thus, we may argue that the notion of protected investments should be understood in essence as any objects of property irrespective of their nature. The current state practice reveals that international investment law protects various object against unlawful expropriation and though in some cases the state may provide the list of the property object which are protected under the investment treaty, such list often is "all-inclusive" and includes basically any objects. Nevertheless, in some instance, the state practice also reveals that some additional criteria for the protected investment may be applicable which may serve as identification of specific object which are protected and what objects are excluded from the protection against unlawful expropriation.

1.1.1. An additional prior authorization, registration or approval requirement

Some BITs also add that investment that investments need to be 'accepted' under the national law of the Host State.[59] Some go even further and state that the treaty protections cover only 'registered' or 'approved' investments. It is particularity prevalent in Southern Asia.[60] The requirement of registration or approval stems from the

54 Ibid., 120.

55 Award of 2005 November 11 Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, para. 113.

56 Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2015), 453.

57 Article 1 (a) (ix) of Japan – Cote D'Ivoire BIT (2020).

58 Award of 2006 October 2 ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, para 32.5.

59 Article 1(1) of the Philippines-Argentina BIT (1999).

60 International Institute for Sustainable Development, "Registration and Approval Requirements in Investment Treaties", Best Practices Series (2012), 2, checked 2021 March 7 https://www.iisd.org/system/files/publications/best_practices_registration_requirements.pdf

planned economic models used by many developing States in the 1960s and 1070s.[61]

The requirement of prior approval while rarely encountered is particularly beneficial to Host States. It requires investors wishing to potentially benefit from substantial protections to "identify themselves". This allows States to exercise qualitative control on the types of investments which are to be protected and promoted[62] and, more generally, to track their potential liabilities. It is especially relevant for poor States, since it is not uncommon that a State becomes aware of the existence of an investment through the notification of a dispute related to it. Another reason to include a registration requirement is to simply reflect at the international level the requirements that exist in domestic level.[63]

Historically, in relations between a South Asian State and a Western State only the former required an approval of investments while the latter not.[64] However, there were exceptions where States that would not use planned economic model would still require an approval of foreign investment. For example, the Indonesia-Denmark BIT of 1968 provided that:

"Article II

The protection accorded to investors by the provisions of this Agreement shall apply:

a) in the territory of the Republic of Indonesia only to investments which have been approved by the Indonesian Government in accordance with the foreign investment legislation currently in force (Law No. 1 of the year 1967);
b) in the territory of Denmark only to investments which have been made consistent with the Danish exchange regulations currently in force (Order No. 199 of June 20th, 1961) *and declared by the Danish Ministry of Foreign Affairs to be covered by the present Agreement.*"[65]

The requirement of approval is not limited to the BITs. The ASEAN Agreement of 1987 also contained this requirement. Its Article 1I(l) provided that the investment must be "specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement." Under Article 11(3), an investment made prior to the entry into force of the Agreement for the host State is only covered by the Agreement if it was "specifically approved in writing and

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61 Ibid.

62 Award of 2008 February 6 Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, para. 106.

63 International Institute for Sustainable Development, "Registration and Approval Requirements in Investment Treaties", Best Practices Series (2012).

64 Article 9 of Belgium-Indonesia BIT (1970): "The protection accorded to investors by the provisions of the present Agreement shall apply: (a) in the territory of the Republic of Indonesia only to investments which have been approved by the Government of the Republic of Indonesia pursuant to the stipulations contained in the Foreign Investment law No. 1 of 1967 or other relevant laws and regulations of the Republic of Indonesia; (b) in the territory of the Kingdom of Belgium only to investments which have been made consistent with the relevant laws and regulations of the Kingdom of Belgium."

65 Article 2 of Indonesia-Denmark BIT (1968).

registered by the host country and upon such conditions as it deems fit for the purpose of this Agreement subsequent in its entry into force." Already in the first ASEAN arbitration the Tribunal had to interpret this provision.[66] The Tribunal in *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar* found that "the mere fact that an approval and registration earlier given by the host State continued to be operative after the entry into force of the 1987 ASEAN Agreement for that State is not sufficient" and that a new explicit approval of investment after the entry into force of Agreement was needed for the investment to fall within the scope of protection.[67] An issue of what kind of approval is necessary for an investment to be a qualified investment arose in *Desert Line v Yemen*.[68] The Tribunal found that "[a]s far as concerns the issue of the certificate, the threshold inquiry is whether Article 1(1) corresponds to mere formalism or to some material objective. The Arbitral Tribunal has no hesitation in opting for the second alternative. A purely formal requirement would by definition advance no real interest of either signatory State: to the contrary, it would constitute an artificial trap depriving investors of the very protection the BIT was intended to provide."[69]

The issue with formulation of the approval requirement as it was in the 1987 ASEAN Agreement is that it would not clarify how and by whom (which authority) it should be done for an investment to be covered by the agreement. This was remedied in the new ASEAN Comprehensive Investment Agreement of 2009 (the "2009 ACIA"). Article 4(a) of the 2009 ACIA stated that in order to be a "covered investment", it had to be, *inter alia*, "specifically approved in writing (FN1) by the competent authority of a Member State" and an Annex 1 on Approval in Writing has been annexed.[70]

Usually, the requirement for approval or acceptance is accompanied with the qualification of it being in accordance with States' laws and regulations. Absent such qualification it is even more unclear how the process of approval should be led. The Tribunal in *Desert Line v Yemen* faced this issue and reasoned that "the notion of "investment

66 Award 2003 March 31 Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1.

67 Ibid. para. 60.

68 Award of 2008 February 6 Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17.

69 Ibid. para. 106.

70 The 2009 ACIA, Annex 1 Approval in Writing
Where specific approval in writing is required for covered investments by a Member State's domestic laws, regulations and national policies, that Member State shall:
(a) inform all the other Member States through the ASEAN Secretariat of the contact details of its competent authority responsible for granting such approval;
(b) in the case of an incomplete application, identify and notify the applicant in writing within 1 month from the date of receipt of such application of all the additional information that is required;
(c) inform the applicant in writing that the investment has been specifically approved or denied within 4 months from the date of receipt of complete application by the competent authority; and
(d) in the case an application is denied, inform the applicant in writing of the reasons for such denial. The applicant shall have the opportunity of submitting, at that applicant's discretion, a new application.

certificate," as opposed to that of "accepted," is not qualified by the words "according to its laws and regulations." This means that the certificate requirement falls to be interpreted and understood in a general sense, in light of the objectives of the BIT."[71]

This development of state practice concerning which investments are protected against unlawful expropriation suggests that the states are free to decide additional requirements which certain property objects may be protected. The idea of excluding certain assets from legal protection reveals the state policy to restrict protection of investment in its territory. This restriction may be regarded as the control of the state to decide what may be the scope of its obligations towards the investors. Though such state practices to impose additional requirements for the investment may not be regarded as universal, in some regions such practice remains relevant. Also, these requirements for the investment are relevant in case the dispute between the state and the investor arises since in such case the tribunal may first assess whether the investment actually met the additional requirements to be identified as investment.

1.1.2. Covered Investments under the International Treaties

Within the context of the Convention the concept of property protected by Article 1 of Protocol No.1 is very broad. It has been held by the ECHR to fall within the scope of protection: movable and immovable property shares[72], patents[73], arbitration awards[74], the entitlement to pension, a landlord's entitlement to rent, exercise of a profession, a clientele of a cinema etc.[75]

Art 25 of the ICSID Convention provides that "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment […]". The Tribunal in *Salini v Morocco* case interpreted the article as requiring four elements for a transaction to be considered as investment: a contribution, a certain duration, assumption of risk, contribution to the economic development of the host State.[76] The interpretation was largely endorsed by investment tribunals and is sometimes perceived as the objective definition of an investment. The ICSID Convention itself does not refer to these criteria, nor do the majority of the BITs, however the influence of the given

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71 Award of 2008 February 6 Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, para. 107.

72 Judgment of ECHR of 1983 December 12 in case Bramelid and Malmsrom v Sweden, applications No. 8588/79, 8589/79.

73 Judgment of ECHR of 1990 October 4 in case Smith Kline and French Laboratories v the Netherlands, application No. 12633/87.

74 Judgment of ECHR of 1994 December 9 in case Stran Greek Refineries and Stratis Andreadis v Greece, application No. 13427/87.

75 Council of Europe Monica Carss-Frisk A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights, Human Rights Handbook No 4 (2003), 6.

76 Award of 2001 July 31 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, para 52.

interpretation to Article 25 is so strong that some novel treaties begin referring to the Salini criteria.

For example, CETA Article 8-1 refers to commitment of capital or other resources, a certain duration, an assumption of risk, and an "*expectation of gain or profit*". It wisely omits the imprecise criterion of contribution to the development of the host State that has generated a lot of discussion. RCEP also provides that "investment means every kind of asset that an investor owns or controls, directly or indirectly, and that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gains or profits, or the assumption of risk."[77]

CETA definition investment provides for "every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;
(b) shares, stocks and other forms of equity participation in an enterprise;
(c) bonds, debentures and other debt instruments of an enterprise;
(d) a loan to an enterprise;
(e) any other kind of interest in an enterprise;
(f) an interest arising from:
    (i) a concession conferred pursuant to the law of a Party or under a contract, including to search for, cultivate, extract or exploit natural resources, (ii) a turnkey, construction, production or revenue-sharing contract; or (iii) other similar contracts;
(g) intellectual property rights;
(h) other moveable property, tangible or intangible, or immovable property and related rights;
(i) claims to money or claims to performance under a contract.

For greater certainty, claims to money does not include:

    (i) claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party.
    (ii) the domestic financing of such contracts; or
    (iii) any order, judgment, or arbitral award related to sub-subparagraph (i) or (ii).

Returns that are invested shall be treated as investments. Any alteration of the form in which assets are invested or reinvested does not affect their qualification as investment"[78]

NAFTA of 1992 that entered into force in 1994, provides an exhaustive list of

77 Article 10.1 of RCEP Chapter 10.

78 Article 8.1 of CETA.

assets that constitute protected investments. In Article 1139 it provides that "investment means:

(a) an enterprise;
(b) an equity security of an enterprise;
(c) a debt security of an enterprise
    (i) where the enterprise is an affiliate of the investor, or
    (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;
(d) a loan to an enterprise
    (i) where the enterprise is an affiliate of the investor, or
    (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;
(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
    (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
    (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from
    (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
    (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
(j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h)".

ASEAN Comprehensive Investment Agreement provides for a non-exhaustive list of protected assets. Article 4 of this agreement provides that "investment" means every kind of asset, owned or controlled, by an investor, including but not limited to the following:

    (i) movable and immovable property and other property rights such as mortgages, liens or pledges;
    (ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived therefrom;

(iii) intellectual property rights which are conferred pursuant to the laws and regulations of each Member State;
(iv) claims to money or to any contractual performance related to a business and having financial value;
(v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and(vi) business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources. The term "investment" also includes amounts yielded by investments, in particular, profits, interest, capital gains, dividend, royalties and fees. Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment;"

In sum, states are free to determine what kind of property ought to be protected, therefore different treaties have different definitions of what constitutes a protected investment. Nowadays, under the absolute majority of investment protection treaties tangible as well as non-tangible property can constitute a protected investment. Importantly, no exhaustive list and only examples of what may constitute an investment are provided. This leaves a rather broad margin of interpretation for investment tribunals to determine case-by-case what constitutes a protected investment. The notion of investment and objects which may fall under this definition obviously require more deeper legal analysis. However, the analysis of the notion of investment is not the aim of this thesis. However, these general conclusions related to the notion of investment are relevant for this thesis to determine what investments should be protected against indirect expropriation.

1.2. Types of expropriation

A starting point of analysis of the concept of expropriation is distinction between direct and indirect expropriation. Once it is determined that no direct expropriation took place, it can be analyzed whether indirect expropriation occurred. However, the question arises how to determine whether indirect expropriation has taken place? What are the factual and legal criteria which would allow to conclude that the rights of the investor may have been violated? Nowadays, claims for direct expropriation are rather rare, however the number of claims for indirect expropriation is growing. The identification of types of expropriation may be a great challenge not only in legal research, but also in investment arbitration disputes since the border line between these types of expropriation is many cases pale. Thus, to reveal the problems associated with indirect expropriation in international investment law it is first relevant in this research to assess what are these types of expropriation and how may be separated.

1.2.1. Direct expropriation

Direct expropriation entails the transfer of title as well as physical taking or seizure of property by a host State.[79] Nowadays direct expropriation has become rare.[80] Yet, sometimes such claims, although usually accompanied by indirect expropriation claims as well, are still brought. For example, in *Garanti Koza v Turkmenistan* claimant argued that Turkmenistan directly expropriated its investment when it "seized" the factory, terminated the contract and the Turkmen courts issued "wrongful judgements".[81]

Direct expropriation refers to takings of property where the title of the property is directly taken[82] or, in other words, the property of a private person is forcibly transferred to the benefit of the State or another private person.[83]

Direct expropriation is clearly identifiable at the moment the action is executed. Indirect expropriation, *au contraire*, is identifiable by its effects *ex post facto*. It does not involve an official transfer of the title, yet produces the exact same effects. It is therefore impossible to qualify *a priori* measures that would result in indirect expropriation.

In *Sempra* the tribunal explained that in order for an action to constitute direct expropriation, at least some essential component of the property right must have been transferred to a different beneficiary, in particular to the State.[84] In that case, the Tribunal found that while it could be argued that "economic benefits may have to some extent been transferred from the industry to consumers, or from the industry to another industrial sector, and that this will ultimately benefit society and the State as a whole. This does not, however, amount to an effect upon a legal element of the property held, such as title to property".[85] The Tribunal in Enron following the same line found that "there can [not] be a direct form of expropriation if at least some essential components of property rights have not been transferred to a different beneficiary, in particular the State".[86]

In cases of alleged direct expropriation, the difficult question is usually not the

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79 Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 44.

80 Brigitte Stern, "In search of the frontiers of Indirect expropriation", *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2007): 29.

81 Award of 2016 December 16 of Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, paras. 253-255.

82 Award 2008 July 24 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, para. 454.

83 L. Yves Fortier, Stepher L Drymer, "Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor", *ICSID Review- Foreign Investment Law Journal*, 19:2 (2004): 297.

84 Award of 2007 September 2007 Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, para. 280.

85 Ibid.

86 Award of 2004 January 14 Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, para. 243.

proof of the expropriation, but the legality of the expropriation and in particular, whether the appropriate compensation had been paid.[87]

1.2.1.1. Specific takings

A type of direct expropriation is specific takings. Specific takings concern situation in which a foreign firm or a specific lot of land are targeted by the State.[88] In *Ioannis Kardassopoulos v. Georgia* it was found that the case presented a "classic case of direct expropriation" through Decree No. 178.[89] The case concerned the actions of Georgia in respect of the interests held by the claimants in an investment seeking to develop an oil pipeline to transfer from the Azeri oil fields on the Caspian Sea through Georgia to the Black Sea (also known as the "Western Route").[90] The Western Route was of crucial importance to Georgia as a means of securing its sovereignty following the breakup of the Soviet Union and establishing stronger ties with the West.[91] The Tribunal accepted the argument that expropriation was in public interest since "the development of Georgia's oil pipeline infrastructure was of crucial national importance to the country's political independence in the region and its economic development".[92] It also found that "There was a broader context to the expropriation of GTI's rights, namely the need to find someone who could deliver a pipeline solution on a scale required to satisfy the prevailing geopolitical and economic concerns of Georgia during the mid-1990s. Considered in this light, Georgia's decision to pursue an arrangement with AIOC, even at the expense of the Claimants, may be understood as a decision taken in the public interest […]".[93]

1.2.1.2. Nationalization

While most treaties refer to nationalization *or* expropriation, nationalization is generally understood to be a form of expropriation.[94] Nationalization can be defined as "expropriation of one or more major national resources as part of a general programme of social and economic reform".[95]

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87 Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 42.

88 Ibid., 44.

89 Award of 2010 March 3 Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18, para. 387.

90 Ibid., para. 2.

91 Ibid., para. 3.

92 Ibid., para. 391.

93 Ibid., 392.

94 Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 42; Award of 1987 July 14 Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited, IUSCT Case No. 56.

95 James Crawford, Brownlie's Principles of Public International Law, (Oxford University Press, 2019), 532.

In *Barcelona Traction* after legal proceedings the shares of the company were annulled and new shares were issued. These new shares were later sold to a Spanish Company. As pointed out by Judge Gros, this situation may seem like nationalization. He stated that "[o]ne cannot but observe how an industrial undertaking which nobody claimed to be Spanish before 1948 became Spanish, against the will of the corporate organs of Barcelona Traction, as a result of acts characterized as a denial of justice both overall and in detail. In fact, the undertaking is today incorporated into the economy of Spain by a sort of 'nationalization' which, if it was effected by a misuse of legal procedure, constitutes a breach of international law between the parties".[96] While, the Court did not have a chance to get deeper into the question of taking, as it found in favor of preliminary objections, in his separate opinion Judge Fitzmaurice briefly noted that the acts appeared "to have had the character of disguised expropriation of the undertaking".[97]

Today there is a new wave of nationalizations in the gas sector in certain South American States such as Bolivia and Venezuela.[98]

1.2.1.3. Confiscation

There is some confusion as to whether confiscation, which constitutes the seizure of property as a punishment for breach of law, constitutes expropriation.[99] Investment treaties rarely refer to confiscation and the jurisprudence on this is issue is scarce.

Iran-Greece BIT of 2000 briefly mentions that "Investments of investors of either Contracting Party shall not be nationalized, confiscated, r subject to any other measure having equivalent effect […]".[100]

A successful expropriation claim for expropriation as a result of confiscation was brought in *Sedelmayer v Russ*ia.[101] Claimant argued that as a result of the Directive issued by the President, while Respondent submitted that the seizure of property was a result of implementing court orders and was in line with the Russian legislation.[102] The Tribunal found that confiscation of property falls under the category of "measures of expropriation or other measures with similar effects" in the relevant BIT and thus that the investor is entitled to compensation under the BIT.[103] The Tribunal reasoned that

96 Judgment of the ICJ of 1979 February 5 Barcelona Traction I.C.J. Reports 1970, p. 3, Separate opinion of Gross.

97 Judgment of the ICJ of 1979 February 5 Barcelona Traction I.C.J. Reports 1970, p. 3, Separate opinion of Fitzmaurice.

98 Brigitte Stern, "In search of the frontiers of Indirect expropriation", *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2007): 29.

99 Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 50.

100 Greece-Italy BIT (2000).

101 Award of 1998 July 7 Mr. Franz Sedelmayer v Russia, Award, SCC case No. 106/1998, IIC 106.

102 Ibid., 67.

103 Art 4(1) of Russia – Germany BIT (1989).

whether the measures were in line with the Russian legislation was irrelevant, since according to the Treaty, an investor is entitled to compensation even if expropriation measures are for public purpose and in line with the relevant legislation.[104]

It must be noted that direct and indirect expropriation is closely related. Direct expropriation of the company's assets is capable of constituting indirect expropriation of the shareholding as well. It is so because the taking or destruction of the company's assets entails that it is not capable to generate value for the shares in the future which means that the consequences for the shareholders are permanent. [105]

The Iran-US claims tribunal in its jurisprudence usually refers to indirect expropriation as de facto expropriation as opposed to de jure expropriation. This terminology, however, is rarely employed by other tribunals.

1.2.2. Indirect expropriation

In principle, the main difference between direct and indirect expropriation is than in the case of the latter, the legal title of the investor to the investment remains unchanged while in case of direct expropriation the very title is lost. However, in certain situations, especially in cases of creeping expropriation, the line between direct and indirect expropriation claims is not always clear cut.[106]

International investment agreements usually do not provide definitions of expropriation and several different terms are used to define the substance of the measures concerned.[107] While the disparity of terms exist and some tribunals in the past dwelled into the linguistic analysis of the terms overall, it does not appear that the terminological disparities introduce divergence between the applicable legal regimes.[108] Sometimes the term used is "*measures* equivalent to expropriation" while elsewhere the term used is "measures having the *effect* equivalent to expropriation". Regardless of the phrasing difference, it is usually held to be the same thing.[109] In *ADC v Hungary*, the State unsuccessfully argued that the term "deprivation" is narrower than the term "expropriation" and that therefore the case law related to expropriation shall not relevant when interpreting the term "depriving measures".[110]

Prof. A. de Nantueil also argues that while terminologically there is a slight mismatch

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104 Award of 1998 July 7 Mr. Franz Sedelmayer v Russia, Award, SCC case No. 106/1998, IIC 106, para. 71.

105 Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2010), 426.

106 Award of 2016 December 16 Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, para. 370: "Garanti Koza's claim of creeping expropriation is basically the same claim as the direct expropriation claim and fails for the same reason".

107 Brigitte Stern, "In search of the frontiers of Indirect expropriation", *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2007):30.

108 A de Nanteuil, L'expropriation indirecte en droit international de l'investissement (Pedone 2014), 9.

109 Ibid., 10.

110 Award of 2006 October 2 ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, para. 385-386.

as to what falls under the scope of the term indirect expropriation, 'measures having the effect equivalent to expropriation', 'de facto expropriation', 'regulatory takings' and 'creeping expropriation' all fall under the umbrella of the notion of indirect expropriation.[111] Redfern and Hunter also use the terms of 'indirect', 'de facto' and 'creeping expropriation' interchangeably.[112]

NAFTA Article 1110 refers to measures "tantamount to nationalization or expropriation", The ECT Article 13 mentions measures "having the effect equivalent to nationalization or expropriation". Most tribunals, although some reluctantly,[113] regard these expressions as synonymous to the term of indirect expropriation. however, the tribunal is *Waste Management* interpreted the expression "tantamount to nationalization or expropriation" as adding to the reference to indirect expropriation.[114] According to the tribunal in *Waste Management* « [a]n indirect expropriation is still a taking of property. By contrast where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant."[115] However, the subsequent tribunals did not follow the view. For example, the tribunal in *Pope & Talbot* explicitly stated that "tantamount" means nothing more than equivalent. Something that is equivalent cannot logically encompass more."[116] The same was repeated in *S.D. Myers* that "tantamount" is to be considered as "equivalent" to expropriation and that "both words require a tribunal to look at the substance of what has occurred and not only form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure".[117] Furthermore, the tribunal added that it "considers that the drafters of the NAFTA intended the word "tantamount" to embrace the concept of so-called "creeping expropriation", rather than to expand the internationally accepted scope of the term expropriation".[118]

B. Stern argues that reference to measures tantamount to expropriation often

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111 A de Nanteuil, L'expropriation indirecte en droit international de l'investissement (Pedone 2014), 9.

112 Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2015), 471.

113 Award 2003 September 16 Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, para. 20.19: "The formulation in the first sentence of Article III(1) is somewhat circular by prohibiting an expropriation by measures tantamount to expropriation. Nevertheless, it is perfectly clear that the State Parties to the BIT envisaged that both direct and indirect forms of expropriation are to be covered by Article III".

114 Award of 2004 April 30 Waste Management, Inc. v. United Mexican States ('Number 2'), ICSID Case No. ARB(AF)/00/3, paras. 143-144.

115 Ibid. para. 143.

116 Award of 2000 June 26 Pope & Talbot v. Government of Canada, UNCITRAL, para. 104.

117 Award of 2000 November 13 S.D. Myers, Inc. v. Government of Canada, UNCITRAL, para. 232.

118 Ibid. 286

complexifies the "simple dichotomy" between direct and indirect expropriation.[119] She compares Article IV of the US – Argentina BIT[120] and Article IV in Greece – Egypt BIT[121] to demonstrate that there appears to be two different types of formulation. One emphasizes the equivalence of the measure itself and the other the equivalence of the effect. However, she concludes that the difference is only formal and not a substantive one and that indirect expropriation is probably best characterized by *its effect* equivalent to direct expropriation.[122]

In *Parkerings v Lithuania* the tribunal found that "*[d]e facto* expropriation (or indirect expropriation) is not clearly defined in treaties, but can be understood as the negative effect of government measures on the investor's property rights, which does not involve a transfer of property but a deprivation of the enjoyment of the property".[123]

In the Anglo-Saxon law the term "taking" is often used.[124] The term "compensation for takings" is used in the U.S. Constitution.[125]

The Tribunal in *Lauder v Czech Republic* elaborated on the issue of terminology and stated that "[t]he Bilateral Investment Treaties (hereinafter: "BITs") generally do not define the term of expropriation and nationalization, or any of the other terms denoting similar measures of forced dispossession ("dispossession", "taking", "deprivation", or "privation"). Furthermore, the practice shows that although the various terms may be used either alone or in combination, most often no distinctions have been attempted between the general concept of dispossession and the specific form thereof".[126]

The intention behind indirectly expropriated property is not limited to the mere gain of property belonging to a foreign investor. In fact, it is rarely present and other such as political goals are more common. Therefore, indirect expropriation should not be perceived as merely "disguised" direct expropriation.[127]

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119 Brigitte Stern, "In search of the frontiers of Indirect expropriation", *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2007): 32.

120 "Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation.") […]".

121 "Investments by investors of either Contracting Party shall not be *expropriated, nationalized* or subjected to any *other measure the effects of which would be tantamount to expropriation or nationalization* in the territory of the other Contracting Party except under the following conditions […]"

122 Brigitte Stern, "In search of the frontiers of Indirect expropriation", Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2007): 33-34.

123 Award of 2007 September 11 Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, para. 437.

124 Brigitte Stern, "In search of the frontiers of Indirect expropriation", *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2007):30.

125 Fifth Amendment to the U.S. Constitution.

126 Award of 2001 September 3 Ronald S. Lauder v. The Czech Republic, UNCITRAL, para. 200.

127 Brigitte Stern, "In search of the frontiers of Indirect expropriation", *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2007): 37.

1.2.3. Creeping expropriation

Creeping expropriation refers to the accumulation of acts that taken together have the effect of indirect expropriation. If taken separately, such acts would not necessarily constitute expropriation.[128] Therefore, "if one or two events in [a] series [of measures] can readily be identified as those that destroyed the investment's value, then to speak about a creeping expropriation may be misleading."[129]

Higgins suggests that creeping expropriation is the same as what is in literature called "indirect takings".[130] Linguistic analysis of typical BIT phrases also demonstrates that creeping expropriation is a type of indirect expropriation. For example, Israel-UAE BIT provides that "indirect expropriation occurs if a measure *or* series of measures […]" affect the investment.[131]

The tribunal in *Generation Ukraine* adopted the following definition "Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State *over a period of time* culminate in the expropriatory taking of such property".[132] It also rightly noted that "although international precedents on indirect expropriation are plentiful, it is difficult to find many cases that fall squarely into the more specific paradigm of creeping expropriation."[133]

In practice, the creeping expropriation approach is typically employed when no single measure in itself is found expropriatory. Therefore, when investors plead individualized and creeping cases of expropriation, one should begin the analysis with a measure-by-measure approach.[134] The tribunal in *Burlington* when relied on *Vivendi II* and stated that "[t]he term "even if" implies that the collective approach is to be applied only after an individualized analysis has resulted in a finding of no expropriation."[135]

1.2.4. Main types of indirect expropriation

Indirect expropriation can be committed in different ways by different actors. While in most cases it is the legislative branch of the State whose conduct results in

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128 Award of 2015 December 17 Oxus Gold plc v. Republic of Uzbekistan, UNCITRAL, para. 740.

129 W. Michael Reisman, Robert D. Sloane, "Indirect Expropriation and its Valuation in the BIT Generation", *British Yearbook of International Law* 115 (2004):115.

130 Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Collected Courses of the Hague Academy of International Law (1982), 322.

131 Article 2(b) of Israel – UAE BIT (2020) Annex A (Expropriation).

132 Award of 2003 September 16 of Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, para. 20.22.

133 Ibid.

134 Award of 2017 February 7 of Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, para. 345.

135 Ibid., 346.

expropriatory actions (regulatory expropriation), in certain circumstances the actions of the judiciary may also be deemed expropriatory (judicial expropriation). Moreover, a State acting through one of its organs, may expropriate the rights of foreign investors by interfering with their exercise of rights protected under a contract (contractual expropriation). These three types of expropriation discussed in this section are the main types of expropriation encountered in the majority of investment arbitration claims, however, there is no exhaustive list of what acts can constitute indirect expropriation. This provides a large margin of appreciation to investment tribunals when interpreting investment treaties.

1.2.4.1. Regulatory takings (compensable takings and non-compensable regulations)

It is important to accord a particular place to the notion of regulatory takings.[136] It relates to such measures as taxation, environmental and health regulations, industry-specific regulations, import and export regulations, currency control and others. The right of foreign investors to the protection of their investment often conflicts with the right of State to regulate within its boundaries.[137] Yet, striking a balance is not easy. On one hand the community cannot reasonably be required to bear the normal commercial risks associated with foreign investments. On the other hand, foreign investors should not be asked to endure unreasonable regulation without compensation. A regulation that goes too far should be recognized as a taking.[138] Regulatory taking is broadly used term that comes from the American jurisprudence such as *Pennsylvania Coal CO. V. Mahon*.[139] The expression, however, is suitable for types of indirect expropriation that constitutes takings by a general State regulatory measure, such as environmental or economical regulations.[140]

The doctrine of regulatory takings has been largely developed by the US Supreme Court. The notion refers to the dispossessions following general regulatory activities of a State that leads to depriving an investor of his property. [141]

The risk attributed to regulatory takings is largely the same concerning national or foreign investors, however while the former can use protections stemming from the national laws, the latter can benefit from conventional protections or contracts and can

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136 Andrew Newcombe, "The Boundaries of Regulatory Expropriation in International Law", *ICSID Review FILJ* 20(1) (2005):1-57; August Reinisch, *Legality of Expropriations* (Oxford University Press, 2008): 171.

137 L.Yves Fortier, Stepher L Drymer, "Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor", *ICSID Review- Foreign Investment Law Journal*, 19:2 (2004): 298.

138 Ibid.

139 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

140 A de Nanteuil, L'expropriation indirecte en droit international de l'investissement (Pedone, 2014), 360.

141 A de Nanteuil, L'expropriation indirecte en droit international de l'investissement (Pedone, 2014), 11.

have recourse to international arbitration.[142]

UNCTAD in its report stated that, according to police powers doctrine, certain acts of States are not subject to compensation under the international law of expropriation. While there is no universally accepted definition, this doctrine covers State acts such as (a) forfeiture or a fine to punish or suppress crime; (b) seizure of property by way of taxation; (c) legislation restricting the use of property, including planning, environment, safety, health and the concomitant restrictions to property rights; and (d) defence against external threats, destruction of property of neutrals as a consequence of military operations and the taking of enemy property as part payment of reparation for the consequences of an illegal war.[143]

In order to clarify situation, most modern BITs contain provisions that unless in rare circumstances, regulatory measures shall not be regarded as expropriation. For example, Djibouti - Turkey BIT in Article 6(2) "Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation".[144] J. Cox explains that such provisions in investment treaties clarify that it is the severity of the measures that play the main role in deciding whether a measure constitutes expropriation. If, in light of its purpose, a measure cannot be perceived as having been adopted and applied in good faith, then it shall constitute expropriation.[145]

The Tribunal in S.D. Myers drew a distinction between actions that do and do not amount to expropriation: "Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs."[146]

In a very recent case *of Olympic Enterntainment Group v Ukraine* the claimants argued that the Gambling Ban Law enacted in Ukraine expropriated their investment. The State, on the other hand alleged that it was a valid exercise of police powers. The Tribunal began its analysis by stating that the BIT did not include any express reference to the police powers doctrine, however since neither of the parties contested that the doctrine was applicable, it looked at the customary rules.[147]

In *Azurix v Argentina* the Tribunal when interpreting the BIT pointed out that "the BIT would require that investments not be expropriated except for a public purpose

142 Brigitte Stern, "In search of the frontiers of Indirect expropriation", Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2007): 29.

143 Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 152-153.

144 Djibouti-Turkey BIT (2013), checked 2021 March 16 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6089/downloadn

145 Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 154.

146 Award of 2000 November 13 S.D. Myers, Inc. v. Government of Canada, UNCITRAL, para. 282.

147 Award of 2021 April 15 Olympic Entertainment Group AS v. Ukraine, PCA Case No. 2019-18.

and that there be compensation if such expropriation takes place and, at the same time, regulatory measures that may be tantamount to expropriation would not give rise to a claim for compensation if taken for a public purpose".[148] Arguably this distinction does not bring clarify, but rather introduces even more confusion. As explained by Judge Higgins, whether in case of a taking for public purpose or regulation, the owner suffers loss. Any regulation amounting to a taking would still need to be 'for a public purpose' as opposed to private interest and therefore a compensation would be due.[149]

Academic opinion appears to be settled that a lawful exercise of State powers does not amount to expropriation. The leading international law expert Professor Ian Brownlie opined that "State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation." [150] The same principle can also be found in the *Third Restatement of the Foreign Relations Law of United States* 1987 which is often referred to as a formula of reference and which by some is considered to reflect customary international law.[151] It states that "[a] state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory.".[152]

The arbitral practice largely follows the same line. *Pope & Talbot* found that "a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation."[153] In the same vein *Tecmed v Mexico* tribunal opined that " ... we find no principle stating that regulatory administrative actions are *per se* excluded from the scope of the Agreement, even if they are beneficial to society as a whole – such as environmental protection – particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever."[154] What is more, *El Paso v Argentina* clearly

148 Award of 2006 July 14 Azurix Corp. v Argentine Republic, ICSID Case No. ARB/01/12, para. 311.

149 Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Collected Courses of the Hague Academy of International Law (1982), 331.

150 James Crawford, Brownlie's Principles of Public International Law, (Oxford University Press, 2019), 532.

151 Award of 2006 April 27 El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, para 238.

152 American Law Institute, *Restatement of the Law Third*, 2 (1987), 712.

153 Award of 2000 June 26 Pope & Talbot Inc. v. The Government of Canada, UNCITRAL (NAFTA), para. 99.

154 Award of 2003 May 29 Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, (ICSID Case No. ARB(AF)/00/2), para. 121.

stated that "as a matter of principle, general regulations do not amount to indirect expropriation".[155]

Overall, regulatory expropriation is the main and the broadest type of expropriation. It is only natural, because it covers the vast majority of State measures related to such areas as taxation, environment, public health, economy, pharmaceuticals and others. In addition to that, legislative measures can take many forms: laws, decrees, regulations, acts and others. It is difficult to predict which State measures may be deemed to be expropriatory as the test for regulatory expropriation is case-by-case and fact specific.[156] The test is becoming cleared with each new case, however, which factors (their weight) and in which combination will be applied remains to be decided by each tribunal separately.

1.2.4.2. Judicial expropriation

International arbitral tribunals are not appellate bodies for decisions of national courts. Their jurisdiction is completely distinct. However, national courts are part of the State apparatus and it does not matter that they function independently from the legislative of executive powers of the State. Art. 4 of the ARSIWA provides that a State is responsible for a conduct of its organs thus including the national courts. Therefore, in certain rare circumstances decisions taken by national courts may amount to expropriation in international law.

That international courts and tribunals are not bound by the decisions of national courts was also confirmed by the ICJ in the Diallo case. It found that "*Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.*"[157]

A question may arise whether exhaustion of local remedies, which usually implies bringing unsuccessful claims all the way to the highest national court whose decisions are not susceptible to appeal, is necessary for a successful claim of judicial expropriation. While the majority of tribunals tend to believe that it is not required, the position on this question is not yet fully settled. For example, in *Loewen v USA* the Tribunal found that exhaustion of remedies was necessary because it provides an opportunity for national judicial system fix a potential violation of international law.[158] However, in *Generation Ukraine* the Tribunal dismissed this proposition and put an emphasis on the quality, i.e. it is the reasonableness to exhaustion of local remedies that is

155 Award of 2006 April 27 El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, para. 236.

156 Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 168.

157 Judgment of ICJ of 30 November 2010 Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo, ICJ Reports 2010, p. 639, para. 70.

158 Award of 2003 June 26 Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, para. 156.

determinative and not its exhaustion as such.[159] The Tribunal in *Saipem v Bangladesh* endorsed this reasoning and made clear that exhaustion of local remedies is not a necessary precondition for an international tribunal to find expropriation.[160]

Denial of justice is one way for judicial expropriation to occur. It forms part of the FET standard and thus makes the two interrelated. In *Loewen v USA* the Tribunal found that an expropriation claim could only succeed if a denial of justice had been proven.[161] Similarly the *MNSS BV v Montenegro* Tribunal found that judicial expropriation is only possible in circumstances of denial of justice.[162]

The UK Courts have long held that ICSID awards and judgements deriving from them[163] were possessions.[164]

It is generally accepted that seizure of property as a result of normal domestic legal process does not amount to expropriation under international law unless there is an element of serious and fundamental impropriety about the legal process.[165] Also, in the words of *Middle East Cement*, "normally a seizure and auction ordered by the national courts do not qualify as a taking" unless "they are not taken 'under due process of law."[166]

In *Stran Greek Refineries and Stratis Andreadis v Greece* a company ("Stran") entered into a contract with the Greek State under which Stran was to build a crude oil refinery near Athens. The project stagnated because the State failed to fulfil its obligations inter alia to provide a suitable piece of land. What is more, after a change of government in Greece from a military regime to democracy, the new government regarded the decree allowing Mr Andreadis, the sole owner of Stran, to import $58 millions to fiancé the scheme as prejudicial to the national economy and thus terminated this "preferential" contract.[167] Stran brought action before the national courts for the grievances to its investment.[168] However, Article 27 of the contract between Stran and the State contained an *ad hoc* arbitration clause and based on it Greece challenged the

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159 Award of 2003 September 15 Generation Ukraine v Ukraine, ICSID Case No. ARB/00/9, para. 20.30.

160 Award of 9 June 2009 Saipem v Bangladesh, ICSID Case No. ARB/05/7, para. 181.

161 Award of 2003 June 26 Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3.

162 Award of 2016 May 4 MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8.

163 In the UK under section 1 of the Arbitration (International Investment Disputes) Act 1966 all ICSID judgments in order to be enforced must be registered in the High Court

164 AIG Capital Partners Inc & Anor. v Kazakhstan [2005] EWHC 2239 (Comm), [2006] 1 WLR 1420, [2006] WLR 1420, paras. 87, 95(5).

165 Award of 2016 December 19 Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, para 365.

166 Award of 2002 April 12 Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, para. 139.

167 Judgment of ECHR of 1994 December 9 in case Stran Greek Refineries and Stratis Andreadis v Greece. Petition No. 13427/87, paras 7-9.

168 Ibid., para. 10.

jurisdiction of its national courts. The court rejected the State's submission and continued with the proceedings. Yet, Greece nevertheless also filed an arbitration petition. Stran participated in the proceedings, appointed an arbitrator and requested alternatively to either stay the proceedings or to rebut the State's arguments on the merits.[169] The Tribunal rendered its decision and found that the responsibility for the losses was shared 70% for Greece and 30% for the company.[170] Stran sought the enforcement of the award, however the Court stayed the proceedings pending the conclusion of the court proceedings already initiated by Stran. After lengthy proceedings at all the instances, the Court of Cassation declared the arbitration award void.[171] The applicants submitted to the ECtHR that they *inter alia* have been expropriated of their possessions – the property rights in their favor recognized by the judgement of the Athens Court of First Instance and by the arbitration award. The Court found that the claimants were expropriated of their rights and that "The State was therefore under a duty to pay the applicants the sums awarded against it at the conclusion of the arbitration procedure, a procedure for which it had itself opted and the validity of which had been accepted until the day of the hearing in the Court of Cassation."[172]

In the *AIG Capital* the Tribunal drew a clear distinction by saying that "[t]he case is entirely unlike the *Stran Greek Refineries case* where the Greek government passed legislation *after* the award to render it invalid and unenforceable."[173]

It is generally accepted that when the parties choose a seat of arbitration, they accept the jurisdiction of the local courts in aid and control of arbitration.[174] It is also accepted that the judiciary is supposed to be independent and free to act as it seems suitable. However, where is the line between the freedom of the judiciary to make determinations and acting so outrageously so that it would amount to denial of justice or in the *Saipem* case - expropriation? In *Saipem v Bangladesh* an Italian company *Saipem* entered into a contract with the Bangladesh Oil Gas and Mineral Corporation (Petrobangla), a State entity, to build a pipeline carrying condensate and gas in various locations of the north east Bangladesh. The project was sponsored by the World Bank and largely financed by the international Development Association.[175] The dispute arose when the completion of the project was delayed. The parties blamed the delay on each other. Later, additional issues regarding the payment and the compensation for the delay arose. In order to sort out these issues Saipem referred the dispute to ICC arbitration as per the arbitral clause in the contract. During the proceedings

169 Ibid., para. 12.

170 Ibid., para. 13.

171 Ibid., para. 23.

172 Ibid., para. 73.

173 AIG Capital Partners Inc & Anor. v Kazakhstan [2005] EWHC 2239 (Comm), [2006] 1 WLR 1420, [2006] WLR 1420, para. 87.

174 No such problem does not occur in ICSID which is considered to be a *sui generis* system.

175 Award of 2009 June 30 Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, para. 7.

several Petrobangla's procedural requests were denied. Due to this, Petrobangla approached the courts of Bangladesh seeking revocation of the ICC Tribunal's authority based on alleged misconduct of the arbitrators. Later Petrobangla applied to the Supreme Court of Bangladesh seeking an injunction restraining Saipem from proceeding with the ICC arbitration and an injunction was granted for a period of eight weeks.[176] The stay was later prolonged and finally the Judge of Dhaka issued a decision revoking the authority of the ICC Tribunal due to improper conduct of the proceedings.[177] Still, the ICC Tribunal decided to resume the proceedings arguing that "revocation of the authority of the ICC Arbitral Tribunal by the Bangladeshi courts was contrary to the general principles governing international arbitration".[178] Yet again Petrobangla sought an injunction restraining Saipem from pursuing the ICC Arbitration which was granted and confirmed several times.[179] Despite national courts' decisions, the arbitration continued and an award for a breach of contractual obligations was issued against Petrobangla. Petrobangla filed an application for annulment of the award. The Supreme Court of Bangladesh found that the Award "[was] a nullity in the eye of the law" because allegedly the Tribunal had no jurisdiction since its authority had been revoked by the previous decisions of Bangladeshi courts.[180] Saipem, therefore, filed an ICSID claim arguing *inter alia* that the actions of Bangladesh constituted an expropriation within the meaning of Article 5 of the Italy-Bangladesh BIT.[181] Saipem submitted that Petrobangla's alleged unlawful disruption of the ICC Arbitration, the alleged interference by the domestic courts with the Arbitration, and the *de facto* annulment of the ICC Award deprived *Saipem* of the sums awarded to it by the ICC Award, and thus amount to an illegal expropriation.[182] The Tribunal found no reason to consider why a judicial act could not result in expropriation since there was no such limitation in the

176 Ibid., para. 37.

177 Ibid., para. 40.

178 Ibid., para. 45.

179 Ibid., para. 47.

180 Ibid., para. 50.

181 In para. 120 of the Award it is summarised that Saipem contended to be deprived of: "(i) its right to arbitration of its disputes with Petrobangla; (ii) the right to payment of the amounts due under the Contract as ascertained in the ICC Award; (iii) the rights arising under the ICC Award, including the right to obtain its recognition and enforcement in Bangladesh and abroad; and therefore (iv) the residual value of its investment in Bangladesh at the time of the ICC Award, consisting of its credits under the Contract. All these matters are facets of the same issue. The focus of the Claimant's case is that its right to payment under the Contract as ascertained by, and incorporated in, the ICC Award has been expropriated by the unlawful decisions of the Bangladeshi Courts that revoked the authority of the ICC arbitrators and declared the ICC Award null and void, thus precluding its enforcement in Bangladesh or elsewhere. The net result of all this was, obviously, to deprive the Claimant of the compensation for its investment."

182 Award of 2009 June 30 Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, para. 129

relevant BIT.[183] It supported this finding by a reference to the ECtHR jurisprudence.[184]

The Tribunal also added that "To avoid any ambiguity, the Tribunal stresses that Saipem's claim does not deal with the courts' regular exercise of their power to rule over annulment or setting aside proceedings of an award rendered within their jurisdiction. It deals with the court's alleged wrongful interference."[185] As a clarification, in *Burlington v Ecuador* the Tribunal found it important to emphasize that in Saipem v Bangladesh the expropriation of the right to collect the proceeds of the sales of the apartments was established *only after* finding that the claimants had been deprived of the "effective use and control" of the property rights in the investment.[186]

Saipem v Bangladesh was heavily relied on by the claimant in *GEA Group Aktiengesellschaft v Ukraine* where it argued that the failure to recognize and enforce an ICC award by the Ukrainian courts constituted expropriation under German-Ukraine BIT.[187] The Tribunal acknowledged that "most cases of expropriation result from action by the executive or legislative arm of a State, a taking by the judicial arm of the State may also amount to an expropriation"[188]. However, drew a clear distinction between the two situations. Non-enforcement in itself does not constitute expropriation, however, the actions of the Bangladeshi courts reached the threshold of egregiousness and thus amounted to expropriation. In the GEA Group case, the courts were properly applying the Ukrainian law and no egregious behavior aiming to harm the claimant took place.[189]

In *Loewen v USA*, "an important and extremely difficult case" as described by the Tribunal itself,[190] the claimant argued that a US court verdict constituted, *inter alia*, expropriation under Article 1110 NAFTA. The case at the US courts in Mississippi, a state with long history of racial tensions, concerned a funeral homes' owner O'Keefe suing the Loewen Group International Inc., a Canadian company, and its US subsidiary (together called "Loewen") owned by Roger Loewen for interference with its business. The action was heard by an African-American judge and a jury. Twelve of the jurors were African-American.[191] The jury awarded O'Keefe $500 million damages, including $75 million damages for emotional distress and $400 million punitive damages. According to claimants, during the trial O'Keefe's team was allowed to make

183 Ibid., para. 132.

184 Judgment of the ECHR of 2003 September 24 in case Allard v. Sweden, application No. 35179/97.

185 Award of 2009 June 30 Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, para. 155.

186 Award of 2010 June 2 Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)), para. 480.

187 Award of 2011 March 31 GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16.

188 Ibid., para. 702.

189 Ibid., para. 234-236.

190 Award of 2003 June 26 Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, para. 1.

191 Explicitly noted by the Tribunal in para 3 of the award.

"extensive irrelevant and highly prejudicial" refences to Loewen's foreign nationality[192], race and class-based distinctions between Loewen and O'Keefe. Nevertheless, the judge refused to give instruction to the jury to disregard those references for being impermissible.[193] When Loewen sought to appeal the verdict and judgement, it was faced with the Mississippi law requirement to pay an appeal bond for 125% of the judgement. The bond may be reduced or dispensed with for "good cause", however it was refused to do by the trial and Supreme courts and the claimant was left with the requirement to pay a $625 million bond within seven days in order to stay the execution and file an appeal.[194] "under extreme duress" the claimant agreed to settle the suit for $175 million. The claimant therefore filed an arbitration claim for NAFTA violations committed primarily by the State of Mississippi in course of litigation. The claimant argued *inter alia* that "the discriminatory conduct, the excessive verdict, the denial of Loewen's right to appeal and the coerced settlement violated Article 1110 of NAFTA, which bars the uncompensated appropriation of investments of foreign investors".[195]

The claim was eventually dismissed due to the claimant's failure to show that the Loewen group had no reasonably available and adequate remedy under US municipal law.[196] However, the Tribunal still found that "[i]n circumstances of this case, a case a claim alleging an appropriation in violation of Article 1110 can succeed *only if* Loewen establishes a denial of justice under Article 1105".[197] Denial of justice forms part of the FET standard. Therefore, by making this finding the Tribunal essentially held that reliance on the expropriation provision in NAFTA Article 1110 added nothing to the FET claim under NAFTA Article 1105. This leads to the conclusion that in certain cases judicial expropriation that manifests itself through the denial of justice can be argued through the FET standard enshrined in the investment treaty and not (or as well as) the expropriation standard itself.

In *Arif v Moldova* the claim concerned several duty-free stores that were prevented from opening because the relevant tender and the leave agreement were declared invalid by the Moldovan courts.[198] The claimant argued that it constituted expropriation under the France-Moldova BIT. The Tribunal pointed out that "[i]t is significant that Claimant does not allege that there is any flaw in Moldovan law or that it is unfair in any way *per se*. Claimant's position in essence is rather that the actual misapplication of Moldovan law by the courts amounts to expropriation".[199] Moreover it added that

192 Award of 2003 June 26 Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, para. 61.

193 Award of 2003 June 26 Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, para. 4.

194 Ibid., paras. 5-6.

195 Ibid., para. 39.

196 Ibid., para. 2.

197 Ibid., para. 141.

198 Award of 2013 April 8 Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23.

199 Ibid., para. 415.

the claimant "has had a fair opportunity to defend its position under Moldovan law before the Moldovan courts. This Tribunal is not a court of appeal of last resort. There is no compelling reason that would justify a new legal analysis by this Tribunal".[200] The Tribunal unambiguously rejected the idea that Moldova could be liable at an international level for the correct application of its domestic laws by its courts.

In *Karkley v Pakistan* the claimant's contract was voided by the Supreme Court of Pakistan's judgement. The Tribunal found that the judgement was arbitrary, thus contained deficiencies incompatible with international law and was deemed to be without any effect in international law.[201] It added that there is no need for such deficiencies to amount of denial of justice and thus that reaching this threshold is not necessary to find expropriation.[202] It also explained that the wrongful decision shall not be simply ignored but rather taken as a fact when deciding whether the measures amounted to expropriation.[203]

It is important to note that tribunals do not accept that purely procedural rights can be expropriated. In *Burlington v Ecuador* the claimant argued that he suffered expropriation and was precluded from pursuing an ICSID arbitration as a result of respondent's non-compliance with the order for provisional remedies which required to end the coactive process.[204] The Tribunal rejected the argument finding that "the non-compliance with an order for provisional remedies, which only creates procedural rights during the arbitration (the situation here) cannot be assimilated to a court's decision to annul a final award (the situation in *Saipem*)".[205]

In summary, judicial expropriation is a rarely encountered type of expropriation. It is crucial to underline that investment tribunals are not appellate bodies, however, in cases of denial of justice or disproportionately 'egregious' conduct the actions of national courts may amount to the violation of foreign investors' rights. However, the analysis of judicial expropriation is linked with the aim to this thesis since it is relevant for the determination of the understand of indirect expropriation.

1.2.4.3. Contractual expropriation

Contractual rights in most cases are considered to be a protected investment that can be expropriated. Already early in the XXth century in the *Chorzow Factory* and the *Norwegian Shipowners* cases it was found that contractual rights had been

200 Ibid. para. 416.

201 Award of 2017 August 22 Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, para. 550.

202 Ibid.

203 Ibid., para. 561.

204 Award of 2012 December 14 Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, para. 481.

205 Ibid.

expropriated. In *The Norwegian Shipowners* the PCA held that "[...] whatever the intentions may have been, the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be constructed."[206] Later, in the *Factory at Chorzów* Case he PCIJ found that: "[...] it is clear that the rights of the Bayerische to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents, licenses, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland. As these rights related to the Chorzów factory and were, so to speak, concentrated in that factory, the prohibition contained in the last sentence of Article 6 of the Geneva Convention applies in all respects to them."[207]

These early findings of the PCA and the PCIJ that contractual rights can be subject to expropriation have been followed by numerous tribunals including ICSID, NAFTA and Iran-US Claims Tribunal.[208]

Most often contractual expropriation cases involve claims for termination of a contract the State or host State's interference with the performance of a contracts. The form of a legal instrument most often seen in this type of jurisprudence is concession contracts such as "BOT" (Build, Operate, Transfer).[209] The issue occurs that in alleged contractual expropriation situations the legal relationship between the foreign investor and the host State are regulated at the same time by the contract and the investment treaty. These two instruments provide for two separate and distinct legal bases. Expropriation is a substantive treaty standard that can only occur in case of a breach of a treaty claim versus a simple claim arising out of an alleged breach of a contract. For there to a treaty breach a State must have exercised its *puissance publique* and acted in its sovereign capacity as opposed to acting as any other party to the contract could have acted.

As explained by the *Siemens* Tribunal "[t]he distinction between acts *iure imperii* and *iure gestionis* has its origins in the area of immunity of the State under international law and it differentiates between acts of a commercial nature and those which pertain to the powers of a State acting as such. Usually States have been restrictive in their understanding of which activities would not be covered by their immunity in judicial proceedings before the courts of another State. Here we have the reverse situation where the State party posits a wide content of the notion of *iure gestionis*."[210]

The fundamental case in the area of treaty vs contract claims is *Vivendi* decision

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206 Award of 1922 October 13 Norwegian Shipowners' Claims (Norway v. United States), 325.

207 Judgment of the PCIJ of 1926 May 25 Certain German Interests in Polish Upper Silesia (Germany v. Poland), Judgment, PCIJ Series A, No. 7, p. 44.

208 Award of 2012 October 31 Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/02, para. 506.

209 Arnaud De Nantueil, *L'Expropriation Indirecte en Droit International de L'Investissement* (Pedone, 2013), 87.

210 Award of 2007 January 17 Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, para. 247.

on annulment where the 'fundamental basis of claim' test was first developed.[211] In that case the *Vivendi* Ad hoc Annulment Committee found that "a Treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the treaty standard". The claim arose from a termination of a thirty-year water sewage contract by Argentinian province of Tucuman. Initially the ICSID tribunal found that the claims for violations under the France-Argentina BIT and the concession contract cannot be distinguished and that the contractual clauses need to be applied. Article 16.4 of the contract foresee that the courts of Tucuman would have the exclusive jurisdiction for the disputes arising out of the contract and thus the Tribunal found that the parties had to refer their dispute to those courts. The award was challenged and the Annulment Committee found that the tribunal was mistaken when refused to exercise jurisdiction since the treaty claims and the contract claims can and must be distinguished. It argued that where the 'essential basis of a claim' is a breach of contract, any valid choice of forum clause in the contract must be given effect. However, when the fundamental basis of a claim is a treaty, the presence of an exclusive jurisdiction clause does not produce the same effect since 'a treaty is laying an independent standard by which the conduct of the parties is to be judged'.[212] In those situations the municipal law is only relevant to the extent of determining whether there had been a treaty breach.[213] Furthermore, the very same act that may violate a treaty may also violate a contract or even both at the same time. This potential overlap does not prevent an international tribunal from considering the act as a potential treaty breach.[214] Eventually the Tribunal in Vivendi found that the acts committed by the provincial government of Tucuman were not simple commercial acts but rather acts committed in its sovereign capacity.

In the same vein, the *Waste Management* tribunal explained: '[I]t is one thing to expropriate a right under a contract and another to fail to comply with the contract**.** Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation.'[215]

In *Consortium RFCC v Morocco* the Tribunal found that there are two characteristics that must be present in order to establish contractual expropriation. First, the measures must have been taken using public powers and not simply by exercising powers provided by the contract. Second, the measures must have substantive effects of certain intensity and/or make disappear the legitimately expected benefits from the

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211 Award of 2005 November 14 Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I), ICSID Case No. ARB/97/3.

212 Award of 2002 July 3 Vivendi, case No. ARB/97/3, para. 100.

213 Ibid.

214 Award of 2007 August 20 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, para. 7.5.4.

215 Award of 2004 April 30 Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3.

exploitation of rights subjects to the said measure to a point that they render the right useless.[216] In this case the Tribunal, however, found that the dispute related to the interpretation of the contract and constructor's contractual responsibility where the dispute does not go beyond a normal disagreement between co-contractors thus the claim was purely of a contractual nature.[217]

In *Waste Management v Mexico II* the dispute occurred from the failure to pay the amounts due under the concession agreement. The Tribunal in deciding whether it constituted contractual expropriation found it useful to introduce methodological analysis since 'if certain cases of contractual non-performance may amount to expropriation, it must be possible to say, in principle, which ones, otherwise the distinction between contractual and treaty claims disappears.'[218] It divided the cases into three groups. First, where a whole enterprise is terminated or frustrated because its functioning is simply halted by decree or executive act, usually accompanied by other conduct. This was so in many of the oil cases; and in many cases before the Iran-United States Claims Tribunal.[219] Second, there are cases where there has been an acknowledged taking of property, and associated contractual rights are affected in consequence. In such cases the bundle of rights requiring to be compensated includes all the associated contractual and other incorporeal rights, unless these are severable and retain their value in the hands of the claimant notwithstanding the seizure of the related property.[220] Third, there is the much smaller group of cases where the only right affected is incorporeal; these come closest to a claim of contractual non-performance.[221] Finally, the Tribunal concluded "that it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation."[222]

In *Siemens v Argentina* the claim was brought for the expropriation of a contract to implement an immigration control, personal identification and electoral information services in Argentina. The contract was supposed to be automatically renewed once after the initial six-year term. Argentina suspended the contract twice and then issued a Presidential decree authorizing unilateral renegotiation of State contracts. Eventually the contract was terminated. Siemens argued that its contractual rights and right to

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216 Award of 2003 December 22 Consortium RFCC v The Kingdom of Morocco, ICSID Case No. ARB/00/6, para. 69.

217 Award of 2003 December 22 Consortium RFCC v The Kingdom of Morocco, ICSID Case No. ARB/00/6, para. 87.

218 Award of 2004 April 30 Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, para. 171.

219 Ibid., para. 172.

220 Ibid., para. 173.

221 Ibid., para. 174.

222 Ibid., para. 175.

complete a project were property rights expropriated by the host State.[223] When distinguishing the treaty claims from contract claims the Tribunal following the Consortium *R.F.C.C. v Morocco* found that "In applying this distinction in the realm of investor-State arbitration, arbitral tribunals have considered that, for the behavior of the State as party to a contract to be considered a breach of an investment treaty, such behavior must be beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract".[224]

In *Parkerings v Lithuania* the Tribunal had to decide whether the termination of a contract to establish and operate a parking system in Vilnius constituted expropriation. It found that there are three conditions that must be present in order for a contractual claim to become a treaty claim. First, "a breach of an agreement will amount to an expropriation only if the State acted not only in its capacity of party to the agreement, but also in its capacity of sovereign authority, that is to say using its *sovereign power*. The breach should be the result of this action. A State or its instrumentalities which simply breach an agreement, even grossly, acting as any other contracting party might have done, possibly wrongfully, is therefore not expropriating the other party".[225] Second, a breach of contract in itself is not always enough to amount to indirect expropriation, therefore, an investor faced with a breach of an agreement by the State counterparty should, as a general rule, sue that party in the appropriate forum to remedy the breach.[226] Third, the breach of the Agreement, *in casu* the termination of the agreement, must give rise to a substantial decrease of the value of the investment."[227] In this case the Tribunal eventually found that "the termination of the Agreement by the City of Vilnius cannot be considered as an expropriation under the BIT due to the fact that the City of Vilnius did not act as a sovereign authority and did not use that authority to expropriate the rights of BP."[228]

In certain situations, even pre-contractual rights can constitute a protected investment. In *Magyar Farms v Hungary* the 1994 Arable Land Act provided the right (a power) for any eligible person to enter into a lease agreement and thereby acquire a statutory pre-lease right. The Tribunal found that this power is not itself a vested right or an asset, and therefore the State could in principle change it without compensation. In turn, once a private party availed itself of this power and entered into a lease agreement, that party will hold a vested right.[229] It added that "[…] due to the

223 Award of 2007 January 17 Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, para. 214.

224 Ibid., para. 248.

225 Award of 2007 September 11 Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, para. 443.

226 Ibid. para. 448.

227 Ibid. para. 455.

228 Ibid. para. 447

229 Award of 2019 November 13 Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27, para. 349.

pre-lease right, the lease fulfilled the same function as ownership in terms of the investor's expectations of legal certainty and stability. As a result, the pre-lease right must be deemed to benefit from the protection against uncompensated State interference. In other words, a deprivation of already vested pre-lease rights should have been accompanied by compensation even if the State acted with a legitimate public purpose, evenhandedly and with procedural propriety."[230]

In common law lease rights constitute property rights and that undeniably are capable of being expropriated. However, in most civil law jurisdictions, lease rights are not considered to be property rights and thus it becomes arguable whether they can be subject to expropriation claims.

Overall, contractual expropriation occurs when foreign investors' rights protected under a contract are significantly affected. In such cases the contract is generally entered into by a foreign investor and a State body. It is important that the action would be attributable to State and result from the exercise of sovereign power of State.

1.3. Efforts to codify customary international law on indirect expropriation

Customs are binding legal sources in international law which requires two cumulative elements. Pursuant to Article 38(1)(b) of the Statute of the ICJ, I t requires consistent and general international practice by states and acceptance of the practice as law by the international community (*opinio juris*). Though the notion of indirect expropriation may be regulated by the treaty law, customary international law can serve are binding legal source for identification and protection against unlawful expropriation in international investment law. For the aim for this research, it is also relevant to determine the development of customary international law in this area.

As early as 1959 in its fourth report on International responsibility Special Rapporteur Garcia-Amador stated that "The right of "expropriation", even in its widest sense, is recognized in international law, irrespective of the patrimonial rights involved or of the nationality of the person in whom they are vested. This international recognition has been confirmed on innumerable occasions in diplomatic practice and in the decisions of courts and arbitral commissions, and, more recently, in the declarations of international organizations and conferences. Traditionally this right has been regarded as a discretionary power inherent in the sovereignty and jurisdiction which the State exercises over all persons and things in its territory, or in the so-called right of "self-preservation", which allows it, *inter alia,* to further the welfare and economic progress of its population. In its resolution 626 (VII) of 21 December 1952 relating to the underdeveloped countries, the General Assembly has stated that " the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations. […] the fact that the right of "expropriation" has been explicitly recognized by international law must obviously be stressed. In fact, […] an act of expropriation, pure

230 Ibid., para. 360.

and simple, constitutes a lawful act of the State and, consequently, does not *per se* give rise to any international responsibility whatever. […] such responsibility can only exist and be imputable if the expropriation or other measure takes place in conditions or circumstances inconsistent with the international standards which govern the State's exercise of the right or, in other words, contrary to the rules which protect the acquired rights of aliens against "arbitrary" acts or omissions on the part of the State[…] the notion of "arbitrariness", which has been adopted as the basis for determining whether international responsibility arises, applies, although not always to the same extent, to each of the various forms which the exercise of this right by the State may assume."[231]

1961 Harvard Draft Convention on the International Responsibility for Injuries (The Harvard Draft Convention) was one of the first important international law instruments attempting to codify expropriation. Article 10(3) of this convention describes expropriation as:

(a) a 'taking of property' includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an interference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference.
(b) a 'taking of the use of property' includes not only an outright taking of the property but also any such unreasonable interference with the use or enjoyment of property for a limited period of time.

A further step in codification of expropriation were 1962 Resolution on Permanent Sovereign over Natural Resources and UNGA Resolution 1803 (XVII) which made clear made clear that expropriations that were not for public purpose, non-discriminatory and adequate compensation was provided were illegal.[232]

The 1967 OECD Draft Convention on the Protection of Foreign Property incorporated all the elements developed by the treaty practice since the very first BIT of 1959.[233] Article 3 describing "Taking of Property" is supplemented by Noted and Commentary expropriation is described as:

(a) ... In the case of direct expropriation ... the law of the property rights concerned is the avowed object of the measure. By using the phrase 'to deprive ... directly or indirectly' in the text of the Article it is, however, intended to bring within its compass any measures taken with the intent of wrongfully depriving the national concerned of the substance of his rights and resulting in such loss (e.g.

231 Document A/CN.4/119, Fourth Report on State Responsibility by Mr F.V. Garcia-Amador, Special Rapporteur, Extract from the Yearbook of the International Law Commission, 1959, Vol. II, paras. 41-42.

232 Vaughan Lowe, *International Law* (Oxford University Press, 2007), 198.

233 Kenneth J. Vandevelde, *Bilateral investment treaties: history, policy and interpretation* (Oxford University, 2010), 284.

prohibiting the national to sell his property or forcing him to do so at a fraction of the fair market price).

(b) ... interference may amount to an indirect expropriation. Whether it does will depend on its extent and duration. Though it may purport to be temporary, there comes a stage at which there is no immediate prospect that the owner will be able to resume the enjoyment of his property.

Thus, in particular Article 3 is meant to cover 'creeping expropriation' ... Under it, measures otherwise lawful are applied in such a way as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation. As instances may be quoted as excessive or arbitrary taxation, prohibition of dividend distribution coupled with compulsory loan; impositions of administrators; prohibition of dismissal of staff; refusal to access to raw materials or essential export or import licenses.

(c) The taking of property within the meaning of the Article must result in a loss of title or substance.

Mass expropriations in China and eastern Europe, *inter alia*, slowed down the flow of foreign investments especially in developing States. Seeking to remedy the situation a system to settle the disputes between foreign investors and host States began to develop. One of the difficulties was to pin down what precisely host States could do to foreign investments. As mentioned, the resolutions of 1962 and the resolution 1803 made clear that expropriations were illegal unless satisfied the three criteria. However, it remained unclear as to what precisely the three criteria meant.[234] Given this uncertainty is it not surprising that only very few expropriation cases regarding mass expropriations in Russia, China or eastern Europe were ever brought.[235]

In sum, the efforts put into trying to outline the notion of indirect expropriation demonstrate that more clarity on the concept is much needed. needed. However, at the same time, the attempts to codify indirect expropriation were not successful and the concept could not be clearly demarcated. This leads to the current situation where the main source for trying to define the concept of indirect expropriation is arbitral practice.

1.4. Indirect Expropriation and FET

For the analysis of the concept of indirect expropriation it is relevant to discuss the applicable standards of investors' protection. There are several autonomous substantive protection treaty standards: fair and equitable treatment (FET), full protection and security (FPS), most favorable nation treatment (MFN), non-discrimination, umbrella clauses and others. Protection from indirect expropriation is one of those standards. There are no objective definitions as to what falls within these standards and the scope

234 Vaughan Lowe, *International Law* (Oxford University Press, 2007), 198.

235 Ibid., 199.

of each of them is defined by investment agreements themselves. Some standards are easier to prove than others because of the higher or lower threshold set out in the agreement. Indirect expropriation requires a substantive and permanent deprivation of the right to enjoy the investment, therefor it a difficult standard to prove for claimants. This naturally results in a situation that foreign investors often argue several substantive protection breaches at the same time.

1.4.1. The concept of FET

FET claims are particularly common to be found next to indirect expropriation claims. In principle, any conduct that constitutes indirect expropriation, would also likely constitute a breach of FET. However, not every breach of FET would constitute expropriation, since the latter is a much narrower standard in comparison to FET which is a very broad standard that does not have a uniform meaning. As explained by S. Schill "[f]air and equitable treatment does not have a consolidated and conventional core meaning as such nor is there a definition of the standard that can be applied easily. So far it is only settled that fair and equitable treatment constitutes a standard that is independent from national legal order and is not limited to restricting bad faith conduct of host States. Apart from this very minimal concept, however, its exact normative content is contested, hardly substantiated by State practice, and impossible to narrow down by traditional means of interpretative syllogism."[236] Similarly, the Sempra v Argentina Tribunal developed that "fair and equitable treatment is a standard that is none too clear and precise. This is because international law is itself not too clear or precise as concerns the treatment due to foreign citizens, traders and investors. This is the case because the pertinent standards have gradually evolved over the centuries. Customary international law, treaties of friendship, commerce and navigation, and more recently bilateral investment treaties, have all contributed to this development. Not even in the case of rules which appear to have coalesced, such as denial of justice, is there today much certainty."[237]

Furthermore, the Tribunal is *PSEG v Turkey* developed that nowadays FET is understood as an "encompass all" and can serve where other more precise standards fail. It reasoned that "[t]he standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the dispute do not clearly support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached. Because the role of fair

236 Stephen Schill, The *Multilateralization of International Investment Law,* (Cambridge University Press, 2009), 263.

237 Award of 2007 September 28 Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, para. 296.

and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable. Yet, it clearly does allow for justice to be done in the absence of the more traditional breaches of international law standards. This role has resulted in the concept of fair and equitable treatment acquiring a standing on its own, separate and distinct from that of other standards, albeit many times closely related to them, and thus ensuring that the protection granted to the investment is fully safeguarded."[238] Professor Rudolph Dolzer similarly argues that the width and impreciseness of FET is the very aim of this standard. commented that essentially According to him, "the purpose of the clause as used in BIT practice is to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties."[239] In order to understand the content of precise obligations the parties and Tribunals shall be guided by the principle of good faith just like it is done by the courts when interpreting civil codes.[240]

The UNCTAD has identified five main concepts that have emerged as relevant in the context of FET:

(a) Prohibition of manifest arbitrariness in decision-making, that is, measures taken purely on the basis of prejudice or bias without a legitimate purpose or rational explanation;
(b) Prohibition of the denial of justice and disregard of the fundamental principles of due process;
(c) Prohibition of targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
(d) Prohibition of abusive treatment of investors, including coercion, duress and harassment;
(e) Protection of the legitimate expectations of investors arising from a government's specific representations or investment- inducing measures, although balanced with the host State's right to regulate in the public interest.[241]

In the past FET has been assimilated to the International Minimum Standard (IMS or Minimum Standard of Treatment - MST).[242] The IMS began developing in the early twentieth century. It grew as a result of a concern of capital-exporting States that the governments of host-States lacked the most basic measures of protection for aliens

238 Award of 2007 January 19 PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, paras. 238-239.

239 Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties", *The International Lawyer*, 39(1) (2005): 90.

240 Ibid., 91.

241 UNCTAD, Fair and Equitable Treatment, Series on Issues in International Investment Agreements (2012).

242 Ibid., 14.

and their property.[243] Back then the MST focused largely on non-discrimination and prevention of denial of justice. During the course of time, where FET obligation was not expressly linked to the MS, many tribunals interpreted it as an autonomous self-standing standard and derived its content not from customary international law, but rather focused on the textual interpretation in accordance with Article 31(1) of the VCLT to interpret what is fair and equitable.[244] When the FET is linked to MS, the *Neer* case is often referred to by the Tribunals. In that case, the US-Mexico Claims Commission was faced with a claim concerning the death of an American national Paul Neer and it was alleged that the Mexican authorities failed to properly prosecute the culprits.[245] The claim was dismissed, however the Commission developed on what constitutes a violation of MS "[t]he propriety of governmental acts should be put to the test of international standards, and […] the treatment of an alien, in order to constitute an international delinquency, should amounts to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[246] Therefore, the international minimum standard of treatment was set at a very high threshold. According to Professor Zachary Douglas, "[t]he invocation of *Neer* as a strict or narrow conception of the minimum standard of treatment in general international law is actually misplaced".[247] He argues that the 'infamous' formulation of the standard of treatment was propounded in the context of a finding that the Mexican authorities acted diligently in their efforts to apprehend those responsible for the murder. However, the Commissioner also rejected the claim despite having formulated a standard far more alike to the modern standard of fair and equitable treatment in investment treaties "it seems to be clear that an international tribunal is guided by a reasonably certain and useful standard if it adheres to the position that in any given case involving an allegation of a denial of justice it can award damages only on the basis of convincing evidence of a pronounced degree of improper governmental administration".[248]

Despite the critiques, the lien between MST and FET is undeniable. In some treaties FET is explicitly attached to MST. For example, Notes of Interpretation of NAFTA Article 1105(1) state that it "prescribes the customary international law minimum

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243 Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105*, (Kluwer Law International, 2013): 13-46.

244 UNCTAD, Fair and Equitable Treatment, Series on Issues in International Investment Agreements (2012), 14; Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 255.

245 Award of 1926 October 15 L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, General Claims Commission.

246 Ibid. para. 4.

247 Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2010), 88.

248 Award of 1926 October 15 L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, General Claims Commission, para. 561.

standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party." And that "[t]he concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[249] The Tribunal in *Glamis Gold v. United States*, when interpreting the provision found that "to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below international standards and constitute a breach of Article 1105(1)."[250]

The *Neer* case was decided in 1920s and the concept of the MST has evolved significantly since then. It is not easy to be applied by the Tribunals in modern cases. As developed by *Sempra v Argentina* "[o]n many occasions, the issue will not even be whether the fair and equitable treatment standard is different or more demanding than the customary standard, but only whether it is more specific, less generic and spelled out in a contemporary fashion so that its application is more appropriate to the case under consideration."[251] Therefore a link between FET and the MST has been mostly useful not to evaluate the substantive content of the obligation but as an expression of the gravity of the conduct for that conduct to be held in violation of the standard.[252]

1.4.2. Legitimate expectations

A key component of FET if the protection of legitimate expectations formed by a foreign investor.[253] It is a mysterious concept in a sense that it has no explicit anchoring in the text of the applicable investment treaties.[254] It is a jurisprudential innovation.[255]

Acknowledging legitimate expectations in the determination of the compensable nature of a measure is largely a question of fairness.[256] It makes sense because an investor that has obtained specific prior assurances that the protection regime would not

249 Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, 2001).

250 Award of 2009 June 8 Glamis Gold, Ltd. v. The United States of America, UNCITRAL.

251 Award of 2007 September 28 Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, para. 302.

252 UNCTAD, Fair and Equitable Treatment, Series on Issues in International Investment Agreements (2012), 15.

253 Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 256.

254 Michele Potesta, Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept, Society of International Economic Law (SIEL), 3rd Biennial Global Conference, 90

255 UNCTAD, Fair and Equitable Treatment, Series on Issues in International Investment Agreements (2012), 9.

256 Ibid.

at least significantly change is more likely to invest in a foreign Sate and the prior due diligence performed would likely be different.

In 2003 in *Tecmed v Mexico* the Tribunal set a nearly-impossible standard for States standard with regards to legitimate expectations. It found that "[t]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."[257]

In *El Paso v Mexico*, the Tribunal opined that "the notion of "legitimate expectations" is an objective concept, that it is the result of a balancing of interests and rights, and that it varies according to the context. / This means, firstly, that the Tribunal considers that a violation can be found even if there is a mere objective disregard of the rights enjoyed by the investor under the FET standard, and that such a violation does not require subjective bad faith on the part of the State. ".[258] It further explained that "[t]his means also, secondly, that legitimate expectations cannot be solely the subjective expectations of the investor, but have to correspond to the objective expectations than can be deduced from the circumstances and with due regard to the rights of the State. In other words, a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest.".[259]

It is undisputed that the concept of legitimate expectations is mostly relevant for findings of the FET breaches. However, it is not completely alien to expropriation. In fact, some tribunals argue that "there is not always a clear distinction between indirect expropriation and violation of legitimate expectations".[260] For example, U.S. Model BIT of 2012, Annex B(4)(a)(ii) explicitly requires for a finding of indirect expropriation, consideration of the extent to which the government action interferes with distinct, reasonable investment-backed expectations. Similar language is found in the Canada Model BIT of 2003, Annex B.13(1)(b)(ii).

In *Parkerings v Lithuania* the tribunal found that "[t]he expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment".[261] Although the finding was made in relation to FET

257 Award of 2003 May 29 Tecnicas Medioambientales Tecmed S.A. v The United Mexican States, ICSID Case No ARB (AF)/99/2, para. 154.

258 Award of 2006 April 27 El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, paras. 356-357.

259 Ibid., para. 358.

260 Award of 2006 April 27 El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, para. 227.

261 Award of 2007 September 11 Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, para. 82.

standard, there is no reason to believe that the same would not apply to indirect expropriation. Not any kind of assurance would give rise to legitimate expectations. Such assurance must be given to a specific investor with regards to a specific investment.[262]

The concept is also closely related to regulatory takings. According to T. Walde, "[o]ne can observe over the last years a significant growth in the role and scope of the legitimate expectation principle, from an earlier function as a subsidiary interpretative principle to reinforce a particular interpretative approach chosen, to its current role as a self-standing subcategory and independent basis for a claim under the "fair and equitable standard".[263] According to him, it is likely because legitimate expectations provide a more supple way of providing a remedy in a particular situation as compared to more drastic remedies that are inherent in the concept of regulatory expropriation.[264] It is probably partly for these reasons that "legitimate expectation" has become for tribunals a preferred way of providing protection to claimants in situations where the tests for a "regulatory taking" appear too difficult, complex and too easily assailable for reliance on a measure of subjective judgment.[265]

Finally, according to arbitrator T. Walde "[o]ne should probably see the breach of legitimate expectation as a former of less intensive breach than expropriation; investment-backed legitimate expectation is one of the standards to define expropriation, particularly in the form of "regulatory taking" (action tantamount to expropriation), but it requires also a very severe interference in the property right and its economic value. The difference between the lesser-intensity breach and the more intensive breach in the form of expropriation should lie primarily in the compensation – full value in expropriation, reliance damage in the case of a non-expropriatory breach of the fair and equitable treatment obligation.".[266]

Professors Solveiga Paleviciene and Simona Drukteiniene argue that nowadays three approaches to legitimate expectations in FET can be identified. First is based on the concept where solely the concept of ensuring a stable and legal business framework. This approach entails an element of stability of the regulatory framework and establishes a good governance obligation of the State. Second requires specific representations to have been made by the State. Under this standard it is held that no investor shall expect for the regulatory framework of the host State to remain unchanged and that the foreign investor has an obligation of due diligence. Third makes the claim

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262 S. Dudas Bilcon of Delaware et. al v. Canada: A Story About Legitimate Expectations and Broken Promises, 1 Sept 2015, Kluwer Arbitration Blog, checked 2022 March 18 http://arbitrationblog.kluwerarbitration.com/2015/09/11/broken-promises-and-legitimate-expectations-bilcon-of-delaware-inc-et-al-v-canada/?print=print

263 Thunderbird v Mexico separate opinion of Thomas Walde para 37, checked 2022 October 27 https://www.italaw.com/sites/default/files/case-documents/ita0432.pdf

264 Ibid.

265 Ibid.

266 Thunderbird v Mexico separate opinion of Thomas Walde, para. 70 checked 2021 August 9 https://www.italaw.com/sites/default/files/case-documents/ita0432.pdf

of legitimate expectations subject to a number of qualifying additional requirements. It requires a number of interconnected elements to find a breach of legitimate expectations[267]

Recently the concept of legitimate expectations widely debated within the context of the renewable energy cases and more precisely the solar energy cases brought against Spain by foreign investors. In 1997 Spain began to introduce national policy seeking to develop its renewable energy sector. For this aim it developed a special regime for renewable energy facilities meeting the technical requirements for registration in the Administrative Registry for Electrical Power Generating Units ("RAIPRE").[268]The tariff price for the energy created using these facilities was supposed to be determined by subsequent royal decrees. In 1998 Spain established a four-year period for revisions of the premium granted to registered facilities. Subsequently, in 2004, the regime was amended to provide that the registered facilities would receive a feed-in-tariff for their full lifespan which was advertised to be of 25 years.[269] A couple of years later Spain began changing its legal framework. In 2007 it established that photovoltaic plants would receive a feed-in-tariff based on its technical features. In 2008 and 2010 the regime was further amended and finally in 2013 it was completely changed with a New Regime that *inter alia* introduced different categorization of facilities based on technical criteria compared to the 2007 regime.[270]

In *Charenne v Spain* the Tribunal found that Spain has provided no specific commitments to foreign investors nor to alter its legal framework.[271] Moreover it found that while certain decrees were directed to a limited group of investors, it does not make them to be commitments specifically directed at each investor and that "[t]o convert a regulatory standard into a specific commitment of the state [...] would constitute an excessive limitation on power of states to regulate the economy in accordance with the public interest".[272]

The date of investment is crucial when determining whether a foreign investor could have had legitimate expectations. In *Isolux v Spain* the Tribunal took into account the date until which the claimants could renounce their investments (29 October 2012). It found that the existing regulatory framework at that time could not have generated the claimed legitimate expectations. Tribunal reasoned that the existence of

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267 Simona Drukteinienė, Solveiga Palevičienė, "Limits of State regulatory power in investment law and under national legislation: search for common denominator", *Entrepreneurship and Sustainability Issues*, 8(2) (2020): 1200-1201.

268 Farnelli Gian Maria, Recent Trends in Investment Arbitration Concerning Legitimate Expectations, "An Analysis of Recent Renewable Energies Investment Case Law", *International Community Law Review*, 23 (2021): 38.

269 Ibid.

270 Ibid., 39.

271 Award of 2016 January 21 Charanne B.V. and Construction Investments S.a.r.l. v Spain, SCC Case No. 062/2012, para. 490.

272 Ibid., para. 493.

a Special Regime throughout the life of the plants could not be an expectation *per se*, regardless of its content and that already in October 2012 all investors from publicly available data already knew or should have known that the regime would change.[273]

In *Eiser v Spain* the Tribunal put an emphasis on the degree of change of the legal regime. It found that "[t]aking into account the context, object and aim of the ECT, the Tribunal concludes that the obligation to provide fair and equitable treatment established by Article 10(1) necessarily implies an obligation to provide fundamental stability in the essential characteristics of the legal regime on which investors relied in making long-term investments. This does not mean that regulatory regimes cannot evolve. Clearly they can […] [but] they may not be so radically changed that they deny investors who made investments on the basis of such regimes of the value of their investment."[274] Moreover, "Respondent's obligation under the ECT to provide fair and equitable treatment to investors protects them from a fundamental change in the regulatory regime in a manner which does not take into account the circumstances of the existing investment made on the basis of the prior regime. The ECT does not prohibit Spain from making appropriate changes in the regulatory regime of RD 661/2007 […] But the ECT does protect investors against the total and unreasonable changes experienced here."[275] Eventually the Tribunal concluded that "the line was crossed" and the regulatory regime was replaced by a "completely new regime".[276]

1.4.3. Relation between FET and indirect expropriation

It is not uncommon that the same set of facts is used to prove both a breach of an FET standard as well as indirect expropriation. It is because such concepts as denial of justice or legal expectations play different, however important roles in both standards. A very close proximity between the FET and indirect expropriation standards and the margin of flexibility to bring claims under these standards is well illustrated by the *Saipem v Bangladesh* case. Because of the wording of the relevant BIT, Saipem was forced to include the denial of justice into its expropriation claim as opposed to bringing a claim under FET standard or independently. Art. 9.1. of the relevant BIT conferred jurisdiction to the Tribunal only over claims of expropriation, "Saipem does equally consider that through the misbehaviours of Petrobangla (a State organ) and its courts, Bangladesh has certainly, according to us, undoubtedly treated Saipem unfairly and inequitably, and in a manner that is below the standard required by international law. However, again, Article 9.1 of the BIT does not confer to your Tribunal jurisdiction over a claim based on breach of the standard of treatment, in particular of the

273 Award of 2016 July 17 Isolux Infrastructure Netherlands B.V. v. the Kingdom of Spain, SCC Case No. V2013/153, para. 803.

274 Award of 2017 May 4 Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, para. 363.

275 Ibid., para. 363.

276 Ibid. para. 458.

fair and equitable treatment, restricts [Tribunal's] jurisdiction to expropriation."[277] The Tribunal upheld jurisdiction and found for the claimant. Moreover, the Tribunal in *SGS v Paraguay* reasoned that "a State's non-payment under a contract is, in the view of the Tribunal, capable of giving rise to a breach of a fair and equitable treatment requirement, such as, perhaps, where the nonpayment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value."[278] Traditionally, substantial deprivation is one of the core elements in expropriation analysis as it touches upon the valuation of property rights.

Sometimes it is very difficult to distinguish whether a particular set of facts should fall under FET or indirect expropriation standards. As developed by *Sempra v Argentina* "[i]t must also be kept in mind that on occasion the line separating the breach of the fair and equitable treatment standard from an indirect expropriation can be very thin, particularly if the breach of the former standard is massive and long-lasting. In case of doubt, however, judicial prudence and deference to State functions are better served by opting for a determination in the light of the fair and equitable treatment standard. This also explains why the compensation granted to redress the wrong done might not be too different on either side of the line."[279] Professor Schreuer also argues that the FET standard has to some extent replaced the central role of protection against expropriation.[280] According to him there are two reasons that led to this development. First, the substantial deprivation standard for indirect expropriation is very high and second, there is a growing tendency of tribunals to respect the host State's power to take regulatory measures in the public interest which results in no finding of indirect expropriation.[281]

What is more, the indirect expropriation and FET standards can be explicitly linked in an investment agreement. Expropriation provisions in the BITs may have additional requirements than the four criteria under customary international law. One of such criteria may be compliance with the FET standard. For example, US-Estonia BIT of 1997 provides that "an expropriation be done for a public purpose; in a non-discriminatory manner; with payment of prompt, adequate and effective compensation; and that it meets the requirements of due process and the general principles of "fair and equitable" treatment provided for in Article II, Paragraph 3 of the BIT".[282] Similarly US-Argentina BIT provides that "Investments shall not be expropriated or

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277 Award of 2009 June 30 Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, para. 121.

278 Award of 2012 February 10 SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case No. ARB/07/29, para. 137

279 Award of 2007 September 28 Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, para. 301.

280 Christoph Schreuer, "Fair and Equitable Treatment (FET): Interactions with other Standards", *Transnational Dispute Management* 4(5) (2005): 133.

281 Ibid.

282 Article 3(1) of the US-Estonia BIT (1997).

nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2)".[283]

Jurisprudence where the FET standard is incorporated into the indirect expropriation standards is relatively scarce. For example, in *Link-Trading v Moldova* the Tribunal interpreted such provision as follows "[i]t is clear from paragraph (1) of Article X of the Treaty that not all fiscal measures necessarily constitute an expropriation, although their habitual effect is to cause the taxpayer to surrender part of his income or property to the State, as a general matter, fiscal measures only become expropriatory when they are found to be an abusive taking. Abuse arises where it is demonstrated that the Slate has acted unfairly or inequitably towards the investment, where it has adopted measures that are arbitrary or discriminatory in character or in their manner of implementation, or where the measures taken violate an obligation undertaken by the State in regard to the investment".[284]

What is more, some treaties contain carve-outs for tax matters which renders the treaty inapplicable to matters of taxation. For example, NAFTA Article 1110(1) contains such a carve-out. However, this does not apply in cases of expropriation. Therefore, in order to obtain protection, a foreign investor has to prove expropriation that occurred because of a tax measure.[285]

Finally, the indirect expropriation and the FET standards are often linked with regards to compensation. As explained in detail within the context of remedies, the investment agreements provide the standard of compensation when it is lawful and in case of unlawful expropriation the customary international law standard of full compensation applies. The difficulty is that other substantive protection standards such as FET do not provide a standard for compensation in a treaty nor there are clearly established mechanisms as to how to evaluate the damage caused to the investment by for example denial of justice or discrimination. This often leads to a situation where tribunals use the standards and techniques created for determining the compensation for expropriation in order to determine the appropriate compensation for FET.

In principle, there is no prohibition for tribunals to refer to compensation for illegal expropriation standards in order to determine compensation for FET.[286] In the absence of precise treaty provisions regarding the compensation in case of FET breaches,

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283 Article 4(1) of the US-Argentina BIT (1991).

284 Award of 2002 April 18 Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova, UNCITRAL, para. 64.

285 Christoph Schreuer, "Fair and Equitable Treatment (FET): Interactions with other Standards", *Transnational Dispute Management* 4(5) (2005): 134.

286 Pierre-Yves Tschanz, Jorge E. Vinuales, "Compensation for Non-Expropriatory Breaches of International Investment Law - The Contribution of the Argentine Awards", *Journal of International Arbitration* 26(5) (2009): 738.

the Tribunals have a discretionary power "to identify the standard best attending to the nature of the breaches found".[287] The criteria to determine whether or not to borrow the standards and techniques used in case of expropriation are of a factual nature, namely the type of asset or of damage which is at stake and the intensity of the interference with the economic position of the investor.[288]

Two different situations need to be separated. First, where an FET breach is found together with indirect expropriation. The Tribunal in *Metalclad v Mexico* developed that "the damages arising under NAFTA, Article 1105 [MST] and the compensation due under NAFTA, Article 1110 [Expropriation] would be the same since both situations involve the complete frustration of the operation of the landfill and negate the possibility of any meaningful return on Metalclad's investment".[289] Similarly in *Crystallex v Venezuela* the Tribunal unambiguously fount that "[b]ecause the Tribunal has found breaches of FET (in addition to an expropriation), the Tribunal considers that the "full reparation" principle under customary international law must be applied as a consequence of its decision on liability. In other words, given the cumulative nature of the breaches that the Tribunal must compensate, and especially in view of its findings on FET that the Respondent's conduct caused all the investments made by Crystallex to become worthless, the Tribunal will apply the full reparation standard according to customary international law."[290]

The second situation is where an FET breach is found, however it is not accompanied by indirect expropriation. In *Enron v. Argentina* no indirect expropriation was established, however, the Tribunal found, *inter alia*, a breach of the FET. When determining the way to measure compensation it reasoned that "the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin and in those circumstances the standard of compensation can also be similar on one or the other side of the line. Given the cumulative nature of the breaches that have resulted in a finding of liability, the Tribunal believes that in this case it is appropriate to apply the fair market value to the determination of compensation."[291] Similarly the *Sempra v Argentina* Tribunal explained that "[a]lthough there is some discussion about the appropriate standard applicable in such a situation, several awards of arbitral tribunals dealing with similar treaty clauses have considered that compensation is the

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287 Award of 2005 May 12 CMS Gas Transmission Company v The Argentine Republic, ICSID Case No. ARB/01/8, para. 409.

288 Pierre-Yves Tschanz, Jorge E. Vinuales, "Compensation for Non-Expropriatory Breaches of International Investment Law - The Contribution of the Argentine Awards", *Journal of International Arbitration* 26(5) (2009): 738.

289 Award of 2000 August 30 Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, para 113.

290 Award of 2016 April 4 Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, para. 846.

291 Award of 2007 May 22 Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, para. 363.

appropriate standard of reparation in respect of breaches other than expropriation, particularly if such breaches cause significant disruption to the investment made. In such cases it might be very difficult to distinguish the breach of fair and equitable treatment from indirect expropriation or other forms of taking and it is thus reasonable that the standard of reparation might be the same."[292]

Indirect expropriation triggers complex questions to what extent and how the substantive protection treaty standards such as fair and equitable treatment (FET), full protection and security (FPS), most favorable nation treatment (MFN), non-discrimination, umbrella clauses and others are applicable to protection of investors' interests. Each of these standards may play significant role in protection of investors against indirect expropriation. However, there is lack of harmonization in international investment law how these standards interact and how they should be applicable in such cases. Due to the vagueness of these standards the investors may invoke several standards to protect their interests in case of indirect expropriation.

292 Award of 2007 September 28 Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, para. 403.

2. DEVELOPMENT OF INDIRECT EXPROPRIATION IN INTERNATIONAL TREATIES

International treaties are one of the binding legal sources in public international law. Nowadays international treaties regulation protection of investment have become an indispensable part of international investment law and may BITs contain clauses for the substantive protection standard of expropriation. To assess the development and the emerging new problems related to indirect expropriation it is important analyse the development of international treaties which protect foreign investments and how they protect investors against indirect expropriation. This analysis will be also needed latter looking for the possible solutions to address the new emerging challenges in international investment law after the legal gap of protection of investors in the EU Member States after the *Achmea* decision and global health crisis caused by the global pandemic in 2021. The reveal more concrete examples of the development of protection of investors against indirect expropriation in the international treaties, this chapter also focuses on the development of the position of the Government of the Republic of Lithuania towards protection of foreign creditors and the disputes in the international tribunals regarding the violation of the BITs entered by the Republic of Lithuania. This development has not been analysed in the legal doctrine yet an raises various issue whether the choice of protection of foreign investments is indeed effective and meet the developing standards of protection of investors' rights in international investment law.

2.1. Historical developments

The first treaties dedicated to protect the property of aliens were Friendship, commerce and navigation (FCN) treaties.[293] Their main aim, however, was not the protection of foreign investors or investments, but mere promotion of trade and shipping.[294] When there were investment provisions in FCNs, they were limited to a low standard of treatment such as 'full protection to the persons and property'.[295]

First provisions on expropriation in FCNs can be traced back to the late 19th century. They were of limited scope in a way that regulated only the seizure of goods related to trade such as "vessels, cargoes, merchandise and effects".[296] The provisions were later expanded to encompass property in general.[297] The FCNs containing property protection clauses were different from their predecessors in at least three aspects.[298] First, they

293 Sebastian Lopez Escarcena, *Indirect Expropriation in International Law* (Edward Elgar Publishing, 2014), 112.

294 Ibid., 113.

295 Ibid.

296 Ibid.

297 Ibid.

298 Kenneth J. Vandevelde, *Bilateral investment treaties: history, policy and interpretation* (Oxford University, 2010), 279.

included prospective as opposed to retrospective protection provisions. Second, some of them were applicable regardless of whether any hostilities were taking place. It is important because back in the day most seizures took place during time of was or civil disturbance. Third, some FCNs began to introduce the requirement of compensation that validated the seizures.[299] Additional requirements beyond just compensation were introduced in treaties after 1920s. K. Vandervelde provides an example of US FCNs negotiated during the inter-war period that stated that property "shall not be taken without due process of law and without payment of just compensation".[300] In the late 1950s they were replaced by the BITs.[301] Some authors argue that the threat of not sufficient protection from expropriation in FCNs was a principal motivating factor in their origin.[302]

It is traditionally held that the first BIT was signed in 1958 between Germany and Pakistan.[303] As A de Nantueil notes, this view is slightly artificial since there were anterior treaties containing nearly identical protections of foreign investments, even though they were not primarily aimed to protect foreign investments.[304] L. Vandevelde agrees that that this BIT was substantively equivalent to the US post-war FCNs.[305] However, he also points out that this BIT imposed an additional condition to expropriation that it must be for "public benefit".[306] Importantly, the a reference to indirect expropriation can also be found in this BIT. Para 3 of the Protocol elaborated that the notion of "expropriation" shall "also pertain to acts of sovereign power which are tantamount to expropriation, as well as measures of nationalization".

The treaty of 1958 is important because it presents an innovation of a treaty *primarily* seeking to protect foreign investors. The appearance of this type of treaties coincides with the increases of oil businesses establishing their operations abroad partnering with the local governments.[307]

Rather quickly, by the end of 1950s the elements of BIT expropriation provisions had crystalized and became prevalent in the BIT practice by mid 1960s.[308]

The principle of State succession also played a crucial role in these developments. The movement that began in the early 1960s to revise the substantive law on takings of

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299 Ibid.

300 Ibid.

301 It should be noted that while the relevance of the FCNs has diminished significantly it has not disappeared. For example, there is no BIT between the US and Iran therefore Iran invoked the FCN in the two most recent cases against the US at the ICJ.

302 Kenneth J. Vandevelde, *Bilateral investment treaties: history, policy and interpretation* (Oxford University, 2010), 271.

303 A de Nanteuil, L'expropriation indirecte en droit international de l'investissement (Pedone 2014), 45.

304 Ibid.

305 Kenneth J. Vandevelde, *Bilateral investment treaties: history, policy and interpretation* (Oxford University, 2010), 282.

306 Ibid.

307 Ibid.

308 Ibid., 285.

foreign property was largely triggered by a sense of dissatisfaction on the part of newly created States that had inherited concession arrangements with foreign companies made by the colonial governments in their name on unsatisfactory terms.[309] It was rejected by the international law that the rights were extinguished by State succession.[310] According to dame R. Higgins, in parallel to international law, "parallel doctrines" that emerged from the UN resolutions have developed.[311] Some States chose to keep the concession contracts entered into for them by the colonial powers. For example, Kuwait has revised and expressly confirmed the concession contract with Aminoil after attainment of complete independence.[312] She argues, that the GA Resolution 1803 (XVII)[313] was the departure point that sought to shift the emphasis from *pacta sunt servanda* and acquired rights, to the notion of permanent sovereignty over national resources.[314] The resolution aimed to strike balance between two general principles of law that of respect for undertaken commitments and State sovereignty. It can also be regarded as the last expression of *opinio iuris* of the international community on this issue.[315] Paragraph 4 of the Resolution provided that: *"Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest, both domestic and foreign. In such cases the owner shall be paid 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. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall e exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication."*[316] Not only the language of the resolution provides a broad base of grounds upon which a State may legally take foreign property, but also in its Article 4 provides for "appropriate" as opposed to "adequate, prompt and effective compensation". The resolution, among others, even though non-binding, was explicitly referred to in *Texaco v Libya*.[317] The sole arbitrator took into account the fact that the resolution was passed by 87 votes for and only 2 against with 12 abstentions.

309 Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Collected Courses of the Hague Academy of International Law (1982), 287.

310 Ibid.

311 Ibid.

312 Award of 1982 March 24 The American Independent Oil Company v. The Government of the State of Kuwait, para. 89.

313 UN Permanent Sovereignty over Natural Resources General Assembly resolution 1803 (XVII) (1962).

314 Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Collected Courses of the Hague Academy of International Law (1982).

315 Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford University Press, 2017), 45.

316 UN Permanent Sovereignty over Natural Resources General Assembly resolution 1803 (XVII) (1962), para. 4.

317 Award of 1997 January 19 Texaco v Libya, Ad Hoc, para. 21.

It was also important for him that such States as the United States voted for it and that States from different regions were also in favor.[318] Similarly in *Aminoil v Kuwait*, the Tribunal allowed for the possibility that the Resolution 1803 reflected the state of international law "by reason of circumstances of its adoption".[319] It also underlined the importance of the Resolution by then stating that the "subsequent resolutions did not have the same amount of authority".[320]

The requirement to pay "appropriate" compensation was a compromise allowing to interpret the Hull formula and to apply a lesser standard.[321] However, this great margin of appreciation meant that in some cases only partial compensation or no compensation at all may be paid to the foreign investor. To counter-balance these statements, Paragraph 8 provided that "foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith".

UN GA Resolution 3171 adopted in 1973 added that "each State is entitled to determine the amount of possible compensation and the mode of payment".

In 1974 the Charter of Economic Rights and Duties of States was adopted and it provided that "Each State has the right […] to regulate and exercise sovereignty over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment". The language chosen suggests that international legal standards were considered to be "preferential" and thus if a Sate through its domestic legislation chose not to follow them, it was allowed to do so.[322] However, it also provides that "(c) 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 considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all the 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." Importantly, the text does not refer to public purpose or prohibition on discrimination.[323] What is more, the reference to internal law and relevant circumstances opens the door for a possibility to determine that no compensation should be due at all. It is what happened in 1970 in the context of nationalizations of foreign property

318 Ibid., para. 84.

319 Award of 1982 March 23 the American Independent Oil Company v. the Government of the State of Kuwait, para. 90.

320 Ibid.

321 Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford University Press, 2017), 46.

322 Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Collected Courses of the Hague Academy of International Law (1982), 291.

323 Ibid., 291.

by Allende in Chile. The Chilean government not only decided that foreign companies had 'excess profits' and thus no compensation was due, but also that they had remaining financial obligations to the State.[324]

The argument advanced for partial compensations in the 1980s was primarily based on the non-ability of the newly independent States to fully compensate for large scale nationalizations because of their poor economic standing.[325] They would be deprived of exercising their right to territorial sovereignty and remain victims of colonialism.[326]

Most developments since the mid-1960s evolved around trying to elaborate or refine the expropriation elements.[327] At the beginning the numbers of the new BITs was growing slowly and started booming towards the end of the 20th century. This led to the establishment of a broad network of these treaties that were initially concluded between developed and developing States.[328]

This historical analysis of the development of regulation of investment protection and expropriation reveals that with the increase of conclusion of BITs this topic emerged as one of the most problematic aspects in international investment law. Also, the practice of the UN institutions in this area reveals that protection of investment has become an important element of public international law which requires special considerations and legal regulation. Nevertheless, the historical analysis reveals that the common understand of the regulation of protection of investments is scarce and this area of law is still developing.

2.2. Expropriation clauses

Today the absolute majority of the BITs contain a clause on the substantive protection standard of expropriation. It confirms the right of States to expropriate foreign property as long as the four cumulative conditions of customary international law (public purpose, non-discrimination, due process and compensation) are satisfied.[329] Most investment treaties, however, do not provide the criteria for determining what measures constitute indirect expropriation and arbitrators have to rely on exclusively on jurisprudence when deciding disputes.[330] This leaves a disproportionate amount of discretion for arbitrators to decide what measures constitute expropriation and the

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324 Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford University Press, 2017), 47.

325 Ibid., 48.

326 Ibid.

327 Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Collected Courses of the Hague Academy of International Law (1982), 29.

328 Ibid, 291.

329 Kenneth J. Vandevelde, *Bilateral investment treaties: history, policy and interpretation* (Oxford University, 2010), 271.

330 Ying Zhu, "Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?", *Harvard International Law Journal* 60(2) (2019): 381.

decisions based on the BITs are likely not representative of the intention of States that entered into them. To remedy these flaws newer generation BITs in addition to the four customary law criteria for lawful expropriation contain additional clauses, annexes or interpretative declarations that better reflect the real intentions of the co-contractors.

UNCTAD identifies three core elements found in the new-generation BITs with regards to expropriation. First, the treaty scope is limited *inter alia* through excluding certain assets from the definition of investment. Second, treaty obligations are clarified in comparison to older BITs. Third, they contain exceptions to transfer-of-funds obligations and/or carve-outs for prudential measures. Put together these three elements aim to preserve the regulatory space of States and minimize their exposure to investment arbitration this way fighting the so-called "chilling effect".[331]

In order to reinforce the regulatory space of States, some BITs adopt carving-out clauses that exclude non-discriminatory public welfare regulations from constituting indirect expropriation in advance.[332] That means that such regulations, in principle, are not even susceptible to be analyzed by tribunals since the BITs that define the scope of tribunals' jurisdiction do not apply to them.

While such clauses are more and more common in new investment treaties, Professor A De Nantueil correctly argues that they are not necessary and do not add value.[333] According to him, the regime of indirect expropriation in itself protects the normative liberty of States without any need for external judicial techniques such as exceptions or derogations. As long as the measures affecting foreign property can be qualified as "normal" the regime of indirect expropriation would not apply to them and they would be excluded.[334] In addition to that, public welfare and non-discrimination being general and broad concepts, some initial analysis remains unavoidable, thus carving-out clauses are not capable to serve as an automatic shield from the analysis by tribunals.

Y. Zhou identifies two types of carving-out clauses. First, the ones that merely provide that regulatory conduct for public purpose does not constitute expropriation. For example, Article 6(2) of the 2012 Bangladesh–Turkey BIT provides that, "[n]on-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation."[335] Second, the type of clauses that supplement the exclusion of

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331 UNCTAD Report, Recent Developments in the International Investment Regime (2018), checked 2022 February 7 https://unctad.org/system/files/official-document/diaepcbinf2018d1_en.pdf

332 Ying Zhu, "Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?", *Harvard International Law Journal* 60(2) (2019):403.

333 Arnaud De Nantueil, *L'Expropriation Indirecte en Droit International de L'Investissement* (Editions A. Pedone, 2013): 586.

334 Ibid., p. 586-587.

335 Article 6(2) of Agreement Concerning the Reciprocal Promotion and Protection of Investments, Turkey-Bangladesh (2012); Ying Zhu, "Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?", *Harvard International Law Journal* 60(2) (2019): 403.

governmental measures for public purpose with the description of the situation where such exclusion would not apply. For example, Article 7(4) of the 2016 Austria–Kyrgyzstan BIT provides that "[n]on-discriminatory measures of a Contracting Party that are de- signed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation, except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith."[336]

Another and more prevalent trend in the new generation BITs is to add contextualization clauses. More and more investment agreements contain a list of specific criteria that should be taken into account when deciding whether a measure is expropriatory. The forms in which the list is provided varies. Sometimes is can be found in the main text of a treaty simply supplement the provision of expropriation, however, usually it is provided in a separate annex dedicated solely to expropriation.

For example, the 2012 US Model BIT contains Annex B which, in addition to the carving-out clause,[337] states that the determination of whether an action or series of actions constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: "(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action."[338]

The Dutch Model BIT of 2019 has a detailed article on expropriation.[339] In its Article 12 (4) it provides a non-exhaustive list of factors that shall be taken into account in order to determine whether a measure constitutes an indirect expropriation. The three listed criteria are the economic impact, the duration and the character of the measure, notably their object and purpose.

The Australia-Hong Kong Investment Agreement of 2019 contains Annex II that provides the "shared understanding" of the parties of certain aspects of expropriation.[340] Article 3 provides that in order to determine whether an action or a series of

336 Article 7(4) of Agreement for the Promotion and Protection of Investment, Austria-Kirgizstan (2016); Ying Zhu, "Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?", *Harvard International Law Journal* 60(2) (2019): 404.

337 Article 4(b) of the US Model BIT (2012), Annex B Expropriation: "*Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations*".

338 Article 4(a) of the US Model BIT (2012).

339 Dutch Model BIT (2019), checked 2021 August 9 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download

340 Annex II of Australia-Hong Kong Investment Agreement (2019), checked 2021 January 6 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5830/download

actions constitute indirect expropriation, a case-by-case, fact-based analysis is necessary. For this analysis, *inter alia*, three elements shall be taken into account: the economic impact of the government action, the extent of interference with distinct, reasonable investment-backed expectations and the character of the government action. It also adds that only in rare circumstances "non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment" would constitute indirect expropriation.[341] A nearly identical provision can be found in Article 6 of the Belarus-Hungary BIT of 2019.[342]

A recently signed Israel-UAE BIT of 2020 contains Annex A on expropriation. The document first of all explicitly states that expropriation can be direct or indirect. The latter has "an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure".[343] It also helpfully sets out a non-exhaustive list of criteria that shall be taken into consideration whether a measure constitutes an indirect expropriation. It refers to the economic impact, the duration, the extent to which the measure interferes with "distinct, reasonable investment-backed expectations" and the character of the measure, "notably [the] object, context and intent".[344]

The Energy Charter Treaty modernization process is currently undergoing. One of the key priorities is to come up with a more precise indirect expropriation standard. Many States as a way to do it see an addition of a new annex listing, *inter alia*, the criteria to be taken int account when deciding whether measures are expropriatory. The European Commission as a proposal has submitted the following non-exhaustive list of elements " (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (b) the duration of the measure or series of measures by a Party; (c) the character of the measure or series of measures, notably their object and context."[345]

Lithuania in 2018 signed a new BIT with Turkey that replaced that of 1994.[346] It is a perfect example of a new-generation BIT containing clearer provisions on indirect expropriation. For example, its Article 8(3) provides that "[t]he determination of

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341 Ibid., para. 3(b)

342 Belarus-Hungary BIT (2019), checked 2022 March 3 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5915/download

343 Israel – UAE BIT (2020), checked 2021 March 8 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6084/download

344 Ibid., Annex A Art. 3.

345 EU text proposal for the modernization of the Energy Charter Treaty (2022), checked 2022 May 8 https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf .

346 Lithuania-Turkey BIT (2018) checked 2022 April 9 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6041/download .

whether a measure or series or measures of the Contracting Party constitute measures having equivalent effect to expropriation requires a case-by-case, fact-based inquiry that considers: (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of the Contracting Party has an adverse effect on the economic value of an investment does not establish that such measure or series of measures constitute measures having equivalent effect to expropriation or nationalization; (b) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations arising out or the Contracting Party's prior binding explicit written commitment directly and specifically lo the investor; and (c) the character or the measure or series of measures, including their nature, purpose, duration and rationale."

It is evident that the trend in new-generation BITs is to include clarified expropriation clauses. However, re-negotiating new treaties is a lengthy and costly process that very few States would be willing to undertake. Yet, the need for clarification being evident, more and more States are opting to issue joint authoritative interpretations of the treaty provisions already in force. It is a welcomed development allowing States to voice their concerns and address new developments such as the importance of sustainable development or climate considerations that were not as accentuated decades ago when the original agreements were concluded. The parties to such declarations usually explicitly express that the authoritative interpretation is binding upon investment tribunals, however even without such statement, Article 31.3 (a) of the VCLT obliges the adjudicators to take into account "any subsequent agreement between the parties regarding the interpretation of the treaty".

In 2016 India proposed a Joint Interpretative Statement to many of its long-term partners with whom it had signed BITs. In 2017 Bangladesh and India signed the Joint Interpretative Notes for India-Bangladesh BIT of 2009. Among other things, the Notes contain an expropriation clarification statement. In its Article 5(2) the Note provides that in order to determine whether measures constitute indirect expropriation, it should be taken into account whether "the measures result in a total or near total and permanent destruction of the value of the investment", "the measures deprive the investor of its rights of management and control over the investment" and "there is an appropriation of the investment by a Contracting Party which results in transfer of the investment, in whole or in significant part, to that Contracting Party or to an agency or instrumentality of the Contracting Party or a third party". In 2014 Colombia signed a similar joint interpretative declaration with France.[347]

Sometimes, clarification of the concept of expropriation in investment treaties can be combined with clarification of other rather obscure concepts that are closely related.

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347 This declaration, however, was necessary and set out as a condition by the Colombian Constitutional Court in order to uphold the constitutionality of the Reciprocal Promotion and Protection of Investments between Colombia and France. For more information see Rafael Tamayo-Alvarez, "Constitutionality of the Colombia-France Bilateral Investment Treaty", *American Journal of International Law* 114(3), (2020).

For example, the India-Kirgizstan BIT of 2019 in its Article 5.3 provides that the following elements should be taken into consideration: the economic impact of the measure, the duration, the character (notably the object, context and intent) as well as "prior binding written commitment to the investor whether by contract, licence or other legal document".[348] The last part of the list of elements taken into account is particularly important. It explicitly refers to the "legitimate expectations" and clarifies what type of State actions would be accepted as capable to give rise to such expectations.

2.3. Indirect expropriation and stabilization clauses in investment contracts

It is not rare to find stabilization clauses in the investment contracts signed in the last decades of the twentieth century. States whose economies that may have been perceived as risky seeking to attract foreign investment would agree to include clauses that would, while not limit their right to regulate *per se*, would ensure that the legal framework as it existed at the time of signing a contract with such clause would still apply to the covered investment even if new legislation was adopted.

In *Aminoil v Kuwait*[349] the Tribunal had to determine the legal effect of the following stabilization clause that was present in the concession contract between Aminoil and Kuwait "[t]he Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this Agreement."[350] In 1962 the Kuwaiti Constitution was changed and while Article 18 stipulated that private ownership was safeguarded and that expropriation was only permitted for the public purpose and upon compensation, Article 21 provided that "All the natural wealth and resources are the property of the State". In 1977 the government of Kuwait terminated the concession via a decree. It established a Compensation Committee that had to decide upon the amount of compensation and remaining obligations owed to Kuwait. The Tribunal, when examining the stabilization clauses stated that "a straightforward and direct reading [of the stabilization clauses] can lead to the conclusion that they prohibit any nationalization".[351] However, the Tribunal, while admitting that such interpretation is possible "on a purely formal plane", did not opt for it.[352] The Tribunal instead found that while such contractual imitations

348 Article 5(3) of the India-Kirgystan BIT (2019), check 2021 May 7 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download

349 Award of 1982 March 23 the American Independent Oil Company v. the Government of the State of Kuwait.

350 Art 17 of the Concession contract.

351 Award of 1982 March 23 the American Independent Oil Company v. the Government of the State of Kuwait, para. 88.

352 Ibid., para. 94.

on the State's right to nationalize are "juridically possible", because of their seriousness, they should be *expressly* stipulated for.[353] Nevertheless, presumably they should cover only a relatively limited period and not be indefinite.[354] Therefore, the Tribunal held that the clauses cannot be interpreted as absolutely forbidding nationalization. Yet, it also found that "by impliedly requiring that nationalization shall not have any confiscatory character, they reinforce the necessity for a proper indemnification".[355] Therefore, the Tribunal concluded, that as long as the nationalization did not possess any confiscatory character, i.e. was accompanied by a proper compensation, it was not precluded despite the stabilization clauses in the concession contract.

The opposite of stabilization clauses is the updating clauses. Their aim is to explicitly provide that the host-State reserves a right to modify its legislation or administrative acts and that as a result a foreign investor may be deprived of any rights to which it may otherwise be entitled.[356] According to some commentators, it is one of the ways to "legitimize" otherwise illegal expropriation.[357]

An updating clause was analyzed in *Tradex v Albania*. In that case the Joint Venture Agreement provided that "[s]uch area will not change during the term of the agreement", but added that "The joint venture shall respect the supplementary needs which will be created for the land".[358] According to the tribunal, "[w]hile it is not quite clear whether thereby a proviso is made for the implementation of future privatization of land by law, a clearer reference is contained in the Authorization of 21 January 1992 of the Joint Venture (T 2). Section 5 of that Authorization provides: "The joint venture will be also conformed to the necessary addendum will taken place to the Albanian legislation concerning the land." (sic the official translation provided to the Tribunal.)".[359] Albania argued that the references to the Land law made clear that privatizations might take place and that no finding of expropriations should be made.[360] The investor, on the other hand argued that it was irrelevant whether the expropriation was lawful under the local law.[361] The Tribunal found that "it must be assumed that these references were meant to have some legal significance and, therefore, they cannot be interpreted as leading necessarily to the same result as would be reached without such references. The legal significance could only be that the parties to the Agreement, including Tradex, accepted future applications of the Land Law and that

353 Ibid., para. 95.

354 Ibid.

355 Ibid., para. 96.

356 Bjørn Kunoy, "The Notion of Time in ICSID's Case Law on Indirect Expropriation", Journal of International Arbitration, 23(4) (2006): 339-340.

357 Ibid.

358 Award of 1999 April 29 Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, para. 129.

359 Ibid.

360 Ibid., para. 130.

361 Ibid.

the investment was subject to future applications of the Land Law, in other words: subject to future privatizations. If this was a legal limitation on Tradex' investment from the very beginning, then it could be argued that the actual application of the Land Law at a later stage did not infringe the investment and thus did not constitute an expropriation."[362]

Another important question with regards to stabilization clauses is whether their presence in an investment treaty can somehow influence the international law standard of expropriation. In *Siemens v Argentina* the host State linked the argument about expropriation of contractual rights and the law applicable to the contract and argued that unless a contract is internationalized through a stabilization clause, contractual rights enshrined therein are not susceptible of expropriation.[363] The Tribunal rejected the argument and found that the fact that the Contract is governed by Argentine law does not mean that it cannot be expropriated from the international law perspective.[364] Therefore, it seems that the presence of stabilization clauses in an investment treaty does not have any effect on the indirect expropriation standard, which is an international substantive protection standard.

2.4. Protection against indirect expropriation in the international treaties concluded by the Republic of Lithuania

In the recent years the position of the Republic of Lithuania towards protection of investors' rights against indirect expropriation has evolved. The change may be seen as the state chose to mode from the "old fashion" expropriation clauses in the BITs towards the new more detailed regulation which to some extent also correspond to the developing state practice in the area. The analysis of the international treaties concluded by the Republic of Lithuania in this area is relevant for this thesis in order to reveal the development of the concept of indirect expropriation in international treaty law.

One of the most notable examples towards the development of policy to ensure effective protection not foreign investments in Lithuania is the renewal of the BIT with Turkey. In 2018 Lithuania chose to renew its existing BIT with Turkey that was signed in 1994. The new version of the BIT now contains detailed provisions on what elements need to be taken into account when determining whether State measures amount to expropriation. Article 8(3) of the treaty provides the following:

"The determination of whether a measure or series or measures of the Contracting Party constitute measures having equivalent effect to expropriation requires a case-by-case, fact-based inquiry that considers:

(a) the *economic impact* of the measure or series of measures, although the sole fact that a measure or series of measures of the Contracting Party has an adverse

362 Ibid.

363 Award of 2007 January 17 Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, para. 267.

364 Ibid.

effect on the economic value of an investment does not establish that such measure or series of measures constitute measures having equivalent effect to expropriation or nationalization;

(b) the *extent to which* the measure or series of measures interfere with *distinct, reasonable investment-backed expectations* arising out of the Contracting Party's prior binding explicit written commitment directly and specifically lo the investor; and

(c) the *character* or the measure or series of measures, including their nature, purpose, duration and rationale."

The Lithuania-India BIT was signed in 2011.[365] It is another perfect example of a new-generation BIT containing a separate Annex on the interpretation of expropriation. Article 2 of the Annex provides the following:

"The determination of whether a measure or a series of measures of a Party in a specific situation, constitutes measures as outlined in paragraph 1 above requires a case by case, fact based inquiry that considers, among other factors:

(i) the *economic impact* of the measure or a series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that expropriation or nationalization, has occurred;

(ii) the *extent to which the measures are discriminatory* either in scope or in application with respect to a Party or an investor or an enterprise;

(iii) the *extent to which the measures or series of measures interfere with distinct, reasonable, investment-backed expectations;*

(iv) the *character* and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention to expropriate."

Some rather unusual provisions can also find in certain BITs signed by Lithuania. For example, Lithuania-Kuwait BIT signed in 2001 does not provide clarified expropriation provisions. However, its Article 6(4) provides that "Without prejudice to [transfers of payments related to investments], the provisions of this Article shall also apply to the returns from an investment as well as, in the event of liquidation, to the proceeds from the liquidation." Article 6(5) explicitly incorporates the relevant arbitral practice and states that "[t]he provisions of this Article shall also apply to interventions or regulatory measures by a Contracting State such as the freezing or blocking of investment assets, levying of arbitrary or excessive tax on the investment, compulsory sale of all or part of the investment, or other comparable measures, that have a de facto confiscatory or expropriatory effect." Article 6(7) is particularly unusual. It provides that "[i]nvestors affected by the expropriation may not raise claims under the provisions of this Article if compensation has been paid pursuant to similar provisions in another investment protection agreement concluded by the expropriating Contracting

365 Lithuania-India BIT (2011) checked 2021 March 6 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1574/download

State." In practice, this provision precludes foreign investors from questioning the adequacy of compensation paid. Nevertheless, the provisions in other investment agreements need only be similar and not identical which raises questions of appreciation as to what degree of similarity between the provisions is needed to fall within the scope of this Article.

While Lithuania is evidently progressing towards the new-generation clarified BITs, the progress is rather slow. At the time of writing, the Turkey-Lithuania BIT is signed and not yet in force. This is the newest signed BIT according to the UNCTAD database.[366] The one before was signed in 2012 with Mauritania and has not yet entered into force either. The text of the treaty is not publicly available. Prior to that, in 2011 Lithuania signed a BIT with North Macedonia, however, it is an old generation BIT that provides only for the customary international law criteria of legality.[367] Same with the Lithuania-Tajikistan BIT signed in 2009.[368]

The stale of the progress is likely to be largely impacted by the *Achmea* decision[369] in which the court found that the BITs signed between Member States of the European Union are incompatible with the EU law. They impair the exclusive jurisdiction of the CJEU to interpret EU law and thus undermine the principle of autonomy enshrined in the EU law. Following the decision, in October 2019 the EU Member States signed an agreement to terminate the existing intra-EU BITs and naturally not to conclude new ones. Lithuania signed the "Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union" in August 2021 and issued a declaration/reservation on the necessity "to strengthen the protection of investments within the European Union, to improve the exercise of investors' rights in the European Union and to ensure effective remedies within the legal framework of the European Union by improving existing or creating new tools and mechanisms, including an effective mechanism for the settlement of investment disputes."[370] It is true that these development precluded Lithuania from renewing its existing BITs with other EU Member States, however, it had no impact of doing so regarding its other existing BITs with third States.

It must be noted that recently Lithuania, as a Member of the EU entered into numerous multilateral treaties with investment provisions (TIPs). In 2019 EU-Vietnam

366 Lithuania BITs Checked 2021 May 5 https://investmentpolicy.unctad.org/international-investment-agreements/countries/121/lithuania

367 Article 4(1) of North Macedonia-Lithuania BIT (2011).

368 Article 4 of Lithuania-Tajikistan BIT (2009).

369 Judgment of the Court (Grand Chamber) of 6 March 2018, Slowakische Republik v Achmea BV, C-284/16.

370 Council of the European Union, Lithuania's Declaration/Reservation to the "Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union", checked 2022 July 8 https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/ratification/?id=2019049&partyid=LT&doclanguage=en

Investment Protection Agreement was signed.[371] It contains Annex 4 detailing how the provision on expropriation should be understood. In 2018 EU-Singapore Investment Protection Agreement was signed.[372] Its Annex 1 provides a nearly identical text on how the provisions on expropriation are to be examined by investment tribunals. In 2016 EU-Canada Comprehensive Economic and Trade Agreement (CETA) was signed.[373] Its Annex 8-A provides that the economic impact, the duration of the measure, the extent of interference with legitimate expectations and the character of the measure shall be taken into account when considering whether a State measure amounts to indirect expropriation.

It can be concluded that Lithuania is undoubtedly advancing with regards to indirect expropriation in investment protection treaties. This may be regarded as the positive development towards provision of more effective protection of investor's right in the Republic of Lithuania. Renewal of the existing old-fashioned treaties and entering into new ones that contain more clarity on the scope of expropriation bring more clearness to the State itself and the foreign investors. Moreover, it allows Lithuania to take initiative and define, or re-define, the scope of protection that it wishes to grant to foreign investors. The examples in the BITs with Turkey and India show that the notion of indirect expropriation is more detailed and shed more light how it may be identified. The examples used in these BITs to defined indirect expropriation reflect the developing international standards in the area and are indeed rather similar. In both BITs three main elements for the consideration of indirect expropriation correspond: economic impact of the measures, their extend (character) and duration. All these criteria improve the regulation of indirect expropriation and provide more legal certainty for both the state and foreign investors. The recent developments in the arbitral jurisprudence are indisputably serving as an inspiration and guidance when deciding which criteria shall be taken into account by arbitrators. It can only be wished that the process of the renewals of the Lithuanian BITs was conducted faster, especially with regards to the main trading partners.

371 EU-Viet Nam Investment Protection Agreement, checked 2021 May 9 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download

372 EU-Singapore Investment Protection Agreement https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download, checked 2022 April 9

373 EU-Canada Comprehensive Economic and Trade Agreement (CETA) checked 2021 May 8https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3593/download

3. DEVELOPMENT OF EXPROPRIATION AND COMEPSANTION OF DAMAGES IN CUSTORMAY INTERNATIONAL LAW

As already mentioned, the attempts to codify what constitutes indirect expropriation were largely unsuccessful and the arbitral jurisprudence remains the main guidance when trying to define what amounts to expropriatory acts. The abundance of jurisprudence allows to identify certain trends and criteria of the evolving concept of expropriation. The previous chapter of the thesis analyzed the development of indirect expropriation in international treaty law and the new trends of protection of investors' rights against indirect expropriation in the BITs have been discussed.

Nevertheless, customary international law remains still a particularly important binding legal source in international investment law since first not all the relevant aspect of indirect expropriation and the state liability for these actions are regulated by the BITs and second, namely the development of international customary law may in some instances serve as the most effective legal defense mechanisms against state's wrongful actions. Thus, this chapter focuses on the development of protection of investors' rights against indirect expropriation in customary international law. The development of customary international law is obviously more difficult to establish since there are no specific written rules which can be analyzed (in contrast to international treaty law) and two necessary criteria shall be established to establish an international custom (state practice and *opinion juris*). To assess the current status of international customary law related to indirect expropriation and state's liability, a number of decisions of arbitral Tribunals is analysed in this chapter.

3.1. Conditions for legality of indirect expropriation

It is crucial to underline, that the criteria for legal expropriation are cumulative and should be of equal importance. This means that methodologically, the tribunals often omit analyzing all the criteria in their assessment and after finding a breach of one or some of them, the analysis is discontinued as it is already established that expropriation cannot be lawful. Such approach does not impact the amount of compensation subsequently awarded to the foreign investor since it is generally accepted that the number of breaches does not have impact on it. For example, in *Vestey v Venezuela* the Tribunal found clear violations of the public purpose and due process requirements and thus dispensed in depth the discussions on compensation, which, as it will be discussed in more detail below, is sometimes considered to be a criterion of particular importance. The Tribunal stated that "Whether compensation was offered would be relevant if the Tribunal were to assess the lawfulness of the expropriation. However, the Tribunal has already found that the expropriation was unlawful because it failed to comply with at least one other cumulative requirement of legality."[374]

374 Award of 2016 April 15 Vestey Group Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4, para. 310.

Most authors agree that the customary international law rules on legal expropriation are not fully settled. According to Reinisch "As opposed to the uncertain state of the customary international law on the conditions under which a state may lawfully expropriate the property of foreigners, treaty-based investment law contains fairly clear rules on the legality requirements for expropriation. These largely correspond to the traditional 'Western' views demanding a public purpose, non-discrimination as well as compensation often among the lines of the Hull formula demanding 'prompt, adequate and effective compensation."[375]

3.1.1. Public purpose

Requirement of public interest in order for expropriation to be considered as lawful is a well-established principle of customary international law.[376] However, defining the exact scope of that interest is not without difficulty. On one hand, since the right to take private property for a public purpose is "one of the essential elements of State sovereignty"[377] it would be reasonable to assume that public interest is a self-judging notion defined by the host-State. On the other hand, however, it would go against the principle of legal certainty where an investor has a right to know on what exact basis its investment may be expropriated. It also has a great impact on the formation of the legitimate expectations.

When analyzing the condition of public interest, it is important to discuss its relation to nationalization which is appropriation of private property for the public sector and thus automatically in public interest. While the two are related, in practice they are easily distinguishable. Nationalization is characterized by the transfer of an activity (ex. gas, agriculture etc.) to the public sector, while expropriation relates to dispossession of a particular property for public benefit. For example, a State may expropriate a land field that may be necessary for the public, but it does not mean that the State nationalizes the whole sector of agriculture.[378]

When examining the measures taken in public interest the notion of arbitrariness if often emphasized.[379] Proving arbitrariness is difficult because it is not rare for measure to have multiple purposes. Therefore, when evaluating the measure, the 'essential' or 'genuine' purpose of the measure needs to be discerned and forms the focal point of the analysis.[380]

The aim of this requirement is simple – to protect from expropriation undertaken

375 August Reinisch, *Legality of Expropriations* (Oxford University Press, 2008), 176.

376 Ibid., 178.

377 Award of 2003 October 7 *AIG* Capital Partners, Inc. & CJSC Tema Real Estate Company v. Republic of Kazakhstan, ICSID Case No. ARB/01/6, para. 139.

378 Arnaud De Nantueil, *L'Expropriation Indirecte en Droit International de L'Investissement* (Editions A. Pedone, 2013): 14.

379 Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 62.

380 Ibid.

for private interest and thus States are given considerable discretion to determine their public policy.[381] However, as Vandevelde correctly points out, in modern liberal economic systems the distinction between private and public interests in often not clear cut.[382] In general, property that has no connection with the economy of the State likely will not be needed for public "interest" or "purpose".[383] On the other hand, property such as concession or contract is likely to be related to the State's most vital needs – its natural resources.[384] Yet, the courts and tribunals tend to avoid second-guessing the public policy justifications of the States.[385] Of course they cannot completely avoid making determinations as to the legitimacy of public purpose when evaluating the legality of expropriation. While providing broad deference to State decisions, the Courts and Tribunals are willing to assess whether the public purposes have in fact been genuinely followed.[386] What is more, the UNCTAD has observed that "usually, a host country's determination of what is in its public interest is accepted".[387]

Some BITs attempt to qualify public interest. For example, the Lithuania-Denmark BIT of 1992 provides that the public purpose needs to be related to the internal needs of the expropriating Party.[388] It is evident, however, that such broad qualification does not add much clarity as to the scope of the provision.

Most BITs do not even attempt to define what is considered to be a valid public interest or purpose at all and it is for the tribunals to interpret it. In *Amoco International Finance Corp. v. Iran* the Tribunal when evaluating whether the goal to implement State's economic and pollical objectives was a proper public purpose rightly pointed out that "a precise definition of the "public purpose" for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested. It is clear that, as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that States, in practice, are granted extensive discretion".[389]

In *ADC v Hungary* the Tribunal unambiguously clarified that while there is a broad margin of appreciation given to States, it is not absolute. "In the Tribunal's opinion, a treaty requirement for "public interest" requires some genuine interest of the public. If

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381 Ibid.

382 Ibid.

383 Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Collected Courses of the Hague Academy of International Law (1982), 297.

384 Ibid.

385 Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 63.

386 August Reinisch, *Legality of Expropriations* (Oxford University Press, 2008): 186.

387 UNCTAD Report, UNCTAD/ITE/IIT/15 Taking of Property (2000), 13.

388 Art. 5 of Lithuania-Denmark BIT (1992) checked 2021 June 8 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1016/download

389 Award of 1987 July 14 Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited, IUSCT Case No. 56, para. 145.

mere reference to "public interest" can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met."[390]

In *Goetz v Burundi*[391] that finally resulted in a settlement the Tribunal estimated that the requirement for the measure to be deemed legitimate only if it is taken exceptionally for the imperatives of public utility, security or national interest needs to be appreciated in light of the Burundian law. "In the absence of a legal or factual error, manifest error of appreciation or abuse of power, the Tribunal shall not substitute its own judgement to that of appreciation discretionary made by the Government of Burundi".[392]

Recently, in *Yukos v Russia* the Tribunal was far from shy when establishing the real aims of Russia's measures. It first found that "the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets."[393] Then when evaluating the public purpose of Russia stated that "whether the destruction of Russia's leading oil company and largest taxpayer was in the public interest is *profoundly questionable*. It was in the interest of the largest State-owned oil company, Rosneft, which took over the principal assets of Yukos virtually cost-free, but that is not the same as saying that it was in the public interest of the economy, polity and population of the Russian Federation."[394]

In *Vestley Group Ltd v Venezuela* the respondent argued that the recovery of the claimant's plant was part of its "overarching plan to ensure sovereign control over the domestic production of food".[395] The Tribunal in its analysis first reminded the very high threshold for a measure not to be regarded as being for public purpose. It stated that "International tribunals should […] accept the policies determined by the state for the common good, *except* in situations of blatant misuse of the power to set public policies."[396] It found that the purpose was perfectly legitimate.[397] However, it then continued the analysis by evaluating whether the expropriatory measure was truly *for*

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390 Award of 2006 October 2 ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, para. 432.

391 Award of 1999 February 10 Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3.

392 Ibid. para. 126: "*En l'absence d'erreur de droit ou de fait, d'erreur manifeste d'appréciation ou de détournement de pouvoir, il n'appartient pas au Tribunal de substituer son propre jugement à l'appréciation faite discrétionnairement par le Gouvernement du Burundi*".

393 Award of 2014 July 18 Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227, para. 1579.

394 Ibid para 1581

395 Award of 2016 April 15 Vestey Group Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4, para. 236.

396 Ibid., para. 294.

397 Ibid., para. 295.

the public purpose and in order to determine that it took into account all the relevant circumstances including the government's post-expropriation conduct.[398] In other words, it looked whether the measure was at least capable of furthering the stated public purpose.[399] Since the expropriated company had been selling goods on the domestic market and at the regulated price, it in fact itself contributed to the implementation of the State's access to food policy[400], therefore due to this and other circumstances the Tribunal established that the nexus between the declared purpose and expropriation was "not obvious".[401]

3.1.2. Non-discrimination

The condition of non-discrimination is a standard in customary international law and most investment treaties.[402] The condition consists of two elements: first, the measures directed against a person must be for reasons unrelated to discriminatory criteria such as nationality. Second, like persons must be treated in a like manner.[403]

In 2000 UNTAD in its report pointed out that the changing nature of expropriation has naturally changed the non-discrimination condition as well. During the times when direct expropriation was prevalent discrimination usually occurred on the basis of nationality or ethnicity, but as regulatory taking became more prominent, "any taking that is pursuant to discriminatory or arbitrary action, or any action that is without legitimate justification, is considered to be contrary to the non-discrimination requirement, even absent any singling-out on the basis of nationality. This includes prohibition of discrimination with regard to and payment of compensation requirements. Moreover, the non-discrimination requirement demands that governmental measures, procedures and practices be non-discriminatory even in the treatment of members of the same group of aliens".[404] Interestingly, as pointed out by J. Cox, UNCTAD report of 2012 brings back the very limited grounds for discrimination, notably – nationality. It states that "an expropriation which targets a foreign investor is not discriminatory *per se*: the expropriation must be based on, linked to, or taken for reasons of, the investor's nationality".[405]

It is important to note, however, that UNCTAD in its 2012 report largely relies on

398 Ibid., para. 296.

399 Ibid.

400 Ibid., para. 297.

401 Ibid., para. 300.

402 August Reinisch, *Legality of Expropriations* (Oxford University Press, 2008), 186.

403 Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 68.

404 UNCTAD Report, UNCTAD/ITE/IIT/15 Taking of Property (2000), 13; Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 68.

405 UNCTAD Report, Expropriation: A Sequel (2012), 34-36.

the decision in *GAMI Investment v Mexico*.[406] In that case the finding on non-discrimination was made under NAFTA, but not within the context of Article 1101 (Expropriation), but 1102(2) (national treatment), thus a separate substantive standard.

It is difficult to analyze the condition of non-discrimination for legal expropriation separately from other treatment standards. FET, NT or MFN all contain an aspect of prohibition on discrimination as well. For NT, a national comparative needs to be found that would be in like situation so that the treatment with foreign investment could be compared against. For MFN, the host State is held to the highest possible standard in terms of treatment accorded to others in like circumstances. Finding discrimination is a fact-based exercise.[407] As explained by the Tribunal in *Parkerings v Lithuania*, "[d]iscrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances."[408] It also added that discrimination does not require bad faith, but it must be unreasonable or lacking proportionality.[409]

While there is a lot of jurisprudence dealing with discrimination within the context of other substantive standards that can serve as an important source of inspiration for arbitrators, it is important to distinguish it from the condition of non-discrimination in expropriation analysis. In *Roseinvest v Russia* the host State alleged that in order for a claim on discrimination to succeed it is crucial is to prove that the basis of discrimination is foreign nationality of the shareholders and that differential treatment as a result of legitimate governmental policies or reasonable justifications is not discriminatory in the context of legality of expropriations.[410] Russia argued that there is no reason to interpret the term 'discriminatory' for the purposes of determining the legality of expropriations and deciding on a breach of the prohibition of discriminatory treatment standard and that proving the basis for disclination being nationality is crucial.[411] The Tribunal disagreed. It explicitly noted that while the parties had used the term "discrimination" rather loosely in their pleadings, the term under Article 2(2) of the IPPA related to discriminatory measures is not the same as Article 5(1) related to discriminatory expropriations. [412] Based on the facts the Tribunal found that there was no discrimination of Yukos based the nationality, however it found that there was clear discrimination in comparison to Russia's treatment of Yukos' competitors.

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406 Award of 2005 August 19 GAMI Investments, Inc. v Mexico, Ad Hoc Tribunal (UNCTAD), IIC 98.

407 Award of 2007 September 11 Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, para. 368.

408 Ibid.

409 Ibid.

410 Award of 2010 September 12 RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, para. 546.

411 Ibid., para. 548.

412 Ibid., paras. 554-555.

3.1.3. Due process

A failure to respect due process such as a period of notice of termination may rob the investor from an opportunity to restructure or relocate its investment which could protect it from substantial harm or even destruction. The key of the condition of due process is to oblige the host State to provide an adequate opportunity to the foreign investor to challenge the legality of the expropriation under the host-State law and the amount of compensation.[413] It also requires for the expropriation to be in conformity with the national law and protects from a denial of justice regarding judicial review of expropriation.[414]

The OECD Draft Convention on the Protection of Foreign Property provides that "In essence, the contents of the notion of due process of law make it akin to the requirements of the "Rule of Law", an Anglo-Saxon notion, or of "Rechtsstaat", as understood in continental law. Used in an international agreement, the content of this notion is not exhausted by a reference to the national law of the parties concerned. The "due process of law" of each of them must correspond to the principles of international law."

It appears that the requirement of due process in certain situations is closely linked to the fair and equitable treatment which is a separate substantial standard on its own. In *ADC v Hungary* the claimant argued that "the lack of *due process* amounted to a denial of justice which in turn constituted a breach of the *fair and equitable treatment* requirement.[415] The Tribunal also developed that ""due process of law", in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that "the actions are taken under due process of law" rings hollow. And that is exactly what the Tribunal finds in the present case."[416] The proposition was fully supported by numerous subsequent tribunals including *Kardassopoulos v Georgia*, in which it was found that indirect expropriation occurred, *inter alia*, as a result of a breach of the due process requirement.[417]

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413 Kenneth J. Vandevelde, *Bilateral investment treaties: history, policy and interpretation* (Oxford University, 2010), 272.

414 Ibid.

415 Award of 2006 October 2 ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, para 379.

416 Ibid., para 435.

417 Award of 2010 March 3 Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18, para 396.

In *Vestley Group Ltd v Venezuela* the responded tried to argue that "a breach of domestic procedures does not necessarily constitute a violation of due process"[418] which would appear to go against the very definition of the breach of due process. The Tribunal, however, found that the application of the wrong law is a violation of due process. It stated that "[b]y introducing and applying the Land Law to Vestey's investment and thereby derogating from the procedural guarantees of the Expropriation Law, Venezuela deprived Vestey not only of the opportunity to have the valuation of its investment reviewed by an independent authority, but of the right to be compensated altogether. The regime provided by the Land Law fails to satisfy the due process requirements of the BIT."[419] It also added that even when applying the wrong law, Venezuela failed to comply with it. It found that "the limited procedural guarantees existing under the *rescate* regime of the Land Law were insufficient to comply with the Treaty's due process requirement and that Venezuela's repeated failures to notify Vestey of its decisions breached even the limited procedural guarantees available under the Land Law."[420]

The dues process requirement was explored in dept by the Tribunal in *Yukos v Russia* case. It found that "Yukos was subjected to processes of law, but the Tribunal does not accept that the effective expropriation of Yukos was "carried out under due process of law" […]. The harsh treatment accorded to Messrs. Khodorkovsky and Lebedev remotely jailed and caged in court, the mistreatment of counsel of Yukos and the difficulties counsel encountered in reading the record and conferring with Messrs. Khodorkovsky and Lebedev, the very pace of the legal proceedings, do not comport with the due process of law. Rather the Russian court proceedings, and most egregiously, the second trial and second sentencing of Messrs. Khodorkovsky and Lebedev on the creative legal theory of their theft of Yukos' oil production, indicate that Russian courts bent to the will of Russian executive authorities to bankrupt Yukos, assign its assets to a State- controlled company, and incarcerate a man who gave signs of becoming a political competitor."[421]

The key condition of due process is to oblige the host State to provide an adequate opportunity to the foreign investor to challenge the legality of the expropriation under the host-State law and the amount of compensation.[422] It also requires for the expropriation to be in conformity with the national law and protects from a denial of justice regarding judicial review of expropriation.[423]

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418 Award of 2016 April 15 Vestey Group Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4, para. 238.

419 Ibid., 305.

420 Ibid., 309.

421 Award of 2014 July 18 Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No.⁋ 2005-04/AA227, para. 1583.

422 Kenneth J. Vandevelde, *Bilateral investment treaties: history, policy and interpretation* (Oxford University, 2010), 272.

423 Ibid.

The due process criterion is also closely related to the requirement to exhaust local remedies. Some tribunals have held that an investor's failure to use available local remedies may prevent a finding of expropriation.[424] In the words of the tribunal in *Generation Ukraine v. Ukraine* **"**[I]t is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction."[425]

However, the *Saipem* tribunal found that exhaustion of local remedies does not constitute a substantive requirement of a finding of expropriation.[426] Moreover, the requirement to resort to local remedies imposes an obligation to resort to them only insofar as they are effective and not impossible.[427] In the *Saipem* case while the claimant has not reached the highest judicial step in the Bangladeshi court system, it has tried a to defend its right before various national courts and institutions, thus it can be held that all reasonable remedies had been exhausted.

One of the aspects of due process is impartiality of the adjudicator. The parties to the dispute should feel confidence in the tribunal and do not have doubts whether the adjudicator is able to make an impartial decision. One of the key aspects of due process in international investment arbitration of the duty to reveal to the parties relevant circumstance which may have impact on of the impartiality of the tribunal. The duty of disclosure in investment arbitration has been analyzed in the legal doctrine.[428] The main sources for the exercise and regulation of the duty of disclosure are the International Bar Association (IBA) IBA Guidelines on Conflicts of Interest in International Arbitration (2014) and the UNCITRAL Arbitration rules (2013) which, reflect the main common standards of this problem. According to to Article 12(1) of the UNCITRAL Model Law, prior to and during their appointment an arbitrator shall prior and during his appointment "disclose without delay any circumstances likely to give rise to justifiable doubts as to his impartiality or independence". Thus, even before the

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424 Hanno Wehland, "Domestic Courts and Investment Treaty Tribunals: The Effect of Local Recourse Against Administrative Measures on the Breach of Investment Protection Standards", *Journal of International Arbitration*, 36(2) (2019): 207–230.

425 Award of 2003 September 16 Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, para. 20,30.

426 Award of 2009 June 30 Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, para. 181.

427 Ibid., para. 29.

428 Dalia Višinskytė, Jelena Čuveljak, Remigijus Jokubauskas, „The duty of disclosure as a basis for fair investment arbitration proceedings", *International Comparative Jurisprudence*, 8(2) (2022).

appointment procedure of an arbitration is carried out, the arbitrator has a duty to reveal all circumstances which may raises doubts about as to their impartiality.

As it was already found, the *scope of the arbitrator's duty of disclosure cannot be clearly defined and largely depends on the factual circumstances of each case. A crucial question that must be answered when trying to define the scope of disclosure is whether it is enough to disclose all circumstances that may "cause doubts" or "justifiable doubts" in the eyes of the parties, or whether only those circumstances that are more likely than not to give rise to a challenge to an arbitrator*.[429] Thus, the scope of the duty of disclosure is not unlimited and is coupled with the disclosure of the circumstance which may raise parties' doubt whether the tribunal is indeed impartial. Also, the interesting development of the duty of disclosure is the case law of the ECHR. According to Article 6 of the Convention, one of the founding principles of the right to a fair trial is impartiality of the tribunal. The case law of the ECHR reveals that violation of the duty of disclosure of relevant information, which is important for the assessment of the impartiality of an arbitration, can led to the violation of the right to a fair trial.[430]

Though there is absence of provisions in the Convention that stipulate that the requirements of the right to a fair trial are also applicable in international arbitration (especially investment arbitration) proceedings, the application of the standard of the right to a fair trial to arbitration proceedings is not a novelty in the case law of the ECHR. t should be noted that the conclusion of an arbitration agreement does not mean that the parties will not enjoy all procedural rights deriving from Article 6 of the Convention, since such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6 of the Convention.[431]

The latest development of the case law of the ECHR regarding the impartiality of arbitral tribunals is the case Beg S.p.a. v. Italy (2021) case, in which the court found a violation of Article 6(1) of the Convention because of the failure of an arbitrator to disclose relevant information to the parties. In this case the ECHR found that the arbitrator failed to reveal to the parties his previous legal and economic links with one of the parties to the dispute. More specifically, it was established that the arbitrator was the chairman and member of the Board of Directors one of the parties to the disputes and also represented one of the in the domestic civil proceedings. According to the ECHR, such circumstances, seen from the point of view of an external observer, could legitimately give rise to doubts as to his impartiality.

This judgment has great relevance for the further development of the application of Article 6(1) of the Convention in arbitration proceedings and the exercise of the duty of disclosure. The ECHR affirmed that the conclusion of a voluntary arbitration agreement is not a waiver of the procedural guarantees of the right to a fair trial and the arbitration

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429 Ibid.

430 Dalia Višinskytė, Remigijus Jokubauskas, Mykolas Kirkutis, Arbitration, "Agreements and Protection of the Right to a Fair Trial", *Baltic Journal of Law & Politics* 13(2), 2021.

431 Judgment of the ECHR of 2018 October 2 in case Mutu and Pechsteins v. Switzerland, applications No. 40575/10, 67474/10.

tribunal shall ensure these guarantees. Also, the court employed the standard subjective and objective tests of impartiality to test whether the arbitration proceedings were compatible with the right to a fair trial. Economic and legal links between the arbitrator and the parties, and possible awareness of the relevant circumstances of the legal relations between the parties before the dispute arises, may be found as sufficient to raise doubts about the impartiality of the arbitrator. Furthermore, court found that the duty of disclosure of the circumstances which may reveal conflicts of interest between the arbitrator and the parties to the dispute is an indispensable part of fair arbitration proceedings. The failure to reveal such circumstances may result in the violation of Article 6 of the Convention and the annulment of the award by the national courts.[432]

3.1.4. Compensation

The duty to compensate is a particularly interesting one and raises complex questions. While compensation is one of the essential components in determining whether expropriation is lawful, sometimes a question still rises whether expropriation can be lawful if all the other condition are presented and it is only compensation that is lacking. Also, whether that compensation could be determined by the tribunal itself.

The discussion in the past has been largely connected to the ideological differences about the concept of property and the state's internal economic order.[433] The idea that expropriation without compensation can still be lawful began to develop after the World War II because of increasing number of communist States and well as newly independent States.[434] The communist ideology rejected the concept of private property altogether while the newly independent States could not exercise their freedom if there were limits placed to their territorial sovereignty due to limited financial resources.[435] To find a compromise the UN GA adopted the 1962 Resolution on the Permanent Sovereignty over Natural Resources which imposed the requirement for 'appropriate' compensation.

In 1970s several UN GA Resolutions were adopted[436] that suggested that compensation should no longer be part of the conditions for lawfulness of expropriations, but rather a consequence of a lawful act that should depend on various factors such as the financial situation of the State and the past profits of the company.[437]

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432 Dalia Višinskytė, Jelena Čuveljak, Remigijus Jokubauskas, The duty of disclosure as a basis for fair investment arbitration proceedings, *International Comparative Jurisprudence*, 8(2) (2022).

433 Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford University Press, 2017), 55.

434 Ibid.

435 Ibid.

436 UN General Assembly Resolution 3201 (S-VI) and Res No. 3202 (S-Vi) (1974).

437 Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford University Press, 2017), 56.

Shortly after in *LIAMCO v Libya* the sole arbitrator found that nationalization, although without compensation, was non-discriminatory and thus legitimate.[438] In the same vein in *Aminoil v Kuwait* the Tribunal found that expropriation was lawful even though no compensation was ever paid.[439] The Tribunal in that case examined the meaning of the term "appropriate compensation" in Resolution 1803 (XVII). It concluded that the determination of the amount of compensation is a case specific exercise rather than an "abstract theoretical discussion".[440]

This means that an obligation to pay for a taking is a primary duty while paying a compensation for unlawful expropriation is a form of reparation for a wrongful act committed.[441] While this conceptual distinction may appear evident, the significant difference in gravity among lawful and unlawful expropriations has blurred the borderline.[442] It is sometimes wrongfully submitted that in cases where the only failure to comply with the four criteria of lawful expropriation is failing to provide a compensation, expropriation is not necessarily unlawful because the tribunal deciding on the dispute shall determine the due compensation. Moreover, it is sometimes argued that if a taking only lacks compensation, the treaty standard for compensation acts as *lex specialis* derogating from the customary rule of full reparation otherwise due.[443] Full reparation in this context is to be understood as the full value of the investment on the date of the award or payment, unless the value was higher at the date of expropriation.[444]

Such reasoning is problematic. Primary norm defines the rule and sets out the obligation imposed. In the expropriation context, investment treaties set out criteria that must be complied with in order for expropriation to be lawful. One of those criteria is payment of compensation. Following this line of reasoning a non-payment of compensation renders expropriation unlawful. The US Secretary of State Hull has also expresses that the legality of an expropriation "is in fact dependent upon the observance of [payment of compensation] requirement".[445] However, not all tribunals agree. In *Goetz v Burundi the* Tribunal stated that non-payment of compensation was not enough to find the measures illegal under international law. It also found that a breach of international law would only be established if Burundi did not pay the compensation stated in the award (by consent).[446]

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438 Award of 1997 April 12 Libyan American Oil Company v. The Government of the Libyan Arab Republic.

439 Award of 1982 March 23 the American Independent Oil Company v. the Government of the State of Kuwait, para. 115.

440 Ibid., para. 144.

441 David Khachvani, "Compensation for Unlawful Expropriation: Targeting the Illegality", *ICSID Review*, 32(2) (2017): 385-403.

442 Ibid. 386.

443 Ibid. 386.

444 Ibid.

445 Marjorie Whiteman, Digest of International Law (Washington: Government printing office, 1967), 1020.

446 Ibid., para. 131.

In *Tidewater v Venezuela* the Tribunal also concluded "that a distinction has to be made between a lawful expropriation and an unlawful expropriation. An expropriation only wanting fair compensation has to be considered as a provisionally lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation".[447] Interestingly, the Tribunal had itself first stated that if the conditions set out for lawful expropriation are not met, it should be considered as a breach of international law.[448]

While prompt, adequate and effective compensation is the prevalent standard, it is not present in all BITS. For example, Belgium-Luxemburg Economic Union-Burundi BIT of 1989 in its Art 4 provides for adequate and effective compensation, leaving out the requirement for it to be prompt. The Tribunal when interpreting this provision in *Goetz v Burundi* fund that because "contrary to certain national laws in the matter of expropriation" there is no requirement as to promptness in this BIT, the fact the compensation had not been paid at the time of the award is rendered, does make the contested measure internationally illegal.[449] Yet, the Tribunal rendered a "conditional award" and found that the legality of the contested measure "remained in suspense" depending on whether Burundi paid the compensation within "a reasonable delay" or not.[450] Despite the lack of the promptness requirement, the Tribunal imposed a "within a reasonable delay" obligation.[451] The *Mondev v USA* Tribunal also found that "at least an obligation to compensate must be recognized by the taking State at the time of the taking or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation".[452]

In the same vein, the Tribunal in *Mobil v Venezuela* found that "the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful. An offer of compensation may have been made to the investor and, in such a case, the legality of the expropriation will depend on the terms of that offer. In order to decide whether an expropriation is lawful or not in the absence of payment of compensation, a tribunal must consider the facts of the case".[453] Therefore, it can be concluded that for some Tribunals it is not the receipt of an actual compensation that determines the legality of compensation, but a mere guarantee to be compensated could be enough.

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447 Award of 2015 March 13 Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, para. 141.

448 Ibid., para. 123.

449 Award of 1999 February 10 Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3, para. 130.

450 Ibid., para. 131.

451 Art 4.2 of the BIT of BLEU (Belgium-Luxembourg Economic Union) (1989).

452 Award of 2002 October 11 Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, para. 71.

453 Award of 2019 October 9 Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, para. 301.

3.1.5. Other additional criteria

Besides the four conditions for legal expropriation, some BITs contain additional requirements such as good faith.[454] Others bind the provisions related to expropriation with non-discrimination, national treatment, FET, MFN or other substantive standards. For example, Art III.1. of the US-Congo BIT of 1984 provides that in addition to being done for public purpose, under due process and accompanied by prompt, adequate and effectively realizable compensation, in order to be lawful, expropriation must "not violate any specific provision on contractual stability or expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriation".[455] Similarly Art. 4 of the Switzerland-Congo BIT of 1974 provides that "the measures of expropriation, nationalization or dispossession shall not be discriminatory or contrary to a specific engagement".[456] Art. 3.2. of the Turkey-Oman BIT of 2007 provides that the investments shall not be expropriated "in the territory of the other Contracting Party except for a public purpose, on a non-discriminatory basis *and* in accordance with applicable law and the general principles of treatment provided for in Article 2 of this Agreement" (Article 2 of the BIT refers to non-discrimination and MFN). Art 12 (d) of the Japan-Cambodia BIT of 2007 provides that expropriation shall be carried out, *inter alia*, "in accordance with due process of law and Article 4" which refers to FET, full protection and security as well as umbrella clauses. Belgium-Luxemburg Economic Union-Burundi BIT of 1989 in its Art 4 states that the contracting parties shall not expropriate unless it is not exclusively for the imperatives of public utility, security or national interest. In addition to that, the measure shall be taken in accordance with legal procedure, accompanied by adequate and effective compensation[457], nor it shall be discriminatory or in violation of specific undertakings.[458]

The additional criteria become of particular importance when a party seeks through the MFN provisions to import additional conditions to lawful expropriation. Importing additional provisions through MFN allows to form a "Frankenstein-like concoction" from expropriation clauses in different treaties.[459] For example, in *Garanti Koza v*

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454 UK-Colombia BIT (2010).

455 Article III.1.(d).

456 Article 4.

457 Note no reference to "prompt".

458 Article 4: " Chaque Partie contractante ne prendre aucune mesure privative ou restrictive de propriété, ni *aucune autre mesure ayant un effet similaire* à l'égard des investissements situés sur son territoire, si ce n'est lorsque des impératifs d'utilité publique, de sécurité ou d'intérêt national l'exigent exceptionnellement, auquel cas les conditions suivantes doivent être remplies :

a) les mesures sont prises selon une procédure légale ;

b) elles ne sont ni discriminatoires, ni contraires à un accord particulier...;

c) elles sont assorties de dispositions prévoyant le paiement d'une indemnité adéquate et effective."

459 Award of 2016 December 19 Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, para. 307.

Turkmenistan the claimant unsuccessfully sought to import via France - Turkmenistan BIT and UAE - Turkmenistan BIT additional conditions to lawful expropriation: (1) that the expropriation not be contrary to a specific commitment, and (2) that it be in accordance with due process of law.[460] So far the attempts to cherry pick the imported provisions have not been successful. As explained by the tribunal in *Garanti Koza v Turkmenistan*, the claimant was seeking to combine provisions of different treaties in order to create one custom-made treaty provision that the respondent never explicitly agreed to and thus it would be unfair.[461]

3.2. Different approaches

3.2.1. Sole effects doctrine

According to the Sole effects doctrine, in order to find indirect expropriation "[w]hat matters is the effect of governmental conduct – whether malfeasance, misfeasance, or nonfeasance, or some combination of the three – on foreign property rights or control over an investment, not whether the state promulgates a formal decree or otherwise expressly proclaims its intent to expropriate."[462]

The core of this doctrine is to concentrate purely on the effect of the State's measure without taking into account the rationale behind it. If the State measure has a severe negative impact on the investment, it must be regarded as expropriatory and the investor must be compensated.

The oft-cited case law in support of this approach is that of Iran-US claims tribunal. No other international claims tribunal has delivered more decisions. According to some authors. The sole effects doctrine is an exclusive creation of the Iran-US Claims Tribunal thus any investment arbitration tribunal applying it is subconsciously relying on the jurisprudence of the Iran-US Claims Tribunal as well.[463]

The landmark case for the development of the sole effects doctrine *Tippets*.[464] The dispute arose when the Iranian Government appointed a temporary manager of the joint venture company in which the claimant had a fifty percent shareholding with the other fifty percent owned by an Iranian entity. The temporary manager commenced his duties in August 1979 and immediately breached the partnership agreement that regulated the joint venture by signing unauthorized cheques and making other decisions without consulting the claimant. The claimant managed to rectify these violations,

460 Ibid. para. 260.

461 Ibid. para. 375.

462 W. M. Reisman, R. D. Sloane, "Indirect Expropriation and its Valuation in the BIT Generation", *Faculty Scholarship Series, Paper* 1002 (2004):121.

463 Aniruddha Rajput, "*Problems with the Jurisprudence of the Iran–US Claims Tribunal on Indirect Expropriation", ICSID Review – Foreign Investment Law Journal*, 30(3) (2015): 591.

464 Award of 1983 December 19 Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, et al No. ITL 32-24-1.

however in November 1979 the hostage crisis at the U.S. Embassy in Tehran began which led to the end of the relationship between the temporary manager and the claimant. The claimant's representatives were forced to leave Iran in December 1979 and thereafter the management of the joint venture ceased all communication with the claimant with respect to its business operations. The Tribunal found that "While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of the fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The *intent of the government is less important than the effects of the measures on the owner*, and the form of the measures of control or interference is less important than the reality of their impact."[465]

The Tribunal in *Santa Elena* approved the *Tippets* findings the tribunal stated that "While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference".[466] It continued by finding that the State's measures aimed to protect the environment "no matter how laudable and beneficial to society as a whole" had the same effect as any other expropriatory measures and therefore Costa Rica was obliged to pay compensation.[467] The logical reasoning behind the Santa Elena decision is that States can only expropriate for the public utility, therefore, they should not be able to invoke public interest as a legitimate reason that would justify the non-payment of compensation to the investor.[468]

Another example of the doctrine is the *Metalclad* case where the tribunal, when interpreting NAFTA Article 1110, found that "expropriation under NAFTA includes not only open […], but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State".[469] This case demonstrates a particularly radical approach, as the tribunal concentrated purely on the effect of the measure and did

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465 Ibid, para. 225-6.

466 Award of 2000 February 17 Compania del Desarrolo de Santa Elena and the Republic of Costa Rica, ICSID Case N. ARB/96/1, para. 71.

467 Ibid., para. 72.

468 Brigitte Stern, "In search of the frontiers of Indirect expropriation", Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2007): 45.

469 Award of 2000 August 30 Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, para. 103.

not enter into a deeper analysis of how the measure would be beneficial to the State, or even if it would be beneficial at all. Nevertheless, it took into account not only the deprivation of already existing property, but also the economic benefit that could have been brought by the investment in the future, which sets the threshold of serious deprivation quite low.

The *Metalclad* radical approach has been followed by some investment tribunals such as *CMS*, where it was held that indirect expropriation occurs in cases where the "enjoyment of the property has been effectively neutralized" regardless of the reasons behind the State measures.[470]

According to A. Rajput, there are several major issues with the sole effects doctrine as a whole and one of the main ones being strong reliance on the Iran-US claims tribunal jurisprudence. He argues that the sole effects doctrine has no support in customary or treaty law. Its development being largely based on the Iran-US claims tribunal's jurisprudence is largely flawed.[471] As explained in *Pope & Talbot* "References to the decisions of the Iran–U.S. Claims Tribunal ignore the fact that that tribunal's mandate expressly extends beyond expropriation to include 'other measures affecting property rights".[472] This specific and broad language of the clause potentially render the jurisprudence *lex specialis.*[473]

Some tribunals reasoned that the doctrine as such is applicable, however, in certain specific circumstances it needs to be applied in a nuanced manner. In *Saipem v Bangladesh* that dealt with the claim of judicial expropriation, the Tribunal developed that "according to the so- called "sole effects doctrine", the most significant criterion to determine whether the disputed actions amount to indirect expropriation or are tantamount to expropriation is the impact of the measure. […] That said, *given the very peculiar circumstances* of the present interference, the Tribunal agrees with the parties that the substantial deprivation of Saipem's ability to enjoy the benefits of the ICC Award is not sufficient to conclude that the Bangladeshi courts' intervention is tantamount to an expropriation. If this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds".[474] The approach allowing to take into account not only the effects of the measure to the investor but also the general circumstances surrounding the dispute is close to the proportionality approach with a particular emphasis put on the effects.

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470 Award of 2005 May 12 CMS Gas Transmission Company v The Argentine Republic, ICSID Case No. ARB/01/8, 262.

471 Aniruddha Rajput, "*Problems with the Jurisprudence of the Iran–US Claims Tribunal on Indirect Expropriation", ICSID Review – Foreign Investment Law Journal*, 30(3) (2015): 591.

472 Award of 2000 June 26 Pope & Talbot Inc v The Government of Canada, NAFTA, para. 104.

473 Aniruddha Rajput, "*Problems with the Jurisprudence of the Iran–US Claims Tribunal on Indirect Expropriation", ICSID Review – Foreign Investment Law Journal*, 30(3) (2015): 592.

474 Award of 2009 June 30 Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, para. 133.

Concentrating purely on the effects of the measure raises question as to what degree a State measure has to interfere with the investor's rights in order for it to constitute indirect expropriation.[475]When determining the required degree of interference investment tribunals often refer to the *Pope & Talbot* case where it was held that "the test is whether that interference is sufficiently restrictive to support a conclusion that property has been 'taken' from the owner"[476] and later found that this threshold is reached if the State measure amounts to a 'substantial deprivation'.[477] This constitutes a high threshold for a measure to be considered expropriatory thus State's regulatory power is restricted less severely and provides some interest balancing.

3.2.2. Police powers doctrine

The police powers doctrine is deeply rooted in international law, jurisprudence and American constitutional doctrine.[478] According to this doctrine, the purpose of a State measure is the decisive factor. The doctrine enshrines the principle that "that the State's reasonable bona fide exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that the measures taken for that purpose should not be considered as expropriatory".[479]

Professor J. Vinuales notes that the term 'police' in its present meaning was already used in the eighteenth century.[480] Yet, he has traced that as an actionable concept it was applied by Vattel in *Le droit des gens* in 1758 where an example of vineyards and corn was given. Vattel argued that "if vineyards are multiplied to too great extent in a country which is in want for corn, the sovereign may forbid the planting of the vine in fields proper for tillage; for here the public welfare and safety of the state are concerned".[481]

In the international jurisprudence, the concept of inherent police powers can be traced back to the decision of the Permanent Court of International Justice (PCIJ) in the *Certain German Interests in Polish Upper Silesia*, where it noted that "the only

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475 Gebhard Bucheler, *Proportionality in Investor-State Arbitration* (Oxford University Press, 2015), 126.

476 Award of 2000 June 26 Pope & Talbot Inc v The Government of Canada, NAFTA, para. 102.

477 Ibid., para. 102.

478 J. E. Vinuales, *Sovereignty in Foreign Investment Law*, The Foundations of International Investment Law: Bringing Theory into Practice Zachary Douglas (ed.) (Oxford University Press, 2014), 326.

479 Award of 2016 July 8 Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), para. 295.

480 J. E. Vinuales, *Sovereignty in Foreign Investment Law*, The Foundations of International Investment Law: Bringing Theory into Practice Zachary Douglas (ed.) (Oxford University Press, 2014), 326.

481 Emer de Vattel, The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury, Kapossy B., and Whatmore R., (eds.) (Liberty Fund, 2008), para. 255.

measures prohibited are those which generally accepted international law does not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation and similar measures are not affected by the Convention".[482]

Later, the principle has been transposed into more specific legal instruments. The 1961 Harvard Draft Convention on the International Responsibility of States for Injury to Aliens already provided in Article 10(5) as follows:

An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from ... the action of the competent authorities of the State in the maintenance of public order, health, or morality ... shall not be considered wrongful, provided

(a) it is not a clear and discriminatory violation of the law of the State concerned;

(b) it is not the result of a violation of any provision of Article 6 to 8 of this Convention [denial of justice];

(c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and

(d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.[483]

Following this, the doctrine was endorsed in the Third Restatement of the Foreign Relations Law of the United States of 1987, which stated that "[a] State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police powers of states, if it is not discriminatory".[484]

The police powers doctrine did not find immediate recognition in investment treaty arbitration by the tribunals, however, a consistent trend of differentiating the exercise of police powers from indirect expropriation became apparent after 2000.[485] To Professor J. Vinuales, the general problem with the application of the police powers doctrine in investment arbitration arises from the scope given to the expression of sovereignty in investment law.[486] Professor argues that sovereignty is a set of "specific legal actionable concepts that are intended to express the special position enjoyed by the State as a historical unit of a social organization".[487]According to him, these actionable

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482 Judgment of the PCIJ of 1926 May 25 Certain German Interests in the Polish Upper Silesia (Merits), PCIJ Series A No. 7, 22.

483 Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 Am. J. Int'l 548 (1961): 562.

484 American Law Institute, Restatement (Third) Foreign Relations of the United States 1 (1987): 712.

485 Award of 2016 July 8 Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), para. 295.

486 J. E. Vinuales, *Sovereignty in Foreign Investment Law*, The Foundations of International Investment Law: Bringing Theory into Practice Zachary Douglas (ed.) (Oxford University Press, 2014).

487 J. E. Vinuales, *Sovereignty in Foreign Investment Law*, The Foundations of International Investment Law: Bringing Theory into Practice Zachary Douglas (ed.) (Oxford University Press, 2014), 317-318.

legal concepts composing sovereignty have been "significantly neglected" because foreign investment law is often seen to be a "special or agreement-based matter" which results in sovereignty being limited to treaty-based public policy exceptions or carve-outs defined by a treaty. Therefore, seeing investment law as a "special regime" limits the impacts of customary international law and thus the idea of sovereignty enshrined therein.[488] Treaties, contracts, and investment arbitration are, from this perspective, exceptions that has grown out of proportion. The confusion arose because the concept of sovereignty itself is not capable to serve as a basis for legal argumentation in investment arbitration. Some more specific "actionable" concepts are used instead, such as the police powers doctrine or immunity from execution.[489] The natural conflation of foreign investment law with treaty or contract law has led to often limiting the room for sovereignty to a handful of public policy exceptions that are subject to demanding requirements".[490]

According to the OECD, police powers are part of customary international law. In its working papers on indirect expropriation, it has found that "[i]t is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police power of the State, compensation is not required." .[491]

Numerous arbitral tribunals have also confirmed that the concept of police powers exists as part of customary international law,[492] thus there would seem to be no need to restate it in investment treaties in other to be able invoke it investment disputes.[493]

One of the rationales of doing so may be the aim to "freeze" the development of custom. The ICJ in the *Nicaragua* case deliberated that customary international law norms continue to exist separately even if the very same rule has been transposed into a treaty. The Court said that "[e]ven if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm".[494]

Another reason may be to include it in order to reaffirm that customary international law shall be applicable to supplement the treaty provisions.[495] The idea that

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488 Ibid., 318.

489 Ibid., 319.

490 Ibid., 324.

491 OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, OECD Working Papers on International Investment, 2004/4 (2004), 5.

492 Award of 2006 March 17 Saluka v Czech Republic UNCITRAL, paras. 255, 260, 262.

493 J. E. Viñuales, Sovereignty in Foreign Investment Law, The Foundations of International Investment Law: Bringing Theory into Practice Zachary Douglas (ed.) (Oxford University Press, 2014), p. 329.

494 Judgment of ICJ of 1986 June 27 in case Military and Paramilitary Activities in and Against Nicaragua, I.C.J. Reports 1986, p. 14, para. 177.

495 Jorge E Viñuales, "Too Many Butterflies? The Micro-Drivers of the International Investment Law System", *Oxford Journal of International Dispute Settlement*, 9 (2018): 649.

custom and treaty provisions continue to apply separately at the same time and the customary international law may be applicable in order to supplement the treaty was confirmed in the ICJ's Advisory Opinion in *Legality of the Threat or Use of Nuclear Weapons* where it observed that "the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be consid- ered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".[496] Professor Viñuales also correctly points out that investment treaties rarely address the extent of a State's regulatory police powers explicitly and when they do sol it is not considered as replacing the customary norms on State sovereignty, therefore, the supplementary role of customary law in the area of indirect expropriation is of a particular importance.[497]

Strong reliance on the police powers doctrine has led to some controversial decisions in investment arbitration. In *Methanex* the Tribunal found that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory".[498] It seems that as long as the measure is in the public interests and satisfies the procedural requirements, it does not matter that the foreign investor or the investment is affected. Nevertheless, the tribunal confirmed the concept to be a principle of general international law.

The *Saluka* tribunal followed the footsteps of *Methanex* stating that "the principle that a State does not commit an expropriation and thus is not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are commonly accepted as within the police powers of States' forms part of customary international law today"[499]This kind of approach is problematic, because States almost always regulate in the public interest and it would be difficult to imagine a situation where a measure taken would not be at least partially in the public interest. It leads to the situation where it would be very difficult or even impossible for a foreign investor to prove that expropriation has occurred and that a compensation should be paid.

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496 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports (1996), p 226, para 25.

497 Jorge E Viñuales, "Too Many Butterflies? The Micro-Drivers of the International Investment Law System", *Oxford Journal of International Dispute Settlement*, 9 (2018): 650.

498 Award of 2005 August 3 Methanex Corporation v United States of America, UNCITRAL, para. 7.

499 Award of 2006 March 17 Saluka v Czech Republic UNCITRAL.

The foreign investor would suffer the damage for almost every realization of a public interest through regulations; nevertheless, the concept of indirect expropriation would loose its significance, as the expropriation causes in BITs would cover only formal or discriminatory expropriations.

3.2.3. Proportionality approach

The proportionality approach, also known as mitigated police powers doctrine, aims to balance the host State's and its foreign investors' interests by taking into account both, the effect of the measure and the reasoning behind its adoption.

As it was mentioned, it was only in 2003 in the *Tecmed* case that the arbitral tribunal referred to the proportionality principle explicitly, when interpreting the Spain-Mexico BIT provision on indirect expropriation. The tribunal in its analysis largely relied on the jurisprudence of ECtHR, however, it has not provided any reasons for why it chose to refer to proportionality as used by the ECtHR instead of, for example, the WTO balancing approach. The WTO, as already explained, also touches upon all the aspects of the proportionality analysis besides having in mind the economical nature of the organization and the right to property related to expropriation, reference to the WTO jurisprudence instead of human rights law may have been more appropriate. However, reason for the tribunal's choice of the human rights law as the source of inspiration will remain unknown, as it provided no explanation in its decision. In fact the arbitral tribunal did not provide any explanation for why it referred to the proportionality analysis at all.

Yet, even if the tribunal chose to disregard the differences between the law systems, there is one major methodological difference between how the proportionality test has been applied in *Tecmed* and how it had been applied by the ECtHR that must be mentioned. While both, the court and the tribunal, dealt with the right to property and its alleged violation by the host State, conceptually the situations in the two regimes are very different. By weighting the effects of the measure and its purpose, the *Tecmed* tribunal sought to establish the very existence of expropriation, while the ECtHR used the proportionality test to decide whether the expropriation was justified.

In the human rights context, it is Article 1(1) of the First Additional Protocol to the ECHR that governs expropriations. The ECtHR in its jurisprudence has repeatedly interpreted the article as containing 3 distinct rules. Firstly, it guarantees the peaceful enjoyment of property in general manner. Secondly, it subjects both direct and indirect types of expropriations to the 'conditions provided for by law and by general principles of international law'. Thirdly, it acknowledges that that host States maintain the right to control the use of property in accordance with the public interest.[500] When analyzing situations of alleged expropriation the Court starts by evaluating the alleged interference with a property right by applying the second and the third rules. If it finds that the State measures do not fall under either of the two rules (for example, in situations

500 Gebhard Bucheler, *Proportionality in Investor-State Arbitration* (Oxford University Press, 2015), 145.

regarding measures that precede expropriations)[501], the ECtHR bases its analysis on the 'fair balance' requirement enriched in the first rule arising from the first sentence of Article 1(1) of the First Additional Protocol that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions".[502]

The case that the *Tecmed* tribunal relied on in particular when introducing the proportionality analysis was *James v. United Kingdom*.[503] The case concerned the long-term tenants who argued that their right to property, guaranteed by Article 1 of the First Additional Protocol, had been violated as a consequence of a governmental act.[504] The domestic Court of the UK decided that the contested act deprived the applicants of their possessions, however did not engage into a deeper analysis of whether expropriation has occurred.[505] The ECtHR, on the other hand, started its examination by establishing that expropriation has occurred and then engaged into proportionality analysis, by weighting the public interest and the interests of the applicants, in order to determine the lawfulness of the expropriation.

The way the Court used the test, and especially having in mind that it also applied the Margin of Appreciation doctrine, it is quite surprising that the *Tecmed* tribunal chose to refer to this case when introducing the proportionality analysis for the purpose of determining the very existence of expropriation. Years later the Tribunal in *Philip Morris v Uruguay* pronounced that the margin of appreciation doctrine is not limited to the context of ECHR but equally applies to claims arising under BITs.[506]

In the ECHR system States enjoy the large margin of appreciation when determining what lies in the public interest and even though the Court does review the measure, it will not be considered exploratory unless it is manifestly without reasonable foundation'.[507] This leads to the fact that even if the State measure complies with the criteria of lawful expropriation enumerated in Article 1(1) of the First Additional Protocol, it may still be found to be unjustified if it does not fulfill the proportionality test. The *Tecmed* tribunal, on the other hand, used the very same test to interpret the Article 5 of the Spain-Mexico BIT on expropriation. The problem is that examining proportionality after the existence of expropriation has already been established, instead of using it for the very establishment of expropriation, subjects the lawfulness of a State measure to one additional requirement. This way State's regulatory freedom is restricted to a much higher degree than the wording of the BIT provision itself and leads to the opposite effect than the ECtHR intended in *James*. The *James* approach

501 Ibid.

502 Ibid.

503 ECHR Judgment of 1986 February 21 in case James v. United Kingdom, application No. 8793/79.

504 Ibid., para. 10-11.

505 Ibid., para. 38.

506 Award of 2016 July 8 Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), 399.

507 Gebhard Bucheler, *Proportionality in Investor-State Arbitration* (Oxford University Press, 2015), 146.

provided a higher degree of protection to the investors, while the *Tecmed* proportionality diminishes the protection provided for in the BITs.[508]

To conclude, there are great differences between the investor-State arbitration system and the human rights protection system. Proportionality is the right approach to be used in order to balance competing interests, however the way it was introduced to the investor-State arbitration is quite controversial. The tribunal did not take into account the Margin of Appreciation doctrine and applied strict proportionality approach.

While the views on whether proportionality is the right principle to be applied in investor-State arbitration differ, most investment tribunals after *Tecmed* have followed the proportionality approach. However, as previously mentioned, none of the tribunals followed a clearly articulated three-stage proportionality analysis, it just used the principle to balance the competing interests.

The case concerned a Spanish company *Tecmed*, which bought a hazardous waste landfill in Mexico. The company acted in Mexico through its subsidiary the *Mexican Cytrar*. In order to operate the landfill the company was supposed to obtain an authorization from the Mexican authorities and the authorization was supposed to be renewed annually at the request of the landfill's owner. Initially the authorization was granted by the authorities and was extended once; however, two years after the initial permit to operate was granted, INE, the Mexican institution responsible for the permits, refused to renew it. The claimant argued that the action of the Mexican authorities violated the Spain-Mexico BIT and constituted indirect expropriation. By non-renewing the permit to operate the landfill of hazardous waste, INE has expropriated the claimant's investment, as without such permit the property has no market value.[509]

The tribunal divided its analysis into two parts. First, it had to determine whether the non-renewal of the permit could be held to be a measure equivalent to expropriation under the terms of the Section 5(1) of the Spain-Mexico BIT; more precisely, whether the measure is sufficiently intense to be considered a compensable indirect expropriation and not merely a non-compensable regulation.[510] In order to do so, the tribunal looked at the measure's effects upon the investment and found that due to the fact that without the permit the landfill has no value, the decision not to renew the permit can be treated as an expropriation under Article 5(1) of the Agreement."[511] If the tribunal had applied the sole effect doctrine, this would have been the end. Nevertheless, according to some authors, finding that as to the effect of the measure became a dominant element in the tribunals reasoning and set the scene for a finding that

508 Ibid., 147.

509 Award of 2003 May 29 Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, paras. 95-96.

510 Ibid., para. 115-118.

511 Ibid., para.117.

nothing could outweigh it.[512] However, it is easy to disagree, as in this case it was just the beginning of analysis. In the second step, the tribunal examined whether the non-renewal "due to its characteristics and considering not only its effects, is an expropriatory decision".[513] The tribunal opted to consider the effects of the measure to be just one of the elements and not the only one in its analysis. At the same time, the tribunal acknowledged that the State has an inherent right to exercise its police power, but it is limited in a sense that a State has to respect the obligations arising from the BIT. Therefore, the two findings (that because of the effect of the measure it could amount to expropriation, but that the State still has a right to regulate) lead to the introduction of a new approach, which is the application of the principle of proportionality, in the analysis.

Although the tribunal acknowledged that due deference must be paid to the State, it also stated that "there must be reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure" and evaluated the State's actions in the light of Article 5(1) of the BIT.[514]

First, the tribunal evaluated the suitability of the measure. It did not explicitly refer to the question whether the non-renewal of the permit was an appropriate measure; however, after having determined that the main reasons leading to such decision were related to the "social or political circumstances and the pressure exerted on municipal and state authorities and even INE itself" the tribunal stated that it would be necessary to examine these reasons as a whole in order to determine whether the measure is proportional to the deprivation of rights and the negative economic impact on the investment.[515] The argument that this paragraph relates to the suitability stage is a rather far-stretched one, however it is possible to see an aspect of suitability in this part of tribunal's reasoning. The tribunal decided to look at local circumstances and decide if they were of such intensity that it could lead to the decision not to renew the permit, which ultimately lead to the closure of the landfill. The tribunal, in a way, judged whether the closure of the landfill was an appropriate answer to the concerns.

Regarding the necessity analysis, it is hard to find in the judgment, and the tribunal has been criticized for not engaging into it at all.[516] The tribunal did not consider the question whether the non-renewal of the permit, which resulted in a complete loss of the enjoyment of the investment, was the least restrictive measure possible. It

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512 Caroline Henckels, "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration", *Journal of International Economic Law* 15(1) (2012): 232.

513 Award of 2003 May 29 Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, (ICSID Case No. ARB(AF)/00/2), para. 118.

514 Ibid., 122.

515 Ibid.,132.

516 Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protections and Regulatory Autonomy* (Cambridge University Press, 2015), 233.

is quite likely, that if the tribunal had evaluated the measure's necessity it would have found that there had been other ways to respond to the community's pressure, such as relocating the landfill, especially having in mind that the claimant had agreed to assume a substantial portion of the cost of the acquisition and the start-up of the new site; and, in general, performed all of its obligations in good faith asking only for the possibility to transfer its activities to a new site.[517]

Finally, the proportionality *stricto sensu* stage is the most evident one in the decision. The tribunal had to weight whether the effects of measure are not disproportionate to the harm suffered by the investor, or in other words, whether the goal pursued by the State measure outweighs the harm suffered by the investor. The crucial point at his stage of analysis is to identify correctly the objective of the measure. In *Tecmed* the tribunal determined that the goal of the non-renewal of the permit was to respond to the community's concerns as well as dissatisfaction about the landfill's location and not, for example, environmental considerations that are likely to be the real basis of the reaction of the community.[518] Had the tribunal looked deeper at where the community's dissatisfaction comes from, maybe it would have identified the aim of the measure differently and the decision would have been different. It is just a hypothesis, however, because the suitability and necessity stages have not been (properly) applied by the tribunal, any concerns as to the real goal of the host State's measure provide a possibility to question the legitimacy of the whole decision.

Overall, the *Tecmed* tribunal's methodology was clearly imperfect. It came to the conclusion that the deprivation of the investment rights was disproportionate without following the three-stage analysis. In this case, a proper evaluation of suitably and necessity of the measure would not have changed the final outcome, yet it would have added more legitimacy to the decision and set a better example for other tribunals. Nevertheless, had the tribunal found that the measure was proportionate after having analyzed only strict proportionality, it could have led to the situation where unsuitable and unnecessary measures would have been held proportionate. Nevertheless, from a methodological point of view, the fact that many relevant considerations (such as possible less restrictive measures) have been left out may lead to concerns of subjectivity, lack of appreciation for the context and lack of transparency.[519]

The *Tecmed* decision, while imperfect, made the first step and explicitly introduced the principle of proportionality into investor-State arbitration.

The *Continental Casualty* decision came shortly after the *Tecmed* and concerned the situation when in 2001-2002 Argentina found itself in a deep economic crisis and the government was forced to take harsh emergency measures in order to fight it. In

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517 Award of 2003 May 29 Tecnicas Medioambientales Tecmed S.A. v The United Mexican States, ICSID Case No ARB (AF)/99/2, 142.

518 Ibid., paras, 127-138.

519 Caroline Henckels, "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration", *Journal of International Economic Law* 15(1) (2012): 233.

this case the claimant, a company providing employment compensation insurance in Argentina, alleged that the State measures, pesification of US dollar deposits in particular, has affected the investment and amounted to indirect expropriation.

The tribunal in its analysis relied on the WTO jurisprudence and its approach of 'weighing and balancing of factors' (it is especially evident in the necessity analysis) as well as the ECtHR practice. Differently from *Tecmed*, the tribunal in *Continental Casualty* took into account the Margin of Appreciation doctrine applied by the court, which lead to a particularly deferential approach toward the host State. When evaluating whether the measures taken by Argentina were necessary and whether any better alternatives were available, the tribunal agreed with the Argentina's submission that the issue should be analyzed with the highest degree of deference and that the tribunal "should not arrogate itself the power to establish what other measures could have been taken instead".[520] The tribunal noted that "it is not its mandate to pass judgment upon Argentina's sovereign choices as an independent state".[521]

The *Continental Casualty* Arbitral tribunal in its analysis, not just mentioned deference to the host State as the *Tecmed* tribunal did, but actually was deferential to Argentina by setting out a very high threshold for a measure to be considered a form of expropriation. It distinguished between the measures that are considered expropriatory because of their impact on property which are legitimate only if adopted for public purpose, non-discriminatory and compensated; and those falling within the host State's regulations of property, which entail mostly 'inevitable limitations'. The latter ones are not considered to be expropriatory measures as long as they "do not affect property in a an intolerable, discriminatory or disproportionate manner", nevertheless the tribunal noted that minor losses that are incidental consequence to a measure adopted for a public purpose should not be regarded to expropriatory.[522]

Regarding the suitability of the chosen measures, tribunal evaluated whether they "contributed materially to the realization of their legitimate aims", more specifically whether the measures were apt to achieve the prescribed goals.[523] In this phase of analysis the tribunal nicely referred to the WTO Appellate Body's decision *EC-Tyres* case[524] and found that "[t]he measures were sufficient in their design to address the crisis and were applied in reasonable and proportionate way."[525]

Finally, regarding the strict proportionality analysis, the tribunal weighted the interference with the investor's rights with the benefit obtained by the host State and found that the measures were applied in "a reasonable and proportionate way", nevertheless "were basically limited to the economic and financial aspects of the economic

520 Award of 2008 September 5 Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, para.189.

521 Ibid., para. 199.

522 Ibid., paras. 279, 284.

523 Ibid., para.196.

524 Ibid., para. 296.

525 Ibid., para. 232.

crisis". Tribunal here evaluated whether the measures takes were not excessive or disproportionate and this reflects the proportionality *stricto sensu* stage.[526]

Overall, *Continental Casualty* arbitral tribunal accurately applied the proportionality analysis relying on both, the WTO and the ECtHR, practice. What is important, it did not pick up pieces from the jurisprudence of the Court, but applied it in full, meaning that the Margin of Appreciation doctrine was exported into investor-State arbitration system by according deference to the host State, while the *Tecmed* tribunal even though indicated that would be deferential to the host State in its analysis, eventually still opted for the strict proportionality approach.

LG&E is another case related to the Argentina's economic crisis in which the tribunal opted for a similarly deferential, yet slightly different approach than in *Continental Casualty*. In this case the claimant (LG&E) argued that Argentina's abrogation of the principal guarantees of the tariff system amounted to indirect expropriation and violated Article IV of the Argentina-USA BIT, because the value of the claimant's holdings in the Licenses has been reduced by more than 90% as a result of the abrogation.[527] Argentina, on the other hand, argued that the State measures affected tariffs by only around 2% and that such a small loss could not amount to indirect expropriation and that in any event, no expropriation could have taken place during the economic crisis as the fluctuation of the value of the investment occurred due to the "macroeconomic conditions affecting the Argentine Republic" rather than the measures adopted by the State.[528]

Similarly to *Tecmed*, the arbitral tribunal in the *LG&E* divided its analysis into two parts and started by defining the concept of indirect expropriation itself by referring to the *CMS* tribunal's formula that the expropriation occurs when the State measures have "effectively neutralized the benefit of property of the foreign owner".[529] The tribunal also defined the term 'neutralized' as a situation when "a party no longer is in control of the investment, or where it cannot direct the day-to-day operations of the investment", this way already setting a very high threshold for a measure to be considered expropriatory.[530]

In the second part of the analysis the tribunal chose to "balance two competing interests: the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies" in order to establish whether the State measures constitute expropriation under article IV of the BIT, this way referring to the principle of proportionality.[531]

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526 Award of 2008 September 5 Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, para. 232.

527 Award of 2007 July 25 LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, para. 177.

528 Ibid., paras.182-183.

529 Award 2021 September 13 CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, para. 604.

530 The tribunal referred to *Pope & Talbot* para.100.

531 Award of 2007 July 25 LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, para.189.

Probably one of the main differences from the *Tecmed* tribunal's analysis is that in the *LG&E* did not only refer to deference to the host State measures, but actually applied the principle. In fact, the tribunal in *LG&E* has been criticized for being too deferential to the host State in its decision; it is particularly evident at the necessity stage.[532] Yet it is clear that the tribunal applied a deferential proportionality analysis and did not get back to the radical police powers approach not only from its references to balancing, but also from the explicit statement that "[i]t is important not to confound the State's right to adopt policies with its power to take an expropriatory measure".[533]

The tribunal applied all the three elements of the proportionality analysis, however accorded very different weight to different elements.

In relation to suitability, the tribunal chose not to engage into a deeper analysis of each measure separately, calling them an 'economic recovery package', and determined that the measures taken by Argentina were overall 'legitimate' and 'reasonable'.[534] It was the necessity stage where the tribunal was particularly deferential. It set a very low threshold for necessity by holding that the implemented measures did not need to be the only available means to respond to the crisis and that it was up to the State to decide what course of action to take. Any 'legitimate' measure was regarded as necessary by the tribunal.[535] This approach of leaving a large marge of discretion to the host State to choose the measure is exactly the opposite of the *CMS* tribunal's finding where it suggested alternative measures that could have been taken by the State and without getting into a deeper analysis of their effectiveness stated that "which of these policy alternatives would have been better is a decision beyond the scope of the Tribunal's task, which is to establish whether there was only one way or various ways and thus whether the requirements for the preclusion of wrongfulness have or have not been met".[536] The *LG&E* approach toward necessity also differs from the *Continental Casualty* approach, where the tribunal was deferential to the host State by not analyzing the necessity of the measures taken in a great depth. In the LG&E the measures were analyzed, simply the set threshold for them to be considered as suitable was low.

The proportionality *stricto sensu* stage the tribunal opted for a very general approach and first stated that the measures adopted by the State that have a social or general welfare purpose "*must* be accepted without imposition of liability, *except* in cases where the State's action is obviously disproportionate to the need being addressed"

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532 Caroline Henckels, Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protections and Regulatory Autonomy (*Cambridge University Press*, 2015), 90.

533 Award of 2007 July 25 LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, para. 194.

534 Ibid., paras. 239-242, 257.

535 Ibid., paras. 239-240.

536 Award of 2005 May 12 CMS Gas Transmission Company v The Argentine Republic, ICSID Case No. ARB/01/8, para. 323.

(emphasis added)[537], then after having evaluated the urgency of the measures, their drafting process, as well as the fact that Argentina took into account the interests of foreign investors when drafting the Emergency Law came to the conclusion that the measures taken were not excessive or disproportionate. The tribunal was deferential at this stage of the analysis as well, as it avoided a substantive review of the measures taken. The fact that Argentina took into account the interests of private parties into account played a major role when deciding that the measures were proportionate. This raises the risk of uncertainty, because the tribunal did not elaborate on this point, and it remains unclear to what extent the interests of the investors need to be taken into account.

Lastly, in the *LG&E* as well as in *Continental Casualty*, the tribunals chose to apply the Margin of Appreciation doctrine, therefore it would seem that the proportionality analysis is developing to be more and more deferential as opposed to strict proportionality approach introduced by *Tecmed*. On the other hand, the development is not consistent, and depends completely on the arbitral tribunal's choice, because as it was in *Siemens v. Argentina*, which has expressly rejected the Margin of Appreciation as a suitable approach in its decision making, the principle does not form part of customary international law, nor there is any reason to apply it if it is not referred to by the BITs.[538]

3.3. Substantial and permanent deprivation

Whichever doctrine is applied when deciding whether a measure constitutes expropriation, it is generally agreed that deprivation of rights needs to be substantial and permanent.[539] The two requirements are cumulative.

3.3.1. Substantial deprivation

Substantial deprivation is the main requirement to find the measures amounted to expropriation. The origins of the test in jurisprudence can be traced back to the Iran-US claims tribunal's decision in *Starrett Housing*.[540] A dispute concerned a US company that through its subsidiary Shah Goli engaged into large-scale construction project in Iran. It argued that when the project was 75 percent complete, it was forced to stop because Starrett's 150 American supervisors and other American subcontractors as

537 Award of 2007 July 25 LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, para. 195.

538 Award of 2007 January 17 Siemens A.G.v. The Argentine Republic, ICSID Case No. ARB/02/8, para. 354.

539 James Crawford, Brownlie's Principles of Public International Law, (Oxford University Press, 2019), 509.

540 Award of 1983 December 19 Starrett Housing Corporation v. Iran.

well as employees had to leave Iran as a result of the Iranian revolution.[541] Moreover, the claimants alleged that since 1978 all major Iranian banks were experiencing major issues which made it impossible to conduct ordinary commercial transactions.[542] Almost a year later the Revolutionary Council of the Islamic Republic of Iran issued a series of legislation regarding the construction sector and via a decree appointed a temporary manager for Shah Goli to direct all further activities in connection with the Project on behalf of the Government. [543] Claimants brought a claim for expropriation arguing that they would have been financially and otherwise capable to finish the project themselves and that it was proceeding on schedule when they were deprived of control.[544] The Tribunal found that at least for a period of time Iran had interfered with the Claimant's property rights and rendered them so useless that they must be deemed to have been taken.[545] The Tribunal in its reasoning distinguished the pre and post revolution periods. With regards to the pre-revolution period, the Tribunal explained that "investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of the economic and political system and even revolution. That any of these risks materialized does not necessarily mean that property rights affected by such events can be deemed to have been taken."[546]

Later in *Tippets* the Tribunal found that "[w]hile assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of the fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."[547]

The ICJ in *ELSI* also found that 'significant deprivation' needs to be present for there to exist expropriation.[548] In this case an Italian company fully owned by two American corporations was requisitioned by Italy. The requisition was ordered for a limited period of time – 6 months, however, less than a month later ELSI filed for bankruptcy. The US claimed that Italy's actions were aimed at damaging ELSI's interests for the benefit of an Italian conglomerate IRI and that its actions qualify as

541 Ibid., para 61.

542 Ibid.

543 Ibid.

544 Award of 1983 December 19 Starrett Housing Corporation v. Iran, December, Interlocutory ITL 32-24-1, 4 Iran-U.S. Claims Tribunal, para. 59.

545 Ibid. para. 69.

546 Ibid. para. 73.

547 Ibid, para. 225, 226.

548 Judgment of the ICJ of 1989 July 20, Elletronica Sicula SpA (ELSI) (United States of America v Italy).

expropriation under Article V paragraph 2 of the FCN between Italy and the US.[549] The Court unfortunately did not delve into expropriation analysis reasoning that due to clear lack of causation expropriation was not possible, nevertheless ELSI's financial status in any case was precarious and that it would have filed for bankruptcy soon. It said that "In the view of the Chamber, however, […], nor the questions raised as to the possibilities of disguised expropriation or of a "taking" amounting ultimately to expropriation, have to be resolved in the present case, because it is simply not possible to say that the ultimate result was the con- sequence of the acts or omissions of the Italian authorities, yet at the same time to ignore the most important factor, namely ELSI's financial situation, and the consequent decision of its shareholders to close the plant and put an end to the company's activities".[550] Moreover, it found that since the requisition was not permanent and not without any recourse of appeal, it could not constitute a "taking", unless it constituted a significant deprivation of the investors' interests.[551] J. Cox, based on Judge Schwebel's dissenting opinion, argues that the time of requisition matters since it provided some economic effects and deprives the investors of their right to control, manage and liquidate ELSI. Had this reasoning be applied to the 'significant deprivation' requirement in the expropriation context, the Court's finding would have been different.[552]

A question may occur whether the term "severe" refers to the loss of valur of an investment or the degree of deprivation of rights. In *Isolux v Spain* the parties agreed to use the test adopted in *Electrabel v Hungary* in order to determine whether State measures were expropriatory. In that case, the Tribunal considered that for characterisation as expropriation there must have been "a substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual wiping out, effective neutralisation or de facto destruction of its investment, value or benefit".[553] However, the parties disagreed as to the interpretation of the test. They did not agree whether the terms „severe" and „radical" describe the loss of value or the deprivation of rights.[554] The Tribunal found it unnecessary to enter into the debate and developed that "since the position adopted both by the court in the Electrabel case and by many international arbitral tribunals in this regard is very clear and reflects the common conviction that illegal direct or indirect expropriation can affect both the investment and its control, and that the effect has to be substantial, that is, that the impact of the measures must be of such a magnitude on the rights or assets of the investor that its investment loses all

549 Ibid. paras. 114-119.

550 Ibid., para. 119.

551 Ibid.

552 Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019), 102-103.

553 Award of 2015 November 25 Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19.

554 Award of 2016 July 17 Isolux Infrastructure Netherlands B.V. v. the Kingdom of Spain, SCC Case No. V2013/153, para. 838.

or a very significant part of its value, which amounts to a deprivation of its property."[555]

More light on the substantial deprivation requirement was brought by the decision in *Pope & Talbot*.[556] In this case An American investor brought a claim under Art. 1110 NAFTA claiming that "Canada's Export Control Regime implementing SLA "has deprived the Investment of its ordinary ability to alienate its product to its traditional and natural market"". The dispute occurred when Canada and the United States entered into a Softwood Lumber Agreement which established a limit on free exports of softwood lumber from Canada into the US. The US investor owning subsidiaries in Canada claimed that each reduction of quotas on free exports violated his property rights and all together constituted creeping expropriation. The Tribunal began its analysis by finding that the Investment's access to the US market as such is a property interest that is protected under Article 1110 NAFTA.[557] It also found that nondiscriminatory regulation is in principle capable of constituting expropriation under the Article. However, it concluded that *en espèce* the State measures did not constitute an interference substantial enough to be characterized as expropriation under international law.[558] It was important that the Investor remained in control of day-to-day operations of the investment and no officers or employees were detained by the Regime.[559] The sole identifiable "taking" was the interference with the Investor's ability to export softwood lumber top the US which resulted merely in diminishment of profits which did not reach the threshold for expropriation.[560]

The *Tidewater v Venezuela* tribunal later synthesized the Pope & Talbot Tribunal's findings into an articulate four-criteria test: whether:

(a) The investment has been nationalised or the measure is confiscatory;
(b) The investor remains in control of the investment and directs its day-to-day operations, or whether the State has taken over such management and control;
(c) The State now supervises the work of employees of the Investment; and,
(d) The State takes the proceeds of the company's sales.[561]

In 2007 in *Sempra* the Tribunal described the measures articulated in *Pope & Talbot* as 'representative of the legal standard required to make a determination on an alleged indirect expropriation'.[562]

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555 Ibid., para. 839.

556 Award of 2000 June 26 Pope & Talbot Inc v The Government of Canada, NAFTA, para. 81.

557 Ibid. para. 96.

558 Ibid.

559 Ibid., para. 100.

560 Ibid., para. 101.

561 Award of 2015 March 13 Tidewater v Venezuela, ICSID Case No. ARB/10/5, para. 105.

562 Award of 2007 September 18 Sempra v Argentina, ICSID Case No. ARB/02/16, IIC 304 (2007), para. 284.

3.3.2. Permanency of deprivation

Deprivation required for expropriation has to be permanent and essentially destroy the investment. It is the deprivation that must be permanent and not the measures. Temporary measures that result in permanent deprivation of property may be enough to find expropriation.

In *Tippets* the Tribunal found that "[w]hile assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of the fundamental rights of ownership and it appears that this deprivation is *not merely ephemeral.* The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."[563]

In *Wena v. Egypt*, an ICSID tribunal had to determine whether or not the occupation of a hotel for the period of around one year was an ephemeral deprivation of the foreign investor's property, and then to decide whether the impugned measure constituted indirect expropriation. Egypt argued that the one-year occupation was temporary and thus the contested measure could not be legally qualified as an indirect expropriation. The Tribunal held that it had no difficulty finding that the actions previously described constitute such an expropriation. "Putting aside various other improper actions, allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the hotels for nearly a year is more than an ephemeral interference."[564]

While the Tribunal in *Wena* found that less than one year time period was enough, the Tribunal in *Middle East Cement v* found that a decree that deprived the Claimant of the rights granted by a licence, which was in force for a period of around four months, was enough to constitute expropriation.[565]

While the jurisprudential examples bring clarity as to the duration that would be perceived as sufficient to constitute expropriation, it is crucial to underline that it is not a quantitative but rather a qualitative exercise. The duration needs to be sufficient to destroy the value of the investment. Once the value is destroyed (and not merely reduced) a measure may be deemed as expropriatory.

An outlier case in the otherwise clear line of jurisprudence may appear to be *S.D. Myers.* In that case the border between Canada and the US was closed for around sixteen months. The Tribunal found *inter alia* that in some circumstances "it may be appropriate to view a deprivation as amounting to an expropriation, even if it were

563 Ibid., paras. 225-6.

564 Award of 2000 December 8 Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, para. 99.

565 Award of 2002 April 12 Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, para. 107.

partial or temporary".[566] However, at the same time the claim of expropriation was dismissed on the very fact that the border was closed only temporarily. Since the Tribunal did not develop as to what may constitute circumstances in which temporary deprivation may amount to expropriation, it remains an isolated statement.

3.4. Compensation standard for illegal expropriation

The starting point on any analysis of reparations in international law is naturally the PCIJ case of the *Chorzów Factory.*[567] According to some authors, it is also the case that introduced the distinction between lawful and unlawful expropriation.[568] In that case the Court found that damages are "*not necessarily limited to the value of the undertaking at the moment of dispossession*"[569] which naturally implies higher amounts for compensation. The facts of the case, however, were highly relevant for making such finding, therefore some commentators question whether it is a proper refence point in investment arbitration cases.[570] *Chorzow Factory* is a continuation of the Court's work in the *Certain German Interests*.[571] In that case based on Article 23(1) of the Upper Silesia Convention Germany instituted proceedings against Poland for alleged expropriation of property of German nationals in Polish Upper Silesia through a ministerial decree and a court decision.[572] Poland, on the other hand, argued that the property allegedly expropriated had not been lawfully acquired in the first place and that it violated three other international agreements.[573] The Court, after having confirmed its jurisdiction *ratione materiae*, found in favor of Germany. More precisely, it found that Poland violated the provisions of 1922 Geneva Convention which prohibited expropriation. While prohibition of expropriation is very unusual in international treaties, in the case of the Geneva convention it can be explained by its object which was to "provide for the maintenance of economic life in Upper Silesia on the basis of the respect for the *status quo*".[574] This meant that even if the customary criteria for expropriation were fulfilled and a fair compensation had been paid, unless the conditions

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566 Award of 2000 November 13 SD Myers v Canada, UNCITRAL, para. 283.

567 Judgment of the PCIJ of 13 September 1928 of the Factory at Chorzow (Claim for Indemnity) (Merits), P.C.I.J. Rep., Ser. A. No. 17.

568 Steven Ratner, Compensation for Expropriations in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction (Cambridge University Press, 2017), 4.

569 Ibid. 47.

570 Christina Beharry, "Lawful Versus Unlawful Expropriation: Heads I Win, Tails You Lose", *Investment Treaty Arbitration and International Law* 9 (2016): 193.

571 Judgment of PCIJ of 1925 August 25 of Certain German Interests in Polish Upper Silesia (Germany. Poland), PCIJ, Preliminary Objections.

572 Ibid., 16.

573 Ibid., 24.

574 Judgment of the PCIJ of 13 September 1928 of the Factory at Chorzow (Claim for Indemnity) (Merits), P.C.I.J. Rep., Ser. A. No. 17.

for taking provided in Article 7 of the Convention had been complied with, the seizure of property would be deemed to be unlawful.[575] Consequently, the reparations were not a consequence of the application of certain articles of the Geneva Convention, but rather of acts contrary to those articles.[576]

The Geneva Convention, which was the legal basis of the dispute, contained provisions on restitution, but not on compensation. The PCIJ found that: "The essential principle contained in the actual notion of an illegal act a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals— is 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. Restitution in kind, or, if this is not of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law".[577] Paradoxically, this oft-quoted passage was not transposed into an actual compensation in the case, since a compensation was never awarded. The parties settled the dispute amicably.

Judge Brower also believes that "The practical consequence of unlawfulness is in the remedies available. The remedy for a lawful taking is full compensation; the remedy for an unlawful taking is restitution or, where restitution is not practical, full compensation. Even in cases of unlawful takings, particularly where restitution is not possible, a difference in remedies potentially still could remain insofar as punitive or exemplary damages might be sought".[578]

However, some other authors that have analyzed the impact on the remedies of findings that expropriation was unlawful concluded that "despite the theoretical differences reflected in the jurisprudence, there is little practical distinction between either the remedies or quantification of damages flowing from a lawful or an unlawful expropriation"[579]and unless there is a direct impact on the financial outcome of a case, it remains just an "academic exercise".[580]

The standard of compensation has caused endless debate for decades. Many BITS provide that the compensation shall be adequate, effective and prompt. According to

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575 Ibid., 46 Ibid. at p, 46 the Court developed that "The action of Poland […] contrary to the Geneva Convention is not an expropriation—to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property […] which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention".

576 Ibid.

577 Judgment of the PCIJ of 13 September 1928 of the Factory at Chorzow (Claim for Indemnity) (Merits), P.C.I.J. Rep., Ser. A. No. 17.

578 Brower separate opinion, para 46.

579 Christina Beharry, "Lawful Versus Unlawful Expropriation: Heads I Win, Tails You Lose", *Investment Treaty Arbitration and International Law* 9 (2016): 187.

580 Ibid. p. 196.

the WB Guidelines, if compensation satisfies these three criteria it is deemed to be "appropriate".[581] What is more, it also states that a compensation is "adequate" if it is based on a fair market value which is determined immediately before the taking.[582] Compensation will be deemed "effective" if it is paid in the currency brought in by the investor where it remains convertible, in another currency designated as freely usable by the International Monetary Fund or in any other currency accepted by the investor.[583] Compensation will be deemed to be "prompt" in normal circumstances if paid without delay.[584]

Restitution or compensation closest to it requirement presupposes the standard of full compensation. As explained by former ICJ President Jiménez de Aréchaga "The fact that indemnity presupposes, as the PCIJ stated, the 'payment sum corresponding to the value which a restitution in kind would bear', has important effects on its extent. As a consequence of the depreciation of currencies and of delays involved in the administration of justice, the value of a confiscated property may be higher at the time of the judicial decision than at the time of the unlawful act. Since monetary compensation must, as far as possible, resemble restitution, the value at the date when indemnity is paid must be the criterion."[585]

Developing States, on the other hand, throughout the years supported the Calvo doctrine that reflected the US resolutions adopted in the 60's and 70's. As mentioned, in 1962 the UN General Assembly adopted the Resolution on Permanent Sovereignty over Natural Resources that affirmed the inherent right of States to nationalize the property of foreign investors. The compensation for such expropriations shall be only appropriate.[586] The standard was supposed to bridge the gap between developed and developing States. In 1974 the UN General Assembly rejected the Hull formula and adopted the Charter of Economic Rights and Duties of States that represented the Calvo doctrine. Article 2(c) of the Charter while explicitly refers to the "appropriate" compensation, then continues to clarify that "in any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals".

Judge Brower in his concurring opinion in *Amoco v Iran* developed a clear scheme as to how compensation should differ in cases of direct and indirect expropriation "If an expropriation is lawful, the deprived party is to be awarded damages equal to "the value of the undertaking" which it has lost, including any potential future profits, as of the date of taking; in the case of an unlawful taking, however, either the injured party

581 Guideline IV para 2 https://documents1.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf

582 Ibid. para. 3.

583 Ibid. para. 7.

584 Ibid. para. 8.

585 Award of 1997 January 19 Texaco v Libya, Ad Hoc, para. 47.

586 OECD International Investment Law: A Changing Landscape A Companion Volume to International Investment Perspectives (2005), 44.

is to be actually restored to enjoyment of his property, or, should this be impossible or impractical, he is to be awarded damages equal to the greater of (i) the value of the undertaking at the date of loss (again including lost profits), judged on the basis of information available as of that date, and (ii) its value (likewise including lost profits) as shown by its probable performance subsequent to the date of loss and prior to the date of the award, based on actual post-taking experience, plus (in either alternative) any consequential damages ."[587]

Punitive damages could be a solution to distinguish lawful and unlawful expropriations in monetary terms. If no punitive damages are awarded, in essence, the State needs to provide the same compensation had it performed expropriation lawfully.[588] The issue is that punitive damages have a very limited space in international law if any. The stated in the leading commentary on the ILC Article 36 "the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character."

In 1986 Judge Charles Brower issued a separate opinion on the issue of compensation for expropriation in *Sedco v NIOC*.[589] In his Opinion Judge Brower analyzed the position of customary international law with regards to full compensation. He pointed out that there were difficulties to ascertain relevant State practice and thus the primary source had to be judicial and arbitral precedents.[590] Lump sum settlements were particularly suspicious, since, for example, the settlement with Eastern European States following WWII provided compensation at a rate of less than 40 cents on the dollar.[591] Judge Brower put into the spotlight Respondent's reliance on the UN GA Resolutions, in particular the Resolution on Permanent Sovereignty of Natural Resources and Resolution 3281. While UN GA Resolutions are regarded as evidence of the practice of States generally accepted as customary international law, it is more important what States do than what they say[592] and eventually concluded that full compensation was indeed the standard under customary international law.[593] However, with regards to the relations between legality of expropriations and compensation he found that I must express doubt as to whether, under customary international law, a State's mere failure, in the end, actually to have compensated in accordance with the international

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587 Award of 1987 July 14 Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited, IUSCT Case No. 56.

588 Award of 1986 Sedco v National Iran Oil Company, para. 203.

589 Separate opinion of Judge Brower.

590 Ibid., para. 22.

591 Ibid., para. 23.

592 Ibid., para. 29.

593 Ibid., para. 39.

law standard set forth herein necessarily renders the underlying taking ipso facto wrongful. If, for example, contemporaneously with the taking the expropriating State provides a means for the determination of compensation which on its face appears calculated to result in the required compensation, but which ultimately does not, or if compensation is immediately paid which, though later found by a tribunal to fall short of the standard, was not on its face unreasonable, it would appear appropriate not to find that the taking itself was unlawful but rather only to conclude that the independent obligation to compensate has not been satisfied. If, on the other hand, no provision for compensation is made contemporaneously with the taking, or one is made which clearly cannot produce the required compensation, or unreasonably insufficient compensation is paid at the time of taking, it would seem appropriate to deem the taking itself wrongful. It is in such cases that *restitutio in integrum* may be appropriate as a remedy and that, in addition to that, or to a monetary award of damages, should that alternative be selected, a tribunal might consider an award of punitive damages". [594]

3.4.1. Standard of compensation and valuation

3.4.1.1. Compensation instead of restitution

In international law restitution is the primary way of reparation and *only* in cases where it is impossible or disproportionately burdensome compensation is appropriate.[595] Article 35 ARSIWA provides that "*[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation*" However, in investment arbitration reparation is almost never awarded as opposed to compensation. It is also almost never regarded as a realistic way of reparation to the foreign investor and compensation is immediately resorted to.

There are several reasons why compensation is the most appropriate reparation method in investment arbitration and especially expropriation cases. First, State, by virtue of its sovereignty, has an inherent right to expropriate. The only limit to the exercise of such right is the compliance with certain conditions. Ordering restitution would consider an infringement of the right to expropriate and would contradict its sovereign decision. As developed by the Tribunal in *Occidental v Ecuador* "[t]o impose on a sovereign State reinstatement of a foreign investor in its concession, after a nationalization or termination of a concession licence or contract by the State, would constitute a reparation disproportional to its interference with the sovereignty of the State when compared to monetary compensation".[596]

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594 Ibid., para 45.

595 Article 35 of ARSIWA.

596 Award of 2007 August 17 Occidental v Ecuador, decision on Provisional Measures, para. 84.

Second, especially in cases of regulatory expropriation, restitution would mean an order to turn back to the regulatory framework that existed before the measures were taken. Besides being unrealistic, it would cause negative consequences to other businesses that have already adapted to the new framework. In *AES v Kazakhstan* the Tribunal reasoned that "'restitution' would mean to undo investments which have been already made in application of the 'tariff in exchange for investment' scheme, which would neither be feasible not helpful".[597]

Third, usually when a dispute is brought to international arbitration the dispute between the investor and the host State is long-lasting and ripe. This implies that the relationship between them is impaired. From a practical point of view, good relationship with the government is important any business to function smoothly. Issuance of various permits, licences, consultations and other is crucial. Therefore, if restitution was granted, the relationship between the investor and the State would likely remain damaged which would potentially have an impact on business performance. What is more, certain investment arbitration disputes are highly mediatized which may lead to reputational damage in the eyes of local customers. Due to this, compensation is almost always awarded by the tribunals.

Fourth, the tribunal would not be able to supervise the restitutionary remedy as opposed to payment of compensation.[598]

Finally, some conventions are not drafted to include restitution as the primary modality of reparations. Or a modality at all. Art. 54(1) of the ICSID Convention provides that only "pecuniary obligations" arising out of an award must be enforced. The lack of jurisprudence leaves it unclear how would an ICSID tribunal approach the issue of enforcement of an obligation to restitute and it is likely to be one of the reasons why such tribunals would avoid awarding it in the first place.

In Enron v Argentina the Tribunal spent several paragraphs on the issue of restitution in investment arbitration. It clarified that "[f]ull reparation can be achieved through monetary compensation corresponding to the value which restitution in kind would carry".[599]

3.4.1.2. Lost Profits

Art 36 (2) of ARSIWA expressly refers to compensation for lost profits. It states that in certain cases compensation for loss profits may be appropriate. In the cornerstone case of reparation Chorzow Factory loss profits already played an important role. The Court found that the claimant shall receive the compensation amounting to the value of expropriated property not as it was at the time of expropriation, but at the time of

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597 Award of 2013 November 1 AES v Kazachstan, ICSID, para. 466.

598 Award of 2013 April 8 Arif v Moldova ICSID, para. 571.

599 Award of 2004 January 14 Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, para. 73.

indemnification.[600] Contract-based lost profits also can be compensated.[601]

However, the practice shows that lost profits must be clearly established and not too remote. Three categories of loss of profits may be distinguished: first, lost profits from income-producing property during a period when there has been no interference with title as distinct from temporary loss of use. It involves claims due to the temporary loss of use and enjoyment of the investment that produced income. Because there is no interreference with the title, the relevant period for the compensation of loss is that where the investor could enjoy the income without interference.[602] Secondly, lost profits from investments between the date of taking of title and adjudication. It is related to the unlawful taking of investments. In this case lost profits have been awarded for the period leading up to the time of adjudication. Finally, award of lost future profits when profits are anticipated after the date of adjudication. These situations occur in case of concessions or other interests protected by contract.[603]

Some tribunals use the argument that lost-profits should not be compensated as the "value of undertaking" comprises only *damnum emergens* and excludes lost profits.[604] According to Judge Brower, such position represents "a misreading of Chorzow Factory and a misunderstanding of economics"[605] and ""value of the undertaking" includes its potential for earning profits."[606]

3.4.1.3. Valuation of damage

Compensation is the main remedy in expropriation cases and there are several different methods applicable to evaluate the amount of compensation that is deemed. Fair market value is the most widely used valuation method for damages sustained due to expropriation of assets. Numerous investment treaties explicitly provide for this method for calculation of compensation.

The method to assess fair market value depends on the nature of the asset concerned.[607] When the property is freely traded on an open market it is easier to deter-

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600 Judgment of the PCIJ of 13 September 1928 of the Factory at Chorzow (Claim for Indemnity) (Merits), P.C.I.J. Rep., Ser. A. No. 17, 47–48, 53.

601 Award of 1997 April 12 Libyan American Oil Company v. The Government of the Libyan Arab Republic, para. 140.

602 ARSIWA commentary, 104.

603 Ibid., 105.

604 Award of 1987 July 14 Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited, IUSCT Case No. 56, Award, paras. 200-203.

605 Award of 1987 July 14 Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited, IUSCT Case No. 56, concurring opinion of Judge Brower, para 17.

606 Ibid., para 19

607 ARSIWA commentary p. 102-103.

mine its value. However, when the assets are unique or unusual, such as art works and cultural property, or are not subject to frequent or recent market transactions, it is more difficult to determine their value.[608] In *Starrett Housing*, the Iran-US claims tribunal adopted the concept of the fair market value as being "as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat".[609]

Some investment instruments seeking to bring more clarity and predictability into the calculations of the fair market value include a list of elements that need to be taken into account or a specific timing when the value shall be assessed. For example, the Dutch Model BIT of 2019 in Article 12 (5) provides that the compensation shall amount to the fair market value valued immediately before the expropriation. Mexico-Iceland BIT Article 4(3) provides that "[t]he valuation criteria shall include the going concern value, asset value, including declared tax value of tangible property, and other criteria, as appropriate, to determine the fair market value."[610] Others refer to invested capital, replacement value, appreciation, current returns and even goodwill among different criteria.[611] However, this introduction of guidelines in advance in not as helpful as it may appear. As pointed out by Marboe, enumeration of different variation methods does not necessarily lead to more clarity as the Tribunals should select the appropriate valuation method depending on the circumstances of the case and the information available.[612] In any case, it is necessary to carry out calculation with respect to the function of compensation in the specific case.[613]

The fair market value method has been explicitly provided for in various investment instruments for a long time as a valuation method to be used in cases of lawful expropriations. Some newer BITs took these realities into account and for example the Dutch Model BIT of 2019 provides that "[f]or greater certainty, this method to evaluate the compensation also applies in case of unlawful expropriation".[614]

There are three main methods to determine a fair market value of an asset: first, income-based approach which calculates the present value of future anticipated cash flows to be generated by the business. Second, market-based approach which infers value from publicly available information pertaining to similar publicly traded companies or transactions. Third, Asset or cost-based approach which values tangible and

608 Ibid. p. 103.

609 Award of 1983 December 19 Starrett Housing Corp v. Iran., 201.

610 Mexico-Iceland BIT (2005), checked 2022 March 15 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1562/download

611 Article 4 of Austria-Croatia BIT (1997), checked 2022 March 8 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/180/download

612 Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford University Press, 2017), 52.

613 Ibid.

614 Article 12(5) of Dutch Model BIT (2019).

intangible assets comprising a business and combines these amounts to establish the value of the business.[615]

As developed in the WB guidelines, fair market value can also be calculated by using: liquidation, replacement or book values.[616]Liquidation value means the amounts at which individual assets comprising the enterprise or the entire assets of the enterprise could be sold under conditions of liquidation to a willing buyer less any liabilities which the enterprise has to meet. Replacement value means the cash amount required to replace the individual assets of the enterprise in their actual state as of the date of the taking. *Book value* means the difference between the enterprise's assets and liabilities as recorded on its financial statements or the amount at which the taken tangible assets appear on the balance sheet of the enterprise, representing their cost after deducting accepted by the International Monetary Fund or in any other currency accepted by the investor.[617]

Overall, even if all those methods relate to the same valuation standard, they are able to produce very different results. This means that in each situation the tribunal will undoubtedly have a large margin of appreciation to choose which methodology is the most suitable for a dispute at hand. Some authors argue that the appropriate method should be chosen based on the quality of the information that is available.[618] The industry in which a company operates is also important. It is argued that in industries that have well-developed international markets, such as oil or mining, income-based approaches would still be suitable even in situations where historical profits were lacking.[619] If historical profits were not available for a company operating in, for example, dairy industry, it is more likely that a different valuation approach would be chosen.

3.4.1.4. Date of valuation

The Court in *Chorzow Factory* found that "the value of undertaking at the moment of dispossession does not necessarily indicate the criterion for the fixing of compensation".[620] This phrase has let to numerous decisions where the evaluation date was fixed at the date of the award. However, it is not a uniform rule.

In principle there are three dates that are important for compensation: the date of the acquisition of the asset, the date of expropriation and the date of the award. The

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615 Sergey Ripinsky, Kevin Williams, Damages in International Investment law (British Institute of International and Comparative Law, 2008), 193.

616 WB Guidelines on the Treatment of Foreign Direct Investment, Guideline IV(5), 31 ILM 1364 (1992), 1383.

617 Ibid.

618 Christina Beharry, "Lawful Versus Unlawful Expropriation: Heads I Win, Tails You Lose", *Investment Treaty Arbitration and International Law* 9 (2016): 206.

619 Ibid., 208.

620 Judgment of the PCIJ of 13 September 1928 of the Factory at Chorzow (Claim for Indemnity) (Merits), P.C.I.J. Rep., Ser. A. No. 17, 50.

closer the "critical date" of valuation is closer to the date of the award, the higher the compensation will be. While the majority of investors will argue for the date of the award to be the date of valuation, the tribunals will not always agree.

In *Santa Elena*[621] the investors bought the land in 1970. In 1978 the State issued the Environmental decree that led to expropriation. The award was issued in 2000. The Tribunal found the critical date to be in 1978 when the Decree was issued. Had it found the date of the award to be the valuation date, the damages awarded to the investors would have been significantly higher.

In *Teinver v Argentina*, the investor made the investment in 2001. The expropriation took place in 2008, right in the middle of the global economic crisis. The award was issued in 2017. Here again the Tribunal chose the date of expropriation as the crucial date for valuation. Naturally, largely due to the crisis that year showed a particularly bad financial result which led to much lower damages than it would have been had any other date for valuation been chosen.[622]

In *ADC v Hungary* where the investment was expropriated right after the infrastructure development project was finished but before the initial term of the contract with the government ended the Tribunal noted that "[t]he present case is almost unique among decided cases concerning the expropriation by States of foreign owned property, since the value of the investment after the date of expropriation […] has risen very considerably while other arbitrations that apply the Chorzow Factory standard all invariably involve scenarios where there has been a decline in the value of the investment after regulatory interference. It is for this reason that the application of the restitution standard by various tribunals has led to use of the date of expropriation as the date for the valuation of damages".[623] It then decided that the date of the award shall be the critical date in the given circumstances.[624]

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621 Award of 2000 February 17 Compania del Desarrolo de Santa Elena and the Republic of Costa Rica, ICSID Case N. ARB/96/1.

622 Award of 2017 July 21 Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1.

623 Award of of 2006 October 2 ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, para. 496.

624 Ibid. para. 497.

4. CONVENTION AS THE LEGAL INSTRUMENT FOR INVESTORS' PROTECTION AGAINST INDIRECT EXPROPRIATION

As explained, the case law developed within the context of the Convention had significant influence on the methods applied by modern investment arbitration tribunals, therefore it is crucial to dwell deeper into its reasoning and formation. The application of the Convention in the context of international investment law and particularly expropriation and the settlement of investment disputes deriving from such cases maybe be relevant, but also problematic. The cases on indirect expropriation may concern two particularly relevant rights protected by the Convention, namely, the right to a fair trial and the right to protection of property. Though investment disputes usually take place in the international investment arbitration, but not State courts, the case law of the ECHR reveals that in some cases the application of the Convention may be also relevant. Also, the issues related to the application of the Convention in case of investment disputes, may be relevant for the comparative analysis of the subject of this thesis. The case law of the ECHR reflects the changing environment of the protection of basic rights and development of these concepts, and it may provide more clarity and uniformity in the protection of these rights in international arbitration as well. This analysis may also be relevant to discuss the possibility for the investors to defend effectively their rights in the national courts of the member States of the Convention relying not only on the national legal regulation or BIT, but also international treaty and in case of the failure of protection of their rights, the option to appeal to the ECHR.

The possible application of ECHR in State-investor disputes is mostly inspired by the legal gap of protection of investors' rights after *Achmea* judgment. The opened vacuum of legal defense mechanisms in the EU Member States suggests that the possible protection against the wrongful actions of the State in investment disputes may actually be State courts which shall ensure effective protection of investors' right to property which in essence may be regarded as the right to protection of investment. However, to make the suggestions of the possible application of the Convention in such disputes, it is important to assess whether, first, the notion of property in the Convention indeed encompasses investments as they are understood under international investment law and whether the protection of property maybe regarded as a sufficient legal instrument to protect investors' rights. Second, it is important to analyse whether the right to compensation as the effective legal remedy against wrongful state actions may be afforded under the Convention in the case right to property is violated (act of indirect expropriation is performed).

4.1. Investment as the object of property under the Convention

As it was already established in first chapter of this thesis, investment is in essence property of the investor which shall be protected by the State. The standards of protection of investment and exceptions which may justify indirect expropriation are also

related to the essence of the right to protection of property. This right is also protected by the Convention.

Article 1 of the 1 Protocol to the Convention reads:

"1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of international law.

2. The preceding provisions shall not however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

The right to protection of property in the said article is based on three major pillars which constitute the core of this right "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule".[625] These major rules of the protection of the right to property provide the standard of protection which the state must ensure and also provide exception when this right can be restricted in limited circumstances.

During the drafting of the Convention, the support for this provision was not abundant. The proposal of the Legal Affairs Committee to include the provision on protection of property was won only by 10 votes to 8 with one abstention.[626] Developed States such as Sweden and the United Kingdom were against the idea of including the right to property into the Convention.[627]

According to Article 1 of 1 Protocol of the Convention, the concept of "possession" has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: the issue that needs to be examined is whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by that provision.[628] Accordingly, as well as physical goods, certain rights and interests constituting assets may also be regarded as "property rights", and thus as "possessions" for the purposes of this provision.[629] The concept of "possessions" is not limited to

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625 Judgment of the ECHR of 1999 March 25 in case Iatridis v. Greece, petition No. 31107/96, para. 55.

626 Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Collected Courses of the Hague Academy of International Law (1982), p. 357.

627 Ibid.

628 Judgment of the ECHR of 2004 November 30 in case Öneryildiz v. Turkey, petition No. 48939/99, para. 124.

629 Judgment of the ECHR of 1999 March 25 in case Iatridis v. Greece, petition No. 31107/96, para. 54.

"existing possessions" but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and "legitimate expectation" of obtaining effective enjoyment of a property right.[630]

In essence the notion of property (possession) under Article 1 of 1 Protocol of the Convention should be interpreted broadly. In essence, any object of property may fall under this notion. Thus, it may be argued that in general any type of investment should fall under the concept of property under the Convention and can be protected under the said article.

Thus, it may be concluded that in general investment which constitutes the object of property may fall under the notion of property under Article 1 of the 1 Additional Protocol of the Convention. The broad scope of the notion of property in most cases should be troublesome to be established since the case law of the ECHR support the broad international of this concept.

4.2. Effective protection against indirect expropriation under the Convention

Though investment may be the object of property (possession) which is protected under the Convention, it is still debatable whether it may be an effective legal instrument to ensure effective protection of investors against indirect expropriation.

First, it is relevant to assess how the Convention treats expropriation as the act of the state which may violate the right to property and how the Convention may be directly applicable in case the dispute between the State and investor over the expropriation of property arises.

Yet, certain States found it insufficient and attached declarations with regards to expropriation when approving the text of the Convention. When Portugal ratified the First Protocol of the Convention in 1978 it added an observation that "expropriation of large landowners, big property owners and entrepreneurs or shareholders may be subject to no compensation under the conditions to be laid down by the law".[631] The UK as well added an observation that "[t]he general principles of international law require the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property".[632] This position of the Member States of the Convention only support the suggestion that the application of the Convention to State-investor dispute is possible, but also debatable. Though the intention of the Convention is to cover any time of property under its scope, namely the investment as the object of property, raises questions whether the Member States actually consider investment as the property right under the Convention. Such different approaches may also impede the effective application of the right to property under the Convention and make this

630 Judgment of the ECHR of 2004 November 30 in case Öneryildiz v. Turkey, petition No. 48939/99, para. 124.

631 Ibid., p. 359.

632 Ibid.

right illusionary, if there is a lack of consensus between the Member States whether the investment shall be protected under the Convention.

The ECHR when interpreting Article 1 of Protocol 1 of the Convention found that compensation shall be paid not only because of general principles of law, but also because such principle is part of national legal systems. In 1986 in the case *of Lithgow and others v the United Kingdom*[633] the Court had to decide *inter alia* on the amount of compensation provided by the UK government to the applicant with regards to the nationalization of the aircraft and shipbuilding industries. The applicants did not question the principle of nationalization as such but rather the inadequateness of the compensation. It was found that "under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 of Protocol 1 of the Convention is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle."[634]

Throughout the years the question inevitably arose as to the scope of the right to regulate and protection of property rights. One of the first cases dealing with the issue was *Handyside* where the ECHR had to decide whether a provisional seizure of a matrix and copies of a schoolbook could be regarded as violation of Article 1 of Protocol 1 of the Convention. The Court dwelled reasoned that "[a]dmittedly the expression "deprived of his possessions", in the English text, could lead one to think otherwise but the structure of Article 1 of Protocol 1 of the Convention shows that that sentence […] applies only to someone who is "deprived of ownership" ("*privé de sa propriété*"). On the other hand, the seizure did relate to "the use of property" and thus falls within the ambit of the second paragraph. […], this paragraph *sets the Contracting States up as sole judges of the "necessity" for an interference*. Consequently, *the Court must restrict itself to supervising the lawfulness and the purpose of the restriction in question.* The ECHR found that that the contested measure was ordered pursuant to section 3 of the 1959/1964 Acts and followed proceedings which it was not contested were in accordance with the law. Again, the aim of the seizure was "the protection of morals" as understood by the competent British authorities in the exercise of their power of appreciation […]. And the concept of "protection of morals" used in Article 10 para. 2 (art. 10-2) of the Convention, is encompassed in the much wider notion of the "general interest" within the meaning of the second paragraph of Article 1 of the Protocol (P1-1). […] The forfeiture and destruction of the Schoolbook, on the other hand, permanently deprived the applicant of the ownership of certain possessions. However, these measures were authorised by the second paragraph of Article 1 of Protocol 1 of the Convention, interpreted in the light of the principle of law, common to the Contracting States of the Convention, where under items whose use

633 Judgment of the ECHR of 1984 March 7 in case Lithgow and others v the United Kingdom, application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81.

634 Judgment of ECHR of 1984 March 7 in case Lithgow and others v the United Kingdom, application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, para. 120.

has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction."[635]

Handyside was followed by *Marckx v Belgium* in 1979. The case concerned the discrimination of illegitimate children and the ECHR found that unmarried mothers were discriminated against in freely disposing their property compared with married mothers. With regards to the right to regulate the ECHR in this case established that "[b]y recognizing that everyone has the right to the peaceful enjoyment of his possessions, Article 1 of Protocol 1 of the Convention is in substance guaranteeing the right of property. This is the clear impression left by the words "possessions" and "use of property; the *travaux préparatoires*, for their part, confirm this unequivocally that the drafters of the Convention continually spoke of "right of property" or "right to property" to describe the subject-matter of the successive drafts which were the forerunners of the present Article 1 of Protocol 1 of the Convention. Indeed, the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property".[636] The second paragraph of Article 1 of Protocol 1 of the Convention nevertheless authorizes a Contracting State to "enforce such laws as it deems necessary to control the use of property in accordance with the general interest". This paragraph thus sets the Contracting States up *as sole judges of the "necessity" for such a law* […]. As regards "the general interest", it may in certain cases induce a legislature to "control the use of property" in the area of dispositions *inter vivos* or by will.".[637]

The decisions affirmed the broad discretion of Member States of the Convention to regulate the level and rules related to protection of investments. However, while the States enjoy wide powers under Article 1 of Protocol 1 of the Convention, they cannot exercise such rights in a discriminatory manner.[638]

Later the provision was also interpreted by the ECHR as applying only to foreigners as opposed to nationals of the Member States. In *Gudmundsson v Iceland* it was found that "[w]hereas, the general principles of international law, referred to in Article 1, are the principles which have been established in general international law concerning the confiscation of the property of foreigners; whereas it follows that measures taken by a State with respect to the property of its own nationals are not subject to these general principles of international law in the absence of a particular treaty clause specifically so providing; whereas, moreover, in the present instance, the records of the preparatory work concerning the drafting and adoption of Article 1 of Protocol 1 of the Convention confirm that the High Contracting Parties had no intention of

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635 Ibid., paras. 62-63.

636 "In the first place, purely as a matter of general international law, the principles in question apply solely to non-nationals. They were specifically developed for the benefit of non-nationals. As such, these principles did not relate to the treatment accorded by States to their own nationals."
Judgment of the ECHR of 1979 June 13 in case Marckx v Belgium, application no. 6833/74, para. 63.

637 Ibid., 63-64.

638 ECHR guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights- Protection of Property, updated on 31 December 2021, 52.

extending the application of these principles to the case of the taking of the property of nationals[…]."[639] The decision was later confirmed in *James*[640] and *Lithgow*[641].

In *Sporrong and Lönnroth v Sweden*[642] the applicants contested the time limits granted to the city of Stockholm for the fixing of compensation for expropriation with regard to expropriation permits and positions of construction. They also complained of the time limits that these measures were in place. Against this background the applicants claimed *inter alia* that they had lost the possibility to sell their property at normal market price.[643] The Government agreed that the property may be more difficult to sell or lease. They also agreed that the prohibitions on construction restricted the normal exercise of the right to property. However, it held that the measures did not impair the peaceful enjoyment of possessions within the meaning of Article 1 of Protocol 1 of the Convention.[644] The ECHR was itself unable to accept this argument. Although the expropriation permits left intact in law the owners' right to use and dispose of their possessions, they nevertheless in practice significantly reduced the possibility of its exercise. They also affected *the very substance of ownership* in that they recognized before the event that any expropriation would be lawful and authorised the City of Stockholm to expropriate whenever it found it expedient to do so. The applicants' right of property thus became precarious and defeasible."[645]

In this case the ECHR also developed a test comprising of 3 rules in order to determine whether the interference found by the ECHR is in violation of Article 1 of Protocol 1 of the Convention.[646] In *James and others v the United Kingdom*.[647] the ECHR clarified that the three rules set out in the previous jurisprudence "are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule."[648]

These cumulative rules may be also applicable in case of indirect expropriation. Though as it can be concluded from the previous case law of the ECHR in most cases

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639 Judgment of the ECHR of 2006 August 31 in case Gudmundsson v Iceland, application 31549/03, p. 394.

640 Judgment of the ECHR of 1986 February 21 in case James v. United Kingdom, application No. 8793/79, paras. 58-66.

641 Judgment of the ECHR of 1984 March 7 in case Lithgow and others v the United Kingdom, application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, paras. 112-113.

642 Judgment of the ECHR of 1982 September 23 in case Sporrong and Lönnroth v Sweden, application No. 7151/75.

643 Ibid., para 58.

644 Ibid., para 59.

645 Ibid., para 60.

646 Ibid., para 61.

647 Judgment of the ECHR of 1986 February 21 in case James v. United Kingdom, application No. 8793/79.

648 Ibid., para 37.

the court had to deal with examples of direct expropriation as the ground for the violation of the right to property.

4.3. Compensation for indirect expropriation under the Convention

One of main elements of protection of property is the requirement of fair compensation. This is the same logic in case of violation of state's obligations to the investor by the acts of the State which constitute indirect expropriation. The cornerstone of liability of the State for the wrongful actions dating back to the PCIJ case of the *Chorzów Factory* is 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. The protection of investors against indirect expropriation without effective remedy against wrongful state's actions would mean the possible defense mechanism rather useless. Thus, it is important to analyze whether the Convention provides effective remedies in case of violation of investor's property rights, namely in case of indirect expropriation.

While the final version of the provision provides for the right to property, Article 1 of the First Additional protocol of the Convention has no explicit reference to the obligation to pay compensation in case of expropriation.[649] The omission was intentional. The ECHR in *Lithhow* explained that "examination of the *travaux préparatoires* reveals that the express reference to a right to compensation contained in earlier drafts of Article 1 of Protocol 1 of the Convention was excluded, notably in the face of opposition on the part of the United Kingdom and other States. The mention of the general principles of international law was subsequently included and was the subject of several statements to the effect that they protected only foreigners. Thus, when the German Government stated that they could accept the text provided that it was explicitly recognised that those principles involved the obligation to pay compensation in the event of expropriation, the Swedish delegation pointed out that those principles only applied to relations between a State and non-nationals. And it was then agreed [with regards to Resolution (52) 1 of 19 March 1952 approving the text of the Protocol and opening it for signature], at the request of the German and Belgian delegations, that "the general principles of international law, in their present connotation, entailed the obligation to pay compensation to non- nationals in cases of expropriation".[650] Dame Higgins confirms that even though the text remained silent on the compensation in cases of expropriation, it is generally perceived that the reference to the general principles of law incorporated an obligation to pay compensation for takings.[651]

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649 Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Collected Courses of the Hague Academy of International Law (1982), 358-360.

650 Judgment of ECHR of 1984 March 7 in case Lithgow and others v the United Kingdom, application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, para. 117.

651 Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 Collected Courses of the Hague Academy of International Law (1982), 360.

The case law of the ECHR reveals that in case of restriction of the right to property, the compensation shall ensure the legitimate interests of the owned and be reasonable: <…> *compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be considered justifiable under Article 1 of Protocol No. 1.*[652] Also, the case law suggests that without fair compensation, the right to property would be illusionary: *the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 (P1-1) is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants.*[653] Nevertheless, the standard of compensation set out by the ECHR also suggests that the compensation may not always be the full one: <…> *the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 (P1-1). Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances.*[654]

The analysis of the standards of the compensation for restriction to the right to property under the Convention reveals that it must be equivalent and well balanced. The balance in this case should be established between the need of the state to restrict this right and the economic loss suffered by the person (for instance, an investor). Such balance may be established in each specific case, depending on the individual circumstances. Nevertheless, the ECHR does not couple the fair compensation standard with full compensation. This approach may contradict with the dominant approach in international law which in case of state's internationally wrongful actions requires that reparation (compensation) must, as far as possible, wipe out all the consequences of the illegal act.

The aim and scope of the right to property under Article 1 of the Protocol 1 of the Convention suggest that investment actually should fall under the notion of investment of this article. This conclusion allows to argue that the Convention should be regarded as the possible instrument for protection of investors' rights. However, namely the question of compensation for indirect expropriation raises significant debate. The text of Article 1 of the Protocol 1 of the Convention and the relevant case law of the

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652 Judgment of the ECHR of 2011 January 11 in case Platakou v. Greece, application No. 38460/97, para. 55.

653 Judgment of the ECHR of 1986 February 21 in case James v. United Kingdom, application No. 8793/79, para. 54.

654 Ibid.

ECHR does not support the application of the principle of full compensation for the wrongful acts of the state. This contradiction between the general customary international law rule applicable in investment arbitration and the limits of compensation against wrongful act of the state in the Convention leaves the question of compensation in case of indirect expropriation still unanswered.

In 2019 the European Commission together with its Member States have submitted a proposal to the WGIII on the "Possible reform of investor-State dispute settlement (ISDS)".[655] The Commission presented three main groups of concerns: (i) concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; (ii) concerns pertaining to arbitrators and decision makers; (iii) concerns pertaining to cost and duration of ISDS cases. Among the second group of concerns are those related to "unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals".[656] Controversies related to the interpretation and application of the indirect expropriation treaty standard fall within this category. While a court could be perceived as a viable alternative to investment arbitration, it would be unfair to say that the same or similar desired results could not be achieved by improving the already-existing system. It is impossible to completely eliminate the lack of consistency and predictability that flows from the *ad hoc* nature of the system. However, more detailed BIT clauses on indirect expropriation that obliges arbitrators to take certain elements into account when performing interest balancing already limits the margin of appreciation of the arbitrators and ensures more predictability. Another problem identified by the Commission that is much more difficult to address is the "perception generated by the system".[657] While implementing gradual changes into the already existing system is long and laborious process, starting afresh with a new judiciary body would likely be easier in terms of perception. What is certain is that it would be very interesting to see how the indirect expropriation standard would develop in such court. Whether the court would be largely inspired by the already existing investment arbitration jurisprudence, or maybe it would adopt the ECtHR approach as the *Tecmed* tribunal did with *James*. Or maybe finally the WTO balancing approach would find some place in the newly developed jurisprudence. The near future will show.

To conclude on this Chapter, it is evident that the ties between investment arbitration and European human rights law are stronger than ever, especially in the realm of indirect expropriation. The jurisprudential developments have come a full circle. The proportionality standard once taken from the ECtHR's *James* and injected into

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655 UNGA, UN Commission on International Trade Law, Working Group III, Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union and its Member States, 24 January 2019, A/CN.9/WG.III/WP.159/Add.1.

656 Ibid., 3.

657 UNGA, UN Commission on International Trade Law, Working Group III, Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union, 12 December 2017, A/CN.9/WG.III/WP.145, p. 11.

investment arbitration through *Tecmed* has become the dominant standard for deciding on the balance of competing interests in expropriation cases. Moreover, it is estimated than around 20% of cases where indirect expropriation has been invoked contained references to the ECHR or ECtHR case law.[658] Finally, a proposal for a permanent dispute settlement mechanism has been made by the European Union and its Member States. If such proposal was adopted, a new body interpreting, *inter alia*, the indirect expropriation standard would be created.

658 José. A. Alvarez, "The Use and Misuse of European Human Rights Law by Investor-State Arbitrators in The Boundaries of Investment Arbitration", JURIS (2018).

5. EMERGENCE OF NEW STATE PRACTICE IN CASE OF INDIRECT EXPROPRIATION AND UNPRECEDENTED CHALLENGES

International investment law is under constant development. Starting from the concept of investment to the search for the possible new venues to hear State-investor dispute have revealed that effective protection of investors' rights has become a challenging task both in legal theory and practice. This is also the case for the development of understanding of indirect expropriation. It is obvious that the legal rules regulating protection of investment and customary international law in this area may not always catch up with the events which may have impact on protection of investment. In the recent years few such events occurred which may already pose whether the current standards of protection of investors against indirect expropriation are enough to protect their rights effectively. To reveal the development of international investment law in this area two contemporaneous examples of indirect expropriation are discussed in this chapter. The new development raise questions whether the new customary international law rules are emerging related to the protection of investors against indirect expropriation.

First, this chapter deals with the examples of indirect expropriation when the world was stuck with the global pandemic in 2020. The impact and legal consequences of the states' measures adopted in pandemic for the protection of public health remains still debatable and not always easy to be explained. However, the recent examples in various states when particularly harsh measures were adopted to curb the spread of the pandemic raise fundamental questions such as whether the common standards for the protection of investors' rights against indirect protection remain still relevant when the indirect expropriation takes places the measure to ensure public health or has it emerged as the new development of customary international law? As it was established by the ICJ in the *North Sea Continental Shelf* case not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[659] Do the recent examples of indirect expropriation when the states adopted measures to tackle the global pandemic amount to already stable state practice sufficient for the formation of a customary rule? Is it also sufficiently supported by *opinion juris*? Or is it only matter of temporary measures which will not make a relevant impact on the development of customary international law in this area?

Second, the challenging task appeared in international investment law how to deal with the application of Ukraine BITs when the dispute concerns the territory of Crimea. The annexation of this region in 2014 has caused various problems in the application of international investment law and one of such is jurisdiction of the disputes which are related to the indirect expropriation of the property located in this region. There is still an ongoing debate in the legal doctrine how to deals with consequences

659 Judgment of the ICJ of 1969 February 20 in case North Sea Continental Shelf Cases, I.C.J. Reports 1969, p. 3, para. 77.

of the annexation to the jurisdiction of arbitral tribunals in such cases concerning indirect expropriation.

5.1. Indirect expropriation in cases of protection of public interests

On 11 March 2020 the World Health Organization declared the COVID-19 virus situation a pandemic. It forced most States to issue unprecedented measures that have directly affected numerous sectors and investments. There is a well-established principle of public international law that a state, a sovereign responsible for its population, cannot be held responsible for the economic consequences resulting from the State adoption of non-discriminatory regulatory measures, taken in good faith and in the pursuit of a legitimate interest.[660] The Tribunal in *Saluka v Czech Republic* in 2006 found that *"international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States"*.[661] The statement may raise doubts whether and to what extent does public health measures fall under the police powers doctrine. Fortunately, the recent decisions in the *Philip Morris v Uruguay* confirmed that "*[p]rotecting public health has since long been recognized as an essential manifestation of the State's police power*".[662] States have freedom to implement measures aiming to protect public health and have a margin of appreciation to decide on them. The tribunal also found that *"[t]he responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgements of national needs in matters such as the protection of public health"*.[663] The only limits to exercise of such power irrationality, bad faith or manifest lack of reasons for the legislation.[664] Thus, international investment law acknowledges the need to protect public health as the possible ground for taking measures by the government which may restrict the rights, including the ones of investors. The international tribunals have not provided extensive explanation of the notion of public health yet. Nevertheless, there is lack of consensus what kind of public health issue may trigger adoption of the state measures. What does public health actually mean in international investment law? In what instances indirect expropriation may be justified by the need to protect public health? Does any measure to protect public health justify taking of investor's property? How to identify the situations when the State take disproportionate measure which lead to indirect expropriation by seeking to protect public health?

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660 Brigitte Stern, "In search of the frontiers of Indirect expropriation", *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2007): 46.

661 Award of 2006 March 17 Saluka v Czech Republic UNCITRAL, para. 263.

662 Award of 2016 July 8 Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), para. 291.

663 Ibid., para. 399.

664 Ibid.

There have been very few cases where state response to diseases has been scrutinized by the tribunals. One of such cases is *Bischoff* which dates back to 1903. In that case the German – Venezuelan Claims Commission held that "[c]ertainly during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police powers."[665]

However, while it is undoubtedly the prerogative of States to issue measures aiming to protect public health, it does not mean that potential claims are not pending. There are several ways in which COVID restriction measures may be related to expropriation. Expropriation in such cases can be in various forms. It may be a direct expropriation of property which is necessary to ensure public health, but also may result in restrictions to pursue business activities. In all such cases the question arises whether the measures taken against the investor can be justified by public health? How to measure proportionality of such measures when the large-scale governmental measures are taken which have a direct impact on the society as a whole?

First, direct expropriation may occur when States requisition certain property. For example, hotels may be requisitioned to be used as isolation centers or certain medical supplies may be requisitioned in order to be used by hospitals. Moreover, several States ordered manufacturers to cease the production of their goods and use the facilities for the production of ventilators or personal protective equipment. For example, the US in March 2020 issued a presidential decree ordering *General Motors* to prioritize the production of ventilators over all other orders. Its section 2 provides "The Secretary [of Health and Human Services] shall use any and all authority available under the Act to require General Motors Company to accept, perform, and prioritize contracts or orders for the number of ventilators that the Secretary determines to be appropriate."[666]

Second, claims may arise from discrimination. For example, in many States only "essential" businesses were allowed functioning and "non-essential" were either closed or allowed to function with restrictions. Qualification as to what is considered "essential" is subjective and varies from State to State. For example, since sport activities are crucial for physical and mental health, it can be argued that they fall under the "essential" category. Similarly cultural activities are important for mental health. However, many States opted for keeping the sport sector activities such as gyms or operas closed while other more 'essential' business were allowed to operate. To take the example of the Netherlands, the gyms were not allowed to operate during the period between 18 December 2021 and 15 January 2022. Then, while the gyms and beauty salons were allowed to open again on 15 January, museums and opera houses were still not allowed to operate until 25 January 2021. This caused a lot of tensions in the Dutch society and resulted in numerous protests such as "hairdresser in opera".[667] While the time periods when some sectors

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665 Bischoff Case, German – Venezuelan Commission, Decision (1903), 10 U.N.R.I.A.A. 420, 421.

666 Memorandum on Order Under the Defense Production Act Regarding General Motors Company (2020), checked 2022 May 8 https://www.govinfo.gov/app/details/DCPD-202000197

667 C. Moses, Theaters and Museums Open as Salons and Gyms for a Day in Protest over a Dutch Lockdown" in NY Times (2022), checked 2022 July 19 https://www.nytimes.com/2022/01/19/world/europe/covid-netherlands-theaters-hairdressers.html.

were allowed to operate and others not is likely too short to qualify as expropriation, it demonstrates that State decisions on which activities to restrict is completely subjective and could potentially serve as basis for investment claims in the future.

The mentioned issues, while heavily discussed in media and academia, have not yet become subject of investment treaty claims, therefore one can only guess how investment tribunals would approach these issues. These governmental measures taken in both instances trigger numerous questions, such as how the state decides which property shall be taken to protect public health? Why property shall be taken (expropriated) instead of acquiring it by public procurement or similar deals? How the state should determine which business may continue working during the general restrictions of movement and which shall be closed? How to assess the possible discriminatory policies against certain business (investors) when such different measures are applicable. Moreover, the question arises how proportionate can be such measures to tackle public health problems? These questions are directly related to the possible development of international investment law and have not been thoroughly analyzed neither in the legal doctrine, nor international tribunals. However, the scale and impact of such measures are likely to trigger difficult questions in case the investors bring a claim against the state for the breach of property (expropriation) and the state invokes public health and the defense strategy.

These recent examples of State's measures may be deemed to be examples of creeping expropriation (regulatory takings) since the right of foreign investors to the protection of their investment conflicts with the right of State to regulate the issues of public health within its boundaries. However, this is namely the traditional questions in such situation which is whether the exercise of State's sovereign powers to regulate certain matters is (dis)proportionate to the interests of investors when such measure directly affect their interests.

The question also arises can the global pandemic be regarded as public health in a certain state under the BIT and customary international law. Does the declaration of the international organisation, such as the WHO mean that each state has the same powers to tackle this crisis *per se*? Or public health shall be assessed only as the national health situation of the certain state and individual assessment where the public health clause may be invoked shall be assessed in each jurisdiction?

5.1.1. State defences

One of the aims of this thesis is analysis of legal grounds which may justify state actions which constitute indirect expropriation. In case investment claims were brought against the States based on their COVID management (protection of public health) measures, there are several defences that may be invoked. This defense mechanism should be interpreted as the grounds which may preclude wrongfulness of the states for the actions which formally constitute the action of indirect expropriation.

5.1.1.1. BIT defences

Some BITs already explicitly provide that measures taken to protect public health shall not be perceived as expropriatory. The 2004 and 2012 U.S. Model BITs provide in the section dealing with "Expropriation" that "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as *public health*, safety, and the environment, do not constitute indirect expropriation." CETA in its Annex 8-A also provides that "except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objective, such as *health*, safety and the environment, do not constitute indirect expropriations. The Dutch Model BIT of 2019 in its article 12 (8) states that "Except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Contracting Party that are designed and applied in good faith to protect legitimate public interests, such as the protection of *public health*, […] do not constitute indirect expropriations.

Other BITs do not explicitly refer to public health but rather broader concepts of unforeseeable circumstances. For example, the UK-Mexico BIT refers to a situation of "national emergency".[668]

As discussed within the concept of the police powers doctrine, it is a principle of customary international law that States shall regulate in public interest to protect the society. Adding additional explicit references to regulations taken to protect public health serve as very strong warning for the investors that non-discriminatory measures taken to protect public health would not be deemed expropriatory.

The mentioned examples of the public health clause in the BITs suggest that some states indeed consider public health as the legitimate public interest and consider that in such case of emergency when certain measures have to be taken to protect public health, they should not be regarded as expropriation. Nevertheless, the langue of such public health exception is obscure and may be still require the thorough analysis whether the applicable measure were proportionate and sought legitimate aims. The BITs in which such clauses are found do not define public health and (or) what kind of measure may be justified. It seems that the first step in such dispute would be to determine what is actually public health in the state and only when argue whether the applicable measures are compatible with the provisions of the BIT.

5.1.1.2. National legislation defences

Certain States already had specific laws that explicitly provide for expropriation during the state of emergency. Pandemic would likely qualify as an emergency. For

668 Article 6 of the UK-Mexico BIT (2006), checked 2022 May 18 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2009/download

example, Art 19(3) of the Constitution of Georgia as well as the law "On the Procedure for the Expropriation of Property for Pressing Social Needs" provides that with the condition of prior payment of compensation, property can be expropriated.[669] Other States issued specific laws to address the new realities. For example, Italy issued a decree no. 18 of 17 March 2020 that provides that investors will be compensated for expropriated assets and the amount will be calculated based on the current market value.

5.1.1.3. CIL defences

ARSIWA provides for six defences possible to invoke in order to preclude responsibility. The most relevant for them in the COVID pandemic situation appears to be force majeure, necessity and distress. All these circumstances cover different situations and it raises doubts which of them may be specifically used to address the public health crisis in the state.

Force Majeure is provided for in Article 23 ARSIWA. The conditions to successfully invoke it are the following: 1) existence an unforeseen event or an irresistible force; 2) that is beyond the control of the State; 3) the event must make it 'materially' impossible to perform an obligation; 4) the State must not have contributed to the situation; 5) the State must not have assumed the risk of the situation occurring.

While COVID-19 would clearly qualify as an unforeseen and irresistible event, chances that it would make State's obligations materially impossible to perform are debatable. The difficulty lies in the fact that in order for the *force majeure* to be successful the obligations cannot simply be more difficult to perform, they must be "materially impossible". It is a very high threshold to achieve and it is difficult to imagine a situation in which a State could successfully plead this defence in the COVID-19 context.

Necessity in investment treaty arbitration has been analyzed in depth within the context of the Argentina economic crisis cases. Also, the notion of necessity and the use of necessity as the ground for preclusion of wrongfulness were assessed by the ICJ in the landmark *Gabčíkovo-Nagymaros Project* case. The World Court when assessing the possible application of necessity as the ground for found which may preclude wrongfulness established that *the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis*.[670] Furthermore, the ICJ stressed that *the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met*.[671] The rationale behind this interpretation allows to argue that necessity as the ground for preclusion of wrongfulness may be invoked in

669 Tamar Khavtasi "The Right to Property in a State of Emergency", Journal of Constitutional Law 1 (2020), 113.

670 Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1.C.J. Reports 1997, para. 51.

671 Ibid.

strictly defined limited instances when there are no less restrictive other state measures to achieve the certain goal, such as protection of public health.

Article 25 of ARSIWA provides that necessity may be successfully invoked as an excuse if four conditions are fulfilled 1) there must be a grave and imminent peril; 2) that threatens an interest that is essential 3) the State's act must not seriously impair another essential interest 4) the State's measure's must be the 'only way' to safeguard the interest from that peril. In addition to that, necessity cannot be invoked to preclude wrongfulness if the obligation in question excludes the possibility of invoking necessity or the State itself has contributed to the situation of necessity. Based on the available information, the fast-spreading pandemic seems to qualify as a grave and imminent peril that threatens an essential interest – public health. It should be evaluated in each particular case; however, it is unlikely that the interests of foreign investors would qualify as an essential seriously impaired by State measures aiming to protect its public health. Finally, the "only way" criterion would also have to be evaluated *en cas d'espece*. It is a very high threshold to satisfy since the existence of alternatives necessarily mean that the plea would fail.[672] While States have some margin of appreciation of selecting the measures, for this particular defense to apply, that margin would be particularly scrutinized by the tribunals. Finally, the requirements of non-contribution and non-preclusion by other obligations should be easy to be satisfied since the States did not contribute to the spread of the pandemic and it would be unusual for investment treaties to prevent States from relying on necessity.

Distress is provided for in Article 24 ARSIWA. There are five requirements for the defence of distress to apply: 1) threat to life; 2) a special relationship between the author of the act, whether this is a State organ or an individual whose acts are attributable to the State, and the persons in question; 3) no other reasonable way to deal with the threat; 4) State did not contribute to the situation; 5) the measures were proportionate.[673] COVID-19 would likely satisfy the criterion of being a threat to life. Regarding the requirement of special relationship, however, speculating is more difficult. F. Paddeau and K. Parlett argue that "[i]n circumstances where *only* the central government has the authority to put in place measures of containment or mitigation in these types of emergencies, it appears arguable that there is a special relationship: to some extent, the fate of the population is within the control of the central authorities."[674] Satisfying the requirement of reasonableness is much easier than that of the measure being "the only way" and it is likely that most State measures taken to control the spread of the pandemic would qualify. Non-contribution, is also likely to be satisfies. As to the proportionality requirement, a balance between the impact of the measure and the restrictions that it imposed would have to be evaluated.

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672 F. Paddeau and K. Parlett, COVID-19 and Investment Treaty Claims, Kluwer Arbitration Blog (2020), checked 2022 April 2 http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims/

673 Ibid.

674 Ibid.

5.1.1.4. Compulsory licences

A patent is an important form of intellectual property. Just like any other tangible property it constitutes an asset that can be expropriated. The question with regards to expropriation of licences became of particular importance during the Covid-19 pandemic when the first vaccines were invented. Were the States allowed to make use of and share the patented vaccine inventions with other States in order to save human lives, or would that have constituted expropriation?

Compulsory licensing in international law is mainly regulated by Article 31 bis of the TRIPS agreement. Generally, inventors of various patentable inventions file for patents in each State individually where they seek protection of the invention. Once a patent is granted, for a certain period of time, usually 20 years, the holder of the patent has the monopoly for the exploitation and benefits of the invention. In negative term, the others are barred from benefiting from the invention. Compulsory licensing is when a State allows someone other than the patent holder to legally produce a patented product or process without the consent of the patent owner. The two main types of compulsory licences are: licences for predominantly domestic supply (TRIPS Article 31) – products manufactured under the licence are designated predominantly for the domestic market and licences for exports (TRIPS Article 31bis) – products manufactured under the licence can be exported to countries that lack manufacturing capacity. This compulsory licence for export applies to pharmaceutical products only.[675]

The issue is of particular significant to poor countries that lack funds. However, depending on circumstance, economically capable States may also seek recourse to this measure. A proper case study is Brazil's, one of the fastest growing economies in the world, expropriation of efavirenz's patent held by Merck & Co in 2007. Brazil led long negotiations asking the company to reduce the price of the HIV drug. Even though Merck & Co offered a 30% reduction, the margin was deemed to be too insignificant and Brazil issued compulsory licenses. Brazil argued that reducing the price would only be fair since the drug had previously been sold to other States much cheaper. As explained by the President at the time "from a political point of view, it represents a lack of respect, as though a sick Brazilian is inferior".[676] Such expropriations are particularly complex because as rightly explained by the company "[t]his expropriation of intellectual property sends a chilling signal to research-based companies about the attractiveness of undertaking risky research on diseases".[677]

There are several well-known cases where western-State incorporated companies that own a patented drug have been denied its protection in poorer countries. For example, in 2013 a Swiss company Novartis AG lost its patent protection for a cancer

675 Checked 2022 August 15 https://ec.europa.eu/commission/presscorner/detail/pt/qanda_21_2802

676 Keith Alcorn, Namaidsmap, Brazil issues compulsory license on efavirenz (2007), checked 2022 August 6 https://www.aidsmap.com/news/may-2007/brazil-issues-compulsory-license-efavirenz

677 Ibid.

drug *Glivec* in India.[678] The decision was particularly welcomed by Indian companies such as *Cipla* and *Natco Pharma* who are selling generic *Glivec* in India for one tenth of the price. Such decisions are potentially in violation of the BITs. It largely depends on the working of the BIT that defines the scope of investment.

The situation illustrates a near-impossible to reach balance between State policy objectives of affordable medication and rightful business interests of the owners of the property rights. Settling of the 'right' price is as, if not more, difficult as determining the appropriate amount of compensation to be paid once expropriation occurs.

Article 31 bis of the TRIPS agreement allows the use and sale of patented inventions without the permission of the patent's holder in order to serve public interest. The 2001 WTO Doha Declaration on the TRIPS Agreement and Public Health explicitly acknowledged the link between the obligations under the TRIPS Agreement and the public health needs of the WTO Members.[679]

On 2 October 2020 India and South Africa submitted an official proposal to the WTO TRIPS Council to waive intellectual property rights such as patents related to COVID 19 vaccines. [680]

The EU on the other hand stated that it does not consider that the broad waiver proposed by a number of WTO members is the right response to the pandemic and that a more targeted approach is required.[681]

An important issue with the compulsory licensing is that while the formula contained in a patent is made available, the transfer of know how is not ensured. The two are usually closely related in order for a product or process to work. Therefore, a voluntary transfer of intellectual property is preferred.

WTO Members are supposed to enact domestic legislation implementing TRIPS provisions including compulsory licensing. Least developed States however, were not obliged to implement the TRIPS Agreement until July 2021 and are specifically exempted from implementing the provisions relating to pharmaceutical products until 2033.[682]An example of implemented TRIPS provision is Sect. 24 of the German Patent Law and Sect. 5(2)(5) of the German Act on the Protection and Control of infectious Diseases in Humans set out provisions allowing to issue compulsory licences during a pandemic.[683]

The exact procedure following which States issue compulsory licences differs. However, Article 31(b) of the TRIPS Agreement foresees that compulsory licences

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678 K. Kulkarni and S. Mohanty, Novartis loses landmark India cancer drug patent case (2013) checked 2022 September 5 https://www.reuters.com/article/us-india-novartis-patent/novartis-loses-landmark-india-cancer-drug-patent-case-idUSBRE93002I20130401

679 Checked 2022 September 3 https://ec.europa.eu/commission/presscorner/detail/pt/qanda_21_2802

680 Checked 2022 October 5 https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True

681 Checked 2022 August 5 https://ec.europa.eu/commission/presscorner/detail/pt/qanda_21_2802

682 Ibid.

683 Article 4 of Patentgesetz 1980, BGBI. 1981 I at 1.

may only be granted if prior to it "the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time." However, the very same Article also states that in cases if national emergency, other circumstances of extreme urgency or in situations of public non-commercial use the requirement may be waived.

Regarding compensation for compulsory licencing, as in any other case of expropriation the owner of intellectual property shall be compensated by the State. Article 31(h) of the TRPS states that "the right holder shall be paid *adequate* remuneration in the circumstances of each case, taking into account the economic value of the authorization". The adequate remuneration shall be calculated taking into account the economic value to the importing Member of the use that has been authorized in the exporting State (TRIPS 31bis (2).).

It is supplemented by paragraph (g) which provides that "any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member". As of today, no compulsory licenses have been issued with regards to the COVID vaccines.

To sum up, the challenges created by the global pandemic to protect public health in 2021 have triggered a number of complex questions in international investment law which still remain unanswered and debatable. However, namely the state practice related to the adopted measures to tackle this problem have revealed the lack regulation of protection of investment against indirect expropriation in case of public health crisis. There are some public health provisions in the BITs which may preclude wrongfulness of the state when such measures are taken. Nevertheless, there provisions are rather obscure and only mention public health without defining what it is actually and how such grounds should be applicable. Thus, the state practice and governmental policies to tackle public health crisis in 2021 shall be used as the grounds for finding the common states' policy towards this problem.

First, as it was revealed, the state measures to tackle the global pandemic crisis in 2021 were indeed different and lack unanimous approach that measures and to what extent should be taken to tackle it. Such measures are expropriation of certain machines (goods) to be used for the public purposes and restrictions of pursuing business activities. Such measures, though may appear as actions which have a legitimate aim, may still trigger a number of problematic questions, such as proportionality between the measures adopted and goals which were sought by such measures.

Second, since public health can be found only in few BITs and the ground for preclusion of wrongfulness, the question is whether the state measures which consist indirect expropriation may be rightly justified by customary international law? The possible circumstances precluding wrongfulness in such case may be found in the ARSIWA which provide a list of customary rules precluding wrongfulness of the state's actions. It may be argued that from all the circumstance preluding wrongfulness, namely *necessity* may be invoked as the most possible and legitimate ground. Though necessity previous has been used to justify the measure taken by the states to control economic

upheaval, such as in case of Argentina, the use of necessity for justification of measure to tackle public health crisis remains debatable. As it was showed, Article 25 of the ARSIWA requires strict cumulative conditions to be found in order to apply necessity. Moreover, the position of the ICJ in the *Gabčíkovo-Nagymaros Project* case only supports the strict application of necessity only in exceptional cases. Though it may be argued that the public health crisis caused by the global pandemic in 2021 may be one of such cases, it is still debatable whether the specific measures which constitute indirect expropriation may be justified by necessity.

Third, the treatment of licenses of vaccines in case of global health crisis raise another set of unprecedented challenges. Though Article 31 bis of the TRIPS agreement allows the use and sale of patented inventions without the permission of the patent's holder in order to serve public interest and it also establishes the compensation mechanisms when such measures are adopted, it is debatable whether this mechanism was not deemed to be served in such instances when the global health crisis appear. The problems of compulsory licensing and indirect expropriation of the licensee's right have already become a debatable issue in international investment law since the state practice since some state, such as India and South Africa have already submitted to waive intellectual property rights such as patents related to COVID 19 vaccines. This reveals another emerging set of states practice towards protection of investors' patents rights and whether the special international agreements such as TRIPS agreement would be applicable in such instances.

5.2. Lack of protection due to the territorial sovereignty uncertainties: the Crimean example

In 2014 after the referendum held in Crimea, the peninsula was annexed to Russia. While the annexation has raised great debates in the international community and the prevailing view is that it was illegal, the fact is that today Russia exercises the effective control over Crimea. This raises numerous questions regarding the protection of foreign investment established therein

In 1998 the Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments (Ukraine-Russia BIT) was concluded. Article 5 of the BIT provides that the property shall not be expropriated without a prompt, adequate and effective compensation.

As of today, at least thirteen investment arbitration cases have already arisen[684]

684 Aeroport Belbek LLC and Mr Igor Valerievich Kolomoisky v Russia, PCA Case No 2015-07; PJSC CB PrivatBank and Finance Company Finilon LLC v Russia, PCA Case No 2015-21; PJSC Ukrnafta (Ukraine) v Russia, PCA Case No 2015-34; (i) Stabil LLC, (ii) Rubenor LLC, (iii) Rustel LLC, (iv) Novel-Estate LLC, (v) PII Kirovograd-Nafta LLC, (vi) Crimea-Petrol LLC, (vii) Pirsan LLC, (viii) Trade- Trust LLC, (ix) Elefteria LLC, (x) VKF Satek LLC, (xi) Stemv Group LLC v Russia, PCA Case No 2015-35; Everest Estate LLC et al v Russia, PCA Case No 2015-36; (1) Limited Liability Company Lugzor, (2) Limited Liability Company Libset, (3) Limited Liability Company Ukrinterinvest, (4) Public Joint Stock Company DniproAzot, (5) Limited Liability Company Aberon Ltd v Russia, PCA Case No 2015-29; NJSC Naftogaz of Ukraine, PJSC

and at least another two are being prepared to be filed soon.[685] Twelve of them have been filed under the Ukraine-Russia BIT and one under the Netherlands-Ukraine BIT.[686] The seats of arbitration include Paris, Geneva, the Hague and Stockholm.[687] The sectors concerned are oil and gas, financial services, air transportation and real estate.[688] What all these very different cases have in common is that in all of them the tribunals will have to make findings on the applicability of the relevant BITs. It includes the territorial scope which leads to the point that findings on whether Crimea should be considered as part of Russia or Ukraine will have to be made. The implicit issue problem in all the arbitrations is undoubtedly very clear. Yet, to date all tribunals that have already passed the jurisdictional stage have upheld jurisdiction.[689] None of the arbitral decisions are public, but from publicly available information, such as the Swiss Court's decisions on Russia's appeals of the Tribunals' finding on jurisdiction discussed below, it appears that the position adopted by those Tribunals is that the protection under Ukraine-Russia BIT extends to investments made in Crimea as the territory is currently under the effective control of Russia.

5.2.1. Interpretation of the territorial scope provision under the BIT

Article 15 of the Vienna Convention on Succession of States to Treaties (VCCT) as well as Article 29 of the 1969 Vienna Convention on the Law of Treaties (VCLT) provide for a "Moving treaty frontiers" rule in the context of cession and transfer of territory. It states that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory". According to the rule, when a territory of one State after succession becomes part of the territory of another State a double effect is produced. First, the treaties of the State that acquired the territory become applicable in that territory. Second, the treaties of the territory that joined another State cease to be applicable in it.[690] It also is a custom-

State Joint Stock Company Chornomornaftogaz, PJSC Ukrtransgaz, Subsidiary Company Likvo, PJSC Ukrgasvydobuvannya, PJSC Ukrtransnafta, and Subsidiary Company Gaz Ukraiiny v Russia, SCC tribunal; Oschadbank v Russia, UNCITRAL tribunal.

685 N. Peacock, O. Dementyeva and D. Choung Inside Arbitration: Crimean Investment Treaty Arbitration Claims: Recent Develpments (2020) checked 2022 July 8 https://www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-crimean-investment-treaty-arbitration-claims-recent-developments

686 Ibid

687 Ibid.

688 Ibid.

689 Ibid.

690 Patrick Dumberry, "Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russia under the Ukraine-Russia BIT", *Journal of International Dispute Settlement* 9(3) (2018): 514.

ary international law rule.[691]

Applying the rule to the situation in Crimea would result in a situation where as of 2014 (the alleged date when Crimea joined Russia) the Ukrainian treaties became no longer applicable in Crimea and Russian treaties began to be applicable in the territory. It is however important to note that Article 6 of the VCCT provides that its provisions "apply only to the effects of succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations". Having in mind that the General Assembly, one of the main organs of the United Nations whose role *inter alia* is to protect the integrity of the UN Charter, has condemned the annexation of Crimea, it seems plausible to assume that since the annexation is perceived as unlawful, the rules embedded in Article 15 is not applicable.

It has been argued, however, that even if the Moving treaty frontiers rule as enshrined in the conventions is not applicable, it may still be applied if perceived as part of customary international law.[692] Arbitral tribunal in *Sanum* has ruled that the moving treaty frontiers rule as contained in Articles 29 VCLT and 15 VCST is reflective rule of custom.[693] Knowing that a customary law rule may coexist with codified treaty norms, one could argue that the Russian treaties began to apply in Crimea after the annexation. Yet, this interpretation does not seem plausible as it goes against the rule of non-recognition discussed below.

Overall, following the analysis presented above, it seems that the Ukrainian treaties should not be regarded as having ceased to be applicable in Crimea. As correctly noted by P. Dumberry such analysis would be most coherent from a "pure international law perspective".[694] However, this leads to a practical issue arising from the present situation. While technically Ukrainian treaties continue to apply in Crimea, Ukraine has no real power in that territory and thus cannot ensure its proper application, including protection of foreign investors under the relevant BITs. At the same time, the annexing State, even if it exercises *de facto* control, cannot be deemed to have succeeded any obligations the original sovereign had entered into.[695] This leads to a result where one State cannot exercise any control and be considered responsible for any harm done to investors, while the State that has annexed the land is legally not considered to be the

691 G. B. Born, J. W. Lim, Dh. Prasad *`Sanum v. Laos (Part I): The Singapore Court of Appeal Affirms Tribunal's Jurisdiction under the PRC-Laos BIT`* Kluwer Arbitration Blog (2016) checked 2022 July 8 http://arbitrationblog.kluwerarbitration.com/2016/11/10/sanum-v-laos-the-singapore-court-of-appeal-af-firms-tribunals- jurisdiction-under-the-prc-laos-bit/

692 Patrick Dumberry, "Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russia under the Ukraine-Russia BIT", *Journal of International Dispute Settlement* 9(3) (2018): 514-515.

693 Award of 2013December 13 Sanum Investments Limited v Laos, UNCITRAL, PCA Case No 2013-13.

694 Ibid, 525.

695 Patrick Dumberry, "Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russia under the Ukraine-Russia BIT", *Journal of International Dispute Settlement* 9(3) (2018): 517.

sovereign of the area in question. The ICJ in the *Namibia* Advisory Opinion stated that "the non-recognition of South Africa`s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation".[696] This leaves the investors in a very vulnerable position. As a result, it is not surprising that some tribunal may be very tempted to find ways to establish jurisdiction in investment treaty cases brought by such investors. At least two tribunals appear to have found a way to solve the issue.

5.2.2. The analysis of the jurisprudence on overcoming the sovereignty question

At least two of the tribunals did not follow the analysis suggested above. The decisions on jurisdiction issued by the tribunals seated in Geneva were challenged by Russia. From the publicly available decisions of the Swiss Courts in two cases it can be deducted how the tribunals actually managed to find a way to overcome the obstacle of the sovereignty issue and establish the existence of jurisdiction over the claims.[697]

The first case concerned claims brought by *PJSC Ukrainafta* which was a Ukrainian company operating in the gas market. In 2013, right before the annexation, it controlled ten percent of the fuel market in Crimea. It argued that after the annexation Russia took measures that led to the expropriation of the investments. To address it, the company brought investment arbitration claims against Russia under the Ukraine-Russia BIT of 1998.[698] Russia did not participate in the proceedings and only became actively involved by contesting the Tribunal's decision on jurisdiction and requesting the Court to set aside the award.

Russia argued, *inter alia*, that the BIT was applicable in Crimea.[699] It contended that the term "territory" in Art. 1(4) of the BIT meant only the territory of the Contracting Parties at the time the investment was made and that there was no evidence that the term should be "understood dynamically", later boundary changes should not be taken into account in absence of further agreement.[700] As the Court rightly pointed out, Russia contested only the Tribunal's dynamic interpretation of the term "territory" and did not try to argue that Crimea is not covered as subject matter by the term "territory".[701]

Indeed, the Tribunal in its analysis concluded that the territory of Crimea is covered by the BIT since Russia has acquired *de facto* control over the Crimean Peninsula

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696 Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1971).

697 Russian Federation *v.* A._____ LLC, 4A_396/2017.; Russian Federation *v.* A._____ LLC, B._____ LLC, C._____ LLC, D._____ LLC, E._____ LLC, F._____ LLC, G._____ LLC, H._____ LLC, I._____ LLC, J._____ LLC und K._____ LLC, 4A_398/2017

698 Russian Federation *v.* A._____ LLC, 4A_396/2017 para A

699 Ibid. para. 4.

700 Ibid. para. 4.3.1.

701 Ibid. para. 4.3.2.

and regards it as part of its territory. Importantly, Ukraine while disputing the Russia's sovereignty claims over Crimea, acknowledged in the arbitration proceedings that Russia exercises *de facto* control over it.[702] The Tribunal reached this conclusion after having interpreted the BIT with reference to Article 31 VCLT. It led to the decision that the term "territory" as used in the BIT also includes an area over which a State exercises *de facto* control.[703] Furthermore, it did take into account the "moving treaty frontiers rule" and based on Article 29 of the VCLT it concluded that a treaty is binding on each party in respect of the entire territory.

It is important to point out that prior to engaging into this analysis, the Tribunal emphasized that "for the assessment of its jurisdiction under Art. 9 IPA 1998, it was not required to address the question of the permissibility of the accession of Crimea into the Russian Federation or the lawfulness of the associated territorial claims".[704]

Overall, the Swiss Court fully upheld the decision and reasoning of the Arbitral Tribunal and therefore dismissed Russia's appeal.[705] The analysis in the second publicly available case of the Swiss Court and the Arbitral Tribunal is nearly identical.[706] In that case the Tribunal also found that the *de facto* control was the determining factor and upheld jurisdiction. The Court also dismissed the appeal.[707]

The approach to look at the effective control rather than make a final decision on the sovereignty over a territory is a balanced one. It allows the tribunals to resolve the issue presented it by the parties and at the same time it allows the avoidance of the implicated issue of sovereignty. However, it can be argued, that such approach violated the international law rule of non-recognition.

5.2.3. The obligation of non-recognition

It can be contested whether the tribunals really found the optimum solution for the implicated sovereignty question. Even though they explicitly noted that their decisions were without prejudice to the question of sovereignty, it can be argued that they violated the principle of non-recognition. The UNGA Resolution 68/262 calls not to recognize any alteration of status of Crimea and to "refrain from any action or dealing that might be interpreted as recognizing any such altered status".[708] While it is explicitly addressed to "all States, international organizations and specialized agencies" it can be easily interpreted that it also applies to international courts and tribunals. While the

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702 Ibid. para. 4.2.

703 Ibid. para. 4.2.

704 Ibid. para. 4.2.

705 Ibid. para. 5.

706 Russian Federation *v.* A._____ LLC, B._____ LLC, C._____ LLC, D._____ LLC, E._____ LLC, F._____ LLC, G._____ LLC, H._____ LLC, I._____ LLC, J._____ LLC und K._____ LLC, 4A_398/2017

707 Ibid., para. 5.

708 UNGA Resolution 68/262.

UNGA Resolutions are not officially binding, they express a strong international consensus on the matter. Furthermore, it can be argued that the obligation of non-recognition has acquired the value of a customary rule in which case it would undoubtedly have to be applied by the courts and tribunals.

The Tribunal in the *Coastal State Rights* also had to deal with the question of non-recognition. It concluded that the recognition of the existence of a dispute over a territorial status of Crimea in no way amounts to recognition of any alterations of its status.[709] The Tribunal noted that it merely recognized that Russia had claims without deciding whether they were "right or wrong".[710]

While the decision of the Tribunals did provide protection to the investors, in a sense that at least they will be able to present their claims in an international forum, it also brings risk that such decision will be used by Russia to advance its sovereignty claims in international arena. Also, it may encourage "co-existence" and continuance of the present situation. Inter-State dispute settlement is a long and slow process, while capable investors bring claims more easily. Since the Tribunals have now paved the way for resolving investment disputes occurring in Crimea, it can be argued that there will be less incentives to resolve the broader dispute.

To conclude, the recent years have provided unprecedented challenges to the investment arbitration dispute settlement system, including indirect expropriation. Ensuring protection of foreign property and procedural guarantees became a particularly difficult task for tribunals that requires a novel approach. Moreover, the situation calls for interdisciplinary approach of the closely-linked investment arbitration and public international law areas. It is certain that with the ongoing war in Ukraine and other conflicts disputes involving investments in the disputed areas will only multiply, therefore the jurisprudence that is being developed at the moment will serve as an important source of inspiration for the tribunals in the future.

709 Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation) 2017-06, para. 178.

710 Ibid.

CONCLUSIONS

1. The conducted research leads to the conclusion that the there is a lack of legal certainty in the concept of indirect expropriation. The vagueness of this concept shows that international tribunals have to deal with the problem of the definition of this concept in each case. Public international law does not provide a common, universal definition of indirect expropriation. Despite the growing number of the decisions of international arbitral tribunals, the concept of indirect expropriation remains unclear and the line between indirect expropriation and non-compensable governmental regulation is not clear-cut. Careful inductive case-by-case consideration remains necessary.
2. The attempts to codify indirect expropriation in BITs and other international treaties have been also unsuccessful. This leads to a situation that investment tribunals when deciding on whether State measures constitute indirect expropriation have a very large margin of appreciation. While the tribunals largely rely of previous case law, it is not binding in arbitration and incoherent. This leads to obscure protection of investors' interests and considerable legal uncertainty. Several approaches have been applied by the arbitrators when balancing these competing interests. The sole effects doctrine and the radical police powers doctrine have long been widely used, however, lately the principle of proportionality has been introduced into investor-State arbitration system and is getting more and more popular. While the idea inherent in the principle can be noticed in the decisions, there is no clear and coherent pattern as to its application.
3. Most investment treaties do not provide the criteria for determination what measures constitute indirect expropriation and arbitrators have to rely on exclusively on non-binding body of jurisprudence when deciding disputes. To remedy these flaws newer generation BITs in addition to the four customary law criteria for lawful expropriation contain additional clauses, annexes or interpretative declarations that better reflect the real intentions of the co-contractors. A clear trend in them is to include clarification on what the tribunals should take into account when determining whether a state measure constitutes indirect expropriation. Methodologically it is done by either including clauses supplementing the provisions on indirect expropriation in the main text of a treaty or by attaching a separate annex dedicated to expropriation.
4. The research analyzed the development of the practice of Lithuania regarding the protection provided to the investors against indirect expropriation. One may argue that Lithuania has been taking active steps to improve the situation of protection of investors against indirect expropriation. The analyzed examples in the BITs entered by the Republic of Lithuania with Turkey and India reveal that the notion of indirect expropriation is rather detailed and shed more light how it may be identified. In both BITs three main elements for the consideration of indirect expropriation correspond: economic impact of the measures, their extend (character) and

duration. All these criteria improve the regulation of indirect expropriation and provide more legal certainty for both the state and investors. Such criteria also reflect the current development of international investment law which aims to provide more clear explanation what measures constitute indirect expropriation and how the interests of investors should be protected.

5. In public international law expropriation is permitted and is a prerogative accorded to all sovereign states. However, in order to be legitimate, it must comply with at least four customary requirements: expropriation must be for public purpose, in due process, non-discriminatory and a compensation to the foreign investor must be paid. Additional criteria may also be provided in the legal instruments. If any of these criteria is not complied with, expropriation should be deemed to be illegal. At the same time, the precise definition of the four criteria is not clear.
6. One of the main peculiarities in the investor-State dispute related to indirect expropriation is the assessment of the proportionality of the State measures when deciding whether indirect expropriation can be justified. The research results suggest that in such disputes one of the sources for the establishment of the content of this principle are standards of proportionality formed in the case law of the ECHR. In order to determine whether or how much investors' rights can be interfered with the actions of the state (expropriation) the ECHR applies the principle of proportionality, however, does not follow the traditional proportionality analysis. One of the particularities in the balancing process of the ECHR is that it applies the margin of appreciation doctrine, according to which Member States can in certain situations restrict the rights provided for by the Convention. Overall, the ECHR does not apply the three-step proportionality analysis, however looking for the right balance between public and private rights is inherent in the provisions of the Convention itself and the judges, by interpreting the Convention, perform the balancing exercise.
7. One of the major developments in protection of investors against indirect expropriation in the recent years is lack of treaty-based protection for investors in the EU which opens regulatory and judicial *lacunae*. Following the *Achmea* decision by the ECJ, the EU Member States signed a treaty to terminate the existing intra-EU BITs and naturally not to conclude the new ones. The situation severely limits the pool of potential BIT partners with whom new generation treaties could be concluded. However, this research reveals that the consequence of *Achmea* decision is in essence the creation of the legal gap for the protection of investors' rights in case of the violation of their right to property (including indirect expropriation). This may lead to the situation when the only possible venue for the defense against indirect expropriation is namely the national court of the EU Member States.
8. Considering the legal gaps for the protection of investors' rights against indirect expropriation after *Achmea* decision, this research also focused on the possible application of Article 1 of the Protocol 1 of the Convention which protects the right to property in the national courts. There is no indication on the Convention had it is applicable to protect the rights on investors and may substitute the protection

provided under international treaty and customary law. Nevertheless, the analysis of the relevant case law of the ECHR and position of the Member States when adopting the Convention reveal that the notion of property is broad enough to encompass most of the types of investment. Thus, there should not be a problem to find that investment falls under the notion of property under the Convention. In essence, the application of the standards of protection of property under the Convention should ensure effective protection of investors' rights in case of indirect expropriation.

9. However, since there is a lack of dispute before the ECHR in which the question would appear how the Member States treated international investments, it remains debatable whether the standard of protection of investor against indirect expropriation would be sufficient and effective. The customary international law, following the *Chorzów factory* case is based on principle of full compensation principle (*restitution on integrum*). Though the ECHR emphasized that in case of violation of the right to property the remedy (damages) awarded should be adequate and proportional, the court seems not be willing to accept the principle of full compensation in such disputes. This is one of the main differences between the remedies available under customary international law and protection under the Convention in case of violation of the right to property.
10. The new emerging issues in international investment law related to indirect expropriation such as indirect expropriation for the protection of public health and the problems of jurisdiction of arbitral tribunals when the dispute concerns the application of the BITs of Ukraine to the assets located in Crimea are far from clear, but also show certain developments in international law. The research further revealed that indirect expropriation as the measure for protection of public health was applicable in some states and did not receive significant opposition as such. However, one of the most debatable questions in such instance remains namely the application of the traditional customary international law rules, such as non-discrimination of investors and the principle of proportionality when expropriation is exercised to protect public health. There are some public health provisions in the BITs which may preclude wrongfulness of the state when such measures are taken. Nevertheless, these provisions are rather obscure and only mention public health without defining what it is actually and how such grounds should be applicable.

PROPOSALS

The conducted research and proposed conclusions suggest that one of the foreign objectives of the Republic of Lithuania is promotion of foreign investments. In order to promote investments and ensure effective protection of investors' rights in case of indirect expropriation, certain steps should be taken.

1. Though the Republic of Lithuania is evidently progressing towards the new-generation clarified BITs, the progress is rather slow. Such policy requires well-crafted legal instruments which would not only attract foreign investors, but also provide a balanced and sophisticated regime for protection of investors' rights against direct and indirect expropriation. To achieve these goals, it is suggested that the Government of the Republic of Lithuanian when drafting the new BIT's follow the developing state practice in the area. It would be suggested for the Government of Lithuania to take initiative and define, or re-define, the scope of protection that it wishes to grant to foreign investors. Most BITs concluded by the Republic of Lithuania still lack the criteria for determining what measures constitute indirect expropriation and in case of the dispute with the investors, this definition is solely determined by the arbitrators who have to rely on exclusively on non-binding body of jurisprudence when deciding disputes. Such disproportionate amount of discretion for arbitrators to decide what measures constitute expropriation and the decisions based on the BITs not only creates legal certainty, but also does not provide legal certainty for potential investors.
2. The practice of more detailed regulation of what State measures constitute indirect expropriation not only provides more legal certainty and clarity for investors, but also allows to avoid unexpected results in case of the disputes with the investors. It is suggested to include in addition to the four customary law criteria for lawful expropriation contain additional clauses, annexes or interpretative declarations that better reflect the real intentions of the State. Such new approached is to some extent followed in the renewed Turkey-Lithuania BIT which included detailed provisions on what elements need to be considered when determining whether State measures amount to expropriation. It should be suggested to renew the previously concluded "old" model BITs and reassess the possible introduction of more detailed provisions on indirect expropriation particularly. When dealing with conclusion of the new BITs the Government of Lithuania should consider particularly these aspects related to indirect expropriation: economic impact of the measures, their extend (character) and duration. The process of the renewals of the Lithuanian BITs was conducted faster, especially with regards to the main trading partners.
3. Furthermore, the conducted research revealed that the Convention serves as a suitable legal instrument for protection of against indirect expropriation. Analysis of the application of Article 1 of the Protocol 1 of the Convention suggests it covers most of the investments as defined under international investment law and the standards of investor's protection and remedies against indirect expropriation established in the Convention should allow to offer suitable for protection of

investor's interests against indirect expropriation. It is suggested for the Government of the Republic of Lithuania when discussing the new BITs and/or assessing the previously concluded ones to discuss the possibilities of inclusion of the reference of Article 1 of the Protocol 1 of the Convention as the legal mechanisms against indirect expropriation.

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MYKOLAS ROMERIS UNIVERSITY

Dalia Višinskytė

INDIRECT EXPROPRIATION IN INVESTOR-STATE ARBITRATION

Summary of doctoral dissertation
Social Sciences, Law (S 001)

Vilnius, 2023

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DALIA VIŠINSKYTĖ

INDIRECT EXPROPRIATION IN INVESTOR-STATE ARBITRATION

SUMMARY

The dissertation focuses on the problems of regulation of the concept of indirect expropriation in international treaty and customary law and how the interests of a foreign investor should be protected in case of indirect expropriation. It seeks to assess the concept of indirect expropriation and how the relevant substantive protection standards such as fair and equitable treatment (FET) are applicable in such dispute. The dissertation also focuses on the development of protection against indirect expropriation in international treaties with the special emphasis on the policy and protection to investor granted by the international investment protection treaties by the Republic of Lithuania. Also, the research deals with the procedural questions related to the actual protection of investors' rights in international investment law. One of the main problems which has emerged recently - what are the possible ways of settlement of State and investor disputes after the *Achmea* decision in the EU. The procedural uncertainties left after this judgment are assessed in this research. To address this problem in detail, the research also focuses on the possible application of the right to property established in the ECHR as protection against indirect expropriation.

The current international practice towards formation of policy of indirect expropriation in international and national law prove the relevance of this research. The international organisations continue pursuit for the development of the regulation of indirect expropriation and the emerging policy of State how to define indirect expropriation in the BIT should be assessed. As the concrete example of such policy development this research chose the Republic of Lithuania since this country in the recent years has been involved in various disputes related to expropriation and concluded new BITs which in more detail regulated the questions related to indirect expropriation and protection of investors' rights. Within the national context, it is relevant to Lithuania because its foreign policy objectives, one of which is to promote foreign investments. Lithuania consistently has been aiming to attract foreign direct and indirect investment.

One of the research results of this dissertation is that the attempts to codify indirect expropriation in the BITs and other international treaties have been unsuccessful. This leads to a situation that investment tribunals when deciding on whether State measures constitute indirect expropriation have a very large margin of discretion. While the tribunals largely rely on the previous case law, it is not binding in arbitration and is incoherent. This leads to considerable legal uncertainty. Several approaches have been applied by the arbitrators when balancing these competing interests. The sole effects doctrine and the radical police powers doctrine have long been widely used, however, lately the principle of proportionality has been introduced into investor-State arbitration system and is getting more and more popular. While the idea inherent in

the principle can be noticed in the decisions, there is no clear and coherent pattern as to its application.

Also, most investment treaties do not provide the criteria for determination what measures constitute indirect expropriation and arbitrators have to rely on exclusively on non-binding body of jurisprudence when deciding disputes. To remedy these flaws newer generation BITs in addition to the four customary law criteria for lawful expropriation contain additional clauses, annexes or interpretative declarations that better reflect the real intentions of the co-contractors. A clear trend in them is to include clarification on what the tribunals should take into account when determining whether a state measure constitutes indirect expropriation. Methodologically it is done by either including clauses supplementing the provisions on indirect expropriation in the main text of a treaty or by attaching a separate annex dedicated to expropriation.

In public international law expropriation is permitted and is a prerogative accorded to all sovereign states. However, in order to be legitimate, it must comply with at least four customary requirements: expropriation must be for public purpose, in due process, non-discriminatory and a compensation to the foreign investor must be paid. Additional criteria may also be provided in the legal instruments. If any of these criteria is not complied with, expropriation should be deemed to be illegal. At the same time, the precise definition of the four criteria is not clear.

The author of the dissertation has found that one of the main peculiarities in the investor-State dispute related to indirect expropriation is the assessment of the proportionality of the State measures when deciding whether indirect expropriation can be justified. The research results suggest that in such disputes one of the sources for the establishment of the content of this principle are standards of proportionality formed in the case law of the ECHR. In order to determine whether or how much investors' rights can be interfered with the actions of the state (expropriation) the ECHR applies the principle of proportionality, however, does not follow the traditional proportionality analysis. One of the particularities in the balancing process of the ECHR is that it applies the margin of appreciation doctrine, according to which Member States can in certain situations restrict the rights provided for by the Convention. Overall, the ECHR does not apply the three-step proportionality analysis, however looking for the right balance between public and private rights is inherent in the provisions of the Convention itself and the judges, by interpreting the Convention, perform the balancing exercise.

Following the *Achmea* decision by the ECJ, the EU Member States signed a treaty to terminate the existing intra-EU BITs and naturally not to conclude the new ones. The situation severely limits the pool of potential BIT partners with whom new generation treaties could be concluded. However, this research reveals that the consequence of *Achmea* decision is in essence the creation of the legal gap for the protection of investors' rights in case of the violation of their right to property (including indirect expropriation). This may lead to the situation when the only possible venue for the defense against indirect expropriation is namely the national court of the EU Member States. Considering the legal gaps for the protection of investors' rights against indirect

expropriation after *Achmea* decision, this research also focused on the possible application of Article 1 of the Protocol 1 of the Convention which protects the right to property in the national courts. There is no indication on the Convention had it is applicable to protect the rights on investors and may substitute the protection provided under international treaty and customary law. Nevertheless, the analysis of the relevant case law of the ECHR and position of the Member States when adopting the Convention reveal that the notion of property is broad enough to encompass most of the types of investment. Thus, there should not be a problem to find that investment falls under the notion of property under the Convention. In essence, the application of the standards of protection of property under the Convention should ensure effective protection of investors' rights in case of indirect expropriation.

The author of the dissertation has found that since there is a lack of disputes before the ECHR in which the question would appear how the Member States treated international investments, it remains debatable whether the standard of protection of investor against indirect expropriation would be sufficient and effective. The customary international law, following the Chorzów factory case is based on principle of full compensation principle (restitutio in integrum). Though the ECHR emphasized that in case of the violation of property the remedy (damages) awarded should be adequate and proportional, the court seems not be willing to accept the principle of full compensation in such disputes. Thus, the question whether the Convention would provide full compensation of the damage suffered by the investors in case of indirect expropriation in the case law of the ECHR remains debatable.

The new emerging issues in international investment law related to indirect expropriation such as indirect expropriation for the protection of public health and the problems of jurisdiction of arbitral tribunals when the dispute concerns the application of the BITs of Ukraine to the assets located in Crimea are far from clear, but also show certain developments in customary international law. The research also revealed that indirect expropriation as measure for protection of public health was applicable in some states and did not receive significant opposition as such. However, one of the most debatable questions in such instance remains the application of the traditional customary international law rules, such as non-discrimination of investors and the principle of proportionality when expropriation is exercised to protect public health. There are some public health provisions in the BITs which may preclude wrongfulness of the state when such measures are taken. Nevertheless, the provisions are rather obscure and only mention public health without defining what it is actually and how such grounds should be applicable.

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MYKOLO ROMERIO UNIVERSITETAS

Dalia Višinskytė

NETIESIOGINĖ EKSPROPRIACIJA INVESTUOTOJO – VALSTYBĖS ARBITRAŽE

Daktaro disertacijos santrauka
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DALIA VIŠINSKYTĖ

NETIESIOGINĖ EKSPROPRIACIJA INVESTUOTOJO-VALSTYBĖS ARBITRAŽE

SANTRAUKA

Netiesioginė ekspropriacija (investicijų nusavinimas) yra tarptautinės investicijų teisės koncepcija, neturinti tikslaus apibrėžimo ar kriterijų jai nustatyti. Tai lemia, kad užsienio investuotojo ir valstybės, priimančios investicijas, santykiuose vyrauja teisinis neapibrėžtumas bei nenuspėjamumas, kaip įvairios valstybės priimtos reguliavimo priemonės turėtų būtų vertinamos. Būtent netiesioginės ekspropriacijos neapibrėžtumas lemia šios temos sudėtingumą, poreikį atlikti mokslinius tyrimus.

Tradicinis ginčų sprendimo būdas tarptautinėje teisėje yra derybos. Kai derybos nepavyksta, ginčo šalių nesutarimus nagrinėja valstybės teismams. Tačiau kai ginčas kyla tarp valstybės ir investuotojo, t. y. kai ginčo šalis yra pati valstybė, jo nagrinėjimas valstybės teismuose nėra tinkamiausia ginčo nagrinėjimo priemonė. Siekiant paskatinti užsienio investuotojus investuoti užsienyje, buvo sukurta investicinio arbitražo sistema. Jos pagrindas yra dvišalės investicijų sutartys (toliau ir – DIS) bei daugiašalės investicijų sutartys, kurios dažnai sudaromos kaip platesnės bendradarbiavimo sutartys, kuriose taip pat yra investicijų nuostatų. Tarptautinėje valstybių praktikoje dvi ar daugiau valstybių pasirašo tarptautinę sutartį, kurioje numatyta, kad vienos iš jų investuotojas, investuojantis kitoje valstybėje, turės teisę tiesiogiai pareikšti ieškinį užsienio valstybei (investicijas priimančiai valstybei) dėl tokios sutarties nuostatų pažeidimo. Investuotojo buveinės valstybės dalyvavimas tokiame ginče nėra būtinas. Anksčiau užsienio investuotojas, norintis pareikšti ieškinį investicijas priimančiajai valstybei, turėjo prašyti diplomatinės apsaugos iš savo buveinės valstybės ir ši turėjo pareikšti ieškinį priimančiajai valstybei savo vardu. Dėl akivaizdžių priežasčių, pavyzdžiui, galimos politinės įtampos, tokia ginčų nagrinėjimo sistema buvo netinkama norint skatinti tarptautinį bendradarbiavimą ir užsienio investicijų plėtrą.

Investiciniai valstybės ir investuotojo ginčai gali būti sprendžiami instituciniame arbitraže arba *ad hoc* arbitraže. Populiariausia investicijų arbitražo ginčus administruojanti institucija yra Tarptautinis investicinių ginčų sprendimo centras (ICSID), kurio būstinė yra Vašingtone (JAV). Europoje žinomiausios tokio pobūdžio ginčus sprendžiančios institucijos šalia komercinio arbitražo ginčų yra Tarptautiniai prekybos rūmai (ICC), Stokholmo prekybos rūmai (SCC) ir Nuolatinis arbitražo teismas (PCA). *Ad hoc* investiciniams arbitražams paprastai taikomos UNCITRAL arbitražo taisyklės.

Tarptautiniuose susitarimuose užsienio investuotojams paprastai garantuojami keli esminiai apsaugos standartai: sąžiningas ir nešališkas elgesys (FET), visiška apsauga ir saugumas (FPS), palankiausios valstybės principas (MFN), nediskriminavimas, vadinamojo „skėtinė“ (angl. *umbrella*) apsauga, mokėjimų garantijos ir kt. Vienas iš esminių

standartų yra apsauga nuo netiesioginio investicijų nusavinimo (ekspropriacijos). Pagal tarptautinę teisę ekspropriacija yra leidžiama ir yra visų suverenių valstybių prerogatyva. Tačiau tam, kad ji būtų teisėta, ekspropriacija turi atitikti bent keturis įprastus reikalavimus: nusavinimas turi būti visuomenės tikslais, vykdomas laikantis teisės normų, nediskriminuojantis ir turi būti sumokėta kompensacija užsienio investuotojui. Dvišalėje investicijų sutartyse taip pat gali būti numatyti papildomi kriterijai. Jei kurio nors iš šių kriterijų nesilaikoma, nusavinimas turėtų būti laikomas neteisėtu.

Anksčiau, XX a. septintajame ir devintajame dešimtmečiuose pagrindinė investicijų ekspropriacijos rūšis buvo tiesioginė. Tačiau šiandien tokie atvejai yra labai reti ir absoliuti dauguma bylų yra susijusios su netiesioginiu nusavinimu. Įprasta, kad ieškiniai dėl netiesioginio nusavinimo siekia šimtus milijonų ar net milijardus. Didžiausia arbitraže priteista suma šiai dienai yra *Yukos* byloje prieš Rusiją ir siekia net 50 milijardų JAV dolerių.[711]

Kai rizikuojama tokiomis sumomis, galima nesunkiai daryti prielaidą, kad „netiesioginės ekspropriacijos“ apibrėžimas turėtų egzistuoti ar bent būti aiškūs kriterijai, kuriais remiantis būtų galima nustatyti, ar valstybės priimta reguliavimo priemonė yra ekspropriacinė. Vis dėlto, nepaisant nuolat didėjančio su ja susijusių bylų skaičiaus, nėra tikslaus netiesioginės ekspropriacijos sąvokos apibrėžimo ar ją sudarančių priemonių sąrašo. Kaip taikliai pažymėta *Generation Ukraine prieš Ukrainą* arbitražo byloje, „nuspėjamumas yra vienas iš svarbiausių bet kurios teisinės sistemos tikslų. Būtų naudinga, jei iš anksto būtų visiškai aišku, ar konkretūs įvykiai patenka į „netiesioginio“ nusavinimo apibrėžimą. Tai sustiprintų pagarbos teisėtiems lūkesčiams jausmą, jei būtų visiškai aišku, kodėl, priimdamas konkretų sprendimą, arbitražo teismas nustatė, kad vyriausybės veiksmas ar neveikimas peržengė ribą, apibrėžiančią netiesioginiai ekspropriacijai prilygstančius veiksmus. Tačiau nėra baigtinio sąrašo šiam tikslui pasiekti. Kiekvienu atveju skiriasi, tai priklauso ne tik nuo konkrečių bylos faktų, bet ir nuo įrodymų pateikimo būdo bei teisinio pagrindo“.[712]

Visuotinai pripažįstama, kad netiesioginė ekspropriacija laikoma atlikta kai iš užsienio investuotojo atimama investicija pažeidžiant anksčiau paminėtus teisinius kriterijus. Šie kriterijai, nustatyti investicinėse sutartyse ar teisės aktuose, yra pagrindinės gairės arbitrams, vertinant ekspropriacijos priemonių teisėtumą, proporcingumą. Aiškaus netiesioginio nusavinimo apibrėžimo bei atitinkamai jo nuspėjamumo trūkumas yra akivaizdi ir svarbi problema tarptautinėje teisėje. Šiuolaikinės investicijų sutartys nuolat tobulėja ir į jas įtraukiama vis daugiau kriterijų, į kuriuos turėtų atsižvelgti arbitrai, nagrinėjantys investicinį ginčą. Senosios kartos investicijų sutartys neturi jokių kriterijų, kurie padėtų arbitrams analizuojant valstybių veiksmus dėl netiesioginės ekspropriacijos, tačiau naujosios kartos dvišalės investicijų sutartys įtraukia aiškų, nors ir ne baigtinį, sąrašą kriterijų, į kuriuos arbitrai privalo atsižvelgti. Vienas pavydžių yra 1996 m. Lietuvos ir Argentinos DIS palyginimas su 2011 m. Lietuvos ir Indijos DIS.

711 Award of 2014 July 18 Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227.

712 Award 2003 September 15 Generation Ukraine v Ukraine, ICSID Case No. ARB/00/9, para. 20.29.

Pirmojoje yra tiesiog pareiškiamas, kad nė viena iš valstybių nenacionalizuos, neeksproprijuos investicijų, ar nesiims jokių kitų tokio pat poveikio priemonių, nebent tai būtų visuomenės tikslais, nediskriminuojant ir laikantis teisingo proceso, o investuotojui sumokama kompensacija bus tinkama apsaugos priemonė. Antroji sutartis yra viena iš „šiuolaikinės kartos" DIS ir joje yra pateiktas papildomas priedas, skirtas tik netiesioginiam nusavinimui ir numatantis papildomus kriterijus, tokius kaip ekonominis poveikis, kišimasis į pagrįstus lūkesčius, priemonių pobūdis ir kt. Vis dėlto, nors šis nebaigtinis sąrašas suteikia daugiau teisinio tikrumo ir yra orientyras arbitrams, kilus ginčui dėl netiesioginės ekspropriacijos, jo nepakanka siekiant užtikrinti veiksmingą investuotojų apsaugą. Tinkamos pusiausvyros tarp investuotojų ir valstybių interesų nustatymas tebėra nelengva užduotis, kurios arbitražo ginčus nagrinėjantys teismai imasi nagrinėdami kiekvieną naują bylą. Kaip teisingai paaiškino nustatyta *Saluka* byloje, „[...]tarptautinė teisė dar turi išsamiai ir galutinai nustatyti, kokios taisyklės yra laikomos „leistinomis" ir „bendrai pripažintomis", priklausančiomis valstybių policijos ar reguliavimo galioms, ir taigi, nekompensuotina. Kitaip tariant, ji dar turi nubrėžti ryškią ir lengvai atskirtą ribą tarp nekompensuojamų reglamentų, iš vienos pusės, ir, kita vertus, priemonių, kurios atima iš užsienio investuotojų investicijas, todėl yra neteisėtos ir kompensuotinos pagal tarptautinę teisę".[713]

Praktikoje ekspropriaciniai (nusavinimo) veiksmai dažniausiai yra atliekami valstybei priimant teisės aktus, kurie sukelia „investicijų nusavinimo efektą" (angl. regulatory takings); teisės institucijų veiksmais (angl. *judicial expropriation*) ar sutartimis įtvirtintų teisių nusavinimu (angl. *contractual expropriation*).

Bėgant laikui tarptautinėje praktikoje susiformavo keletas identifikuojamų doktrinų netiesioginei ekspropriacijai nustatyti. Netiesioginio nusavinimo pradžioje dažnai buvo taikoma „poveikio" doktrina. Pagal ją netiesioginis nusavinimas įvyksta tada, kai pažeidžiamos užsienio investuotojų teisės naudotis savo nuosavybe, nepaisant to, kokios yra priežastys. Pagrindinis šios doktrinos pavyzdys yra *Santa Elena* byloje, kurioje arbitražo teismas pareiškė, kad nepaisant to, kiek naudinga nauja priemonė gali būti visai visuomenei, ji turi tokį patį poveikį kaip ir kiti nusavinimo veiksmai, todėl yra netiesioginis nusavinimas.[714]

Vėliau svarbią vietą užėmė vadinamoji „policijos galių" doktrina, kuriai būdinga valstybės galia reguliuoti viešąjį interesą, todėl reguliavimo priemonės, kurių imamasi siekiant viešojo intereso apsaugos, negali būti laikomos nusavinamomis. Tačiau griežtas šios doktrinos taikymas sukėlė užsienio investuotojų, kurie manė, kad jų investicijos užsienyje nėra pakankamai apsaugotos, neigiamą reakciją, todėl tarpvalstybinės investicijos ryšiai sumažėjo.

Siekiant sušvelninti situaciją dėl investuotojų interesų apsaugos, buvo pradėtas taikyti „proporcingumo metodas" kuris tapo plačiausiai taikoma doktrina tarptautinėje

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713 Award of 2006 September 6 Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, para. 263.

714 Award 2000 February 17 Compania del Desarrolo de Santa Elena and the Republic of Costa Rica, ICSID Case N. ARB/96/1, para. 72.

investicijų teisėje. Šios doktrinos tikslas – rasti tinkamą balansą tarp užsienio investuotojų ir valstybių interesų. Problema tai, kad „proporcingumas“ nėra aiškiai apibrėžta sąvoka. Tradicinė proporcingumo analizė tarptautinėje investicijų teisėje susideda iš trijų etapų: būtinumo, tinkamumo ir griežto proporcingumo balansavimo (proporcingumo *stricto sensu*). Tačiau teismai nėra linkę griežtai laikytis šio metodo ir neretai atsižvelgia tik į dalį kriterijų. *Tecmed* byla buvo pirmoji, kurioje buvo aiškiai pripažintas proporcingumo metodas.[715]

Apibendrinant galima teigti, kad šiuolaikinėje investicijų teisėje vis dar ieškoma atsakymo, kaip tinkamai tai subalansuoti užsienio investuotojų ir investicijas priimančių valstybių interesus. Viena vertus, tarptautinė investicijų teisę turi skatinti investuotojus investuoti užsienio valstybėse bei sukurti teisingą pagrįstą lūkestį dėl jų interesų apsaugos valstybėje, kurioje yra investuojama. Kita vertus, valstybės suverenių galių apribojimas tarp pat turi būti proporcingas, nes valstybei taikant įvairias priemones (pavyzdžiui, investicijų ekspropriaciją) gali būti siekiama teisėtų ir pagrįstų tikslų, susijusių ir su viešojo intereso apsauga. Todėl tarptautinėje investicijų teisėje siekiama teisingo investuotojo ir valstybės interesų balanso.

Taigi akivaizdu, kad nors netiesioginės ekspropriacijos srityje kyla dar daug neaiškumų (ne tik dėl konkretaus teisinio reguliavimo nebuvimo, tarptautinės paprotinės teisės neapibrėžtumo), ši teisinė koncepcija yra neretai taikoma valstybės ir investuotojų ginčuose ir jos svarba tarptautinėje investicijų teisėje yra vis didesnė. Tyrimo metu įvyko keletas itin svarbių įvykių susijusių su netiesiogine ekspropriacija, kurie reikšmingi ir pasirinktos temos vertinimui.

Visų pirma, Europos Sąjungos Teisingumo Teismas 2018 m. priėmė sprendimą *Achmea* byloje, kuris galiausiai lėmė, jog buvo nutrauktos DIS tarp Europos Sąjungos Valstybių Narių.[716] Tai sukėlė teisinį „vakuumą“ užsienio investuotojams Europos Sąjungoje ginti savo interesus tarptautinėje arenoje. Atitinkamai tai lėmė, kad nesant galimybės investuotojams savo pažeistas teises ginti arbitražo teisme, vienintelė pagrįsta ginčų nagrinėjimo alternatyva lieka Valstybių Narių nacionaliniai teismai. Minėta, kai įprastai investicinius ginčus, kuriuose viena iš ginčo šalių yra pati valstybė, nėra įprasta nagrinėti pačios valstybės teisme. Tačiau pripažinus DIS negaliojimą Europos Sąjungoje, viena iš galybių tokių atvejų investuotojų teisių gynybai Valstybių Narių teismuose galėtų būti Europos Žmogaus Teisių Konvencijos (toliau – EŽTK), kuri saugo teisę į nuosavybę, taikymas investuotojui ginantis nuo Valstybės narės priimtų sprendimų. Tačiau tarptautiniame investiciniame arbitraže ir EŽTT praktikoje yra naudojamas skirtingas kompensacijos standartas, todėl yra sunku kol kas aiškiai nuspėti, ar investuotojų teisės būtų tinkamai ir veiksmingai apgintos nacionaliniuose teismuose, nes ir taikant EŽTK kaip tarptautinės sutarties nuostatas.

Antra, pasaulyje įvyko COVID-19 pandemija, kuri taip sukėlė nemažai klausimų,

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715 Award of 2003 May 29 Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, (ICSID Case No. ARB(AF)/00/2).

716 Judgment of the Court (Grand Chamber) of 6 March 2018, Slowakische Republik v Achmea BV, C-284/16.

susijusių su investuotojų apsauga. Pandemijos sukelti sunkumai privertė valstybes imtis beprecedenčių priemonių, siekiant užtikrinti viešąjį interesą, visų pirma, visuomenės sveikatą. Nors ir siekiant viešojo intereso apsaugos, neretai valstybių taikytos priemonės apsaugos visuomenės sveikatą, lėmė investuotojų teisių suvaržymą ar galimą pažeidimą ekspropriuojant jų investicijas. Nors viešai prieinamų iš šios situacijos kilusių ginčų tarptautinėje teisėje dar nėra, tyrime buvo nagrinėjama, kokias pasekmes valstybių reguliacinės priemonės galėjo sukelti bei kokias gynybos priemones jos galėtų panaudoti siekdamos pateisinti savo veiksmus, ekspropriuodamos investuotojų investicijas.

Trečia, 2022 m. prasidėjo karas Ukrainoje. Esama situacija, tarptautinių investicijų srityje, lėmė situaciją, kad net teoriškai nėra iki galo aišku, kaip užsienio investicijos turėtų būti apsaugotos teritorijoje, dėl kurios kovojama, arba tiksliau, koks rėžimas turėtų būti taikomas toms investicijoms. Tai ne pirmieji Rusijos agresijos atvejai Ukrainoje ir arbitražai jau turėjo galimybę priimti sprendimų dėl investicijų Krymo pusiasalyje. Tyrime buvo nagrinėjama, kaip tokios investicijos turėtų būti saugomos ir koks rėžimas joms galėtų būti taikomas.

Galiausiai, 2023 m. kovo mėn. 30 d. Tarptautinis Teisingumo Teismas priėmė sprendimą byloje Iranas prieš JAV, kuriame vienas pagrindinių ieškinių buvo dėl netiesioginės ekspropriacijos, konkrečiai Markazi banko ir kitų įmonių turto nusavinimo JAV teritorijoje.[717] Tai itin svarbi byla netiesioginės ekspropriacijos srityje, nes pirmą kartą teismas tarpvalstybinėje byloje turėjo galimybę išsamiai pasisakyti apie ekspropriaciją, negana to teisinę ekspropriaciją, kuri retai sutinkama investuotojų ginčuose. Nemažiau svarbu tai, kad Tarptautinis Teisingumo Teismas kaip reikšmingais precedentus netiesioginės ekspropriacijos srityje rėmėsi būtent arbitražo teismų sprendimais.

Apibendrinant, nors netiesioginio nusavinimo koncepcijai neabejotinai trūksta aiškumo, kaip rodo jau tyrimo eigoje įvykę pokyčiai, dabar ši tema yra aktuali ir reikalauja mokslinio tyrimo. Atsižvelgiant į tai, darbo pradžioje yra išsamiai analizuojamos doktrina bei jurisprudencija, o gautos išvados yra pritaikomos praktiškai šioms dienoms kylančioms problemoms spręsti.

TYRIMO OBJEKTAS IR UŽDAVINIAI

Šio tyrimo tikslas yra paaiškinti ir nustatyti tarptautinės investicijų teisės raidą netiesioginės ekspropriacijos srityje ir pateikti mokslinius siūlymus užtikrinti veiksmingą investuotojų teisių apsaugą netiesioginės ekspropriacijos atveju viešojoje tarptautinėje teisėje

Siekiant tyrimo tikslo, keliami tokie uždaviniai:

1. Nustatyti ir išanalizuoti netiesioginės ekspropriacijos tarptautinėje investicijų teisėje sąvoką ir atskleisti investicijos sąvokos problemą.

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717 International Court of Justice, Judgement, 30 March 2023, Certain Iranian Assets (Islamic Republic of Iran v. United States of America).

2. Išnagrinėti ekspropriacijos išlygas tarptautinėse sutartyse ir kituose šaltiniuose bei valstybių formuojamą politiką ir Lietuvos Respublikos sudarytas tarptautines investicijų sutartis, siekiant įvertinti, kokios valstybės taikomos priemonės laikytinos netiesiogine ekspropriacija.
3. Nustatyti tarptautinės paprotinės teisės plėtrą, susijusią su netiesioginės ekspropriacijos ir kompensacijos mechanizmais dėl tokių neteisėtų valstybės veiksmų.
4. Išanalizuoti galimybę taikyti teisės į nuosavybę, nustatytos Konvencijoje apsaugą, kaip investuotojų gynybos būdą dėl netiesioginės ekspropriacijos po sprendimo *Achmea* byloje ir įvertinti, ar tokia apsaugos priemonė suderinama su tarptautinės paprotinės teisės taisyklėmis;
5. Nustatyti esamas tarptautinės paprotinės teisės plėtros kryptis apsaugos nuo netiesioginės ekspropriacijos tarptautinėje investicijų teisėje.

Darbe siūlomi du ginamieji teiginiai:
1. Netiesioginės ekspropriacijos sąvoka nėra aiški bei tarptautinėje investicijų teisėje nėra vienodos jos sampratos ir ji turėtų būti nustatoma naudojant indukcinį, atskirų atvejų analizės metodą.
2. Investuotojo teisės, pažeistos dėl netiesioginės ekspropriacijos, gali būti veiksmingai ginamos taikant teisės į nuosavybės apsaugą taisykles, nustatytas Žmogaus teisių ir pagrindinių laisvių apsaugos konvencijoje bei Europos Žmogaus Teisių Teismo praktikoje.

IŠVADOS

1. Atliktas tyrimas leidžia daryti išvadą, kad netiesioginės ekspropriacijos sąvoka nėra aiški. Šios sąvokos neapibrėžtumas rodo, kad tarptautiniai teismai bei arbitražai kiekvienu atveju turi spręsti jos apibrėžimo problemą. Viešoji tarptautinė teisė nepateikia bendro, universalaus netiesioginės ekspropriacijos apibrėžimo. Nepaisant vis didėjančio tarptautinių arbitražinių teismų sprendimų skaičiaus, netiesioginės ekspropriacijos sąvoka lieka neaiški, o riba tarp netiesioginės ekspropriacijos ir teisėto valstybės priimto teisinio reguliavimo nėra aiški. Todėl reikalingas individualus indukcinis kiekvieno ginčo atvejo nagrinėjimas. Šios temos ypatumas – tarptautinių sutarčių teisės ir tarptautinės paprotinės teisės apsaugos nuo netiesioginės ekspropriacijos reglamentavimas, dėl kurio atsiranda teisinių neaiškumų, pavyzdžiui, teisėtumas, valstybės priemonių proporcingumas, kompensavimas ir kiti aspektai. Šis tyrimas yra susijęs su netiesioginės ekspropriacijos problemomis tarptautinėje viešojoje teisėje. Tyrime nebuvo skirtas dėmesys kitų teisės sistemų, pavyzdžiui, Europos Sąjungos teisės, analizei.
2. Bandymai netiesioginę ekspropriaciją kodifikuoti dvišalėse investicijų sutartyse ir kitose tarptautinėse sutartyse kol kas yra nesėkmingi. Praktikoje arbitražo teismai, nagrinėdami investicinius ginčus, spręsdami, ar valstybės priemonės laikytinos netiesiogine ekspropriacija, turi didelę vertinimo laisvę. Nors arbitražo teismai daugiausia remiasi ankstesne praktika, arbitraže ji nėra privaloma ir yra nenuosekli.

Tai lemia neaiškią investuotojų interesų apsaugą ir didelį teisinį neapibrėžtumą. Arbitražo teismai, ieškodami tinkamo investuotojų interesų apsaugos balanso, taiko įvairius metodus. „Vienintelių padarinių“ doktrina ir „radikalių policijos galių“ doktrina buvo plačiai taikomos jau seniai, tačiau pastaruoju metu vis dažniau taikomas proporcingumo principas (testas). Nors arbitražo teismų sprendimuose galima pastebėti šiam principui būdingus vertinimo kriterijus, kol kad nėra aiškaus ir nuoseklaus jo taikymo modelio.

3. Daugumoje investicijų sutarčių nenumatyti kriterijai, pagal kuriuos būtų galima nustatyti, kokios priemonės laikytinos netiesiogine ekspropriacija, o arbitrai, spręsdami tokius ginčus, remiasi ankstesne praktika, kuri nėra privaloma. Siekiant ištaisyti šiuos trūkumus, naujesnės kartos dvišalės investicijų sutartys, be keturių paprotinės teisės kriterijų, taikomų teisėtai ekspropriacijai, turi papildomų sąlygų, kurios tiksliau atskleidžia tikruosius šalių ketinimus. Aiškios tendencijos šiuo metu yra įtraukimas pavyzdžių, kurie nustato netiesioginę ekspropriaciją, kuriuos arbitražo teismai turėtų vertinti, nustatydami, ar valstybės priemonės laikytinos netiesiogine ekspropriacija. Tai atliekama įtraukiant atskiras nuostatas į dvišalės investicijų sutarties tekstą ar pateikiant priedą prie tokios sutarties.
4. Tyrime buvo analizuojama Lietuvos Respublikos taikomos investuotojų apsaugos nuo netiesioginės ekspropriacijos praktikos raida. Galima teigti, kad Lietuvos formuoja tarptautinė praktika rodo, kad valstybė imasi aktyvių veiksmų siekiant užtikrinti veiksmingesnę investuotojų apsaugą nuo netiesioginio nusavinimo. Pavyzdžiui, nors Lietuva ir Turkija 1994 m. pasirašė dvišalė investicijų sutartį, tačiau ši sutartis buvo atnaujinta. Atnaujintoje 2018 m. Lietuvos ir Turkijos dvišalėje investicijų sutartyje įtraukti kriterijai, į kuriuos turi atsižvelgti arbitražo teismai, spręsdami, ar valstybės taikoma priemonė yra netiesioginė ekspropriacija. Toks pakeitimas turėtų paskatinti Lietuvos Respublikos Vyriausybę atnaujinti daugiau dvišalių investicijų sutarčių, ypač su strateginiais partneriais. Šis teigiamas pokytis yra matomas ir Lietuvos – Indijos dvišalėje investicijų sutartyje, kuri taip pat atskleidžia tarptautinės investicijų teisės raidą ir investuotojų apsaugą nuo netiesioginės ekspropriacijos. Išanalizuoti Lietuvos su Turkija ir Indija sudarytų dvišalių investicijų sutarčių pavyzdžiai rodo, kad netiesioginės ekspropriacijos sąvoka yra gana detaliai apibrėžiama ir teikia daugiau aiškumo, kaip ji gali būti nustatoma. Abiejose dvišalėse investicijų sutartyse netiesioginės ekspropriacijos elementai apibrėžiami panašiai: reguliacinės priemonės sukeliamos ekonominės pasekmės, jų pobūdis ir trukmė. Šie visi kriterijai suteikia daugiau teisinio aiškumo ir tikrumo tiek valstybei, tiek investuotojams.
5. Viešojoje tarptautinėje teisėje ekspropriacija yra leidžiama ir ji yra visų suverenių valstybių prerogatyva. Tačiau tam, kad ji būtų teisėta, ji turi atitikti bent keturis tarptautinėje paprotinėje teisėje nustatytus reikalavimus: ekspropriacija turi būti grindžiama visuomenės tikslais, tinkamai vykdoma, nediskriminuojanti ir ją pritaikius turi būti sumokėta kompensacija. Tarptautinėse sutartyse taip pat gali būti numatyti papildomi kriterijai. Jei kurio nors iš šių kriterijų nesilaikoma,

ekspropriacija turėtų būti laikoma neteisėta. Tačiau minėtų kriterijų apibrėžimas nėra visada aiškus.

6. Vienas pagrindinių investuotojo ir valstybės ginčo, susijusio su netiesiogine ekspropriacija, ypatumų yra valstybės priemonių proporcingumo vertinimas sprendžiant, ar netiesioginė ekspropriacija gali būti pateisinama. Tyrimo rezultatai leidžia teigti, kad tokiuose ginčuose vienas iš šio principo turinio nustatymo šaltinių yra Europos Žmogaus Teisių Teismo (EŽTT) praktikoje suformuoti proporcingumo standartai, sprendžiant dėl EŽTK nustatytų teisių ribojimo. Siekiant nustatyti, ar ir kiek valstybės veiksmais gali būti kišamasi į investuotojų teises (investicijų nusavinimą), EŽTT taiko proporcingumo principą, tačiau nesilaiko tradicinės proporcingumo analizės.
7. Vienas iš svarbiausių pastarųjų metų įvykių, susijusių su investuotojų apsauga nuo netiesioginės ekspropriacijos, yra sutartimis pagrįstos investuotojų apsaugos Europos Sąjungoje (ES) atsisakymas, kuris lemia teisinio reguliavimo spragas. Europos Sąjungos Teisingumo Teismui priėmus sprendimą *Achmea* byloje, Europos Sąjungos Valstybės Narės pasirašė sutartį dėl galiojančių ES vidaus dvišalių investicijų nutraukimo. Šiame tyrime atskleista, kad sprendimo *Achmea* byloje pasekmė iš galimai yra teisinės spragos atsiradimas investuotojų teisių apsaugoje pažeidžiant jų teisę į nuosavybę (įskaitant netiesioginę ekspropriaciją). Tai lemia situaciją, kad tik Valstybių Narių teismai yra kompetentingi spręsti ginčus dėl netiesioginės ekspropriacijos.
8. Atsižvelgiant į teisines spragas investuotojų teisių apsaugoje nuo netiesioginės ekspropriacijos po sprendimo *Achmea* byloje, šis tyrimas taip pat buvo skirtas galimam EŽTK 1 protokolo 1 straipsnio, saugančio teisę į nuosavybę, taikymui nacionaliniuose teismuose gilus valstybės ir investuotojo ginčui. EŽTK nėra jokių nuorodų, ar ji būtų taikoma investuotojų teisėms apsaugoti ir galėtų pakeisti apsaugą, teikiamą pagal tarptautines sutartis ir paprotinę teisę. Vis dėlto, analizuojant EŽTT formuojamą praktiką ir EŽTK valstybių narių poziciją priimant šią tarptautinę sutartį, matyti, kad nuosavybės sąvoka turėtų būti suprantama pakankamai plačiai ir turėtų apimti daugumą investicijų rūšių. Taigi, neturėtų kilti problemų nustatyti, kad investicijos pagal EŽTK patenka į nuosavybės sąvoką. Iš esmės nuosavybės apsaugos standartų taikymas pagal EŽTK turėtų užtikrinti veiksmingą investuotojų teisių apsaugą netiesioginės ekspropriacijos atveju.
9. Tačiau kadangi EŽTT praktikoje nėra atskleista, kaip jos valstybės narės supranta investicijas, kyla klausimas, ar šios tarptautinės sutarties suteikiama teisės į nuosavybę apsauga atitinka keliamus tarptautinėje teisėje standartus nuosavybės apsaugai. Tarptautinėje paprotinėje teisėje, vadovaujantis dar *Chorzów* gamyklos byloje suformuotais kriterijais, kompensacija grindžiama visiško kompensavimo principu (*restitutio in integrum*). Nors EŽTT pabrėžia, kad nuosavybės į turtą pažeidimo atveju priteisiamas teisių gynimo būdas (žalos atlyginimas) turi būti adekvatus ir proporcingas, tačiau panašu, kad tokiuose ginčuose EŽTT neturėtų taikyti tokio visiško nuostolių atlyginimo standarto. Todėl kyla pagrįstas klausimas, ar pagal formuojamą EŽTT praktiką, EŽTK numatytų visišką investuotojų patirtos žalos

atlyginimą netiesioginės ekspropriacijos atveju, kaip to reikalauja tarptautinė paprotinė teisę.

10. Naujos tarptautinės investicijų teisės problemos, susijusios su netiesiogine ekspropriacija, pavyzdžiui, ekspropriacija siekiant apsaugoti visuomenės sveikatą, rodo tam tikrus tarptautinės paprotinės teisės pokyčius. Tyrimas atskleidė, kad netiesioginė ekspropriacija kaip visuomenės sveikatos apsaugos priemonė kai kuriose valstybėse buvo taikoma ir nesulaukė didelio nepritarimo. Tačiau vienas iš labiausiai diskutuotinų klausimų tokiu atveju išlieka tradicinių paprotinės tarptautinės teisės taisyklių, tokių kaip investuotojų nediskriminavimas ir proporcingumo principas, taikymas, kai ekspropriacija vykdoma siekiant apsaugoti visuomenės sveikatą. Dvišalėse investicijų sutartyse yra tam tikrų visuomenės sveikatos teisinės apsaugos nuostatų, kurios gali užkirsti kelią valstybės neteisybei, kai imamasi tokių priemonių. Taip pat diskutuotina, kaip tarptautinės paprotinės teisės taisyklės, suteikiančios pagrindą neteisėtam veikimui, griežtai aiškinant tokius pagrindus remiantis Tarptautinio Teisingumo Teismo *Gabčíkovo-Nagymaros Project* byloje pateiktu išaiškinimu, turėtų būti taikomos valstybės ir investuotojo ginče, susijusiame su netiesiogine ekspropriacija.

PASIŪLYMAI

Atliktas tyrimas ir pateiktos išvados leidžia teigti, kad vienas iš Lietuvos Respublikos užsienio politikos tikslų yra užsienio investicijų skatinimas. Nors Lietuvos Respublika akivaizdžiai žengia link naujos kartos dvišalių investicijų sutarčių sudarymo (sudarytų sutarčių tobulinimo), tokių sutarčių kol kas dar nėra daug. Tokiai politikai reikalingos gerai parengtos teisinės priemonės, kurios ne tik pritrauktų užsienio investuotojus, bet ir sudarytų subalansuotą bei veiksmingą investuotojų teisių apsaugą nuo tiesioginės ir netiesioginės ekspropriacijos. Siekiant šių tikslų, Lietuvos Respublikos Vyriausybei, rengiant naujas dvišales investicijų sutartis, siūlytina vadovautis šioje srityje besiformuojančia tarptautine valstybių praktika. Lietuvos Vyriausybei siūlytina imtis iniciatyvos ir apibrėžti apsaugos, kurią ji nori suteikti užsienio investuotojams, apimtį. Daugumoje Lietuvos Respublikos sudarytų dvišalių investicijų sutarčių vis dar trūksta kriterijų, pagal kuriuos būtų galima nustatyti, kokios priemonės laikomos netiesioginė ekspropriacija, o kilus ginčui su investuotojais šį apibrėžimą nustato tik arbitrai, kurie turi remtis išimtinai neįpareigojančia praktika sprendžiant ginčus. Todėl didesnį teisinį aiškumą ir tikrumą suteiktų aiškesnių netiesioginės ekspropriacijos kriterijų nustatytas tarptautinėse sutartyse.

Detalesnis reguliavimas, kokios valstybės priemonės yra netiesioginė ekspropriacija, ne tik suteiktų daugiau teisinio tikrumo ir aiškumo investuotojams, bet ir leistų išvengti netikėtų rezultatų kilus ginčams su investuotojais tarptautiniame arbitraže. Siūlytina, be keturių paprotinės teisės kriterijų, taikomų teisėtai ekspropriacijai, tarptautinėse sutartyse įtraukti papildomus kriterijus bei aiškinamąsias deklaracijas, kurie geriau atspindėtų tikruosius valstybės ketinimus investicijų apsaugos srityje. Tokio naujo požiūrio iš dalies laikomasi atnaujintoje Turkijos ir Lietuvos dvišalėje investicijų

sutartyje, kurioje buvo pateiktos išsamios nuostatos, į kokius požymius reikia atsižvelgti nustatant, ar valstybė atliko ekspropriaciją. Siūlyti atnaujinti anksčiau sudarytas „senojo“ modelio dvišales investicijų sutartis ir iš naujo įvertinti galimą detalesnių nuostatų dėl netiesioginės ekspropriacijos nustatymą. Lietuvos Respublikos Vyriausybė, spręsdama naujų dvišalių investicijų sutarčių sudarymą, turėtų ypač atsižvelgti į šiuos su netiesiogine ekspropriacija susijusius aspektus: ekonominį priemonių poveikį, jų pobūdį ir trukmę.

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INDIRECT EXPROPRIATION IN INVESTOR-STATE ARBITRATION: daktaro disertacija. – Vilnius: Mykolo Romerio universitetas, 2023, P. 196.

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The dissertation focuses on the problems of regulation of the concept of indirect expropriation in international law and how the interests of a foreign investors could be protected in case of indirect expropriation. It seeks to assess the concept of indirect expropriation and identify the issues related to its application in practice. The dissertation also focuses on the development of protection against indirect expropriation in international treaties with the special emphasis on the policy and protection to investor granted by the international investment protection treaties by the Republic of Lithuania. Also, the research deals with the procedural questions related to the actual protection of investors' rights in international investment law. One of the main problems which has emerged recently - what are the possible ways of settlement of State and investor disputes after the Achmea judgement in the EU. The uncertainties left after this judgment are assessed in this research. Finally, the practical issues related to indirect expropriation with regards to the situation of protection of investors in Crimea and patents of COVID vaccines are analysed in this dissertation.

Šioje disertacijoje nagrinėjamos netiesioginės ekspropriacijos koncepcijos tarptautinėje teisėje bei užsienio investuotojų apsaugos nuo netiesioginės ekspropriacijos problemos. Siekiama įvertinti netiesioginės ekspropriacijos koncepciją ir identifikuoti pagrindines su jos taikymu praktikoje susijusias problemas. Disertacijoje taip pat skiriamas dėmesys apsaugos nuo netiesioginės ekspropriacijos vystymuisi tarptautinėse sutartyse, ypatingą dėmesį skiriant Lietuvos Respublikos sutartims. Taip pat tyrime nagrinėjami praktinės problemos, susijusios su netiesioginės ekspropriacijos koncepcijos taikymu tarptautinėje investicinėje teisėje saugant investuotojų interesus. Viena pagrindinių problemų – ginčų tarp užsienio investuotojų bei valstybės sprendimas po Achmea sprendimo ES. Su tuo susiję neaiškumai yra nagrinėjami šioje disertacijoje. Galiausiai, praktinės problemos susijusios su investuotojų apsauga Kryme bei COVID vakcinų patentais yra analizuojamos šioje disertacijoje iš netiesioginės ekspropriacijos perspektyvos.

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