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INTERNATIONAL INVESTMENT PROTECTION FROM EXPROPRIATION

Master's Thesis

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Declaration of Authorship

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Abstract

International investment law has become increasingly prominent in the international legal order. This thesis explores specific and topical problem of international expropriation law with the main focus on the vast network of international investment agreements (IIAs) supplemented by the general rules of international law.

The thesis traces the context and evolution of the protection of foreign investments in response to the transformation of state liability in international law. Particular consideration is given to the relationship between the International Minimum Standard (IMS) and the Calvo Doctrine as two clashing descriptive statements of customary international law governing the treatment of foreigners and their assets. With the onset of the BIT generation, the economical accountability of states is examined in compliance with the scope and conditions defined in clauses and provisions of the contemporary investment treaties.

In addition, the thesis focuses on the substantive protection accorded to foreign investors and investments. The aim is to identify the limits of the state's right to expropriate foreign investments by imposing legality requirements standard. The requirements for lawful expropriation are addressed with a thorough examination of jurisprudence of international courts and tribunals. The attempt to define the scope of expropriation in international law is made by analysis of various forms in which expropriation could be carried out. The traditional distinction between direct and indirect expropriation is supplemented by identification of specific forms of indirect expropriation – creeping expropriation and, today more prevalent form of, regulatory expropriation. The crucial factors that concretize the elusive concept of indirect expropriation are explored in pursuance with tribunals' practise. In conclusion, the thesis also includes chapter on partial expropriation.

Keywords

Bilateral Investment Treaty, Compensation, Expropriation, Investment protection

Abstrakt

Právo medzinárodných investícií sa stáva stále dôležitejšou súčasťou medzinárodného právneho systému. Diplomová práca preto skúma osobitnú a aktuálnu problematiku vyvlastnenia v medzinárodnom práve so zameraním sa na širokú sieť medzinárodných investičných zmlúv ako i na obyčajové pravidlá medzinárodného práva.

Práca sleduje súvislosti vývoja ochrany zahraničných investícií v reakcii na zmenu poňatia zodpovednosti štátov v medzinárodnom práve. Osobitná pozornosť je venovaná vzťahu medzi tzv. medzinárodným štandardom (IMS) a Calvovou doktrínou, reprezentujúcich dva protichodné názory, ktoré sa snažia popísať obyčajové medzinárodné právo v oblasti ochrany majetkových práv cudzincov. S nástupom BIT generácie je zodpovednosť štátov v ekonomickej oblasti skúmaná v nadväznosti na ustanovenia moderných medzinárodných investičných dohôd.

Práca sa okrem iného zaoberá materiálnou ochranou poskytovanou zahraničným investorom a zahraničným investíciám. Cieľom je identifikovať limity práva štátu vyvlastniť zahraničné investície, a to stanovením podmienok, za ktorých tak môže učiniť. Kritéria legálneho vyvlastnenia sú vysvetlené na základe dôkladnej analýzy judikatúry medzinárodných súdnych orgánov a tribunálov. Zároveň sa práca pokúša definovať rozsah pojmu vyvlastnenie v medzinárodnom práve prostredníctvom rozboru jednotlivých foriem, v ktorých sa vyvlastnenie môže odohrať. Tradičné rozdelenie na priamu a nepriamu formu vyvlastnenia je doplnené o rozlíšenie špecifických foriem nepriameho vyvlastnenia, konkrétne plíživého vyvlastnenia a vyvlastnenia na základe regulačných opatrení štátu. Kľúčové faktory, ktoré sú nápomocné pri identifikácii rozličných foriem nepriameho vyvlastnenia sú analyzované v nadväznosti na bohatú prax investičných tribunálov. Na záver práce je umiestnená kapitola zameraná na čiastočné vyvlastnenie.

Kľúčové slová

Dvojstranné dohody o podpore a ochrane investícií, Ochrana investícií, Kompenzácia, Vyvlastnenie

Contents

List of Abbreviations

BITs	bilateral investment treaties
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
FET	Fair and Equitable Treatment
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IMS	International Minimum Standard
IPO	Initial Public Offering
MAI	Draft Multilateral Agreement on Investment
MFN	most-favoured-nation
MIGA	Convention Establishing the Multilateral Investment Guarantee Agency
MITs	multilateral investment treaties
NAFTA	North American Free Trade Agreement
NGO	Non-governmental Organisation
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
SCC	Stockholm Chamber of Commerce
UNCTAD	United Nations Conference on Trade and Development
UNICITRAL	United Nations Commission for International Trade Law

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1. Introduction

Respect for property rights represents a generally accepted principle of international law governing the treatment of aliens. Violation of this principle may result in an international wrongdoing engaging the responsibility of the host state. However, states frequently encroach upon property rights in many ways without raising the state responsibility. Thus, the already existing tension between the expropriating state and the injured party increases if the injured party is a foreigner, causing overlapping and incompatible claims of the host state and the state of origin in various areas of jurisdiction. The reaction of international legal doctrine contains two contradictory theories concentrating on the treatment of foreigners and their assets as well as on the jurisdiction over disputes between foreign investors and host states. The nature of both, the Calvo Doctrine and the International Minimum Standard will be addressed by focusing on their characteristics, the tension between them and their impact on international investment law as well as international relations.

Traditionally, the state has the power and the right to expropriate both foreign-owned and domestic-owned property which has been considered as a discretionary power inherent in the sovereignty and jurisdiction which the state exercises within its territory. But only a few other issues exited as much controversy as the subject of expropriation in the development of international investment law. In the early 20th century, the Communist and Mexican nationalizations triggered the wave of expropriations of foreign-owned property followed by post-war socializations in Eastern Europe, expropriations of private property in the new-onset states throughout the decolonisation process with the oil industry disputes of the 1960s and 1970s in the Middle East region.

International law, however, imposes conditions on the lawful character of expropriation and nationalization measures. The legality of expropriation is ensured under the condition that it is carried out in conformity with certain internationally required preconditions. As opposed to uncertainty within customary international law, under treaty-based investment law there are today four recognized principles. These requirements, although differing in the terminology, relate to a public purpose, non-discriminatory character of the measure which ought to be accompanied by compensation and also carried out in accordance with applicable laws and due process.

Given the broad scope of the notion of expropriation and no precise definition, the international judicial and arbitral bodies are forced to construe expropriation taking into account the whole body of state practise, international treaties and interpretations of this notion in the international jurisprudence. Yet the international legal doctrine has traditionally distinguished between two forms of expropriation, direct and indirect. The exceptional occurrence of direct expropriation, in the sense of an outright taking by direct means, correspond to the shift of interest to indirect expropriation and the question of what amounts to an indirect expropriation of an investment. The problem of indirect expropriation will be addressed through the analysis of the international judicial and arbitral awards rendered, *inter alia*, by the ICSID tribunals, Iran- Us Claims Tribunal as well as ad hoc tribunals adjudicating under ICSID Convention, NAFTA Chapter 11 or applicable international investment treaties.

The main objective of my thesis is to present a better insight into international investment protection against expropriation by concise analysis of historic roots of international investment law, evolution of international investment rules as well as the clash between developed and developing states which emerged on account of disputes concerning treatment of foreign investments. The core of the thesis is the present state of international expropriation law with focus on the state's right to expropriate, the notion of expropriation, the legality requirements for expropriation as well as the scope of rights protected as property rights under international investment law. The second part of the heart of the thesis concentrates on the forms of expropriation, predominantly indirect expropriation, as well as tries to outline the newest development in the field of partial expropriation.

2. Historic Roots of International Investment Law

Diminishing communication and transportation costs allowed the change of the domestic markets that happened by the mid-nineteenth century. Higher revenues encouraged corporations to extend their businesses abroad.[1] Nevertheless, "the extension of capital across national boundaries is an inherently problematic activity"[2]. Implicit risks may be associated with the unstable political climate, commercial calculation or security. All these risks could affect the corporations in many ways in which the most severe interference is a direct challenge to their patrimonial rights. To further the market expansion as well as returns the emergence of the international investment rules was inevitable.

2.1. Development of International Investment Rules

Foreigners and their assets were utterly subject to domestic laws which might put conditions on their admission or not to admit them at all. But with the intention to facilitate the capital transfers and thus promote their own fiscal interests, states were markedly concerned about the security of their citizens not to mention their citizens' property. Due to growing economic linkage the need for the determination of the basic international rules for proper treatment of the foreigners was shared by the major trading states. Consequently, the expression of these minimum standards can be found in the provisions of multiple commercial treaties negotiated among the European states. According to these rules "[i]nterference with foreigners' property was permissible, but only in exceptional cases involving a clear and limited public purpose"[3]. Based on the reciprocal character of these treaties independent judicial review and full compensation were required to consider this interference lawful. The contingent violation of these requirements constituted illegal confiscation and thus international tort. After pursuing local remedies in the domestic courts until they are exhausted, the harmed national

[1] The business was no longer carried out by companies importing/exporting goods from/to Asia or Africa but rather companies producing goods outland. We may label them as the predecessors of current multinational enterprises.
[2] Lipson, Charles. Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Century. University of California Press, 1985, p. 4 Available online at http://books.google.com/books?id=F50Bc68Xl-IC&printsec=frontcover&dq=charles+lipson&hl=cs&ei=jI29TZnHCdra4wawjrnABQ&sa=X&oi=book_result&ct=result&resnum=5&ved=0CDwQ6AEwBA#v=onepage&q&f=false (visited 16.12.2011)
[3] Ibid, p. 8

might eventually request his/her home state to take up his/hers claims against the host state.

Colonial expansion inflicted the spread of these "principles of international law that ... were European in origin and reflected the national interests of the European states"[4] to Asia and Africa. Whereas the colonialism was expected to benefit Europe economically and strategically by subjugating the rest of the world, "[e]xtending these rules beyond Europe ... involved few reciprocal relationships, considerably more coercion, and constrained bargaining among radically unequal states"[5]. "To a large extent, this system of international law based on power was supported by the cognitive theory of recognition."[6] As said by this theory, recognition of an entity as a state is not automatic and only upon recognition by other states, possessing a great deal of discretion in this matter, the state exists in accordance with the law.

Newly created international doctrines, *inter alia*, enabled European powers to introduce their legal systems into the colonial territories and thus to accommodate European concepts of individual rights of property and freedom of contract.[7] That way this system granted the sufficient protection of the investments flowing into the colonies from the great powers. "Where investments were made in areas which remain uncolonised, a blend of diplomacy and force ensured that these states did not interfere with foreign investors too adversely."[8] As a result, conclusions of treaties between these states and powers were frequently procured by the threat or use of force in order to establish the system of extraterritoriality. Consequently, the contingent investment disputes were exempted from the local jurisdiction and decided according to the home state's laws of the investor. The state of the tight political and legal restraints, however, didn't correspond with the dynamically growing international commerce.

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[4] Sornarajah, M. The Pursuit of Nationalized Property. Martinus Nijhoff Publishers, 1986, p. 3, 4 Available online at http://books.google.com/books?id=BL_8jlapxGUC&printsec=frontcover&dq=sornarajah&hl=cs&ei=gZC-TbfQGYPFswaguZn9BQ&sa=X&oi=book_result&ct=result&resnum=2&ved=0CC4Q6AEwAQ#v=onepage&q&f=false (visited 16.12.2011)

[5] Supra Note 2, p. 12

[6] Supra Note 4, p. 4

[7] Sornarajah, M. The International Law on Foreign Investment. Cambridge, NY: Cambridge University Press, 2nd edition, 2004, p. 19 Available online at http://site.ebrary.com/lib/cuni/docDetail.action?docID=10131738 (visited 16.12.2011)

[8] Ibid, p. 20

The process of extending international investment rules to Latin America was of different approach as the states embodied these standards in their fundamental laws. Hence, the new states in Western hemisphere established suitable environment for investments supported by the local political guarantees. Although this suitable environment didn't prevent all the disputes and conflicts, "[i]n many cases ... the investors were able to protect themselves through concerted economic action, principally they stranglehold over credit."[9] Otherwise the investors turned to their home countries for the assistance, meaning diplomatic protests or even military actions. Contrasting many colonial regions, Latin American states were independent and sovereign members of the international community and thus "they were the first to dispute the investor's traditional legal privileges, particularly the right to call on outside powers for diplomatic and military assistance"[10].

2.2. The Origin of the Minimum Standard

The minimum standard of the treatment of foreigners has a long history with its origins in the ancient doctrine of denial of justice. "Denial of justice is an elusive concept."[11] "The term "denial of justice" has been used widely to describe certain types of acts and omissions of States directed against foreigners deemed to be internationally illegal and justifying diplomatic interposition by the aggrieved State."[12] According to Professor Don Wallace's explanation of the origins of "denial of justice" developed among many countries, "the merchant was not able to find a court in the place of its debtor to redress its grievance, either because a court did not exist or the merchant was denied access to the courts (in effect there were no suitable local remedies to which to have recourse and hence no satisfaction of rights and grievances) and the merchant had then appealed to his 'prince' (i.e. the authorities), who in turn had appealed to the 'prince' of the debtor without success; at that point the aggrieved merchant was authorized to take reprisal against the debtor's community with a view to seizing property so as to compensate

[9] Supra Note 2, p. 17
[10] Supra Note 2, p. 18
[11] Paulsson, Jan. Denial of Justice in International Law. Cambridge University Press, 2005, p. 10 Available online at http://books.google.com/books?id=U-SxVdG0OjMC&printsec=frontcover&dq=paulsson+denial+of+justice&hl=cs&ei=vbDDTrfSFcSFhQeI0JXZDQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CDMQ6AEwAA#v=onepage&q&f=false (visited 16.12.2011)
[12] Lissitzyn, Oliver J. The Meaning of the Term Denial of Justice. American Journal of International Law, Vol. 30, Issue 4, 1936, 632-646, p. 632

himself for his losses and injury"[13]. Subsequently, the practise of authorized reprisals evolved into the system of conspicuous displays of military power to redress the grievances of the merchants and other persons. Under these circumstances the international minimum standard served as a valuable instrument for the justification of pursuing claims of the powers' nationals against the other states. "Resort to an external, minimum standard was deemed necessary to advance the interests of States in expanding trade and investment in territories with rudimentary forms of government or where local institutions and legal standards did not provide protection satisfactory to capital exporting States."[14]

The interest of the state in protecting its citizens abroad is rooted in Vattel's statement that "[w]hoever uses the citizen ill, indirectly offends the state, which is bound to protect this citizen"[15]. Under the Vattelian fiction, "the state pretends to suffer an injury through injury suffered by one of its nationals as a result of an internationally wrongful act"[16]. This view forms the basis for diplomatic protection, the elementary[17] doctrine of customary international law, which purpose is the protection of persons and of property of aliens. "Diplomatic protection is the procedure employed by the injured alien's State of nationality to secure compliance with the primary rules of international law governing the treatment of aliens or to claim reparation for the injury inflicted upon the alien"[18]. The valid exercise of diplomatic protection must meet two requirements: the nationality of the foreigner and the exhaustion of local remedies in the host state. The requirement to exhaust local remedies is dispensed providing virtually futile or

[13] Wallace Jr., Don. Fair and Equitable Treatment and Denial of Justice: Loewen v. US and Chattin v. Mexico. In International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law. Cameron May, 2005, p. 673 Available online at http://books.google.com/books?id=8m8-3hidSKYC&pg=PA597&hl=cs&source=gbs_toc_r&cad=4#v=onepage&q&f=false (visited 16.12.2011)

[14] The Center for International Environmental Law Issue Brief. International Law on Investment. August, 2003, p. 1 (Footnote omitted) Available online at http://www.ciel.org/Publications/investment_10Nov03.pdf (visited 16.12.2011)

[15] Vattel, Emerich. The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs and Nations and Sovereigns. Book II, Chapter VI. Philadelphia: T. & J. W. Johnson, Law Booksellers, 1844, § 71 Available online at http://books.google.com/ebooks/reader?id=z8b8rrzRc7AC&hl=cs&printsec=frontcover&output=reader&pg=GBS.PP5 (visited 16.12.2011)

[16] Vermeer-Künzli, Annemarieke. As If: The Legal Fiction in Diplomatic Protection. The European Journal of International Law, Vol. 18, No. 1, 2007, 37-68,p. 39 Available online at http://ejil.oxfordjournals.org/content/18/1/37.full.pdf+html (visited 16.12.2011)

[17] See Mavrommatis Palestine Concession. Publications of the Permanent Court of International Justice, Series A, No. 2, 1924, p. 12 Available online at http://www.icj-cij.org/pcij/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf (visited 16.12.2011)

[18] Dugard, John. Diplomatic Protection. In Crawford, J. and Pellet, A. and Olleson, S. (ed.). The Law of International Responsibility. Oxford, New York: Oxford University Press, 2010, p. 1051

ineffective local remedies.[19] Then, under the international doctrine of State responsibility for injuries to aliens, a state has a discretionary right to take up the case of one of its subjects, resort to diplomatic action or judicial proceedings on his behalf.[20]

Naturally, this system of protection of foreign investors was openly endorsed by the capital exporting countries as they took the view that "the governments of the territories receiving the investments were uncivilized, arbitrary, or unable to ensure the rule of law"[21]. The international minimum standard, also denoted as a moral standard for civilized states, "has not developed unchallenged, [as] the Latin American states have consistently objected to the model"[22] that allowed the abusive exercise of power, in defence of their citizens, by the capital exporting countries (especially European and the United States).

"There has always been considerable support for the view that the alien can only expect equality of treatment under the local law because he submits to local conditions with benefits and burdens and because to give the alien a special status would be contrary to the principles of territorial jurisdiction and equality."[23] The national treatment standard as opposed to the international minimum standard emerged in the late 19th century and grew in acceptance in Latin America during most of the 20th century as an essential part of the Calvo doctrine.

2.3 The Calvo Doctrine

The author of ideas, that have come to be known as the Calvo Doctrine is an Argentine and later on Paraguayan diplomat and a jurist Carlos Calvo. The compilation of images was first outlined in his book *Derecho Internacional Teórico y Práctico de Europa y América* published in 1868.

The Calvo Doctrine is the thesis under which the foreigners are not to be accorded better treatment than nationals and, accordingly, disputes between foreigners and the host state must be adjudicated exclusively by the state's courts in accordance with the state's law. "That thesis was originally formulated as an attack against two institutions

[19] The rule of exhaustion of local remedies is also subject to other important exceptions. See Article 15 of the ILC's Draft Articles on Diplomatic Protection
[20] Supra Note 17
[21] Supra Note 14 (Footnote omitted)
[22] Supra Note 4, p. 12
[23] Brownlie, Ian. Principles of Public International Law. Oxford: Oxford University Press, 2003, p. 501-502

of customary international law: the requirement that States treat aliens in accordance with a minimum standard of fairness and the international remedies available in case of breach of that standard, including diplomatic protection by the State of which the alien is national. By the same logic, the Calvo Doctrine evolved as a policy against undertaking international obligations that might weaken the State's claim of exclusive competence to prescribe the legal treatment of aliens and to adjudicate any disputes arising out of such treatment."[24]

The lynchpin of Carlos' theories is that the foreigners are to be treated in exactly the same manner as local nationals.

> "It is certain that aliens who establish themselves in a country have the same right of protection as nationals, but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country prosecuting the delinquents, and not claim from the state to which the authors of the violence belong any pecuniary indemnity. ...
>
> The Rule that in more than one case it has been attempted to impose on American states is that foreigners merit more regard and privileges more marked and extended than those accorded even to the nationals of the country where they reside.
>
> This principle is intrinsically contrary to the law of equality of nations. ...
>
> To admit in the present case governmental responsibility, that is the principle of an indemnity, is to create an exorbitant and fatal privilege, essentially favourable to the powerful states and injurious to the weaker nations, establishing an unjustifiable inequality between nationals and foreigners. From another standpoint, in sanctioning the doctrine that we are combating, one would deal, although indirectly, a strong blow to one of the constituent elements of the independence of nations, that of territorial jurisdiction; here is, in effect, the real extent, the true significance of such frequent recourse to diplomatic channels to resolve

[24] Garibaldi, O. M. Carlos Calvo Redivivus: The Rediscovery of the Calvo Doctrine in the Era of Investment Treaties. Transnational Dispute Management, Vol. 3, Issue 5, December 2006, 1-58, p. 2 (Footnote omitted)

> the questions which from their nature and the circumstances in the middle of which they arise come under the exclusive domain of the ordinary tribunals. ...
>
> The responsibility of governments toward foreigners cannot be greater than that which these governments have toward their own citizens."[25]

The concept of the equality between nationals and foreigners is not understood *stricto sensu* as their positions are routinely not the same. The foreigners lack the political rights, face restrictions on the practise of particular professions and the economic activities or the kind of property they may possess. Thus, the national treatment being accorded to foreigners does not signify that foreigners should be treated the same as nationals, but that they are not entitled to be given better treatment than nationals. "Such better treatment, the argument goes, would discriminate against nationals, who are not eligible under international law to benefit from such substantive standards or to invoke such remedies."[26] It is questionable why alleged better treatment accorded to aliens at the expense of nationals is discriminatory, but on the other hand the national treatment which doesn't insist on the same level of protection of nationals and aliens is not considered offending.

Another argument, according to Calvo, that backs up the idea of no better protection of foreigners is the assumption of the sweeping awareness of local legal conditions which the aliens submit to by entering the host state. This is truly a fiction as the operative laws and regulations could be so complex, contradictory or even unavailable, in the sense that they are not yet adopted. Hence, the argument doesn't seem compelling enough to repudiate the minimum standard as a whole.

The requirement that foreigners are only entitled to national treatment is supplemented with the theory of final jurisdiction of the local courts over the claims of aliens and a denial of the right to diplomatic recourse.[27] Hence, disputes are resolved by state's courts, under the state's law without any interference of other states and thereby leaving tiny room for international law.

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[25] Shea, D. THE CALVO CLAUSE 16. The University of Minnesota Press, 1955, p. 18-19 Quoted in Garibaldi, O. M. Carlos Calvo Redivivus: The Rediscovery of the Calvo Doctrine in the Era of Investment Treaties. Transnational Dispute Management, Vol. 3, Issue 5, December 2006, 1-58, p. 5-6

[26] Supra Note 24, p. 18 (Footnote omitted)

[27] Borchard, Edwin M. The Diplomatic Protection of Citizens Abroad, 1919, p. 51 Available online at http://www.archive.org/stream/diplomaticprotec00borcrich#page/n3/mode/2up (visited 16.12.2011)

In order to justify his theories and thus present them as a part of general international law, Calvo invoked the principles of national sovereignty, equality of states and territorial jurisdiction to overturn the international minimum standard, ”as a body of substantial law”[28], and diplomatic protection, “as a body of procedural (or remedial) law”[29]. Acknowledging that the international minimum standard confines the state sovereignty is admissible only if the national sovereignty was viewed as absolute. But neither Calvo shared this view and actually recognized many limitations on national sovereignty without substantiating their validation. He keeps silent in the matter of why certain limitations comply with the idea of national sovereignty and why others like the international minimum standard or diplomatic protection of aliens do not.

Regarding territorial jurisdiction there is no doubt that the host state asserts local jurisdiction over the aliens and their assets stationed on its territory *in absentia* other international obligation in contrary including, but not limited to a treaty. “But it does not follow, *pace* Calvo, that territorial jurisdiction is inconsistent with obligations imposed by general international law regarding the way in which the State exercises that jurisdiction.”[30]

The discontent with the institution of the minimum standard lies mainly in the perception that it is “intrinsically contrary to the law of equality of nations” and also is ”essentially favourable to the powerful states and injurious to the weaker nations”.[31] The principle of equality in international law is “an invariable quality derived from ... [the] international personality”[32]. The principle of equality is prevailingly conceived in the way that states have equal rights and obligations (equality of capacity for rights).[33] “[A]ccording to Calvo, equality has a twofold consequence, in that it attributes to all states the same rights and imposes upon them reciprocally the same duties.”[34] However, according to Carnazza Amari:

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[28] Supra Note 24, p. 9
[29] Ibid, p. 9
[30] Supra Note 24, p. 12
[31] Ibid, p. 11
[32] Oppenheim, L. International Law: A Treatise, Vol. I – Peace. Edited by Lauterpacht, H. London: Longmans, Green and Co., 1948 , p. 238
[33] Unlike the concept of equality of protection in the enjoyment of rights, this is in municipal law usually described as equality before the law or equal protection of law.
[34] Dickinson, Edwin Dewitt. The Equality of States in International Law. Cambridge: Harvard University Press, 1920, p. 105 Available online at http://www.questia.com/PM.qst?a=o&d=24190103 (visited 16.12.2011)

> "This fundamental equality should not be taken to mean that it is necessary for them to develop their existence and realize their rights in the same degree; these rights may differ according to the more or less extensive activity of each state and according to the differences of situation in which the different peoples may find themselves and the varied influence of accompanying circumstances. It is necessary to understand this equality in the sense that all states have potentially the same rights, and enjoy, as Romagnosi has well said, the same inviolability in the exercise and in the realization of their rights. This equality results from the human nature which presents in all states the same characteristics of type; it is a natural which has a real existence; it is, therefore, based on human nature; and to violate it is to destroy the very constitution of human kind and of states.
>
> Equality, strictly speaking, is not a right; but it establishes a general limit imposed on states, which have an equal power of realizing the same rights, and which ought to exercise them with the same inviolability when they have become concrete."[35]

Consequently, in the case of a right to a vote, whenever a question arises which has to be settled by consent, every state has this right. In the eyes of the international law, then, every vote has the same weight whether it comes from the largest and most powerful state or from the weakest and the smallest one. Moreover, the international law as at present constituted doesn't recognise any legislative process in the proper sense of the word that would enable the imposition of legally binding rules upon a dissenting state or minority of states.[36]

The principle of equality under which the states are equal in the law of nation (juridical equality) cannot, however, disregard the patent inequalities of fact. Thus, the question is how to reconcile practise and principle, specifically in connection with the hegemony of great powers which was attacked by Calvo.

The predicament whether the hegemony of great powers impairs the principle of equality is by no means unanimous among the jurists. Some of them assert that the two

[35] Ibid, p. 107 (Footnote omitted)
[36] Supra Note 32, p. 238-239

are compatible because the juridical equality is a legal principle unlike the hegemony of great powers which is purely political. This appears to be the opinion of Oppenheim, who says:

> "Legal equality must not be confounded with political equality. The enormous differences between States as regards their strength are the result of a natural inequality which, apart from rank and titles, finds it expression in the province of policy. Politically, States are in no manner equals, as there is a difference between the Great Powers and others. ...
>
> But, however important the position and the influence of the Great Powers may be, they were not ... derived from a legal basis or rule."[37]

"Other writers, while opposing just as vigorously the suggestion that the position of the great powers is legally superior to that of other states, admit frankly that it is in conflict with equality and that it represents a tendency which, unless checked, may place important limitations upon the principle's application."[38]

"It is often said that the Calvo Doctrine was a product of its time."[39] The creation of the Calvo Doctrine was indeed the reaction "to the concrete and specific 19th century enemies of diplomatic protection and gunboat diplomacy"[40].[41]

Though the Calvo Doctrine may not be very sound as the description of the general international law in the 19th century and certainly not at present, it was definitely successful and popular policy expressing the way international law ought to be (*de lege ferenda*) or should evolve. The policy was embraced and passionately advocated by most of Latin American states since the end of the 19th century and throughout the whole 20th century.

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[37] Ibid, p. 244 (Footnote omitted)
[38] Supra Note 34, p.128-129
[39] Supra Note 24, p. 16
[40] Montt, Santiago. What International Investment Law and Latin America Can and Should Demand from Each Other. Updating the Bello/Calvo Doctrine in the BIT Generation. Yale Law School, 2007, p. 8 Available online at http://www.iilj.org/GAL/documents/SantiagoMontt.GAL.pdf (visited 16.12.2011)
[41] These "enemies" no longer exist, at least not since the Porter Convention on the Limitation of the Employment of Force for the Recovery of Contract Debt (1908) and the UN Charter (1945).

2.4. The Tension between the International Minimum Standard and the Calvo Doctrine

"The developed states have maintained that aliens must be treated according to an international minimum standard, which could be a higher standard than that accorded by a host state to its own nationals."[42] The failure to conform to this external standard constitutes the violation of the norm of general international law and thus gives rise to international responsibility of the violating state. At the beginning, the object of the protection had been the person of the alien, meaning his/hers life, freedom and security. The extension of the idea to the property of the alien which followed, became the basis for building up a law on the protection of foreign investment.[43]

On the contrary, the developing countries, mainly Latin American states, have asserted their territorial jurisdiction over the aliens and also contingent disputes between the aliens and the host state and that the aliens are entitled, at the most, to the national treatment.

The clash between these two ideas can be witnessed in the foreign investment relations between the United States and Latin American states. The United States shared the view that "there is state responsibility for damage caused to the person of the alien or for destruction of the property of the alien by state forces or as a result of negligence by the host state in providing protection"[44]. The opposition of the Latin America was based on the dissent with the broadening of this concept into the field of foreign investments. In this context, Sornarajah claims that "[r]esort to an external standard was made only in circumstances where the internal conditions in the host state were such that no remedies could possibly be expected from the host state"[45] and that "interference is an exception to the general rule and was confined to a region and that too when conditions in the state were unsettled."[46]

The tussle continued by the consistent practise of the United States which insisted on the existence of the minimum standard of treatment and the obligation of the Latin American states to accord such treatment to the American investors in the region. On

[42] Supra Note 7, p. 140
[43] Ibid, p. 140
[44] Ibid, p. 142-143
[45] Supra Note 7, p. 144
[46] Ibid, p. 144

the other hand, the Latin American states objected every time such a claim was made and refused to acknowledge any customary practise in this area. The situation got complicated as the USA as an emerging regional economic power and the leading investor in Latin America embarked on perceiving the minimum standard as an instrument through which the United States was able to maintain its economic dominance. "This was resisted by the Latin American states which have consistently argued that interference with property, particularly in pursuance of economic programmes, fell within the domestic sovereignty of the host state."[47]

The important role in the battle between the IMS and the Calvo Doctrine proponents played the international tribunals and their awards. One influential case involves a dispute between the United States and the Norwegian nationals in relation to the ships which were being built in the USA for the Norwegian subjects at a time. Ultimately, the US government requisitioned these ships for use in its World War I operations as the demand for ships was enormous, owing to the needs of army and to the losses of mercantile ships. As a result, Norway took up the claim of its nationals who weren't satisfied with the compensation for the act of the US government. The Permanent Court of Arbitration found for Norway, stating that:

> "It has been proved that the claimants lost the use and possession of their property through an exercise by the United States of their power of eminent domain. ...
>
> Whether the action of the United States was lawful or not, just compensation is due to the claimants under the municipal law of the United States, as well as under the international law, based upon the respect for private property."[48]

"By far the best known and most often quoted case on state responsibility to foreign investors was the so-called *Chorzow Factory* case, which came several times before the

[47] Ibid, p. 146
[48] Norway v. United States of America, Norwegian Shipowners' Claims, Permanent court of Arbitration, Award, October 13, 1922, p. 28 Available online at http://www.pca-cpa.org/upload/files/Norwegian%20Shipowners%20award%20only.pdf (visited 16.12.2011)

Permanent Court of International Justice."[49] In this case, The Permanent Court judged a dispute over the issue of expropriation of the foreign owned property and stated that:

> "The action of Poland ... is not an expropriation – to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention.
>
> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practise and in particular by the decision of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[50]

The court's statement is interpreted as an enunciation of the principle that compensation has to be awarded in case of expropriation of foreign owned property and is also sometimes referred to in the proposition that unlawful expropriation justifies higher measure of compensation.

2.4.1. The Hull Formula

"During the dispute concerning the Mexican expropriations of US property, the Hull[51] formula that prompt, adequate and effective compensation must be paid to the foreign investor upon expropriation of his property had been articulated."[52] Naturally, the Hull formula was endorsed by a number of the developed states while the developing states continued to support the Calvo Doctrine.

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[49] Lowenfeld, Andreas. International Economic Law. New York: Oxford University Press, 2nd edition, 2008, p. 474 (Footnote omitted, emphasis in original)
[50] The Factory at Chorzów (Germany) v. Poland, Award, September 13, 1926, para. 123-124 Available online at http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm (visited 16.12.2011)
[51] Cordell Hull, the American Secretary of State, put forth what has become the prominent formulation of compensation standard in a series of diplomatic exchanges with the Government of Mexico.
[52] Supra Note 7, p. 147

2.4.2. Permanent Sovereignty over Natural Resources

In the post war era another repercussion of the national standard versus the international minimum standard quarrel emerged. It was the permanent sovereignty over natural resources principle which evolved as a new principle of international economic law. "Since the early 1950s this principle was advocated by developing countries in an effort to secure, for those people still living under colonial rule, the benefits arising from the exploitation of natural resources within their territories and to provide newly independent States with a legal shield against infringement of their economic sovereignty as a result of property rights or contractual rights claimed by other States or foreign companies."[53]

In 1962 the General Assembly of the United Nations adopted the Resolution 1803 better known as The Declaration on Permanent Sovereignty over Natural Resources[54]. Though the resolution is considered vague and that different interests could cite different provisions for their own purposes[55], it still represents the consensus among nations of the world which "includes positive recognition of the obligation to pay compensation where property is taken, to observe investment agreements and agreements to arbitrate and to abide by other requirements of international law"[56]. The standard of compensation in the resolution is set to appropriate[57] 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. Withal among the positive elements is that foreign capital shall be governed[58] by the terms of its import, by national legislation and "by international law".[59]

[53] Schrijver, Nico. Sovereignty over natural resources: Balancing rights and duties. Institute of Social Studies, The Hague. Cambridge University Press, 2007, p. 3 Available online at http://catdir.loc.gov/catdir/samples/cam034/96033595.pdf (visited 16.12.2011)
[54] UN Doc. A/RES/1803(XVII), The Declaration on Permanent Sovereignty over Natural Resources, 14 December 1962 Available online at http://www1.umn.edu/humanrts/instree/c2psnr.htm (visited 16.12.2011)
[55] Supra Note 49, p. 489
[56] Schwebel, Stephen M. The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources. American Bar Association Journal, Vol. 49, Issue 5, May 1963, p. 463-469, p. 469
[57] In this case the United States shared a confidant view that the provision appropriate compensation can only mean prompt, adequate and effective compensation.
[58] The United States believed that by this provision the resolution incorporated the non-discriminatory treatment when dealing with foreign capital.
[59] Supra Note 56, p. 469 (Footnote omitted)

In 1966, the General Assembly adopted another resolution on the subject of permanent sovereignty over natural resources. The Resolution 2158[60] contained "several tilts to the balance of Resolution 1803"[61]. The following Resolution 3171 which was adopted in 1973 changed the so far accepted approach and affirms that:

> "[T]he application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measure;"[62]

"In the following year the reign of the 'Group of 77[63]' reached its high point, with the adoption of a Charter of Economic Rights and Duties of States, designed to describe (or bring about) a 'New International Economic Order'."[64] Signalling the end of complete Northern hegemony and the emergence of a new interdependence of power and wealth, this NIEO Charter took no notice of the so-called public purpose (or public utility doctrine), the doctrine of alien non-discrimination and the much heralded international law principle of compensation appears to be "domesticated", i.e., rejected as an *international* regulatory norm.[65]

2.4.3. Bilateral Investment Treaties (BITs)

The lack of generally accepted rules in international law on the subject of foreign investments and also need for binding dispute settlement mechanism led to the

[60] UN Doc. A/RES/2158(XXI), Permanent Sovereignty over Natural Resources, 25 November 1966. Available online at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/004/61/IMG/NR000461.pdf?OpenElement (visited 16.12.2011)
[61] Supra Note 49, p. 490
[62] UN Doc. A/RES/3171(XXVIII), Permanent Sovereignty over Natural Resources, 17 December, 1973 Available online at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/282/43/IMG/NR028243.pdf?OpenElement (visited 16.12.2011)
[63] The Group of 77 (G-77) was established by seventy-seven developing countries signatories of the "Joint Declaration of the Seventy-Seven Countries" issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva.
[64] Supra Note 49, p. 491
[65] Weston, Burns H. The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-owned Wealth. American Journal of International Law, Vol. 75, Issue 3, July 1981, 437-475, p. 439

evolution of the bilateral investment treaties (BITs).[66] The first BIT in the history was signed in 1959 between Germany and Pakistan. Now there is about 2 500 BITs worldwide. "Although a BIT binds only the two signatory states, the general effect of the BIT movement has been to establish and increasingly dense network of treaty relationships between capital-exporting states and developing countries ..."[67] "While one major purpose of the BIT is to create an incentive for new investments, it would be incorrect to assume that"[68] this instrument is employed only by developing countries, on the contrary. The United States – Canada Free Trade Agreement, signed in 1988, created the largest free trade area in the world and in the Chapter 16 in effect constituted a BIT regarding its typical provisions[69]. Likewise, after the disintegration of the Soviet Union all of the Central and Easter European countries entered into numerous BITs to attract investments to further their economic transformation and even developing countries among themselves concluded bilateral investment treaties. The BIT phenomenon reached its peak in the 1990s when the number of BITs quintupled. According to Newcombe the BIT boom[70] has two major causes. "First, there was an increased political commitment by governments in both developed and developing states to economic liberalism and the freer international flow of goods, services and investment. ... The second main cause of the BIT boom was the lack of developing state alternatives to FDI [Foreign Direct Investment]."[71] In other words, the states believed

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[66] Dolzer, Rudolf. Bilateral Investment Treaties. Martinus Nijhoff Publishers, 1995, p. 10 Available online at http://books.google.com/books?id=u2CF6a6yvCoC&printsec=frontcover&dq=dolzer+investment+treaties&hl=cs&ei=vwbgTYqYNsqeOrDizPQJ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CCkQ6AEwAA#v=onepage&q&f=false (visited 16.12.2011)

> "The forerunners of bilateral investment agreements, the FCNs [Friendship, Commerce and Navigation Treaty], contained provisions relating to foreign property but these agreements were primarily concerned with facilitating trade as opposed regulating foreign investments."

[67] Salacuse, Jeswald W. BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries. International Lawyer, Vol. 24, Issue 3, Fall 1990, 655-676, p.656

[68] Supra Note 66, p. 12

[69] These are for example: treatment of the investor's investment, expropriation or dispute settlements provisions.

[70] The BIT boom was later on accompanied with the boom of arbitrations. As a matter of fact, most bilateral investment treaties embodies the investor-state dispute settlement mechanism which provides rights to foreign investors to seek redress for damages arising out of alleged breaches by host governments of investment-related obligations. The system of investment dispute settlement has borrowed its main elements from the system of commercial arbitration.

[71] Newcombe, Andrew and Paradell, Lluís. Law and Practise of Investment Treaties: Standards of Treatment. Kluwer Law International, 2009, p. 48 Partially available online at http://books.google.cz/books?id=4fuB9-0_D9kC&pg=PA48&lpg=PA48&dq=Argentina+first+BIT&source=bl&ots=psqcUHZM8O&sig=ndA9VStFIWJ_l2UmirhkW_OMjgQ&hl=cs&ei=vUbhTZvMEc_GswbGxvT8BQ&sa=X&oi=book_result&ct=r

that BITs are responsible for the increased number of foreign investments required for their development. Moreover other sources of financing, e.g., lending or foreign aid became increasingly scarce.

Conversely, the Latin American countries as loyal protagonists of the Calvo Doctrine continued to resent the international rules regarding foreign investments whether in the form of the international minimum standard or concluding treaties concerning protection and promotion of the foreign investments. It was only by the 1990s when they started entering into BITs in large amounts and began to accede to the ICSID Convention.[72]

"Although states have been willing to create a network of IIAs [International Investment Agreements] in piece-meal way, states have been unable to agree on investment issues at a multilateral level."[73] The OECD's attempt to adopt the Multilateral Agreement on Investments (MAI)[74] failed to reach a successful ending on account of pressure from a global movement of NGOs, citizen's groups and a number of governments of developing countries.

Nowadays, there is actually a rising backlash in the BIT regime characterized by re-evaluation on the part of both developed and developing states.[75] "The source of this backlash may be distilled into two causes: substantively, the expansive interpretation of foreign investor protections by tribunals; and procedurally, the broad rendering of the arbitrability of disputes by arbitrators."[76] A few from many suggestions on how to reform this regime are a world investment organization, an appeals mechanism for arbitral decisions or guidelines for arbitrators and others involved in the international arbitral process.

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esult&resnum=4&ved=0CC4Q6AEwAw#v=onepage&q=Argentina%20first%20BIT&f=false (visited 16.12.2011)

[72] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States established the International Centre for Settlement of Investment Disputes, the leading arbitrational institution devoted to investor-State dispute settlement. Available online at http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp (visited 16.12.2011)

[73] Supra Note 71, p. 55

[74] OECD Doc. DAFFE/MAI(98)7/REV1, OECD Negotiating Group on Multilateral Agreement on Investment (MAI), The Multilateral Agreement on Investments Draft Consolidated Text 6 , April 22, 1998Available online at http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf (visited 16.12.2011)

[75] Kaushal, Asha. Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime. Harvard International Law Journal, Vol. 50, No. 2, Summer 2009, p. 491-534, p. 492 Available online at http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ_50-2_Kaushal.pdf (visited 16.12.2011)

[76] Ibid, p. 492 (Footnote omitted)

2.5. The Content of International Minimum Standard

"The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property. Violation of this norm engenders the international responsibility of the host State and may open the way for international action on behalf of the injured alien provided that the alien has exhausted local remedies."[77]

Initially, during the 19th century certain rights of aliens were recognised, including the right to receive due process and be free from a denial of justice, the right to be free from abusive treatment at the hands of public authorities, and the right to the enjoyment of their property unless taken for a public purpose.[78] Overall, the minimum standard has been developed through customary international law, judicial and arbitration decisions and treaties.

The landmark definition of the international minimum standard was rendered in 1926 by the General Claims Commission established by the United States and Mexico. The award in the *Neer v. United Mexican States* stated as follows:

> "[T]he propriety of governmental acts should be put to the test of international standards ...
>
> [T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful 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."[79]

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[77] OECD Directorate for Financial and Enterprise Affairs. Working Papers on International Investment. Number 2004/3. Fair and Equitable Treatment Standard in International Investment Law, September, 2004, Footnote 32 Available online at http://www.oecd.org/dataoecd/22/53/33776498.pdf (visited 16.12.2011)

[78] Max Planck Encyclopaedia of Public International Law. Minimum Standards. Available online at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e845&recno=1&searchType=Quick&query=international+minimum+standard (visited 16.12.2011)

[79] Neer v. United Mexican States, Award, October 15, 1926, para. 4 Available online at http://untreaty.un.org/cod/riaa/cases/vol_IV/1-769.pdf#xml=http://untreaty.un.org/dtSearch/dtisapi6.dll?cmd=getpdfhits&DocId=71&Index=D%3a\UN

The Conference of the Codification of International Law which was held at Hague in 1930 had as one of its object the issue of the rights of the alien. However, the states failed to agree upon the Convention on the Responsibility of States for Damage Done in Their Territories to the Persons and Properties of Foreigners. As a result, the notion of the minimum standard continued to be a source of tension between developed and developing States.

"The minimum standard was initially applied to claims involving injury to the person but was then expanded to include property rights, which is the standard's primary area of application today."[80]

Since 1945 new principles of international law have evolved and have managed to modify the minimum standard, among others the principle of non-discrimination.

In 1989, the International Court of Justice influenced the content of the international minimum standard in *Elletronica Siculla* case which involved the temporary requisitioning of a foreign company by local authorities in order to prevent strife after the company announced plans for closure and liquidation. The award provides as follows:

> "The primary standard laid down by Article V is the "full protection and security required by international law", in short "the protection and security" must conform to the minimum international standard ... supplemented by the criteria of national treatment and most-favoured-nation treatment."[81]

In this case, the International Court of Justice concluded that the full protection and security principle cannot mean that property shall never, in any circumstance, be disturbed.[82]

In addition, the court defined arbitrariness as follows:

TREATY\UNTREATY.ORG\cod\riaa\dtSearch\Indexes\Cases&HitCount=49&hits=7052+7055+70f2+70f7+70fb+7145+714b+715b+71ef+74ba+757a+757f+7583+75bb+75e7+75f1+7639+763e+7648+765b+76a2+76e6+7705+7718+7726+777e+77b9+77ef+781c+784c+7866+789d+7a3d+7d27+7eb7+886d+1279e+127a2+154a2+15bae+1b940+1f0b4+2a0af+2a0b3+2ae5e+2ae62+2e1b9+2e1bd+3aff6+&.pdf (visited 16.12.2011)

[80] Supra Note 78

[81] Elettronica Sicula S.p.A. (ELSI) (USA) v. Italy, Award, July 20, 1989, para. 111 Available online at http://www.icj-cij.org/docket/files/76/6707.pdf (visited 16.12.2011)

[82] Supra Note 78

> "It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[83]

In the following period, arbitral tribunals have built upon the ICJ's formulation of the minimum standard which contains the standard of full protection and security and the prohibition of arbitrariness.

In the second half of the 20th century, the BIT practise introduced the fair and equitable standard of treatment which led to some controversy regarding the relation between this principle and the international minimum standard. In order to clarify the interpretation of FET standard and whether it provides a higher standard of treatment than the IMS, the NAFTA[84] Free Trade Commission issued a binding interpretation that provides as follows:

> "Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> The 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."[85]

The central issue of the content of the international minimum standard has been faced particularly inside the context of expropriation.[86] Within this context, the minimum standard is believed to include one or more of these four following requirements: a) the expropriation must be made for a public purpose, b) on the non-discriminatory basis, c) accompanied by the compensation for expropriation and d) in due process of law. Additionally, the competent compensation rule is considered the Hull Formula requiring the prompt, adequate and effective compensation.

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[83] Elettronica Sicula (ELSI), Above n 81 at para. 128

[84] North American Free Trade Agreement (NAFTA) was signed by the governments of Canada, Mexico and the United States of America to eliminate barriers of trade and investments which came into force on January 1, 1994.

[85] NAFTA Free Trade Commission. Notes of Interpretation of Certain Chapter 11 Provisions. 31 July 2001 Available online at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d (visited 16.12.2011)

[86] Supra Note 7, p. 149

Despite the indicated content of the international minimum standard this phenomenon in international law remains quite vague and thus follows its content elements which tribunals gave different interpretations. However, "it continues to be applied on a case-by-case basis rather than through coherent application, and no guarantee exists that arbitration tribunals will enforce the standard in a uniform manner."[87]

[87] Supra Note 78

3. Expropriation in International Law

"Expropriation in the sense of an outright taking of private property by the state, usually involving a transfer of ownership rights to the state or to a third person, has been a major public international law issue throughout the 20th century."[88] The subject matter has gradually shifted from the requirements for an expropriation to be lawful, especially an amount of compensation, to the question of what amounts to an indirect expropriation of an investment.

Although the practical relevance of expropriation in investment disputes has recently receded, there was a time indeed when investor protection was virtually synonymous with protection against uncompensated expropriation.[89] "Declining figures of outright takings of property inversely correspond to an increase of various legislative and regulatory measures that *de facto* or indirectly deprive investors of their property."[90]

Despite this development, the protection of private property has always been a traditional part of international law and there is a considerable amount of investment cases concerning expropriations both under customary international law and according to applicable treaty standards.[91]

3.1. The principle of acquired (vested) rights, the principle of unjust enrichment

"The protection of private property under international law has various roots, including the customary international rules concerning the treatment of aliens and the body of human rights norms that cover private property."[92] The protection of foreign-owned property against expropriation is based upon two equitable principles: the principle of acquired rights and the principle of unjust enrichment.

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[88] Reinisch, August. Expropriation. In Muchlinski,P. and Ortino, F. and Schreuer, C. (ed.). The Oxford Handbook on of International Investment Law, Oxford University Press, 2008, p. 408
[89] Schreuer, Christoph. Introduction: Interrelationship of Standards. In Reinisch, August. Standards of Investment Protection. New York: Oxford University Press, 2008, p. 1
[90] Reinisch, August. Legality of Expropriations. In Reinisch, August. Standards of Investment Protection. New York: Oxford University Press, 2008, p. 171 (Emphasis in original)
[91] Ibid, p. 172
[92] Reinisch, August and Kriebaum, Ursula. Right to Property, International Protection. Max Planck Encyclopaedia of Public International Law. Available online at http://www.mpepil.com/subscriber_article?id=/epil/entries/law-9780199231690-e864 (visited 16.12.2011)

"The notion of "acquired" or "vested" rights (*droits acquis*) has been developed in different areas of the law, such as State succession and intertemporal conflicts, besides nationalisation, with the effect of upholding that when a certain status or legal right has been acquired under municipal law of a State, such status or right must be respected as a matter of international obligation."[93] Thus, the principle of respect for vested rights forms ... part of generally accepted international law.[94]

However, the doctrine of acquired rights doesn't establish the absolute protection of these rights precluding any permissible interference or even creating infeasibility of expropriation. The intention of this principle compresses to the requirement of compensation for expropriation which would "be of such a nature and measure as to put the expropriated owner in the same position as he was before the taking"[95].

Closely related to the principle of respect for acquired rights is the principle of unjust enrichment. "The principle of unjust enrichment postulates in itself that not the loss of the expropriated owner ... but the beneficial gain of the nationalising State must be taken into account to establish the measure of reparation. The main advantage of the application of this principle to resolve the issue of compensation is that it permits a legal formulation of the duty to indemnify without resorting to the idea of "damages" which postulates a wrongful action."[96]

Both the principle of acquired rights and the principle of unjust enrichment are originally general principles of domestic orders which were transferred to international law. "Considerations regarding the sovereignty of the host state and problems of the property valuation and procedural aspects, for instance, may call for different interpretations under a specific domestic order than under international law."[97] Therefore, the benefits to the debate on expropriation, especially the standard of compensation, aren't particularly helpful.

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[93] Francioni, Francesco. Compensation for Nationalisation of Foreign Property the Borderland between Law and Equity. International and Comparative Law Quarterly, Vol. 24, Issue 2, 1975, p. 255-283, p.258-259

[94] Certain German Interests in Polish Upper Silesia. Publications of the Permanent Court of International Justice, Series A, No. 7, 1926, p. 22 and 42 Available online at http://www.icj-cij.org/pcij/serie_A/A_07/17_Interets_allemands_en_Haute_Silesie_polonaise_Fond_Arret.pdf (visited 16.12.2011)

[95] Supra Note 93, p. 261

[96] Ibid, p. 272

[97] Dolzer, Rudolf. New Foundations of the Law of Expropriation of Alien Property. American Journal of International Law, Vol. 75, Issue 3, July 1981, p. 553-589, p. 570

3.2. The Right of the State to Expropriate

Expropriation is recognized and practised by all states, either as regards the property rights of their own nationals or of foreigners established in their territory.[98] "This international recognition has been confirmed on innumerable occasions in diplomatic practise 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."[99]

However, international law imposes conditions on the exercise of this right which States must obey. "Today, it appears to be recognized that the basic principles of customary international law on expropriation state that foreign-owned property may not be expropriated, or subject to a measure tantamount to expropriation, unless four conditions are met: (1) the measure is for a public purpose; (2) it is taken in accordance with applicable laws and due process; (3) it is non-discriminatory; and (4) it is accompanied by compensation."[100]

3.3. Expropriation in the States' practise throughout 20th century

"The Communist and Mexican nationalization measures in the 1920s, followed by socializations of private property in Eastern European countries after World War II and takings of foreign investments in developing countries in the course of the decolonization process, as well as the oil concession disputes of the 1960s and 1970s, mark the most important waves of expropriations of foreign property."[101]

In 1917 the Russian October Revolution and the establishment of the Dictatorship of the Proletariat necessarily entailed the socialisation of all the means of production which

[98] Friedman, S. Expropriation in International Law. London: Stevens and Sons Limited, 1953, p. 5
[99] UN Doc. A/CN.4/Ser.A/1959/Add.1, Yearbook of the International Law Commission Volume II, 1959, p. 11 (Emphasis in original)
[100] UN Doc. UNCTAD/ITE/IIA/2007/3, Investor- State Dispute Settlement and Impact on Investment Rulemaking, 2007, p. 56 Available online at http://www.unctad.org/en/docs/iteiia20073_en.pdf (visited 16.12.2011)
[101] Supra Note 88, p. 408

resulted in measures of expropriation on a vast scale.[102] At first, the Decree on Land issued on 26 October 1917 declared the abolishment of private property in land without any compensation. The upheaval continued not only with nationalizations of all banks but also other essential industries. "The Western Powers protested, asserting in a formal declaration 'that they view the decrees relating to the repudiation of Russian State loans, the confiscation of property and other similar measures as null and void in so far as their nationals are concerned'."[103] Eventually, the clash that dragged on for several years ended in an impasse as the states, one after another, ceased to insist on their requests. The Soviet expropriations which redefined the potential relationship between the state and private property were the first direct challenge to international property rules.[104] Hence, the sanctity of property rights of foreigners underwent a significant change.

"Like the Soviet reforms which they preceded by almost a year, the Mexican agrarian and oil reforms were similarly inspired by revolutionary ideas."[105] The outcome of the revolution directed against Porfirio Diaz brought on a groundbreaking concept of property which was promulgated in Article 27 of the newly adopted Constitution of Mexico. "The first paragraph of Article 27 vested the ownership of lands and waters in the nation which had the right to transmit title thereof to private persons, thereby constituting private property, as well as the right to impose such restrictions on the latter as might be necessary for the general welfare."[106] The alteration from the recognised individual right to own property to the concept that the nation alone owned the land within the borders affected predominantly US nationals. Though relating to the expropriations the United States raised no objections, the US government markedly protested in the case of the rate of compensation. The difference in perspective on this subject was expressed in a long correspondence between the two governments which ultimately resulted in the invocation of opposed doctrines: the Calvo Doctrine and the Hull rule.

"Many of the measures of nationalization prior to World War II were aimed primarily at foreigners; post war measures of nationalization, however, usually hit nationals and

[102] Supra Note 98, p. 17
[103] Supra Note 49, p. 471 (Footnote omitted)
[104] Supra Note 2, p. 69
[105] Supra Note 98, p. 23
[106] Ibid, p. 23

foreigners alike."[107] "All the countries that had come under Communist rule following World War II – all of the states of Eastern Europe (except Greece), as well as China and later Cuba – nationalized land and private industrial property, including the property of aliens."[108] The elimination of the traditional capitalist system and the establishment of a central planned economy required these measures of socialization.

"Politically, expropriation of alien property has emerged since 1973 as the issue over which the confrontation between the defenders of traditional concepts of international law and those seeking a change in these concepts has become most acute; developing states have made it clear that on this question, possibly more so than on any other, they do not wish to be bound by traditional norm."[109] Hence, the newly independent states in Africa and Asia embraced the taking over the assets of companies controlled from the former colonial powers in order to recover control of the economy.[110]

In this post-colonial world, there was a widely held view that governments could and should intervene directly to address social and economic problems and thus all forms of nationalism were in the ascendancy including 'resource nationalism'.[111] Resource nationalism coupled with the rise of permanent sovereignty over natural resources, dissatisfaction with the concession terms agreed in the previous period and rising oil demand commenced a battle between the oil producer governments and the International Oil Companies. The most widely known case in this context is the Iranian nationalization of 1951 regarding Anglo-Iranian Company. The emerged claims regarding US nationals were subsequently resolved by the Iran-United States Claims Tribunal established in 1981 which until now rendered over 3 900 awards.

By the 1970s the producing countries reached an unprecedented victory whereby the old-style concessions had been swept away by production sharing agreements and the producer governments had full control over their oil operations through National Oil Companies and indeed their oil prices.

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[107] Doman, Nicholas R. Postwar Nationalization of Foreign Property in Europe. Columbia Law Review, Vol. 48, No. 8, December 1948, p. 1125-1161, p. 1140
[108] Supra Note 49, p. 483 (Footnote omitted)
[109] Supra Note 97, p. 555-556 (Footnotes omitted)
[110] Supra Note 7, p. 346
[111] See Stevens, Paul. National oil companies and international oil companies in the Middle East: Under the shadow of government and the resource nationalism cycle. Journal of World Energy Law & Business, Vol. 8, No. 1, 2008, p. 5-30

Expropriation in the States' practise throughout the 20th century wasn't particularly convincible with regards to the promulgated doctrines concerning the rules on expropriation. "By and large, uncompensated expropriations of aliens in nonwar situations have had no place in the postwar period."[112]

3.4. The Notion of Expropriation

The international expropriation law operates with an ample wording but with no precise definitions. In the context of the deprivation of property rights the terms of expropriation, nationalization and taking are often used interchangeably, though they are endowed with differences.

"The essence of the matter [expropriation] is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control. The deprivation may be followed by transfer to the territorial state or to third parties ..."[113]

"In contrast with individual or personal acts of expropriation, nationalization measures reflect changes brought about in the State's socioeconomic structure (land reforms, socialization of industry or of some of its sectors, exclusion of private capital from certain branches of the national economy); or, looked at from another angle, nationalization measures constitute the instruments through which those changes in the former liberal economy are introduced."[114] In spite of this and a few other differences, principally the rate of compensation, these two institutions of international law are substantially the same.

The term taking, mostly used by Anglo-American legal literature, is often attributed the wider meaning than expropriation. This view also took the Tribunal in ELSI case according to which there is obvious difference between the term taking and in this context Italian espropriazione (expropriation) and thus stated:

> "The word "taking" is wider and looser than "espropriazione"."[115]

[112] Supra Note 97, p. 560 (Footnote omitted)
[113] Supra Note 23, p. 508-509 (Footnote omitted)
[114] Supra Note 99, p. 13
[115] Elettronica Sicula (ELSI), Above n 81 at para. 113

In the arguments presented by the parties, the United States argued that in international law a "taking" is generally recognized as including not merely outright expropriation of property, but also unreasonable interference with its use, enjoyment or disposal.[116]

The multilateral (MIT) and bilateral (BIT) investment treaties append a few more formulations. Article 1110(1) of the North American Free Trade Agreement contains the following provision:

> "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except:
>
> (a) For a public purpose;
> (b) On a non-discriminatory basis;
> (c) In accordance with due process of law and Article 1105(1); and
> (d) On payment of compensation in accordance with paragraphs 2 through 6."[117]

Article 13(1) of the Energy Charter Treaty (ECT), another MIT, provides as follows:

> "Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation)) except where such Expropriation is:
>
> (a) For a purpose which is in the public interest;
> (b) Not discriminatory;
> (c) Carried out under due process of law; and
> (d) Accompanied by the payment of prompt, adequate and effective compensation."[118]

[116] Elettronica Sicula (ELSI), Above n 81 at para. 114
[117] North American Free Trade Agreement, Signed 17 December 1992, Entered into force 1 January 1994 Available online at http://www.sice.oas.org/trade/nafta/chap-111.asp#A1110 (visited 16.12.2011)
[118] Energy Charter Treaty, Signed 17 December 1991, Entered into force 16 April 1998 Available online at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf (visited 16.12.2011)

"The difficulty of determining with precision the meaning of expropriation in international law because of the generality of language in international materials such as multilateral and bilateral investment treaties and the broad doctrinal statements that have appeared in many cases is reinforced by the fact that the expropriation provisions in treaties, though often similar, sometimes contain distinctions in wording."[119] Hence, the dissimilarity between measure tantamount to nationalization or expropriation (NAFTA) and measure having effect equivalent to nationalization or expropriation was elucidated by the Pope & Talbot and SD Myers Tribunals which endorsed the fact that tantamount means equivalent.

In order to construe expropriation, references to some codifications of the standards and also major human rights conventions have been made. In this case the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, specifically the Article 10 titled Taking and Deprivation of Use or Enjoyment of Property, states:

> "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 inference 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."[120]

Article 3 of the 1967 OECD Draft Convention on the Protection of Foreign Property took the similar view by granting "[p]rotection against wrongful interference with its [property] use by unreasonable or discriminatory measures"[121], which "might amount to indirect deprivation ... depend[ing] on its extent and duration"[122]. Referring to the creeping expropriation as a form of indirect expropriation the Draft Convention stated as follows:

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[119] McLachlan, Campbell, Shore, Laurence, Weiniger, Matthew. International Investment Arbitration Substantive Principles. New York: Oxford University Press, 2007, p. 268-269 (Footnote omitted)
[120] Professor Sohn, Louis B. a Baxter, R. R. Responsibility of States for Injuries to the Economic Interests of Aliens. American Journal of International Law, Vol. 55, 1961, p. 545-584, p. 553
[121] OECD Draft Convention on the Protection of Foreign Property, p. 19 Available online at http://www.oecd.org/dataoecd/35/4/39286571.pdf (visited 16.12.2011)
[122] Ibid

> "[M]easures 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 excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusal of access to raw materials or of essential export or import licences."[123]

The Restatement (Third) of the Foreign Relations Law of the United States codified by American Law Institute, which is often referred to as an authoritative statement of international law provides as follows:

> "State is responsible under international law for injury resulting from:
>
> (1) a taking by the state of the property of a national of another state that:
> (a) is not for a public purpose, or
> (b) is discriminatory, or
> (c) is not accompanied by provisions for just compensation."[124]

Taking is defined in the Restatement (Second) of the Law the Foreign Relations Law of the United States as:

> "Conduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all benefit of his interest in property, constitutes a taking of the property ... even though the state does not deprive him of his entire legal interest in the property."[125]

Nevertheless, The Third Restatement, adopted in 1986, states that a state is not responsible for loss of property or other economic disadvantage resulting from bona

[123] Ibid
[124] American Law Institute (ed.). Restatement (Third) on Foreign Relations Law of the United States, 1987, § 712(1). Quoted in Dolzer, Rudolf. Indirect Expropriations: New Developments?. Environmental Law Journal, Vol. 11, 2003, p. 63-93, p. 71
[125] American Law Institute (ed.) Restatement (Second) of the Law the Foreign Relations Law of the United States, Chapter 3, 192 Available online at http://untreaty.un.org/ilc/documentation/english/a_cn4_217_add2.pdf (visited 16.12.2011)

fide general taxation, regulation, forfeiture from crime, or other action of the kind that is commonly considered as within the police powers of states.[126]

Organisation for Economic Co-operation and Development stepped in the same rivers of international investment law in May 1995 when it launched the negotiations with the purpose to provide a broad multilateral framework for international investments. Later on the negotiations were discontinued, *inter alia*, because of the opposition from developing countries and, therefore, the Multilateral Agreement on Investment[127] (MAI) couldn't reach a successive completion. But "[t]he MAI would have contained provisions similar to those in BITs and, in certain areas, furthered investment liberalization."[128]

The Investment Protection section of the MAI includes expropriation and compensation provisions which in the Article 2.1 provide:

> "A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation") except:
>
> (a) For a purpose which is in the public interest,
>
> (b) On a non-discriminatory basis,
>
> (c) In accordance with due process of law, and
>
> (d) Accompanied by payment of prompt, adequate and effective compensation in accordance with Articles 2.2 to 2.5 below. "[129]

The MAI negotiating text contains a lot of interpretative notes and the one regarding expropriation states as follows:

> "Articles - - on General Treatment, and - - on Expropriation and Compensation, are intended to incorporate into the MAI existing

[126] Supra Note 7, p. 357
[127] Supra Note 74
[128] Newcombe, Andrew Paul. Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory And When Should Compensation Be Paid? Toronto: Faculty of Law University of Toronto, 1999 Available online at http://italaw.com/documents/RegulatoryExpropriation.pdf (visited 16.12.2011)
[129] Supra Note 74, Article IV.2..1, p. 143

> international legal norms. The reference in Article IV.2.1 to expropriation and nationalisation and "measures tantamount to expropriation or nationalisation" reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments. Nor would such normal and non-discriminatory government activity contravene the standards in Article - - .1 (General Treatment)"[130]

International Human Rights instruments represent fruitful source for international expropriation law. The codification of the relevant principles for the purposes of the convention for the Protection of Human Rights and Fundamental Freedoms[131] (the "European Convention on Human Rights") laid down in Protocol No. 1, was based on three broad principles:[132]

> "Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> 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."[133]

[130] Ibid, Annex: Package of Proposals for Text on Environment and Labour, p. 143
[131] The European Convention for the Protection of Human Rights and Fundamental Freedom, Signed 4 November 1950, Entered into force 3 September 1953 Available online at http://www.hri.org/docs/ECHR50.html (visited 16.12.2011)
[132] Dolzer, Rudolf. Indirect Expropriations: New Developments?. Environmental Law Journal, Vol. 11, 2003, p. 63-93
[133] The European Convention for the Protection of Human Rights and Fundamental Freedom, Signed 4 November 1950, Entered into force 3 September 1953, Protocol 1 Enforcement of certain Rights and Freedoms not included in Section 1 of the Convention Available online at http://www.hri.org/docs/ECHR50.html (visited 16.12.2011)

In addition, The American Convention on Human Rights[134] introduces the compensation requirement in Article 21:

> "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."[135]

"In the absence of firm guidance, arbitral tribunals have fashioned a variety of tests for assessing whether States are liable for expropriation, which can create both opportunities and uncertainties for parties in circumstances where expropriation arguably has occurred."[136]

3.5. The Legality of Expropriation

The idea that expropriation is considered intrinsically lawful was embraced both from the municipal and international points of view.

The legality of expropriation is ensured under the condition that it is carried out in conformity with certain internationally required preconditions, such as "public utility" or "public interest", non-discrimination, and lack of "arbitrariness".[137] As expropriation constitutes a lawful act of state, it doesn't give rise to any state responsibility unless inconsistent with the international standards.[138] Thus, the unlawfulness of expropriation might stem from a breach of a treaty which prohibits the state to execute the right to expropriate.

"These considerations clearly reflect the traditional legality requirements which can also be found in some of the United Nations General Assembly (UNGA) resolutions confirming the right to expropriate as an expression of the permanent sovereignty over natural resources."[139] The political controversy that accompanied these UN resolutions

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[134] American Convention on Human Rights, Signed 22 November 1969, Entered into force 18 July 1978 Available online at http://www.hrcr.org/docs/American_Convention/oashr.html (visited 16.12.2011)
[135] Ibid
[136] Supra Note 119, p. 267
[137] Supra Note 99, p. 11,13, para. 42, 50
[138] Ibid, p. 11, para. 42
[139] Supra Note 90, p. 173-174

regarded essentially the standard of compensation. In spite of a new attitude which the majority of states put through, they didn't establish new customary international rules.

The traditional requirements are maintained among other relevant sources by the Restatement (Third) of the Foreign Relations Law of the United States which states as follows:

> "A state is responsible under international law for injury resulting from:
>
> (1) a taking by the state of the property of a national of another state that:
> (d) is not for a public purpose, or
> (e) is discriminatory, or
> (f) is not accompanied by provisions for just compensation."[140]

In 2004 the United Nations Conference on Trade and Development (UNCTAD) issued the three volume set dealing with international investment agreements and their key issues asserting that:

> "Under customary international law and typical international investment agreements, three principal requirements need to be satisfied before a taking can be considered to be lawful: it should be for a public purpose; it should not be discriminatory; and compensation should be paid."[141]

The first two requirements are deemed generally accepted; the compensation requirement is as well widely accepted but only in principle without any universal agreement relating to the manner of assessment of the compensation due. Moreover, in pursuance of International Investment Agreements (IIAs) practise a new requirement seems to develop that deserves attention and that is due process of law.

"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 of expropriation."[142] The very first BIT signed between Germany and Pakistan in 1959 set

[140] Supra Note 124
[141] UN Doc. UNCTAD/ITE/IIT/2004/10, International Investment Agreements: Key Issues, Vol. 1, 2004, p. 235 Available online at http://www.unctad.org/en/docs/iteiit200410_en.pdf (visited 16.12.2011)
[142] Supra Note 90, p. 176

an example of the applied provisions concerning protection and promotion of investments. In connection with expropriation the treaty provides as follows:

> "Nationals or companies of either Party shall not be subjected to expropriation of their investments in the territory of the other Party except for public benefit against compensation, which shall represent the equivalent of the investments affected. Such compensation shall be actually realizable and freely transferable in the currency of the other Party without undue delay. Adequate provision shall be made at or prior to the time of expropriation for the determination and the grant of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law."[143]

The evolution of the standard concerning expropriation is outlined by the two following examples of Germany BIT practise. The Treaty between the Federal Republic of Germany and Jamaica concerning the Reciprocal Encouragement and Protection of Investments (1992) states as follows:

> "Investments by nationals or companies 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, hereinafter referred to as "comparable measure", in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure was made known by the authorities. ... The legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law."[144]

The Germany – Bosnia and Herzegovina BIT (2001) contains following provisions:

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[143] Pakistan and Federal Republic of Germany Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes). Signed 25 November 1959, Entered into force 28 November 1962, Article 3(2) Available online at http://www.iisd.org/pdf/2006/investment_pakistan_germany.pdf (visited 16.12.2011)

[144] The Treaty between the Federal Republic of Germany and Jamaica concerning the Reciprocal Encouragement and Protection of Investments, Signed 24 September 1992, Entered into force 29 May 1996, Article 4(2) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/germany_jamaica_gr_eng.pdf (visited 16.12.2011)

> "Investments by investors of either Contracting State shall not be directly or indirectly 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 State except for the public benefit and against compensation. ... The legality of any such expropriation, nationalization or comparable measure, the relevant procedures and the amount of compensation shall be subject to review by due process of law."[145]

"It is noteworthy that the 2001 Germany – Bosnia and Herzegovina BIT effectively replicates the language in Article 1110 (1) of NAFTA, whereas the 1992 BIT did not include the words 'directly or indirectly'."[146]

The expropriation provisions employed in Germany BIT practise are still strongly influenced by the wording of the first modern BIT between Germany and Pakistan, although the comparison provided by this BIT uncovers the basic elements of the evolution of the standard of protection.[147] "In the straightforward language of the expropriation provisions of this earliest BIT, there is no term used other than 'expropriation', and nothing that would hint at the breadth and or flexibility that the additional terms which are now so familiar in investment instruments – i.e. 'directly or indirectly', 'tantamount', 'equivalent' – would suggest."[148]

For completion, at the end of 2009 Germany and Pakistan signed a new Agreement on the Encouragement and the Reciprocal Protection of Investments which took place at the 50th anniversary of the earlier BIT. The Agreement replaces the old BIT and adds significant new provisions in line with contemporary international standards, in this context providing the payment of interest for the compensation.[149]

The legal requirements created through International Investment Agreements which were presented here on the German BIT practice largely correspond to the traditional

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[145] The Treaty between the Federal Republic of Germany and Bosnia and Herzegovina concerning the Encouragement and Reciprocal Protection of Investments, Signed 18 October 2001, not yet entered into force, Article 4(2) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/germany_bosnia.pdf (visited 16.12.2011)
[146] Supra Note 119, p. 282
[147] Supra Note 90, p. 177
[148] Supra Note 119, p. 282
[149] http://www.pakistantalk.com/forums/economy/6057-new-bit-attract-more-investment-dr-gregor.html (visited 16.12.2011)

'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.[150] The assessment of compensation usually differs from treaty to treaty as well as the requirement of due process of law if this fourth one is included.

Hence, decisions of international arbitral tribunals have become central in the process of giving interpretation to the legal requirements concerning expropriation and their conclusions will be discussed in here.

Public Purpose

This requirement for an expropriation to be considered lawful is contained in the vast majority of IIAs and proclaims that measure must be taken in the "public interest"[151] or for a "public purpose"[152] or "public benefit"[153] or sometimes for a "public purpose related to the internal needs"[154] or that the measure must be for a "purpose which is in the public interest"[155].

"Writers largely concur on the need for this legality requirements; though they usually do not seem to regard it as a very high hurdle for states."[156] The notion of public interest is undeniably broad and thus enables the states to handle its application masterly when denoting the governmental actions as for public purpose. Then, the public purpose

[150] Supra Note 90, p. 176
[151] E.g. Agreement on Encouragement and Reciprocal Protection of Investment between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Signed 29 April 1991, Entered into force 1 October 1992, Article 5(2) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/czech_netherlands.pdf (visited 16.12.2011)
[152] E.g. US Model BIT (2004), Article 6(1)(a) Available online at http://www.state.gov/documents/organization/117601.pdf (visited 16.12.2011); Canadian Model BIT (2004), Section B, Article 13(1) Available online at http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf (visited 16.12.2011)
[153] E.g. German Model BIT (2008), Article 4(2) Available online at ita.law.uvic.ca/documents/2008-GermanModelBIT.doc (visited 16.12.2011); Agreement on Economic and Technical Co-operation between the Government of the Kingdom of the Netherlands and the Government of the Democratic Republic of the Sudan, Signed 22 August 1970, Entered into force 27 March 1972, Article XI Available online at http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_sudan.pdf (visited 16.12.2011)
[154] E.g. Agreement between the Government of Hong Kong and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, Signed 30 November 1995, Entered into force 30 May 1997 Available online at http://www.unctad.org/sections/dite/iia/docs/bits/hongkong_france.pdf (visited 16.12.2011)
[155] Supra Note 118, Article 13(1)
[156] Supra Note 90, p. 179

requirement doesn't seem like "much of a limitation in modern times"[157]. In fact, international tribunals are grudging in questioning a state's view that a taking was in a public interest.

"Nevertheless, as recent cases have proven, the test is not wholly irrelevant and may be used by tribunals not only in cases of blatant misuse, such as expropriations for the private gain of a ruling elite or expropriations carried out in the context of the commission of serious human rights violations, crimes against humanity, or genocide."[158]

The public purpose requirement was markedly elaborated in the jurisprudence of the Iran-US Claims Tribunal. For example, the *INA Corp* case asserted the legality of expropriation carried out for a public purpose and held that:

> "[I]t has long been acknowledged that expropriations for a public purpose ... are not per se unlawful."[159]

The content of the public purpose notion was dealt in the *Amoco* case which provides:

> "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 practise, are granted extensive discretion. An expropriation, the only purpose of which would have been to avoid contractual obligations of the State or of an entity controlled by it, could not, nevertheless, be considered as lawful as under international law."[160]

ICDIS tribunals have had the opportunity to comment on this issue as well. For instance, in the *AMCO v Indonesia* case the tribunal held that under general international law:

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[157] Supra Note 7, p. 395
[158] Supra Note 90, p. 179 (Footnotes omitted)
[159] INA Corp v Government of the Islamic Republic of Iran Award No. 184-161-1, 13 August 1985 in Research Centre for International Law. International Law Reports. Vol. 75, Edited by E. Lauterpacht, Cambridge: Grotius, 1975, p. 603
[160] Amoco International Finance Corp v The Government of the Islamic Republic of Iran, Partial Award NO. 310-56-3 in International Legal Materials, Vol. 27, Issue 5, September 1988, p. 1320-1390, para. 145

> "[...] the right to nationalize supposes that the act by which the State purports to have exercised it, is a true nationalization, namely a taking of property or contractual rights which aim to protect or to promote the public interest."[161]

Simultaneously, ICSID tribunals have been reluctant to analyze the state's reasoning of their public interests. It was highlighted in the NAFTA case of *Feldman v Mexico* that "the conditions (other than the requirement for compensation) are not of major importance in determining expropriation"[162]. This approach was refined in *Methanex v United States* (2005) and *Saluka v. Czech Republic* (2006) in which "tribunals have chosen to apply the criteria normally use to determine the legality of an expropriation in order to establish whether an expropriation had occurred in the first place"[163]. On the other hand, "[i]ts considerations on public purpose are still relevant because they confirm the willingness, albeit reluctant, to scrutinize a State's decision on measures in the public interest"[164].

More recently, the issue of the legal requirements of an expropriation was the subject of interest to the ICSID case of *ADC v Hungary*. The tribunal concluded that the expropriation

> "... was unlawful as: (a) the taking was not in the public interest; (b) it did not comply with due process ...; (c) the taking was discriminatory and (d) the taking was not accompanied by the payment of just compensation."[165]

In its address on the requirement of a public purpose the ADC tribunal held that:

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[161] Amco Asia Corporation v Republic of Indonesia, ICSID Case No. ARB/81/1, Award, 20 November 1984 Cited in Reinisch, August. The Legality of Expropriation. In Reinisch, August. Standards of Investment Protection. New York: Oxford University Press, 2008, p. 182

[162] Feldman v Mexico, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 99 Available online at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC587_En&caseId=C175 (visited 16.12.2011)

[163] Knahr, Christine. Indirect Expropriation in Recent Investment Arbitration. Transnational Dispute Management, December 2007, p. 1-18, p. 1

[164] Supra Note 90, p. 183

[165] ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary, ICSID Case No. ARB/03/16, 2 October 2006, para. 476 Available online at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648_En&caseId=C231 (visited 16.12.2011)

> "... a treaty requirement for "*public interest*" requires some genuine interest of the public. If 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."[166]

Basically, the Tribunal rejected the view that states are in the position of free determination of their public interests by insisting on the genuine interest of the public. Thus, the Tribunal "*de facto* reversed the burden of proof by requiring the expropriating State to demonstrate such genuine public interest"[167].

The existing case law, in my opinion, is sufficiently convincing that the public purpose requirement is the relevant criteria for assessing the legality of expropriation "both under investment treaty and unwritten international law standards"[168].

Non-Discrimination

"The principle of non-discrimination is recognized in international customary practice, as part of general international law, judicial decisions and treaty law."[169] In order to characterize this rule we can consent that an expropriation "[...] that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law."[170] Thus the status of a foreigner becomes one of many other existing basis for discrimination, e.g. racial discrimination. "Since 'discrimination' is regarded as 'unreasonable distinction', expropriations of certain persons may not be unlawful if such distinction is '[...] rationally related to the state's security or economic policies might not be unreasonable'."[171]

[166] Ibid, para. 432 (Emphasis in original)
[167] Supra Note 90, p. 185
[168] Ibid, p. 186
[169] Maniruzzaman, A.F.M. Expropriation of Alien Property and the Principle of Non-discrimination in International Law of Foreign Investment: An Overview. Journal of Transnational Law & Policy, Vol. 8, Issue 1, Fall 1998, p.57-78, p. 57 (Footnote omitted)
[170] American Law Institute (ed.). Restatement (Third) on Foreign Relations Law of the United States, 1987, §712, comment f Cited in Reinisch, August. The Legality of Expropriation. In Reinisch, August. Standards of Investment Protection. New York: Oxford University Press, 2008, p. 186 (Footnote omitted)
[171] Supra Note 90, p. 186 (Footnote omitted)

Investment treaty law operates strenuously with this principle providing that expropriation or expropriatory measures must be "not discriminatory"[172], "non-discriminatory"[173], taken "on a non-discriminatory basis"[174], "in a non-discriminatory manner"[175] and the like.

The case law of international tribunals positively acknowledges the non discrimination requirement in order to consider an expropriation to be lawful. Libyan Oil Concession cases might serve as sources of the analysis as some of them addressed this issue. For instance, the sole arbitrator in the *LIAMCO* case affirmed the unlawful character of an expropriation which was carried out on discriminatory basis. He stated that:

> "It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice.... Therefore, a purely discriminatory nationalization is illegal and wrongful."[176]

However, he reached the conclusion that, there was no substantial proof of the fact that political motive[177] was the predominant motive for nationalization which would constitute a purely discriminatory expropriatory measure. The result was based on following facts:

> "... LIAMCO was not the first company to be nationalized, nor was it the only oil company nor the only American company to be nationalized ....

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[172] E.g. Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Federative Republic of Brazil. Signed 25 November 1998, Not yet entered into force, Article 6(a) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_brazil.pdf (visited 16.12.2011)

[173] E.g. Agreement between the Government of the People's Republic of China and the Government of the Polish People's Republic on the Reciprocal Encouragement and Protection of Investments, Signed 7 June 1988, Entered into force 8 January 1989, Article 4(1) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/china_poland.pdf (visited 16.12.2011)

[174] E.g. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Sierra Leone for the Promotion and Protection of Investments, Signed 13 January 2000, Entered into force 20 November 2001, Article 5(1) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/uk_sierraleone.pdf (visited 16.12.2011)

[175] E.g. US Model BIT (2004), Article 6(1) Available online at http://www.state.gov/documents/organization/117601.pdf (visited 16.12.2011); Canadian Model BIT (2004), Section B, Article 13(1) Available online at http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf (visited 16.12.2011)

[176] Libyan American Oil Company (LIAMCO) and the Government of the Libyan Arab Republic Relating to Petroleum Concessions 16, 17 and 20 , Award, 12 April 1977. International Legal Materials, Vol. 20, Issue 1, January 1981, p. 1-87, p. 58

[177] In the case of British Petroleum v Libya, the sole arbitrator concluded that the taking violated public international law as it was carried out for purely extraneous political reasons and thus was arbitrary and discriminatory in character.

> Other companies were nationalized before it, other American and Non-American companies were nationalized with it and after it, and other American companies are still operating in Libya."[178]

"On the other hand, even the fact that the one foreign investor is expropriated while another one is not does not necessarily imply a discriminatory taking if there were 'adequate reasons' for distinguishing."[179] For instance, in the case of *Kuwait v American Independent Oil Company (Aminoil)* "the tribunal found that the situation did not itself constitute discrimination, as there was no suggestion that Aminoil had been nationalized because of its American nationality and there were adequate reasons[180] for excepting A.O.C [Arabian Oil Company] at that time"[181].

Undoubtedly, the non-discrimination requirement is applied as one of the aspects of the legality of an expropriation both under customary international law and applicable IIAs provisions. "While tribunals tend to qualify politically motivated or other egregious forms of discrimination as unlawful, they do apply a more nuance approach to expropriations which affect only some foreigners[182] if such discrimination may be the result of legitimate government policies."[183]

Due Process

The requirement that an expropriation is to be carried out in accordance with due process of law is basically the product of treaty-based investment law as it is often provided for in BITs and other IIA. Most of the investment treaties, though there are exceptions, contain the requirement that any expropriation must be made or accomplished "under due process of law"[184] or "in accordance with due process of

[178] Libyan American Oil Company (LIAMCO) v Libya, Above n 176, p. 60
[179] Supra Note 90, p. 188
[180] Kuwait, Government of and the American Independent Oil Company (Aminoil), Award, 24 March 1982. International Legal Materials, Vol. 21, Issue 5, September 1982, p. 976-1053, p. 1020, para. 87
[181] Tschanz, Pierre-Yves. The Contributions of the Aminoil Award to the Law of State Contracts. International Lawyer, Vol. 18, Issue 2, Spring 1984, p. 245-284, p. 274
[182] See ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary, ICSID Case No. ARB/03/16, 2 October 2006, Available online at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648_En&caseId=C231 (visited 16.12.2011)
[183] Supra Note 90, p. 190
[184] E.g. US Model BIT (2004), Article6(1) Available online at http://www.state.gov/documents/organization/117601.pdf (visited 16.12.2011); Canadian Model BIT (2004), Section B, Article 13(1) Available online at http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf (visited 16.12.2011)

law"[185]. Despite the frequent occurrence of this requirement it is seldom explained. "The due process prerequisite is usually understood as a requirement to provide for a possibility to have the expropriation and, in particular, the determination of the amount of compensation reviewed before an independent body[186]."[187] Some other BITs refers to the principle of legality[188] requiring that the expropriation procedure comply with domestic legislation.[189]

Some BITs opted for the kind of structure that does not put together all the requirements of a legal expropriation and therefore the due process requirement is located somewhat apart[190] from other three requirements. "Indeed, since the due process prerequisite is not so much a substantive requirement but rather a procedural obligation in order to guarantee compliance with the substantive requirements it appears sensible to differentiate in this context."[191]

The number of arbitral awards addressing the due process requirement is limited. The already mentioned case of *ADC v Hungary* dealt with the due process concept provided for in the applicable BIT between Cyprus and Hungary[192]. The Tribunal's comment on the specific content of due process of law in the expropriation context read as follows:

> "Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to access the actions in

[185] E.g. Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investment, Signed 30 May 2001, Entered into force 5 September 2002, Article 7(1)(a) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/australia_egypt.pdf (visited 16.12.2011)

[186] E.g. Agreement between the Government of Canada and the Government of Republic of Trinidad and Tobago for the Reciprocal Promotion and Protection of Investments, Signed 11 September 1995, Entered into force 7 July 1998, Article VIII(2) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/canada_trinidad.pdf (visited 16.12.2011)

[187] Supra Note 90, p. 191

[188] Agreement between the Government of the Kingdom of Thailand and the Government of the Russian Federation on the Promotion and the Reciprocal Protection of Investments, Signed 17 October 2002, Not yet entered into force, Article 4(3) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/russia_thailand.pdf (visited 16.12.2011)

[189] UN Doc. UNCTAD/ITE/IIT/2006/5, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, 2007, p. 47 Available online at http://www.unctad.org/en/docs/iteiia20065_en.pdf (visited 16.12.2011)

[190] E.g. Treaty between the Federal Republic of Germany and the Islamic Republic of Afghanistan concerning the Encouragement and Reciprocal Protection of Investments, Signed 20 April 2005, Not yet entered into force, Article 4(2) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/germany_afghanistan.pdf (visited 16.12.2011)

[191] Supra Note 90, p. 192

[192] Agreement between the Government of the Republic of Cyprus and the Government of the Hungarian People's Republic of Mutual Promotion and Protection of Investments, Signed 24 May 1989, Entered into force 25 May 1990 Available online at http://www.unctad.org/sections/dite/iia/docs/bits/hungary_cyprus.pdf (visited 16.12.2011)

> 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."[193]

"What is interesting in the *ADC* award is the fact that the tribunal had no problem at all to conclude that the unqualified 'due process' requirement of the Cyprus/Hungary BIT should be read in the more expansive fashion of other BITs expressly requiring the possibility of judicial or quasi-judicial review of expropriation decisions."[194]

In summary, the concept of due process of law often appears in IIAs, however its position as a rule under customary international law is less certain unlike the other two requirements of a public purpose and non-discrimination.

Compensation

Prior to the 1950s it seems to be accepted in international practise that an expropriation carried out by a state requires the full compensation.[195] Following the existing trend was among other the award of the *de Sabla* case which held that:

> "[...] acts of a government in depriving an alien of his property without compensation impose international responsibility."[196]

Similarly, in the Norwegian Shipowners' Claims case, the tribunal emphasized not only the obligation to pay full compensation at the latest on the day of the effective taking[197] but also proclaimed that:

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[193] ADC v Hungary, Above n 163, para. 435
[194] Supra Note 90, p. 193 (Emphasis in original)
[195] Norton, Patrick M. A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation. American Journal of International Law, Vol. 85, Issue 3, July 1991, p. 474-505, p. 476-477 (Footnote omitted)

> "Some sixty international claims tribunals sat between the early nineteenth century and the Second World War, many dealing with claims arising out of taking of alien property. Although their reasoning is sometimes obscure, none held that the appropriate measure of compensation was less than the full value of the property taken, and many specifically affirmed the need for full compensation."

[196] Marguerite de Joly de Sabla (United States) v. Panama, Award, 29 June 1993. Reports of International Arbitral Award, Vol. VI, p. 358-370, p. 366 Available online at http://untreaty.un.org/cod/riaa/cases/vol_VI/358-370_Marguerite.pdf (visited 16.12.2011)
[197] Norwegian Shipowners' Claims, Above n 48, p. 36

> "International law and justice are based upon the principle of equality between States. No State can exercise towards the citizens of another civilised State "the power of eminent domain" without respecting the property of such foreign citizens or without paying just compensation as determined by an impartial tribunal, if necessary."[198]

The breakdown of the consensus was caused by large scale nationalizations which followed socio-political changes in many developing countries throughout 20th century and by the postcolonial formation of new states which dissenting views were formulated in connection with the attempts to establish a New Economic Order through UN resolutions. The changes accompanying the standard of compensation were indeed rather political and on the jurisprudential level basically failed to suggest appropriate alternative concerning uncompensated expropriations.

"Most likely as a result of the uncertain (customary) international law on the question of compensation, most international investment agreements contain fairly detailed rules on the obligation to pay compensation in case of expropriation."[199] Many investment treaties apply the Hull formula of "prompt, adequate and effective compensation"[200]; while others merely refer to "compensation"[201] or require the payment of "just compensation"[202]. The compromise expression of "appropriate compensation"[203] used in UNGA resolutions occurs as well. Furthermore, investment treaties contain supplementary provisions specifying the requirement of compensation and thus leave the qualifying adjective without much significance. For instance, Article 13 of the ECT states as follow:

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[198] Ibid, p. 33
[199] Supra Note 90, p. 195
[200] E.g. US Model BIT (2004), Article 6(1)(a) Available online at http://www.state.gov/documents/organization/117601.pdf (visited 16.12.2011); Canadian Model BIT (2004), Section B, Article 13(1) Available online at http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf (visited 16.12.2011); Energy Charter Treaty, Signed 17 December 1991, Entered into force 16 April 1998, Article 13(1)(d) Available online at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf (visited 16.12.2011)
[201] E.g. German Model BIT (2008), Article 4(2) Available online at ita.law.uvic.ca/documents/2008-GermanModelBIT.doc (visited 16.12.2011)
[202] E.g. Agreement between the Government of the Republic of Cyprus and the Government of the Hungarian People's Republic of Mutual Promotion and Protection of Investments, Signed 24 May 1989, Entered into force 25 May 1990, Article (4)(1)(c) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/hungary_cyprus.pdf (visited 16.12.2011)
[203] E.g. Agreement between the Government of Hong Kong and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, Signed 30 November 1995, Entered into force 30 May 1997, Article (5)(1) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/hongkong_france.pdf (visited 16.12.2011)

> "Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment ...."[204]

"In addition, many IIA's contain similar detailed rules on the precise method of valuation[205] which usually clarifies that the precepts of the *Hull* formula are to be followed."[206] The meaning of the components of the Hull rule can be described as follows: "Prompt" means that the payment must occur at the time of the taking, or must include interest from the time of the taking to the time of payment; "Adequate" means that the compensation must equal "the fair market value" of the property taken; "Effective" means that the payment must be in an established international currency or in a currency freely exchangeable into such a currency and eligible for repatriation.[207] However, the international practice expressed through the arbitral awards doesn't fully support the Hull formula, historically endorsed by the United States, since the owners of expropriated property have been forced to accept delayed, partial and in-kind compensations.[208]

The practice of international tribunals generally affirmed the existence of the obligation of states to pay compensation both under treaty-based law and general international law. In the *American International Group v Iran* Arbitration, the tribunal held that:

> "[...] it is a general principle of public international law that even in a case of a lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken."[209]

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[204] Supra Note 118, Article 13

[205] There are several common alternatives of valuation including (a) liquidation value, (b) replacement value, (c) book value and/or (d) discounted cash flow value. Each method is appropriate in some circumstances but not others. See World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment, Adopted 21 September 1992 in International Legal Materials, Vol. 31, Issue 6, November 1992, p. 1363-1384

[206] Supra Note 90, p. 195-196 (Footnote omitted, Emphasis in original)

[207] Merrill, Thomas W. Incomplete Compensation for Taking. N.Y.U. Environmental Law Journal, Vol. 11, Issue 1, 2003, p. 110-135, p. 112

[208] Ibid

[209] American International Group, Inc., et al. v The Islamic Republic of Iran, Award No. 93-2-3, 19 December 1983 Cited in Reinisch, August. The Legality of Expropriation. In Reinisch, August. Standards of Investment Protection. New York: Oxford University Press, 2008, p. 196

The question whether the prompt, adequate and effective standard of compensation represents the prevailing standard of compensation or not was addressed in *Ebrahimi* case. The tribunal noted that:

> "The tribunal believes that, while international law undoubtedly sets forth an obligation to provide compensation for property taken, international law theory and practice do not support the conclusion that the 'prompt adequate and effective' standard represents the prevailing standard of compensation [...] Rather, customary international law favors an 'appropriate' compensation standard [...] The prevalence of the 'appropriate' compensation standard does not imply, however, that the compensation *quantum* should be always 'less than full' or always 'partial'."[210]

However, the tribunal's decision contains the dissenting opinion under which:

> "[...] there is virtual total uniformity in the Tribunal's ruling on the standard of compensation under international law. Every decision rendered by this Tribunal, whether based upon the Treaty of Amity[211] or customary international law, or both of them, has concluded that compensation must equal the full value of the expropriated property as it stood on the date of taking."[212]

Additionally, arbitral tribunals were faced with the question concerning the actual payment of compensation and the timing of such a payment. "In this context, tribunals have consistently held that an offer of compensation or other provision for compensation, in particular where the exact amount may still be in controversy, is enough to satisfy this legality requirement."[213]

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[210] Shahin Shaine Ebrahimi v Government of the Islamic Republic of Iran, Award No. 569-44/46/47-3, 12 October 1994 Cited in Reinisch, August. The Legality of Expropriation. In Reinisch, August. Standards of Investment Protection. New York: Oxford University Press, 2008, p. 197 (Emphasis in original)

[211] Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, Signed 15 August 1955, Entered into force 16 June 1957, Article 4(2) Available online at http://www.parstimes.com/law/iran_us_treaty.html (visited 16.12.2011)

> "[...] property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken [...]."

[212] Ebrahimi v Iran, Above n 210 Cited in Reinisch, August. The Legality of Expropriation. In Reinisch, August. Standards of Investment Protection. New York: Oxford University Press, 2008, p. 197

[213] Supra Note 90, p. 198

For instance, the ICSID Tribunal in the case of *LETCO* stated that the state in order to justify its actions as an act of nationalization would have had to show that it was accompanied by payment (or least the offer of payment) appropriate compensation.[214]

In conclusion, the obligation to pay compensation for an expropriation is clearly recognized both in customary international law and investment treaty law. However, the amount of such compensation remains one of the most contentious areas of international law. Despite the lack of consensus, this issue doesn't pose a difficulty in modern investment disputes since almost all bilateral investment treaties and multilateral investment treaties contain specific provisions on the standard of compensation.[215]

3.5.1. Implications of the Il/legal Character of an Expropriation for Remedies

The fulfilment of all mentioned requirements signifies the legal character of an expropriation. Providing the failure of at least one requirement, an expropriation becomes unlawful *per se* and thus gives rise to State's responsibility. The state committing a wrongful act is under and obligation to make restitution, i.e. re-establish the situation which existed before the act was committed.[216] "In the case of an illegal taking of property, the primary remedy would thus be restitution in kind."[217] "On the other hand, there are often situations where restitution is not available and consequently the state is obliged to compensate the injured party of any financially assessable damage.[218] "Nevertheless, it is sometimes asserted that both lawful and unlawful expropriations trigger the same obligation to compensate."[219]

The primacy of restitution was confirmed by PCIJ in its well-known case of the *Factory at Chorzów* in which it held that illegal dispossession of an industrial undertaking:

> "[...] involves the obligation to restore the undertaking and, if this is not possible, to pay its value at the time of the indemnification, which value

[214] Liberian Eastern Timber Corporation (LETCO) v. the Government of the Republic of Liberia, Award (ICSID), 31 March 1986 in International Legal Materials, Vol. 26, Issue 3, May 1987, p. 647-679, p. 665
[215] Supra Note 119, p. 317
[216] ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Adopted by the International Law Commission at its 53rd session (2001), Article 35 Available online at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (visited 16.12.2011)
[217] Supra Note 90, p. 200
[218] Supra Note 216, Article 35, 36
[219] Supra Note 90, p. 200 (Footnote omitted)

> is designed to take the place of restitution which has become impossible."[220]

Furthermore, the Court referred to the "the essential principle contained in the actual notion of an illegal act" as the rule of customary international law:

> "[...] reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[221]

The consecutive elaboration on this so-called *Chorzów Factory* standard provides as follows:

> "Restitution in kind, or, if this is not possible, payment 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 [...]."[222]

The PCIJ in its decision unequivocally distinguished between the unlawful expropriation which was in the centre of attention in this case and the lawful expropriation which, in Court's opinion, requires only payment of just price of what was expropriated that is limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment.[223]

"The distinction between damages for illegal acts and compensation for legal expropriations has not always been clearly adhered to."[224] However, the *Chorzów Factory* standard was strongly endorsed in the *Texaco* case in which the sole arbitrator held that "*restitutio in integrum* is, both under the principles of Libyan law and under the principles of international law, the normal sanction for non-performance of

[220] The Factory at Chorzów (Claim for Indemnity) (Germany) v. Poland, Judgement (Merits), September 13, 1926, para. 126 Available online at http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm (visited 16.12.2011)
[221] Ibid, para. 125
[222] Ibid, para. 125
[223] Ibid, para. 124
[224] Supra Note 90, p. 201(Footnote omitted)

contractual obligations and that it is inapplicable only to the extent that restoration of the *status quo ante* is impossible"[225].

The case law of the Iran-US Claims Tribunal basically maintains "a clear distinction ... between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking"[226]. However, the Chamber Two in the case of *Phillips* considered the lawful/unlawful distinction irrelevant. [227]

"ICSID jurisprudence generally adheres to the distinction between lawful and unlawful expropriation and the different consequences stemming from these different acts."[228] In the *SPP v Egypt* case, the Tribunal noted that:

> "... the Claimants are seeking "compensation" for a lawful expropriation, and not "reparation" for an injury caused by an illegal act such as a breach of contract. The cardinal point ... in determining the appropriate compensation is that ... Claimants are entitled to receive fair compensation for what was expropriated rather than damages for a breach of contract."[229]

Recently, in the case of *ADC v Hungary* the tribunal made the clear distinction between lawful and unlawful expropriations and therefore refused to apply BIT provisions[230] concerning the amount of compensation of the legal form of an expropriation and resorted to customary international law. The Tribunal held that:

> "Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful

[225] Texaco Overseas Petroleum Company/California Asiatic Oil Company v the Government of the Libyan Arab Republic, Award, 19 January 1977 in International Legal Materials, Vol. 17, Issue 1, January 1978, p. 1-37, para. 109
[226] Amoco International Finance Corp v Iran, Above n 160, para. 192
[227] Phillips Petroleum Company Iran v The Islamic Republic of Iran, The National Iranian Oil Company, Award No. 425-39-2, 29 June 1989, para. 109-110 Partially available online at http://www.trans-lex.org/232300 (visited 16.12.2011)
[228] Supra Note 90, p. 201
[229] Southern Pacific Properties (Middle East) Ltd [SPP] v Arab Republic of Egypt, Award No. ARB/83/4, 20 May 1992, para. 183 Available online at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC671_En&caseId=C135 (visited 16.12.2011)
[230] Agreement between the Government of the Republic of Cyprus and the Government of the Hungarian People's Republic of Mutual Promotion and Protection of Investments, Signed 24 May 1989, Entered into force 25 May 1990, Article 4(2) and 4(3) Available online at http://www.unctad.org/sections/dite/iia/docs/bits/hungary_cyprus.pdf (visited 16.12.2011)

> expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case."[231]

The Tribunal at length reviewed the application of the *Chorzów Factory* standard in many cases concerning the expropriation by States of foreign owned property and after that concluded that this standard would be applicable to this very case. The Tribunal stated that:

> "It is clear that actual restitution cannot take place and so it is, in the words of the *Chorzów Factory* decision, "*payment of a sum corresponding to the value which a restitution in kind would bear*", which is the matter to be decided."[232]

Since the value of the investment after the date of expropriation has risen very considerably the Tribunal held that:

> "... it must assess the compensation to be paid by the Respondent to the Claimants in accordance with the *Chorów Factory* standard, i.e., the Claimants should be compensated the market value of the expropriated investments as at the date of this Award, which the Tribunal takes as of September 30, 2006."[233]

Similarly, the Tribunal in *Siemens A.G. v Argentina* case acknowledged the distinction between lawful and unlawful expropriations regarding the consequences stemming from that distinction. After having found that Argentina took measures that had the effect of expropriating the investment and that such expropriation was unlawful the Tribunal noted:

> "The law applicable to the determination of compensation for a breach of of such Treaty obligations is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty."[234]

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[231] ADC v Hungary, Above n 163, para. 483 (Emphasis in original)
[232] Ibid, para. 495 (Emphasis in original)
[233] Ibid, para. 499 (Emphasis in original)
[234] Siemens A.G. v The Argentine Republic, Award No. ARB/02/8, 6 February 2007, para. 349. Available online at http://ebookbrowse.com/siemens-argentina-award-pdf-d13403564 (visited 16.12.2011)

Subsequently, the Tribunal mentioned the key difference between the *Chorzów Factory* standard also endorsed by the Draft Articles on Responsibility of States[235] and Article 4(2) of the Germany/Argentina BIT[236] and provided as follows:

> "Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages."[237]

"The Tribunal expressly distinguished this standard from the standard laid down in the applicable BIT providing for compensation '[...] equivalent to the value of the expropriated investment'."[238]

3.6. The Scope of Protected Property Rights

"Protection from expropriation relates not only to tangible property or physical assets but to a broad range of rights that are economically significant for investor."[239] "Property that may be expropriated by states thus comprises immaterial rights and interests, including in particular contractual rights."[240]

Hence, the scope of protected rights is very much related to the definition of an investment contained in international investment agreements (IIAs). "Investments are usually defined as broadly as possible."[241] "The typical BIT contains investment definitions that include intangible property rights and contractual rights along the following lines:"[242]

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[235] Ibid, para. 352.
„The key difference between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account "all financially assessable damage" or "wipe out all the consequences of the illegal act" as opposed to compensation "equivalent to the value of the expropriated investment" under the Treaty."

[236] Treaty on the Mutual Protection and Promotion of Investments between the Federal Republic of Germany and the Argentine Republic, Signed 9 April 1991, Entered into force 8 November 1993 Available online at http://www.unctad.org/sections/dite/iia/docs/bits/germany_argentina_sp.pdf (visited 16.12.2011)

[237] Siemens A.G. v Argentina, Above n 234, para. 352

[238] Supra Note 90, p. 203 (Footnote omitted)

[239] Schreuer, Christoph. The Concept of Expropriation under the ECT and other Investment Protection Treaties. Revised 20 May 2005, p. 19 Available online at http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (visited 16.12.2011) (Footnote omitted)

[240] Supra Note 88, p. 410

[241] Supra Note 7, p. 220

[242] Supra Note 88, p. 410

> "the term "investments" comprises every kind of asset, in particular: (a) movable and immovable property as well as other rights in rem, such as mortgages, liens and pledges; (b) shares of companies and other kinds of interest in companies; (c) claims to money which has been used to create an economic value or claims to any performance having an economic value; (d) copyrights, industrial property rights, technical process, trade-marks, trade-names, know-how, and good-will; (e) business concessions under public law, including concessions to search for, extract and exploit natural resources ..."[243]

"A direct relation between the definition of an investment and the object of expropriation can be found in some of the recent US Free Trade Agreements[244], which make it clear that intangible property rights or interests can be expropriated..."[245]

Traditionally, the judicial and arbitral tribunals have dealt with the problem of the scope of protected rights under the rubric of acquired or vested rights.[246] In the early *Rudloff* case, decided by US-Venezuela Mixed Claims Commission, the commissioner noted that:

> "The taking away or destruction of rights acquired, transmitted and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property;"[247]

Generally, the case law concerning the scope of property rights that are possible objects of the expropriatory or tantamount measures supports "a wide concept of "property" that includes intangible rights especially rights under contracts ..."[248].

One of the important cases in this regard is the *Norwegian Shipowners' Claims* case before the PCIJ which is related to the requisition of "not only the ships and the

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[243] Supra Note 66, p. 27

[244] United States – Chile Free Trade Agreement, Signed on 6 June 2003, Entered into force on 1 January 2004, Annex 10-D(2) Available online at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file1_4004.pdf (visited 16.12.2011)

„An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment"

[245] Supra Note 88, p. 411

[246] Ibid

[247] Rudloff Case, US-Venezuelan Claims Commission, Interlocutory Decision, 1903, p. 250 Available online at http://untreaty.un.org/cod/riaa/cases/vol_IX/244-255.pdf (visited 16.12.2011)

[248] Supra Note 239, p. 20

material, but also the contracts, the plans, detailed specifications and payments made"[249] by the United States. During the World War I, the United States adopted a series of legislative and administrative measures for war purposes that provided for the requisition of ships built by the US shipyards and the cancelation of any existing contract for the building or purchase of ships concluded between the private US shipyards and foreigners. The Tribunal concluded that the interference with contractual rights amounted to de facto expropriation and stated that:

> "... whatever the intensions 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."[250]

Another important precedent is the *Certain German Interests in Polish Upper Silesia (Chorzów Factory)* case where the PCIJ held that Poland had also expropriated the contractual rights of the Bayerische, the company that managed and operated the Chorzów Factory. Thus, the Court held that not only the owner of the undertaking but also the company holding contractual rights had been expropriated:

> "... 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, licences, 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 respect of them"[251]

"The relevance of the *Chorzów Factory* case for modern investment disputes has been emphatically reaffirmed by the Iran-US Claims Tribunal."[252] The Iran-US Claims Tribunal also recognized the possibility of expropriation of intangible property, such as

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[249] Norwegian Shipowners' Claims, Above n 48, p. 11
[250] Ibid, p. 18
[251] Certain German Interests in Polish Upper Silesia (The Factory at Chorzów), Germany v. Poland, Judgment, 15 May 1926, PCIJ Ser. A, No. 7 (1927), p. 44 Available online at http://www.icj-cij.org/pcij/serie_A/A_07/17_Interets_allemands_en_Haute_Silesie_polonaise_Fond_Arret.pdf?PHPSESSID=17da65f64894d8a759c9a9fa355d83b9 (visited 16.12.2011)
[252] Supra Note 88, p. 414 (Emphasis in original)

contractual rights. In *Starrett Housing* case, the tribunal expressly noted that the Claimants:

> "[...] rely on precedents in international law in which cases measures of expropriation or taking, primarily aimed at physical property, have been deemed to comprise also rights of a contractual nature closely related to the physical property."[253]

"In the *Amoco* case the Iran-US Claims Tribunal said with respect to rights arising from a concession agreement:"[254]

> "Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction ..."[255]

The similar conclusion regarding expropriation of contractual rights has been made by the ICSID tribunals. For instance, in the *SPP v Egypt* case the tribunal repudiated

> "[...] the argument that the term "expropriation" applies only to *jus in rem*. The Respondent's cancellation of the project had effect of taking certain important rights and interests of the Claimants. What was expropriated was not the land nor the right of usufruct ... Clearly, those rights and interests were of a contractual rather than *in rem* nature. However, there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore."[256]

The NAFTA Chapter Eleven tribunals have held similarly as well. The tribunal in the case of *Methanex* endorsed the broad definition of an investment outlined in the

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[253] Starrett Housing Corporation, Starrett Systems Inc and Starrett Housing International Inc v Government of the Islamic Republic of Iran, Bank Omran, Bank Mellat and Bank Markazzi, Award, 14 August 1987 in Lauterpacht, E., International Law Reports, Vol. 85, p. 392 Partially available online at http://books.google.cz/books?id=HhVHUokxeVAC&pg=PA350&lpg=PA350&dq=starrett+housing+award&source=bl&ots=bcdwrizMYe&sig=US1v4K6HwfMksyD16DrvfvvzQ74&hl=cs&ei=jlAITrLBKsmE-wa3l-i7DQ&sa=X&oi=book_result&ct=result&resnum=4&ved=0CDQQ6AEwAw#v=onepage&q=rely%20on%20precedents&f=false (visited 16.12.2011)

[254] Supra Note 239, p. 21

[255] Amoco International Finance Corp v Iran, Above n 160, para. 108

[256] SPP v Egypt, Above n 229, para. 164

Pope&Talbot[257] award under which the investor's access to the U.S. market is regarded as a property interest subject to protection under NAFTA. Hence, the *Methanex* tribunal held that:

> "Certainly, the restrictive notion of property as a material "thing" is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing."[258]

"In the more recent *CME* case, another UNICITRAL ad hoc arbitration, the tribunal upheld the investor's claim that its contractual rights had been expropriated by the interference of a regulatory body of the host state."[259] "Thus, although the State had not taken express measures of expropriation, the Media Council [the regulatory body] had effectively neutralized the benefit of the property of the Dutch owner."[260] With regard to the expropriation of the investment the tribunal stated that:

> "The Respondent's view that the Media Council's actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State or because the original License granted to CET 21 always has been held by the original Licensee and kept untouched, is irrelevant. What was touched and indeed destroyed was the Claimant's and its predecessor's investment as protected by the Treaty. What was destroyed was the commercial value of the investment ... by reason of coercion exerted by the Media Council ..."[261]

In general, the conclusion that the contractual rights of the investor may be expropriated is well established in general international law. "The law of expropriation proceeds not from a traditional concept of tangible property but from a broad concept of economic

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[257] Pope & Talbot Inc v The Government of Canada, Interim award, 26 June 2000 Available online at http://www.naftalaw.org/Disputes/Canada/Pope/PopeInterimMeritsAward.pdf (visited 16.12.2011)
[258] Methanex Corporation v United States of America, Final award on Jurisdiction and Merits, 3 August 2005, part IV, chapter D, para. 17 Available online at http://www.state.gov/documents/organization/51052.pdf (visited 16.12.2011)
[259] Supra Note 88, p. 415
[260] Supra Note 119, p. 311
[261] CME Czech Republic B.V. (The Netherlands) v Czech Republic, Partial Award, 13 September 2001, para. 591 Available online at http://italaw.com/documents/CME-2001PartialAward.pdf (visited 16.12.2011)

rights that are necessary for the investor to pursue its business successfully."[262] Or in the words of Waelde and Kolo:

> "In modern understanding, the key function of property is less the tangibility of 'things', but rather the capability of a combination of rights in a commercial and corporate setting and under a regulatory regime to earn commercial rate of return."[263]

[262] Supra Note 239, p. 24
[263] Waelde, T. and Kolo, A. Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law. International and Comparative Law Quarterly, Vol. 50, Issue 4, October 2001, p. 811-848, p. 835

4. The Forms of Expropriation

"International law does not prescribe in an imperative manner the particular form which a measure of expropriation must assume."[264] Actually, an expropriation may occur in many ways and under different names. "The primary distinction in customary international law is between: (i) direct forms of expropriation in which the state openly and deliberately seizes property, and/or transfers title to private property to itself or a state-mandated third party; and (ii) indirect forms of expropriation in which a government measure, although not on its face effecting a transfer of property, results in the foreign investor being deprived of its property or its benefits."[265] In recent times, due to significant decrease in number of direct (formal) expropriation cases the international arbitrations have predominantly addressed the issue of the indirect form of expropriation. "Though there have been various attempts at clarifying and differentiating between different types of indirect expropriations, it appears that the term is frequently used interchangeably with expressions such as *de facto*, disguised, constructive, regulatory, consequential or creeping expropriation."[266]

Professor Schreuer explains this development by two compelling arguments.[267] Firstly, the investor must prove the total or at least substantial deprivation regarding the investment which is extremely difficult if any commercial value remains. Secondly, there is a growing sympathy on the part of tribunals for regulatory measures in the public interest. The reluctance of tribunals to declare expropriation in these cases is caused by the intention to avoid to pay full compensation as its consequence.

Despite the indicated dyadic polarization of the forms of expropriation the position of international expropriatory law in this regard is a bit more complicated. Since there is no definition of what constitutes indirect expropriation the scope and meaning of this notion is dubious and in like manner the concept of impartial expropriation.

[264] Supra Note 98, p. 136
[265] Supra Note 71, p. 323 (Footnotes omitted)
[266] Supra Note 88, p. 422 (Footnote omitted)
[267] Schreuer, Christoph. Introduction: Interrelationship of Standards. In Reinisch, August. Standards of Investment Protection. New York: Oxford University Press, 2008, p. 1

4.1. Direct Expropriation

"Expropriation in the sense of an outright taking of private property by the state, usually involving a transfer of ownership rights to the state or to a third person, has been a major public international law issue throughout the 20th century."[268]

The classic forms of direct expropriation represent the nationalizations of entire industries or sectors of the economy.[269] "Although a clear-cut definition cannot easily be formulated, it was tentatively adopted by the *Institut de Droit International* in 1952:

> "Nationalization is the transfer to the State, by a legislative act and in the public interest, of property or private rights of a designated character, with a view to their exploitation or control by the State, or to their direction to a new objective by the State."[270]

"Expropriations of property during wartime or national emergency are often called requisitions.[271] "Confiscation is used to describe compulsory acquisitions of property where the acquisition is not accompanied by compensation, for example in the case of forfeiture of property acquired by crime or left intestate"[272] Concurrently, the term confiscation sometimes denotes the expropriation that is regarded as unlawful.

Regardless of the term used to describe expropriation "the essence of the matter is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control"[273] which "may be followed by transfer to the territorial state or to third parties"[274].

State responsibility for acquisition or appropriation of property will arise unless the taking can be justified as a legitimate exercise of state's power in accordance with traditional legality requirements for the expropriation of foreign investments.[275]

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[268] Supra Note 88, p. 408
[269] Supra Note 71, p. 324
[270] Domke, Martin. Foreign Nationalizations Some Aspects of Contemporary International Law. American Journal of International Law, Vol. 55, Issue 3, July 1961, p. 585-616, p. 587-588 (Footnote omitted)
[271] The classic case of wartime requisition is Norwegian Shipowners' Claims, supra note 47
[272] Supra Note 71, p. 324-325 (Footnotes omitted)
[273] Supra Note 23, p. 508-509 (Footnote omitted)
[274] Ibid, p. 509
[275] Supra Note 71, p. 325

4.2. Indirect Expropriation

"It is on the whole undisputed that the prohibition of expropriation of foreign property, both under customary international law and under applicable treaty law, covers not only formal taking but also indirect expropriation."[276] At the same time, the significance of the indirect forms of expropriations or measures having equivalent effect has surpassed now rarely occurring direct expropriations. The UNCTAD study on Taking of Property explained this predominant character as follows:

> "It is not the physical invasion of property that characterizes nationalizations or expropriations that has assumed importance, but the erosion of rights associated with ownership by State interferences. So, methods have been developed to address this issue."[277]

"It is clear, that – contrary to direct expropriation – indirect expropriation does not involve an outright taking of the property. Rather it occurs in situations where governmental acts interfere with the investment to an extent short of actually depriving the investor of the property title."[278] The pivotal question, then, reads: What constitutes an indirect expropriation?

4.2.1 The Notion of Indirect Expropriation

The decisive element in an indirect expropriation is not an actual physical taking of property but the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor caused by certain governmental measures.[279] These attributes generate the difficulty in distinguishing whether these measures are in fact expropriatory and require compensation in accordance with public international law or involve non-compensable interference with the property rights.

The concept of indirect expropriation (regularly used interchangeably with de facto, regulatory or creeping) ranges a large variety of forms of indirect interferences with the investors' economic interests. "Attempts to define indirect expropriations focus on the

[276] Supra Note 88, p. 420-421
[277] UN Doc. UNCTAD/ITE/IIT/15, Taking of Property, 2000, p. 20 Available online at http://www.unctad.org/en/docs/psiteiitd15.en.pdf (visited 16.12.2011)
[278] Supra Note 163, p. 1-2
[279] Supra Note 277, p. 2

'unreasonable interference', with the 'prevention of enjoyment' or the 'deprivation' of property rights."[280]

International documents concentrating on international investment protection usually do not expressly address the issue of indirect expropriation. Usually, they provide protection against indirect expropriations and measure equivalent[281] or tantamount[282] to expropriation but rarely try to define them. "The reason is the great variety of possible measures, amounting to a *de facto* taking of foreign owned property, which defies any more specific description."[283] "If they attempt to do so they sometimes do it in a negative way, describing state measures that may not be considered to constitute indirect expropriation.[284]"[285] The commentary to the 1967 OECD Draft Convention on the Protection of the Foreign Property deems the indirect expropriations as:

> "[M]easures 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 excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusal of access to raw materials or of essential export or import licences."[286]

"Certain defining elements of expropriation can be found in the MIGA Convention which characterizes 'expropriation and similar measures' in the context of risks covered by investment insurance in the following way:"[287]

> "[A]ny legislative action or administrative action or omission attributable to the host state government depriving the holder of a guarantee of his control over or a substantial benefit from hi investment ..."[288]

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[280] Supra Note 88, p. 422 (Footnotes omitted)
[281] E.g. OECD Doc. DAFFE/MAI(98)7/REV1, OECD Negotiating Group on Multilateral Agreement on Investment (MAI), The Multilateral Agreement on Investments Draft Consolidated Text 6 , April 22, 1998Available online at http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf (visited 16.12.2011)
[282] E.g. North American Free Trade Agreement, Article 1110 Available online at http://www.sice.oas.org/trade/nafta/chap-111.asp#A1110 (visited 16.12.2011)
[283] Supra Note 239, p. 5
[284] Canadian Model BIT (2004), Section B, Article 13(1) Available online at http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf (visited 16.12.2011)
[285] Supra Note 239, p. 422
[286] Supra Note 121, p. 17
[287] Supra Note 88, p. 423

In the absence of a definition in most bilateral and multilateral investment treaties, which just acknowledge the possibility of indirect expropriation, it has been up to arbitral tribunals to come up with the satisfying clarification on the concept of indirect expropriation.

The Iran-US Claims Tribunal has persistently addressed this concept in its awards. "In *Starrett Housing v. Iran* the foreign investor had not been expropriated formally but a local "temporary manager" had been put in charge of the project. The Tribunal found that this amounted to an expropriation:"[289]

> "it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner."[290]

In the *Tippets* case, the Tribunal stated as follows:

> "The Tribunal prefers the term 'deprivation' to the term 'taking', although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required. A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected."[291]

NAFTA's provision on expropriation, in the context of indirect expropriation, was described in the *Metalclad* case. The tribunal held that:

> "... expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference

[288] Convention Establishing the Multilateral Investment Guarantee Agency of 1985, 11 October 1985, Article 11/a/ii. International Legal Materials, Vol. 24, Issue 3, May 1985, p. 692-715, p. 696
[289] Supra Note 239, p. 7 (Footnote omitted)
[290] Starrett Housing Corporation v Government of the Islamic Republic of Iran, Above n 253, p. 398
[291] Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran, The Government of the Islamic Republic of Iran cited in Reinisch, August. Expropriation. In The Oxford Handbook on of International Investment Law. Ed. by Peter Muchlinski, Frederiko Ortino and Christoph Schreuer. Oxford University Press, 2008, p. 424

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."[292]

"In the *CME* case, an ad hoc UNCITRAL arbitral tribunal relied on the broad concepts of destruction of the commercial value of an investment and denial of benefits to the investor in its finding of an indirect expropriation:"[293]

> "What was touched and indeed destroyed was the Claimant's and its predecessor's investment as protected by the Treaty. What was destroyed was the commercial value of the investment..."[294]

> "De facto expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims."[295]

ICSID jurisprudence has endorsed the standard of substantial deprivation in regard of the concept of indirect expropriation. In the *CMS v. Argentina* case, the tribunal, relying on cases like CME[296], Metalclad[297], and Pope & Talbot[298], stated that:[299]

> "The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized."[300]

In the *Pope & Talbot*[301] case, the tribunal identified the list of measures as being tantamount to expropriation, which has been, in some awards[302], labelled as "representative of the legal standard required to make a determination on alleged

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[292] Metalclad Corporation v. The United Mexican States, (NAFTA), Award, Case No. ARB(AF)/97/1, 30 August 2000, para. 103 Available online at http://ita.law.uvic.ca/documents/MetacladAward-English.pdf (visited 16.12.2011)
[293] Supra Note 88, p. 426
[294] CME v Czech Republic, Above n 261, para. 591
[295] Ibid, para. 604
[296] CME v Czech Republic, Above n 261
[297] Metalclad , Above n 192
[298] Pope & Talbot Inc v Government of Canada, Above n 257
[299] Supra Note 88, p. 426
[300] CMS Gas Transmission Company v The Argentine Republic, Case No. ARB/01/8, Award, 12 May, 2005, para. 262 Available online at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504_En&caseId=C4 (visited 16.12.2011)
[301] Pope & Talbot Inc v Government of Canada, Above n 257, para. 100
[302] Enron Corporation Ponderosa Assets, L.P v The Argentine Republic, Case No. ARB/01/3, Award, 22 May 2007, para. 245 Available online at http://italaw.com/documents/Enron-Award.pdf (visited 16.12.2011)

indirect expropriation"[303]. The tribunal in *PSEG v. Turkey*, citing *Pope & Talbot*, held that:

> "... there must be some form of deprivation of the investor in the control of the investment, the management of day-to-day operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part."[304]

Although the concept of indirect expropriation is well recognized in the international documents as well as in the presented case law of international judicial authorities, the predicament of what amounts to indirect expropriation still remains intricate. "The general description of indirect expropriation as wealth deprivation or denial of benefits employed by many arbitral tribunals is of limited value in this respect. While it is true that many findings of indirect expropriations are necessarily very fact-specific and may best be rationalized on a case-by-case basis, a scholarly analysis should not dispense with identifying those elements and factors that are crucial for a finding of an indirect expropriation."[305]

4.3. Creeping Expropriation

"Creeping expropriation is a form of indirect expropriation that takes place incrementally or step by step."[306] "It could result from a series of acts and/or omissions that, in sum, result in a deprivation of the property."[307] "It is sometimes referred to as 'constructive taking' so as to emphasise the idea that results akin to taking are produced though externally the situation remains unchanged."[308]

Professor Reisman and R.D. Sloane analyzed the issue of creeping expropriation in their article on indirect expropriation. In their words:

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[303] Sempra Energy International v The Argentine Republic, Case No. ARB/02/16, Award, 28 September 2007, para. 284 Available online at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8 (visited 16.12.2011)
[304] PSEG Global Inc. et al. v Republic of Turkey, Case No. ARB/02/5, 19 January 2007, para. 278 Available online at http://italaw.com/documents/PSEGGlobal-Turkey-Award.pdf (visited 16.12.2011)
[305] Supra Note 88, p. 426 (Footnote omitted)
[306] Supra Note 239, p. 14
[307] Supra Note 88, p. 426
[308] Supra Note 7, p. 350

> "Discrete acts, analyzed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights."[309]

> "Because of their gradual and cumulative nature, creeping expropriations also render it problematic, perhaps even arbitrary, to identify a single interference (or failure to act where a duty requires it) as the 'moment of expropriation'."[310]

The arbitral practice clearly distinguishes the existence of the gradual form of an expropriation. "In *Biloune v. Ghana*, the authorities had issued a stop work order, had subjected the investment to intrusive financial scrutiny, had demolished part of the project and had arrested and expelled the investor. The Tribunal said:

> "What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. … The Tribunal therefore holds that the Government of Ghana, by its acts and omissions culminating with Mr Biloune's deportation, constructively expropriated MDCL's assets, and Mr. Biloune's interest therein."[311]

In the *Santa Elena* case, the issue of creeping expropriation came to light in the Tribunal's decision on the investment valuation. According to the Tribunal:

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[309] Reisman, W. Michael and Sloane, Robert D. Indirect Expropriation and Its Valuation in the BIT Generation. British Yearbook of International Law, Vol. 74, 2004, p. 115-150, p. 123-124 Available online at http://www.bu.edu/law/faculty/scholarship/workingpapers/documents/SloaneR-ReismanW110806.pdf (visited 16.12.2011) (Footnote omitted)

[310] Ibid, p. 125

[311] Biloune and Marine Drive Complex Ltd. v Ghana Investments Centre and the Government of Ghana, Award on Jurisdiction and Liability, 27 October 1989 In Research Centre for International Law. International Law Reports, Vol. 95, p. 183-232, p. 209

> "…the period of time involved in the process may vary – from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership. It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title."[312]

In the *Waste Management* case, decided under the NAFTA Chapter 11 provisions, the dissenting opinion of arbitrator Keith Highet parsed the issue of creeping expropriation. He reasoned:

> "…a "creeping expropriation" is comprised of a number of elements, none of which can – separately – constitute the international wrong. These constituent elements include non-payment, non-reimbursement, cancellation, denial of judicial access, actual practice to exclude, non-conforming treatment, inconsistent legal blocks, and so forth. "[313]

> "A nationalization or expropriation – in particular a "creeping expropriation" comprised of numerous components – must logically be more than the mere sum of its parts…"[314]

In the *Tecmed v Mexico*, the NAFTA tribunal found that the refusal to renew the claimant's permit of operating landfill had entailed the breach of the applicable treaty in the respect of protection against expropriation and/or equivalent measures. In its analysis on the terms "equivalent to expropriation" the tribunal remarked:

> "This type of expropriation does not necessarily take place gradually or stealthily – the term "creeping" refers only to a type of indirect expropriation – and may be carried out through a single action, through a series of actions in a short period of time or through simultaneous

[312] Compañía del Desarrollo Santa Elena, SA v Republic of Costa Rica, Case No. ARB/96/1, 17 February 2000, para. 76 Available online at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC539_En&caseId=C152 (visited 16.12.2011)
[313] Waste Management, Inc. v United Mexican States, Case No. ARB(AF)/98/2, Dissenting opinion, 8 May 2000, para. 17 Available online at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC572_En&caseId=C166 (visited 16.12.2011)
[314] Ibid, para. 18

> actions. Therefore, a difference should be made between creeping expropriation and *de facto* expropriation, although they are usually included within the broader concept of "indirect expropriation" and although both expropriation methods may take place by means of a broad number of actions that have to be examined on a case-by-case basis to conclude if one of such expropriation methods has taken place."[315]

Similarly, the Tribunal in *Generation Ukraine v Ukraine* dealt with the concept of creeping expropriation although it rejected the alleged violation of the relevant international standard of protection against expropriation. The claimant asserted that the refusal to issue amended lease agreements by the Kyiv City State Administration "was the culmination of a series of other prejudicial acts that ultimately deprived the Claimant of its rights to its investment"[316] and amounted to creeping expropriation. According to the tribunal:

> "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."[317]

"The Tribunal in *Generation Ukraine* rejected the claim of a creeping expropriation because the investment did not yet exist at the relevant time and hence could not be expropriated."[318] Additionally, according to the tribunal the conduct of the said administrative body did "not come close to creating a persistent or irreparable obstacle to the Claimant's use, enjoyment or disposal of its investment"[319].

"In addition to including a series of acts as well as omissions in the broad notion of indirect expropriation tribunals have also stressed that the measures equivalent to an

[315] Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, Case No. ARB(AF)/00/2, Award, 29 May 2003 In International Legal Materials, Vol. 43, Issue 1, January 2004, p. 133-195, para. 114, p. 162 (Footnotes omitted)
[316] Generation Ukraine, Inc. v Ukraine, Case No. ARB/00/9, Award, 16 September 2003, para. 20.21 Available online at http://www.asil.org/ilm/Ukraine.pdf (visited 16.12.2011)
[317] Ibid, para. 20.22 (Emphasis in original)
[318] Supra Note 239, p. 18
[319] Generation Ukraine, Inc. v Ukraine, Above n 316, para. 20.32

expropriation need not be 'legal acts' or acts having an immediate legal effect."[320] In a similar vein, the tribunal in *Ethyl* case stated that:

> "Clearly something other than a "law," even something in the nature of a "practice," which may not even amount to a legal stricture, may qualify [as such a measure]."[321]

Based upon the presented awards the valid conclusion that the concept of creeping expropriation is well recognized in international tribunal's practice can be drawn.

4.4. Regulatory Expropriation

"Regulatory measures that are taken by State authorities in the exercise of their public order function frequently have negative effects on private property rights including those of foreign investors."[322] The predicament of how and where to draw the line between legitimate non-compensable national regulation that serves some public purpose on one hand, and regulation which is 'tantamount' to expropriation requiring compensation, on the other hand represents a currently very controversial issue.[323] "The quest for a generally applicable test for this distinction, and, at the same time, the futility of such pursuit, has been aptly described by the ICSID tribunal in the *Generation Ukraine* case:"[324]

> "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

[320] Supra Note 88, p. 431
[321] Ethyl Corporation v The Government of Canada, Award on Jurisdiction, 24 June 1998, para. 66 Available online at http://italaw.com/documents/Ethyl-Award.pdf (visited 16.12.2011)
[322] Supra Note 239, p. 28
[323] Supra Note 263, p. 811
[324] Supra Note 88, p. 432

> legal bases pleaded. The outcome is a judgment, *i.e.* the product of discernment, and not the printout of a computer programme."[325]

Sharing the same view, the tribunal in *Saluka* case remarked 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 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."[326]

As a result expropriation standard adherent to international investment protection may under some circumstances contravene the state's "right to regulate and exercise the public order function, their sovereign powers"[327]. As a matter of fact the states often intervene with the property rights while exercising their regulation power[328] "to protect essential public interests from certain types of harm"[329]. However, "[t]he judicial and arbitral debate is framed by assertions that, on the one hand, legitimate regulatory measures are outside the scope of indirect expropriation and that a too far-reaching protection against expropriation should not serve as *de facto* substitute for investment protection. On the other hand, it is said that any substantial deprivation of value regardless of its purposes should be considered expropriatory."[330] The Tribunal in *Tecmed* case considered this predicament as follows:

> "The principle that the State's exercise of its sovereign powers within the framework of its police powers may cause economic damage to those

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[325] Generation Ukraine, Inc. v Ukraine, Above n 316, para. 20.29

[326] Saluka Investment BV v The Czech Republic, Partial Award, 17 March 2006, para. 263 Available online at http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf (visited 16.12.2011)

[327] Hoffmann, Anne K. Indirect Expropriation. In Reinisch, August. Standards of Investment Protection. New York: Oxford University Press, 2008, p. 157

[328] Newcombe, Andrew. The Boundaries of Regulatory Expropriation in International Law. ICSID Review – Foreign Investment Law Journal, Vol. 20, 2005, p. 1-55, p. 30

„The exercise of such powers may not be grossly unfair, unjust, idiosyncratic or discriminatory. It must involve a minimum standard of due process."

[329] Ibid, p. 21

[330] Supra Note 88, p. 433

> subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable."[331]
>
> "... regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, ..."[332]

"One of the central difficulties in distinguishing a regulatory measure from a regulatory expropriation lies in the identification of legitimate purposes of regulatory measures."[333] Public interest, public purpose or public benefit doesn't represent the justifiable postulate as it is only considered as a requirement for lawful expropriation. The doctrine refers here to pre-eminent-public interests, legitimate or *bona fide* interests. "[T]he most widely accepted of which are as follows: under treaty provisions; as a legitimate exercise of police power, including measures of defence against external threats; confiscation as a penalty for crimes; seizure by way of taxation or other fiscal measures; loss caused indirectly by health and planning legislation and the concomitant restrictions on the use of property; the 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."[334]

Even the tribunals have recognised their existence, for example in *Saluka* award stating that:

> "It is now established in international law that States are not liable to pay compensation to a foreign investor, when in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[335]

"Although it is sometimes asserted that 'bona fide general taxation' belongs to the category of non-compensable regulatory measures, this does not mean that taxation is entirely insulated from expropriation claims."[336] The confiscatory taxation has been considered to achieve the expropriatory effect which was confirmed in the *Feldman* award. The tribunal held that:

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[331] Tecmed, Above n 315, para. 119
[332] Ibid, para. 122
[333] Supra Note 88, p. 434
[334] Supra Note 23, p. 511-512 (Footnotes omitted)
[335] Saluka v Czech Republic, Above n 326, para. 255 and 275
[336] Supra Note 88, p. 436 (Footnote omitted)

> "By their very nature, tax measures, even if they are designed to and have the effect of an expropriation, will be indirect, with an effect that can be tantamount to expropriation. If the measures are implemented over a period of time, they could also be characterized as "creeping", which the Tribunal also believes is not distinct in nature from, and is subsumed by, the terms "indirect" expropriation or "tantamount to expropriation" in Article 1110(1)."[337]

Similarly, the arbitral tribunal in *Occidental* case noted that:

> "... expropriation need not involve the transfer of title to a given property, which was the distinctive feature of traditional expropriation under international law. It may of course affect the economic value of an investment. Taxes can result in expropriation as can other types of regulatory measures."[338]

In the context of environmental expropriations the blurring between the non-compensable regulations of foreign investments and compensable expropriatory acts truly stands out. For instance, the *Santa Elena* tribunal, as a matter of fact, didn't regard this interest as a justification for non-compensation at all and held that:

> "Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensations remains."[339]

The disregard for the environmental intentions of the state and focus solely on the particular effect that a given measure has on the legal position of investor was specifically endorsed in *Tecmed* award:

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[337] Feldman v Mexico, Above n 162, para. 101
[338] Occidental Exploration and Production Company v The Republic of Ecuador, Case No. UN 3467, Final Award, 1 July 2004, para. 85 Available online at http://italaw.com/documents/Oxy-EcuadorFinalAward_001.pdf (visited 16.12.2011) (Footnotes omitted)
[339] Santa Elena, Above n 312, para. 72

> "... no principle stating that regulatory administrative actions are *per se* excluded from the scope of the [applicable BIT], 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."[340]

The opposite approach assumes that non-discriminatory regulatory measure for legitimate public purpose does not give rise to the right to compensate under international law. This point of view was shared, for example, by the tribunal which rendered the *Methanex* award which held that:

> "But 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 alias, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the ten putative foreign investor contemplating investment that the government would refrain from such regulation."[341]

The express reference to given approach recognizing the *bona fide* regulations resulting in economic injuries to investors as non-compensable elements under customary international law was made by UNICITRAL tribunal in Saluka case under which:

> "... the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary international law today."[342]

"If the approach of the *Methanex* and *Saluka* tribunals were to be followed, this would lead to a considerable gap in international investment protection: any non discriminatory measure, taken in the public interest that interferes with property rights

[340] Tecmed, Above n 315, para. 121
[341] Methanex, Above n 258, part IV, chapter D, para. 7
[342] Saluka v The Czech Republic, Above n 326, para. 262

will no longer be an expropriation regardless of its consequences."[343] This predicament was addressed by the ICSID tribunal in the *Azurix* case which found that "the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim"[344]. The tribunal didn't accept the *bona fide* public purpose criterion as a sufficient reasoning for non-compensable economic injuries caused by the police powers of the state and suggested additional pointers of determining whether regulatory actions would be expropriatory and thus give rise to compensation, such as proportionality and non-discrimination.[345]

4.5. The Crucial Factors for Identification of Indirect Expropriation

"On the basis of the sometimes very-fact-specific determinations by international arbitral and judicial bodies having to decide whether an indirect expropriation actually took place, one may identify an emerging trend of using certain abstract legal rules that may assist decision-makers in their task of differentiating."[346]

Intensity of Interference

"Usually, an insignificant, minor restriction or interference with property rights does not constitute indirect expropriation."[347] Thus, in order to recognize expropriation there must be "substantial loss of control or value"[348] of an investment or "severe economic impact"[349].

"There is broad consensus in academic writings that the intensity and duration of the economic deprivation is the crucial factor in identifying an indirect expropriation or equivalent measure."[350] According to professor Dolzer:

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[343] Kriebaum , Ursula. Regulatory Taking: Balancing the Interests of the Investor and the State. The Journal of World Investment and Trade, Vol. 8, No. 5, October 2007, p. 717-744, p. 726 (Footnote omitted)
[344] Azurix Corp. v The Argentine Republic, Case No. ARB/01/12, Award, 14 July 2006, para. 310 Available online at http://italaw.com/documents/AzurixAwardJuly2006.pdf (visited 16.12.2011)
[345] Ibid, para. 310-312
[346] Supra Note 88, p. 438
[347] Ibid
[348] Supra Note 277, p. 41
[349] OECD Working Papers on International Investment. "Indirect Expropriation" and The "Right to Regulate" in International Investment Law. No. 2004/4, September 2004, p. 10 Available online at http://www.oecd.org/dataoecd/22/54/33776546.pdf (visited 16.12.2011)
[350] Supra Note 239, p. 29 (Footnote omitted)

> "No one will seriously doubt that the severity of the impact upon the legal status, and the practical impact on the owner's ability to use and enjoy his property, will be a central factor in determining whether a regulatory measure effects a taking."[351]

The position of international law on the weight of the interference may be found in the *Revere Copper* award. The tribunal found that, even though the investor maintained the formal ownership, the Government actions (tax increase) caused that the investor's control over use and operation of its properties was no longer effective.[352]

The Iran-US Claims Tribunal commented in a number of cases about the severity of the interference in respect of the investment. In *Starrett Housing v Iran*, the tribunal held that the appointment of a manager by Iran interfered with property rights to such an extent that these rights were rendered so useless that they must be deemed to have been expropriated.[353] "In the *Tippetts* case it was not the appointment by the government of an Iranian manager that was seen as an expropriation, but the degree of interference by the manager with the owners' property rights that constituted a taking of property:"[354]

> "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 ... such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral."[355]

Another case concerning "the magnitude or severity"[356] of the interference is *Pope & Talbot* which confirmed that under NAFTA in order to constitute an expropriation,

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[351] Supra Note 132, p. 79
[352] Revere Copper & Brass Inc v Overseas Private Investment Corp, Award, 24 August 1978 Cited in McLachlan, Campbell, Shore, Laurence, Weiniger, Matthew. International Investment Arbitration Substantive Principles. New York: Oxford University Press, 2007, p. 297
[353] Starrett Housing Corporation v Government of the Islamic Republic of Iran, Above n 253, p. 398
[354] Supra Note 239, p. 32 (Footnote omitted)
[355] Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran, The Government of the Islamic Republic of Iran cited in Reinisch, August. Expropriation. In The Oxford Handbook on of International Investment Law. Ed. by Peter Muchlinski, Frederiko Ortino and Christoph Schreuer. Oxford University Press, 2008, p. 439
[356] Pope & Talbot, Above n 257, para. 96

"international law requires an actual interference with fundamental ownership rights"[357]. The Tribunal held that:

> "... While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner. Thus, the *Harvard Draft* defines the standard as requiring interference that would "justify an interference that the owner *** will not be able to use, enjoy, or dispose of the property... The *Restatement*, in addressing the question whether regulation may be considered expropriation, speaks of "action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property." ... under international law, expropriation requires a "substantial deprivation"."[358]

In the case of *SD Myers*, the tribunal addressed the effect of governmental measures and held that:

> "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."[359]

"It reinforced this distinction by focusing on the degree and intensity of the interference:"[360]

> "An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some context and circumstances, it would be appropriate to view a

[357] Ibid, para. 88
[358] Ibid, para. 102 (Footnotes omitted)
[359] SD Myers, Inc. v Government of Canada, Partial Award, 13 November 2000. International Legal Materials, Vol. 40, Issue 6, November 2001, p. 1408-1492, para. 282
[360] Supra Note 88, p. 441

> deprivation as amounting to an expropriation, even if it were partial or temporary."[361]

In the specific case, the temporary closure of the border that lasted approximately 18 months and affected the investor's ability to export hazardous waste, according to the Tribunal, did not amount to an expropriation.

Similarly, in the *Nykomb* case the Stockholm Chamber of Commerce arbitral tribunal found that "[t]he decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail"[362]. On this basis, the tribunal concluded that the withholding of payment of the agreed double tariff for surplus electric power did not amount to an expropriation or the equivalent of an expropriation because there was

> "... no possession taking of Windau or its assets, no interference with the shareholder's rights or with the management's control over and running of the enterprise – apart from ordinary regulatory provisions laid down in the production licence, the off-take agreement, etc."[363]

Expropriation Does Not Require State Acquisition

The fact that expropriation can occur without any "state acquisition"[364] "was acknowledged by the Iran-US Claims Tribunal in an incidental fashion when the tribunal stated that it preferred 'the term "deprivation" to the term "taking", although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required'[365]."[366]

The ICSID tribunal in the *Amco* case noted the important thing that the deprivation of the property rights may be followed by transfer to third parties. According to this award:

> "[I]t is generally accepted in International Law, that a case of expropriation exists not only when a state takes over private property but

[361] SD Myers, Above n 359, para. 283
[362] Nykomb Synergetics Technology Holding AB, Stockholm v Latvia, Award, 16 December 2003, para. 4.3.1. Available online at italaw.com/documents/Nykomb-Finalaward.doc#_Toc59278334> (visited 16.12.2011)
[363] Ibid
[364] Supra Note 328, p. 16
[365] Tippetts, Above n 291
[366] Supra Note 88, p. 442

> also when the expropriating state transfers ownership to another legal or natural person."[367]

"Despite broad definitions of the scope of expropriation, there are in fact only a handful of expropriation cases where the foreign investor suffered a deprivation of property rights without a corresponding acquisition of control or rights by the state... these cases, often involved the unjustified and arbitrary destruction of property or severe restrictions on its use, transfer or export."[368]

In the *Tecmed* case, concerning the refusal to renew the permit to operate the landfill, the tribunal narrowly analyzed the substance of the expropriatory measures and held that:

> "Although formally an expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect, the term also covers a number of situations defined as *de facto* expropriation, where such actions or laws transfer assets to third parties different from the expropriating State or where such laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the Government."[369]

The *Tecmed* tribunal decided to focus on the effect of the governmental measures, rather than the benefit of the state, to determine whether they are expropriatory or not. According to tribunal in order to establish expropriatory character of the governmental measure:

> "[I]t must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use of and enjoyment of its investments, as if the rights related thereto – such as the income or benefits related to the Landfill or to its exploitation – has ceased to exist. In other words, if due to the actions of the Respondent, the assets

[367] Amco Asia Corporation v Republic of Indonesia, Above n 161, para. 158
[368] Supra Note 328, p. 17
[369] Tecmed, Above n 315, para. 113 (Footnote omitted)

> involved have lost their value or economic use for their holder and the extent of the loss."[370]

Despite the fact that "of the over 2200 international investment treaties, there do not appear to be any treaties that define expropriation as an appropriation or unjust enrichment by the state"[371], we can trace some arbitral awards which divert from this approach, referred to as "the orthodox approach"[372].

For instance, in *Lauder* case, the UNICITRAL tribunal rejected the claim of indirect expropriation, partially, because the precise actions of Media Council did "not amount to an appropriation – or the equivalent – by the State, since it did not benefit the Czech Republic or any person or entity related thereto"[373].

Similarly, the *Olguin v Paraguay* tribunal specifically required the appropriation of the investment by the State of Paraguay in order to comply with the claim of an expropriation and held that:

> "For an expropriation to occur, there must be actions that can be considered reasonably appropriate for producing the effect of depriving the affected party of the property it owns, in such a way that whoever performs those actions will acquire, directly or indirectly, control, or at least, the fruits of the expropriated property."[374]

The "Sole Effect" Doctrine

The Sole Effect Doctrine prioritizes the effect of a governmental measure on the alien's property when dealing with indirect expropriation. In order to recognize expropriation there must be complete or substantial deprivation of the economic value, use or enjoyment of the investment. The controversy of this opinion doesn't rest in the justification of this approach, which is undoubtedly an essential factor, but rather in the fact whether it should be the only decisive factor in the identification of indirect

[370] Ibid, para. 115
[371] Supra Note 328, p. 18 (Footnote omitted)
[372] Ibid, p. 4
[373] Lauder v The Czech Republic, Final Award, 3 September 2001, para. 203 Available online at http://www.sekaninalegal.eu/document_download.php?id=48 (visited 16.12.2011)
[374] Olguín v Republic of Paraguay, Case No. ARB/98/5, Final Award, 26 July 2001, para 84. Available online at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC575_En&caseId=C171 (visited 16.12.2011)

expropriation. However, according to Newcombe, who refers to this doctrine as to the orthodox approach, the Sole Effect Doctrine is considered the dominant conception in international law.[375] Also having regard to the reasoning and decision we may trace the evidence of this approach in international tribunals' awards.

In the *Tippetts* case, decided by the Iran – United States Claims Tribunal, the claimant created and held a 50% ownership interest in an Iranian entity established solely for the sole purpose of performing engineering and architectural services on the Tehran International Airport. As a consequence of Iranian revolution in 1978, the new manager of the partnership was appointed by the Iranian Government. The Tribunal concluded that the expropriation took place and held that:

> "A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.
>
> 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 ... such a conclusion is warranted whenever events demonstrate that the owner was deprived of 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. "[376]

In the *Biloune v Ghana*, the claimant formed a joint venture with another governmental entity for the development of the Marine Drive resort complex. The work had proceeded substantially to completion when government officials issued an order to stop the work, citing the lack of building permit. The claimant alleged that the respondent interfered with his investment and by various means, including his arrest and

[375] Supra Note 328, p. 8
[376] Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran, The Government of the Islamic Republic of Iran found in Dolzer, Rudolf. Indirect Expropriations: New Developments?. Environmental Law Journal, Vol. 11, 2003, p. 63-93, p. 87

deportation, effectively expropriated the assets of MDCL. The claimant's arguments were accepted by the Tribunal asserting that:

> "[T]he motivation for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune's interest in MDCL, unless the Respondents can establish by persuasive evidence sufficient justification for these events." [377]

"The third explicit and unequivocal pronouncement in favour of the "sole effect doctrine" followed in the *Metalclad* decision rendered in 2000."[378] In this case the US company purchased the Mexican enterprise together with its permits in order to construct hazardous waste transfer station and landfill site. The Mexican local authority, however, issued an order to stop the work on the ground that the municipal permit was necessary. The Tribunal found that:

> "... expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the State, 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

[377] Biloune, Above n 311, p. 209
[378] Supra Note 132, p. 88

> reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[379]

"Nevertheless, where there is clear evidence of intent to expropriate this may assist tribunals in their assessment of facts."[380]

Transparency

In pursuance of the arbitral tribunals' practise, the absence of transparency may be another ground with the possibility to amount to the violation of the expropriation standard. "In particular in NAFTA Chapter 11 arbitrations tribunals have discussed this element – reaching, however, different conclusions."[381] According to *Metalclad* tribunal, the lack of transparency in Government's actions constituted an indirect expropriation:

> "[T]he Municipality's denial of the construction permit without any basis in the proposed physical construction or any defect in the site, and extended by its subsequent administrative and judicial actions regarding the *Convenio*, effectively and unlawfully prevented the Claimant's operation of the landfill.
>
> These measures, taken together with the representations of the Mexican federal government, on which *Metalclad* relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation."[382]

On the contrary, the *Feldman* tribunal doubted that the non-transparent behaviour of the Government had the expropriatory character. Although the tribunal empathized with the Claimant's position when dealing with "at best ambiguous and misleading"[383] acts on the side of the Mexican tax authorities but its opinion:

[379] Metalclad, Above n 292, para. 103
[380] Supra Note 88, p. 447 (Footnote omitted)
[381] Supra Note 263, p. 9
[382] Metalclad , Above n 292, para. 106, 107
[383] Feldman v Mexico, Above n 162, para. 132

> "[I]t is doubtful the lack of transparency alone rises to the level of violation of NAFTA and international law, particularly given the complexities not only of Mexican but most other tax laws."[384]

The tribunal remarked in a nutshell that "[u]nfortunately, tax authorities in most countries do not always act in a consistent and predictable way"[385].

Legitimate Investor's Expectations

"In the context of investment disputes, the disappointment of legitimate investor expectations by host states may play a crucial factor not only with regard to the fair and equitable treatment standard, but also in the determination of whether an expropriation has taken place."[386]

In this context, the tribunal in the *Metalclad* case stressed the element of "the reasonably-to-be-expected economic benefit"[387] when deciding the expropriation claim under NAFTA. "It was a crucial aspect of the tribunal's finding that Metaclad had relied on the representations of the Mexican federal government of its exclusive authority to issue permits for hazardous waste disposal facilities."[388]

Similarly, in the *Generation Ukraine* case legitimate expectations of the investor were the subject of the interest as the tribunal found it "relevant to consider the vicissitudes of the economy of the state that is host to the investment in determining the investor's legitimate expectations"[389]. The tribunal acknowledged "frustration and delay caused by bureaucratic incompetence and recalcitrance in various forms"[390] on one hand, but found that there was no indirect expropriation as the investor was aware of both future above-average profits and "potential pitfalls"[391] when investing in less developed Ukrainian economy.

[384] Ibid, para. 133
[385] Ibid, para. 113
[386] Supra Note 88, p. 448
[387] Metalclad, Above n 292, para. 103
[388] Supra Note 88, p. 448
[389] Generation Ukraine, Inc. v Ukraine, Above n 316, para 20.37
[390] Ibid
[391] Ibid

Proportionality

The case-law of the ECtHR represents a rich source of the application of the proportionality test. "In effect, the European Court of Human Rights examines whether the interference at issue strikes a reasonable balance between the demands of the general interest of the community and the private interests of the alleged victim of the deprivation, or whether the measure in fact imposes an unreasonable or excessive burden upon the individual."[392]

In the Sporrong and Lönnroth case, the Court did not find the Swedish measure concerning plans for expropriation and prohibition of construction proportionate. The Court opined that the two series of measures:

> "[U]pset the fair balance which should be struck between the protection of the right of property and the requirements of the general interest: the Sporrong estate and Mrs. Lönnroth bore an individual and excessive burden which could have been tendered legitimate only if they had had the possibility of seeking a reduction of the time-limits or of claiming compensation."[393]

The first award where the relation between the effect and the purpose of the measure was designed was the *Tecmed* award in which the tribunal related to the judgments rendered by European Court of Human Rights and applied the proportionality test[394].

> "After establishing that regulatory actions and measurea will not be initially excluded from the definition of expropriatory acts, in addition to the negative

[392] Mountfield, Helen. Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights. Environmental Law Journal, Vol. 11, 2003, p. 136-147, p. 141 (Footnote omitted)
[393] Case of Sporrong and Lönnroth v Sweden, Judgement, 23 September 1982, para. 73 Available online at http://portal.uclm.es/descargas/idp_docs/jurisprudencia/sporrong%20-%20proteccion%20de%20la%20propiedad.%20titularidad%20y%20alcance.%20privacion%20legal%20de%20la%20propiedad.%20in.pdf (visited 16.12.2011) (Emphasis omitted)
[394] Christoffersen, Jonas. Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights. BRILL, 2009, p. 69-70

"The proportionality test may be divided into three independent, yet intertwined, sub-principles:

- the principle of suitability meaning that the measures affecting individual rights must be suitable for the purpose of facilitating or achieving the pursued aim,
- the principle of necessity meaning that a suitable measure must also be necessary in the sense that there is no other equally suitable measure available, which is less restrictive to the protected right, and
- the principle of proportionality in the strict or narrow sense (the principle of balancing) meaning that a suitable and necessary measure may not upset the fair balance and/or destroy the essence of the right."

financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.“[395]

However, in the given case, the application of proportionality test pursued only the objective of specifying whether the expropriation has occurred or not - as opposed to the ECtHR practise.

Discrimination

“It has been suggested that the discriminatory effect/intent of a governmental action may be relevant in order to establish whether such action constitutes indirect expropriation.”[396] For instance, in the *Eureko* case the ad hoc tribunal pointed out the discriminatory character of the actions of the Government of Poland which were expropriatory in effect.[397] Since the measures were aimed “to exclude foreign control”[398] and retain the majority Polish control of the leading insurance company, the tribunal identified them as clearly discriminatory.

“In this context, discriminatory intent or effect only serves as a subsidiary or additional element evidencing indirect expropriation.”[399]

4.6 Partial Expropriation

Although the recognition of an indirect expropriation requires complete or substantial deprivation of the economic value, use or enjoyment of the investment, the practise still raises the question of the exact intensity of the interference that constitutes expropriation. “At first sight, this doctrine would rule out the notion of a partial expropriation: if the investment has been affected only in part, there is no expropriation.”[400] But this pattern of thinking would completely disregard the fact that

[395] Tecmed, Above n 315, para. 122 (Footnote omitted)
[396] Supra Note 88, p. 450
[397] Eureko B.V. v The Republic of Poland, Partial Award, 19 August 2005, para. 260 Available online at http://italaw.com/documents/Eureko-PartialAwardandDissentingOpinion.pdf (visited 16.12.2011)
[398] Ibid, para. 242
[399] Supra Note 88, p. 451
[400] Kriebaum, Ursula. Partial Expropriation. The Journal of World Investment & Trade, Vol. 8, No. 1, February 2007, p. 69-84, p. 69

there are typical scenarios outlining a partial expropriation. "A genuinely "partial expropriation" involves a situation in which only parts of an overall investment are taken."[401]

The reaction of the judicial authorities to the concept of partial expropriation is difficult to read as some of them expressly denied it while others found in favour of the possibility of a partial expropriation, either explicitly or implicitly.[402]

The first case that expressly denied the notion of partial expropriation concerned the mobile telecommunication services provided by the Norwegian company at the territory of Hungary. The case arose from various regulatory initiatives taken by Hungary between 2001 and 2003 to bring its telecommunications regime into line with European Union norms, as part of the EU accession process. But the Telenor's losses from the alleged regulatory violations did not constitute substantial erosion of value, according to its own annual financial statements.

The award confirmed that the interference with the investor's rights must be such as substantially to deprive investor of the economic value, use or enjoyment of its investment and emphasized that:

> "... in the present case at least, the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value."[403]

Generally, the tribunals were not prepared to accept the existence of an expropriation of only parts of an investment or where the affected rights were among the items listed in the definition of investment in the applicable investment protection treaty.[404]

„In other cases, tribunals explicitly accepted the concept of partial expropriation. However, these tribunals rejected the existence of an expropriation in the concrete cases under consideration for other reasons."[405]

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[401] Ibid, p. 72
[402] Ibid, p. 73
[403] Telenor Mobile Communications A.S. v Hungary, Case No. ARB/04/15, Decision on Jurisdiction, 13 September 2006, para. 67 Available online at http://italaw.com/documents/TelenorvHungaryAward_001.pdf (visited 16.12.2011)
[404] Supra Note 400, p. 77
[405] Ibid, p. 77

For instance, in the *Waste Management v Mexico* case concerning a concession for the provision of waste disposal services in the Mexican city of Acapulco, the tribunal explicitly recognized the concept of partial expropriation. In regards to NAFTA provisions on expropriation the tribunal noted:

> "It is open to the Tribunal to find a breach of Article 1110 in a case where certain facts are relied on to show the wholesale expropriation of an enterprise but the facts establish the expropriation of certain assets only. Accordingly the Tribunal will consider fist the standard set by Article 1110, in particular for conduct tantamount to expropriation, then whether the enterprise as a whole was subjected to conduct in breach of Article 1110, and finally whether (even if there was no wholesale expropriation of the enterprise as such) the facts establish a partial expropriation."[406]

Hence, the Tribunal clearly distinguishes between measures affecting Acaverde as a whole and those concerning particular contractual rights under the Concession Agreement.[407] At the end of a day, the Tribunal didn't regard the conduct of Mexico consisting of the persistent refusal or inability to pay sums due under the Concession Agreement as being expropriatory or tantamount to expropriation of the enterprise as such.[408] Subsequently, the tribunal analyzes the alleged virtual expropriation of contractual rights. In its conclusions, the tribunal made a distinction between non-compliance by a government with contractual obligations and factual expropriation or measures equivalent or tantamount to expropriation. In tribunal's opinion:

> "In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum. The law of breach of contract is not secreted in the interstices of Article 1110 of NAFTA. Rather it is necessary to show an effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to substantial extent."[409]

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[406] Waste Management, Inc. v United Mexican States, Case No.ARB(AF)/00/3, Award, 30 April 2004, para. 141 Available online at http://italaw.com/documents/laudo_ingles.pdf (visited 16.12.2011)
[407] Ibid, para. 155
[408] Ibid para. 159, 162
[409] Ibid, para. 175

In the end, the tribunal rejected the existence of partial expropriation in this given case, but, nevertheless, confirmed the possibility of expropriation of specific rights forming part of an overall investment.

Similarly, in the *GAMI v Mexico* case, the tribunal discussed the concept of partial expropriation. GAMI was an American investment company which held shares in a Mexican company that acquired sugar mills from the Government of Mexico. These mills had been temporarily expropriated by a decree. "The Tribunal gave a number of examples which indicate that it was prepared to accept the concept of partial expropriation:"[410]

> "Should *Pope & Talbot* be understood to mean that property is taken only if it is so affected in its entirety? That question cannot be answered properly before asking: *what property?* The taking of 50 acres of a farm is equally expropriatory whether that is the whole farm or just fraction. The notion must be understood as this: *the affected property* must be impaired to such an extent that it must be seen as "taken".
>
> GAM's own case would thus not have been affected in principle if only one mill had been expropriated. GAM's property rights in that single mill would have been "taken" because GAM was formally disposed of those rights." [411]

In addition, the tribunal mentioned other awards which "have given support for the proposition that *partial* destruction of the value may be tantamount to expropriation"[412].

However, the tribunal rejected the expropriation claim because the claimant didn't prove the total loss of the investment stated in its allegation.

One of the cases which implicitly accepted the notion of partial expropriation is the case of *Eureko B.V. v Poland*. The case concerned a share purchase agreement between the investor and the Republic of Poland. Under the terms of the SPA the investor purchased 30% of the PZU, leading polish insurance company. Later on, a related agreement

[410] Supra Note 400, p. 79
[411] GAMI Investments, Inc. v The Government of the United Mexican States, Final Award, 15 November 2004, para. 126, 127 Available online at http://www.state.gov/documents/organization/38789.pdf (visited 16.12.2011) (Emphasis in original)
[412] Ibid, para. 131 (Emphasis in original)

guaranteed to the investor the right to acquire an additional 21 % of shares and, thus, become a controlling shareholder. The following change of the Polish Government's privatization strategy resulted in the withdrawal of this related agreement.

The original 30% of shares remained untouched by this measure in question, however, the investor lost its opportunity to gain control over the company. In this regard the tribunal stated:

> "It is plain that Respondent has not deprived Eureko of its shares in PZU which it continues to hold and on which it receives dividends."[413]

Simultaneously, the tribunal regarded the rights acquired by Eureko in respect of the holding of IPO [Initial Public Offering] as "assets" and in its view the State deprived the investor of those assets.

> "Since the RoP [Republic of Poland] deprived claimant of those assets by conduct which the Tribunal has found to be inadmissible, it must follow that Eureko has a claim against the RoP under Article 5 of the Treaty.
>
> There is an amplitude of authority for the proposition that when a State deprives an investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation in violation of the type of provision contained in Article 5 of the Treaty. The deprivation of contractual rights may be expropriatory in substance and in effect."[414]

"The Tribunal clearly applied a concept of partial expropriation even if it did not use the term or discuss it explicitly."[415] The tribunals that accepted the concept implicitly, generally, "adopted an approach that views an overall investment operation as composed of several discrete investments"[416]. Hence, the substantial deprivation requirement applies only to the particular investment regardless of the treatment of the overall investment.

The case law on partial expropriation is not in the slightest integrated and creates the uncertainty for both investors and states. Under these circumstances, Ursula Kriebaum

[413] Eureko B.V. v Poland, Above n 397, para. 239
[414] Ibid, para. 240, 241 (Footnote omitted)
[415] Supra Note 400, p. 81
[416] Ibid, p. 82

proposes a solution which might determine when the concept of partial expropriation should be accepted. Consequently, the following requirements are to be fulfilled:

- the overall investment project can be disassembled into a number of discrete rights;
- the State has deprived the investor of a right which is covered by one of the items in the definition of "investment" in the applicable investment protection treaty;
  and
- this right is capable of economic exploitation independently of the remainder of the investment.[417]

"The proposed approach would make sure that investment protection against expropriation does not work like an insurance policy to protect the investor against every risk of value diminution of its investment. On the other hand, investors would be protected against the deprivation without compensation of a right which could have economically exploited independently of other parts of the overall investment."[418]

[417] Ibid, p. 83
[418] Ibid, p. 84

5. Conclusion

International law of foreign investment plays an important role in the prosperity and development of many countries. Hence, in order to promote the overall flows of foreign investments international investment rules have been developed to protect investors and their assets. In this case, however, the tussle between the developed and developing states resulted in a long-term doctrinal and political disagreement about the content of customary international law regarding the treatment of aliens and their property rights. The developed states argued for an international minimum standard protecting foreign investments, whereas the Latin American states coupled with the newly independent nations argued for national control over foreign investments, including the ending of foreign investment by expropriation. The clash was symbolically resolved on 14 November 1991 by signing the bilateral investment treaty between the United States of America, a historic proponent of the minimum standard, and the Argentine Republic, the country of Calvo. Based upon the specific provisions of this treaty, Argentine had withdrawn, in effect, its endorsement of the Calvo Doctrine. Now, the importance of the word symbolically comes into play as over the last years the contemporary politics of investment protection, not excluding the US politics, rediscovered the Calvo doctrine which today appears in many legal disguises. For instance, the exhaustion of local remedies is not obligatory in contemporary investment arbitration but the requirement to use domestic courts before resorting to international arbitration is reappearing in a number of ways. Thus, using the metaphor of professor Schreuer, Carlos Calvo is not alive but he has children and grandchildren that have an uncanny family resemblance to him.

The protection against expropriation was traditionally one of the most important standards provided by international investment law. Throughout the 20th century, expropriation in the sense of a deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control in favour of the state or third parties ranked at the top of contentious issues of international investment law. Radical expropriations bringing about either a redistribution of property or even a complete destruction of property rights were often carried out in the entire absence of compensation. Some settlements of claims relating to expropriation of property were negotiated between the expropriating states and the home states of investors and led to

lump-sum agreements while in other cases states ceased to press their claims arising out of the expropriatory measures. The remainder of cases was resolved at the hand of international tribunals, either ad hoc or set up claims commissions. Over time, the issues concerning expropriation of foreign investment have shifted from the protection against uncompensated expropriation to the legality of expropriation. In the modern BIT generation, where BITs define the lawfulness of expropriation, there are four requirements that limit the right of state to take property. The principal requirements of public purpose, non-discrimination, compensation and due process produced by IIA's practise are, however, sometimes questioned as customary international law requirements – specifically the manner of assessment of compensation due and the requirement of due process, itself. But the practice of tribunals shows that IIA's standards and standards under customary international law converge largely with the aforesaid traditional legality requirements standards.

In recent times, the debate has focused on the forms of expropriation, predominantly indirect expropriation. Considering the exceptional occurrence of direct expropriations, the elusive concept of indirect expropriation has become the most important issue which drew the attention to the question of what amounts to indirect expropriation of an investment. Generally, in order to recognize indirect taking there must be an effective loss of management, use or control or a substantial deprivation of the value of the property. But until the international law defines exactly the intensity of interference that constitutes expropriation, it is plausible that the expropriation standard adherent to international investment protection may under some circumstances contravene the state's right to regulate and adopt the measures that affect foreign investments. However, practise indicates that tribunals often reject the claims of regulatory expropriation which would entail the requirement of full compensation. Instead of the compilation of a check list of regulatory measures amounting to regulatory expropriation, the recent international investment agreements rather concentrate on detailed formulation of the rules governing the identification of indirect expropriation.

Since indirect expropriation requires an interference with property leading to a total or at least substantial deprivation, it is not surprising that the view of partial expropriation is clearly divided. A question of the issue of partial expropriation has arisen repeatedly in actual practise and thus placing the emphasis on the quantitative requirements.

However, the cases in which tribunals did not accept the existence of partial expropriation probably outnumber the tribunals' awards which did.

The level of investment protection in international law for foreign investment ought to be based on a proper balance between the interests of host states and those of foreign investors. In the international investment protection against expropriation, however, the interests of the two sides are in sharp conflict. The practise of tribunals will have to develop standards in the interpretation of international law on investment that to justice to the legitimate investors' expectations in judicial protection and, at the same time, respect the concerns of host states which are faces with costly arbitration proceedings.

Summary

Diplomová práca Ochrana medzinárodných investícií pred vyvlastnením si kladie za cieľ poskytnúť komplexný prehľad historického vývoja ako i súčasného stavu tejto dôležitej a aktuálnej oblasti práva medzinárodných investícií zameraného na ich vyvlastnenie. Preto sa práca sústreďuje na analýzu historických koreňov práva medzinárodných investícií z pohľadu vývoja obecne platných pravidiel medzinárodného práva o zaobchádzaní s investíciami a zároveň podrobne rozoberá modernú mnohostrannú a dvojstrannú zmluvnú úpravu medzinárodnoprávnej regulácie investícií i rozhodovaciu činnosti medzinárodných súdnych orgánov a arbitrážnych tribunálov.

Úvodná kapitola diplomovej práce sa zameriava na historický vývoj práva medzinárodných investícií v kontexte stabilizácie obyčajových pravidiel zaobchádzania s investíciami. Na tento vývoj je v nej nazerané z pohľadu dvoch protichodných názorov na otázku obsahu obyčajových pravidiel medzinárodného práva o zaobchádzaní s investíciami.

Tradičné medzinárodné právo podrobne neupravovalo postavenie cudzincov a ich majetkových práv za hranicami ich domovského štátu. Bolo to až 19. storočie, ktoré prinieslo ekonomické a politické zmeny, ktoré napomohli rozšíreniu trhu a zdôraznilo potrebu vytvorenia pravidiel pre zaobchádzanie s investíciami. Každému štátu je tradične prisudzované právo upraviť prostredníctvom svojho vnútroštátneho právneho poriadku režim zaobchádzania so zahraničnými investíciami. Rastúce ekonomické prepojenie medzi jednotlivými štátmi spôsobilo, že sa vytvorenie obecných zásad medzinárodného práva pre zaobchádzanie so zahraničnými investíciami začalo javiť ako nevyhnutnosť. Prirodzene, systém ochrany investorov bol podporovaný predovšetkým krajinami exportujúcimi kapitál, ktoré často považovali importné krajiny za necivilizované a neschopné zaistiť fungovanie právneho štátu ako garanta adekvátneho režimu zaobchádzania so zahraničnými investíciami. Rozvinuté štáty sa preto snažili presadiť ako obecnú zásadu medzinárodného práva tzv. medzinárodný štandard, t.j. štandard spravodlivého a rovnoprávneho zaobchádzania, ktorý za určitých okolností mohol byť vyšší ako národný štandard poskytovaný hostiteľským štátom voči jeho vlastným občanom. Na rozdiel od iných obecných zásad medzinárodného práva však neobsahuje konkrétne materiálne pravidlá ale predstavuje len určité meradlo pre

posudzovanie súladu pravidiel hostiteľského štátu s medzinárodným právom.[419] Podľa tejto koncepcie zasahovanie štátu do majetkových práv investora bolo povolené iba vo výnimočných prípadoch, a to vo verejnom záujme a za náhradu.[420] Prípadné nedodržanie predpísaného štandardu malo za následok, že konkrétny zásah štátu bol označený ako protiprávny z pohľadu medzinárodného práva a obsahom zodpovednosti štátu bola reparačná povinnosť.

Koncept medzinárodného štandardu sa nevyvíjal bezproblémovo a bol predmetom protestov hlavne zo strany latinsko-amerických štátov, ktoré naopak vyjadrovali značnú podporu národnému režimu poskytujúcemu rovnakú úroveň zaobchádzania so zahraničným a domácim investorom v súlade s vnútroštátnym právom.[421] Štandard národného zaobchádzania na rozdiel od medzinárodného štandardu vznikol až ku koncu 19. storočia a v priebehu 20. storočia si získal širokú podporu medzi štátmi Latinskej Ameriky, a to ako základná časť Calvovej doktríny. Autorom myšlienok, ktoré sa stali známe pod označením Calvova doktrína, je argentínsky právnik Carlos Calvo. Súbor jeho myšlienok bol po prvýkrát prezentovaný v knihe *Derecho Internacional Teórico y Práctico de Europa y América* vydanej v roku 1868. Calvova doktrína zdôrazňuje požiadavku, podľa ktorej sa cudzincom nemá poskytovať lepšie zaobchádzanie ako domácim občanom a adekvátne musia i spory medzi zahraničným investorom a hostiteľským štátom byť rozhodované výhradne vnútroštátnymi súdmi na základe vnútroštátneho práva. Koncept rovnosti v tomto prípade nie je chápaný *stricto sensu*, keďže postavenie cudzincov a domáceho obyvateľstva nie je zvyčajne rovnocenné. Národný režim v tomto kontexte nezdôrazňuje fakt, že cudzinci majú nárok na rovnaké zaobchádzanie ale skôr sa zameriava na to, že nemajú nárok na výhodnejšie zaobchádzanie ako je poskytované občanom hostiteľského štátu.

Zrážka názorov bola udržiavaná najmä ustálenou praxou Spojených štátov amerických, ktoré trvali na existencii medzinárodného štandardu zaobchádzania a povinnosti latinsko-amerických štátov poskytovať tento štandard americkým investorom v danej oblasti. Na druhej strane ale latinsko-americké štáty protestovali proti tomuto názoru a odmietali uznať medzinárodný štandard ako súčasť medzinárodného obyčajového práva. Dôležitú úlohu v tomto spore nakoniec zohrali i medzinárodné tribunály a ich

[419] Balaš, V. and Šturma, P. Kurs mezinárodního ekonomického práva. Praha: C. H. Beck, 1997, p. 193
[420] Supra Note 3
[421] Supra Note 22

rozhodnutia. Najznámejším a najcitovanejším prípadom o zodpovednosti štátu voči zahraničným investorom je prípad *Chorzów Factory*, ktorý sa niekoľkokrát objavil pred Stálym dvorom medzinárodnej spravodlivosti.[422] V tomto konkrétnom prípade Stály dvor rozhodoval spor vo veci nemeckej továrne vyvlastnenej Poľskom v rozpore so Ženevskou dohodou z roku 1922. Na adresu žiadosti o poskytnutie náhrady za škodu spôsobenú nezákonným vyvlastnením súd konštatoval, že je *podstatnou zásadou, že reparácia musí vždy, keď je to možné odstrániť všetky následky protiprávneho činu a obnoviť stav, ktorý by so všetkou pravdepodobnosťou existoval, keby k takému činu nedošlo*[423]. Toto rozhodnutie súdu je vykladané ako vyslovenie zásady, že akt vyvlastnenia musí byť sprevádzaný vyplatením náhrady. Otázka výšky náhrady za vyvlastnenie sa stala jedným z kľúčových problémov ochrany medzinárodných investícií, ktorý vyvolával mnoho doktrinálnych i praktických sporov. Požiadavka náhrady podľa tzv. Hullovej formuly, t.j. okamžitej, dostatočnej a reálnej kompenzácie (prompt, adequate and effective compensation) bola prijateľná iba pre skupinu rozvojových štátov, keďže rozvojové krajiny spravidla vôbec nemali faktickú možnosť zaplatiť za vyvlastnenie zahraničnej investície náhradu podľa tohto štandardu.

V povojnovom období dostal spor medzi rozvinutými a rozvojovými krajinami v otázke medzinárodného štandardu nový rozmer, keď sa rozvojové krajiny začali odvolávať na novú obecnú zásadu medzinárodného práva o trvalej zvrchovanosti štátu nad jeho prírodnými zdrojmi. Jej účelom bolo zabezpečiť ochranu ziskov z ťažby prírodných surovín pre dnešné rozvojové krajiny, ktoré sa v období 50. rokov 20. storočia stále nachádzali pod koloniálnou nadvládou mocností, a zároveň im poskytnúť právnu ochranu pred porušovaním ich ekonomickej suverenity zo strany iných štátov alebo zahraničných spoločností.[424] Valné zhromaždenie Spojených národov prijalo na jeseň roku 1962 rezolúciu 1803 pod názvom Deklarácia o trvalej zvrchovanosti nad prírodnými zdrojmi, ktorá je síce formálne nezáväzná ale v danej dobe na ňu bolo nahliadané ako na snahu o zachytenie medzinárodného obyčajového práva. Rezolúcia vo svojom texte priznáva povinnosť zaplatiť kompenzáciu v prípade vyvlastnenia v zodpovedajúcej výške (appropriate compensation) a v súlade s platnými pravidlami štátu, ktorý vykonal takéto opatrenia a zároveň v súlade s medzinárodným právom. Valné zhromaždenie v nasledujúcich rokoch prijalo sériu rezolúcii, ktoré sa ale

[422] Supra Note 49
[423] Supra Note 50
[424] Supra Note 53

postupne odklonili od duchu rezolúcie 1803. Snaha rozvojových krajín o zásadnú zmenu existujúceho medzinárodného hospodárskeho poriadku sa vykryštalizovala na začiatku 70. rokov v požiadavke nastolenia Nového medzinárodného ekonomického poriadku (New International Economic Order). Charta hospodárskych práv a povinností štátov mala signalizovať úplný koniec nadvlády štátov severu a nové rozloženie moci a bohatstva medzi štátmi. Tento dokument uznal právo každého štátu vydávať predpisy o zahraničných investíciách v rámci svojej národnej jurisdikcie a uplatňovať nad nimi svoju právomoc v súlade so svojimi zákonmi a predpismi a podľa svojich národných priorít a cieľov. Neexistencia akéhokoľvek odkazu na medzinárodné právo v tomto prípade je daná jasnou snahou odmietnuť akýkoľvek medzinárodný štandard zaobchádzania s investíciami. Rozvojové štáty však zlyhali v otázke nastolenia nových obecne platných pravidiel.

Pretrvávajúci spor o pravidlách dotýkajúcich sa zaobchádzania so zahraničnými investíciami a vzrastajúca potreba vytvorenia právne záväzného mechanizmu riešenia medzinárodných sporov z investícií viedli k uzatváraniu medzinárodných investičných zmlúv (IIAs), a to prevažne dvojstranných dohôd o ochrane a podpore investícií (BITs). Prvá dvojstranná medzinárodná dohoda o ochrane a podpore investícií bola uzatvorená v roku 1959 medzi Nemeckom a Pakistanom a v súčasnosti existuje po celom svete zhruba 2 500 takýchto zmlúv. Fenomén dvojstranných medzinárodných dohôd o ochrane a podpore investícií dosiahol svoj vrchol v 90. rokoch, keď sa ich počet späťnásobil. Podľa Newcomba má tento rozmach dve hlavné príčiny. Prvou z nich je zvýšený záujem vlád rozvinutých aj rozvojových krajín o liberalizáciu obchodu a voľnejší pohyb tovaru, služieb a investícií. Druhou hlavnou príčinou je presvedčenie, že uzatvorenie dvojstrannej medzinárodnej dohody o ochrane a podpore investícií má priamy účinok na výšku prílevu zahraničného kapitálu, ktorý krajiny potrebujú pre svoj ekonomický rozvoj.[425]

Napriek rozsiahlej tendencii štátov upravovať zaobchádzanie so zahraničnými investíciami na bilaterálnej úrovni, snaha o úpravu danej otázky na multilaterálnej úrovni bola doteraz neúspešná. Najvýznamnejšou iniciatívou o prijatie mnohostranného inštrumentu bolo úsilie na pôde OECD, ktorého výsledkom malo byť uzatvorenie Mnohostrannej dohody o investíciách (Multilateral Agreement on Investment). Jej

[425] Supra Note 71

konečný neúspech bol spôsobený viacerými faktormi, okrem iného i negatívnym postojom vlád rozvojových štátov k navrhnutej úprave ich záväzkov.

Rovnako aj na dvojstrannej úrovni ochrany investícií môžeme v súčasnosti pozorovať protichodné reakcie a prehodnocovanie poskytovaného štandardu ochrany zo strany rozvinutých i rozvojových krajín.[426] Extenzívny výklad tribunálov v kontexte ochrany zahraničných investorov rovnako ako aj široká arbitrabilita sporov vedú k požiadavke reformy stávajúceho systému.[427]

Predmetom druhej kapitoly je pojem vyvlastnenia v medzinárodnom práve, prax štátov v tejto oblasti v priebehu 20. storočia a v neposlednom rade podmienky, ktoré musí akt vyvlastnenia splniť aby bol v súlade s medzinárodným právom.

Otázka vyvlastnenia, ktoré je možné chápať ako odňatie majetkových práv štátom sprevádzané prevodom týchto práv v prospech štátu alebo tretej osoby, aktívne zamestnávala medzinárodné právo verejné v priebehu celého 20. storočia.[428] Právo štátu pristúpiť k vyvlastňovacím alebo znárodňovacím opatreniam voči domácim i zahraničným investíciám je uznávané súdobým medzinárodným právom a potvrdené bohatou praxou suverénnych štátov. Výkon tejto kompetencie štátu je dnes považovaný za prejav jeho územnej zvrchovanosti.

V tomto zmysle, zaznamenalo 20. storočie niekoľko významných vĺn vyvlastňovacích a znárodňovacích opatrení po celom svete. Ruská októbrová revolúcia a nastolenie diktatúry proletariátu so sebou priniesli zoštátnenie všetkých výrobných prostriedkov, ktoré vyústilo vo vyvlastňovacie opatrenia veľkého meradla.[429] Komunistické revolučné zmeny boli prirodzene predmetom protestov západných mocností, ktoré považovali konfiškačné opatrenia voči ich vlastným občanom za neplatné a dožadovali sa ich odstránenia. Niekoľkoročné vyjednávania napokon skončili v slepej uličke, pretože štáty sa jeden po druhom vzdali svojich nárokov.

Mexická revolúcia namierená proti vláde P. Diaza privodila priekopnícku zmenu v poňatí vlastníckeho práva, ktorú preniesla do ustanovení novo prijatej ústavy krajiny. Individuálne právo vlastniť majetok bolo nahradené konceptom, ktorý prehlásil pôdu

[426] Supra Note 75
[427] Supra Note 76
[428] Supra Note 88
[429] Supra Note 102

a nerastné bohatstvo krajiny za národné bohatstvo a udelil cudzincom zákaz ho nadobúdať. Reformy mexického hospodárstva zasiahli predovšetkým amerických občanov. Rozdielnosť pohľadov na predmet sporu medzi Spojenými štátmi a Mexikom bola vyjadrená v dlhotrvajúcej korešpondencii na vládnej úrovni a nakoniec vyvrcholila dovolávaním sa dvoch protichodných doktrín: Calvovej doktríny a Hullovej formuly.

Zatiaľ čo väčšina znárodňovacích opatrení pred vypuknutím 2. svetovej vojny smerovala voči cudzincom, povojnové obdobie nastolilo opačný trend.[430] Odstránenie kapitalistického systému a zavedenie centrálne riadenej ekonomiky v štátoch východnej Európy ako i v Číne a neskôr na Kube, vyžadovalo znárodnenie súkromného majetku domáceho obyvateľstva i cudzincov.

Zápas rozvojových krajín v priebehu procesu dekolonizácie bol poznačený snahou o vyvlastnenie majetku spoločností kontrolovaných z bývalých koloniálnych mocností za účelom opätovného získania kontroly nad ekonomikou krajiny.[431] Presvedčenie o práve štátu zasahovať do majetkových práv za účelom riešenia sociálnych a ekonomických problémov stálo za spormi o koncesie k využívaniu surovín zo 60. a 70. rokov 20. storočia.[432]

Vyvlastňovacia prax štátov v priebehu 20. storočia neodrážala úplne či už rozvinutými alebo rozvojovými štátmi presadzované doktríny o zaobchádzaní so zahraničnými investíciami.[433]

Nejasný charakter sa však neobmedzuje len na spomínané pravidlá o zaobchádzaní s investíciami ale vzťahuje sa i na samotnú definíciu pojmu vyvlastnenie. Medzinárodné právo zamerané na otázku vyvlastnenia operuje s mnohými pojmami ale žiadnou presnou definíciou. V kontexte zabavenia majetkových práv navyše používa viaceré pojmy ako vyvlastnenie, znárodnenie a odňatie, ktoré sú často používané zameniteľne napriek tomu, že sú nadané určitými rozdielmi. Podstatou veci však stále zostáva, že ide o všetky druhy odňatia majetkových práv, bez ohľadu na ich formálno-právny status a osobitosti. Pojem znárodnenia, na rozdiel od individuálnych alebo osobných aktov vyvlastnenia, odráža zmeny, ktoré nastali v socioekonomickej štruktúre štátu (pozemkové reformy, zoštátnenie priemyslu alebo jeho sektorov, vylúčenie súkromného

[430] Supra Note 7
[431] Supra Note 110
[432] Supra Note 111
[433] Supra Note 112

vlastníctva z určitých oblastí národnej ekonomiky).[434] Pojmu odňatie, ktorý je používaný prevažne v anglo-americkej právnej literatúre, je často prisudzovaný širší význam ako pojmu vyvlastnenie. V zmysle argumentácie v prípade *ELSI* je všeobecné uznávané, že pojem odňatie nezahrňuje iba úplne vyvlastnenie majetku ale i neprimerané zasahovanie do jeho užívania, výkonu a nakladania s ním.

K definovaniu pojmu vyvlastnenie nepochybne formuláciou svojich ustanovení prispievajú i bilaterálne a multilaterálne dohody o ochrane investícií. Dohoda o severoamerickej zóne voľného obchodu (NAFTA), ktorá predstavuje ojedinelý príklad zmluvy uzatvorenej medzi dvoma vyspelými priemyslovými krajinami (USA a Kanada) a jednou skôr rozvojovou krajinou (Mexiko), sa zaoberá všetkými aspektmi investícií vo svojej 11. kapitole. Článok 1110 hovorí, že *žiadna zo strán nesmie priamo alebo nepriamo znárodniť alebo vyvlastniť investíciu investora druhej zmluvnej strany na svojom území alebo prijať opatrenie rovnajúce (tantamount) sa znárodneniu alebo vyvlastneniu tejto investície s výnimkou: verejného záujmu; na nediskriminačnom základe; na základe právneho postupu; proti náhrade*[435]. Podobné ustanovenie o vyvlastnení obsahuje i ďalšia dohoda multilaterálneho charakteru, Zmluva o energetickej charte. Jej článok 13(1) stanoví v podstate rovnaké podmienky vyvlastnenia ako NAFTA s tým rozdielom, že *investície nepodliehajú opatreniu alebo opatreniam majúci účinok rovnajúci (having effect equivalent) sa znárodneniu alebo vyvlastneniu*[436]. Ťažkosti s určením presného významu pojmu vyvlastnenia v medzinárodnom práve spôsobené všeobecnosťou jazyka medzinárodných dokumentov sú ešte posilňované tým, že ustanovenia o vyvlastnení nachádzajúce sa v zmluvných dokumentoch, i keď často podobné, obsahujú niekedy rozdielne formulácie.[437] Z tohto dôvodu, bola rozdielnosť medzi opatreniami rovnajúcimi sa znárodneniu alebo vyvlastneniu a opatreniami majúci účinok rovnajúci sa znárodneniu alebo vyvlastneniu vysvetlená tribunálmi v prípadoch *Pope & Talbot* a *SD Myers*, ktoré potvrdili, že ich obsah je totožný.

Výraznou pomocou pri výklade pojmu vyvlastnenie boli súkromné iniciatívy ako napríklad Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens z roku 1971, podľa ktorej *„odňatie majetku“ nezahŕňa iba úplné*

[434] Supra Note 114
[435] Supra Note 117
[436] Supra Note118
[437] Supra Note 119

odňatie majetku ale i akékoľvek neprimerané zásahy do užívania, výkonu a nakladania s majetkom[438].

Plodným zdrojom pre medzinárodné právo v otázke vyvlastnenia sa ukázali byť i ľudsko-právne dokumenty ako Európsky dohovor o ochrane ľudských práv či Americký dohovor o ľudských právach.

Predmetom diskusie dnes býva ani nie tak samotné právo štátu zahraničnú investíciu vyvlastniť, ako skôr podmienky či kritéria legálneho vyvlastnenia (znárodnenia). Zákonnosť vyvlastnenia je podľa medzinárodného práva zaistená v prípade, že vyvlastnenie je realizované vo verejný prospech alebo verejný záujem, na nediskriminačnom základe a za náhradu. Zatiaľ čo prvé dve menované podmienky legálneho vyvlastnenia sú všeobecne prijímané, tretia podmienka vzťahujúca sa na poskytnutie náhrady za vyvlastnenie je prijímaná iba principiálne. V skutočnosti totižto neexistuje žiadna univerzálna dohoda o spôsobe určenia výšky priznanej náhrady. Napriek tomuto nejasnému stavu, ktorý panuje v medzinárodnom obyčajovom práve o podmienkach legality vyvlastnenia, zmluvná úprava medzi štátmi obsahuje celkom jasné pravidlá o podmienkach zákonnosti.[439] Pravidlá vytvorené prostredníctvom uzatvorených medzinárodných investičných dohôd do značnej miery korešpondujú s tradičnými požiadavkami západných krajín, keďže vyžadujú existenciu verejného záujmu, nediskrimináciu rovnako ako aj vyplatenie náhrady často chápanej v duchu Hullovej formuly, t.j. okamžitej, dostatočnej a reálnej náhrady.[440] Spôsob určenia výšky náhrady za vyvlastnenie sa zvyčajne líši zmluva od zmluvy rovnako ako i otázka podmienky, aby sa pri vyvlastnení postupovali v súlade s právom, za predpokladu, že je v zmluve vôbec zahrnutá.

Problém interpretácie jednotlivých podmienok legálnosti vyvlastnenia nakoniec zostáva na pleciach medzinárodných arbitrážnych tribunálov, ktoré sa s nimi zaoberali pri svojich rozhodnutiach.

Prvá z podmienok legálneho vyvlastnenia, ktorá vyžaduje existenciu verejného záujmu, je síce všeobecne uznávaná ale súčasne dovoľuje pomerne široký výklad, čo môže mať za následok spochybnenie jej funkcie. Otázku, ktoré vyvlastňovacie opatrenie je a ktoré

[438] Supra Note 120
[439] Supra Note 142
[440] Supra Note 150

nie je vo verejnom záujme, totižto zodpovedá práve hostiteľský štát a z tohto pohľadu podmienka existencie verejného záujmu vôbec nepredstavuje neprekonateľnú prekážku. V tejto súvislosti sa vyjadril ICSID tribunál v prípade *ADC v Hungary*, ktorý rozhodol, že *zmluvou stanovená požiadavka „verejného záujmu" vyžaduje skutočný, nefalšovaný záujem verejnosti*.[441] Keďže tribunál trval na skutočnom a nefalšovanom verejnom záujme, v podstate odmietol názor, že štáty sú v pozícii, v ktorej by sami mohli voľne rozhodovať o obsahu pojmu verejného záujmu.

Zákaz diskriminácie, druhá podmienka legality vyvlastnenia, je všeobecne prijímaný ako súčasť obyčajového i obecného medzinárodného práva ako i zmluvného práva.[442] Vyvlastnenie na nediskriminačnom základe predpokladá, že štát úmyselne neuprednostní vyvlastnenie cudzincov alebo cudzincov určitej národnosti či konkrétneho cudzinca pred domácim obyvateľstvo.[443] V praxi tribunáli síce zvyčajne označujú politicky motivované alebo jasné formy diskriminácie za nelegálne akty vyvlastnenia, avšak v prípade vyvlastnení, ktoré postihnú iba zopár cudzincov aplikujú omnoho citlivejší prístup, keďže diskriminácia v týchto prípadoch môže byť dôsledkom legitímnej vládnej politiky.[444]

Podmienka, aby sa v prípade vyvlastnenia postupovalo v súlade s právom, je v zásade výsledkom zmluvnej úpravy v rámci bilaterálnych zmlúv o ochrane investícií a iných medzinárodných zmlúv upravujúcich reguláciu investícií. Obsah tejto podmienky je možné interpretovať ako poskytnutie možnosti na súdne preskúmanie prípadu, hlavne čo sa týka určenia výšky náhrady alebo ako vyjadrenie princípu zákonnosti požadujúceho, aby vyvlastnenie prebehlo v súlade s vnútroštátnym právnym poriadkom.

V otázke náhrady za vyvlastnenie panoval do 50. rokov 20. storočia konsenzus, podľa ktorého štátom vykonané vyvlastnenie vyžaduje poskytnutie plnej kompenzácie (*full compensation*).[445] Tento konsenzus sa vytratil z dôvodu znárodnení veľkých rozmerov spojených so socio-politickými zmenami v mnohých rozvojových štátoch ako i vzniku nových postkoloniálnych nezávislých štátov, ktorých nesúhlasné postoje k dovtedajšiemu usporiadaniu boli vyjadrené pokusmi o založenie Nového ekonomického poriadku prostredníctvom rezolúcii OSN. Pravdepodobne na základe

[441] ADC v Hungary, Above n 166
[442] Supra Note 169
[443] Supra Note 170
[444] Supra Note 183
[445] Supra Note 195

tejto nejasnosti, ktorá panuje v obyčajovom medzinárodnom práve v súvislosti s výškou náhrady, obsahujú medzinárodné investičné dohody pomerne detailné pravidlá o povinnosti zaplatiť náhradu v prípade vyvlastnenia.[446] Okrem problematiky výšky náhrady museli arbitrážne tribunály riešiť i otázku skutočného vyplatenia náhrady a jej časovej špecifikácie. V tomto kontexte je možné z arbitrážnej praxe dovodiť záver, že ponuka vyplatenia náhrady alebo iný akt v prípade, ak je otázka jej výšky naďalej sporná, je dostatočný pre naplnenie kompenzačnej podmienky legality vyvlastnenia.[447]

Splnenie všetkých predpísaných podmienok značí legálny charakter aktu vyvlastnenia. Nesplnenie čo i len jednej podmienky má za následok, že vyvlastňovacie opatrenie sa stáva samo o sebe nelegálnym a vedie k medzinárodnoprávnej zodpovednosti štátu. Štát, ktorý sa dopustí protiprávneho chovania má reparačnú povinnosť, to znamená, že má povinnosť obnoviť stav, ktorý by existoval keby k takému činu nedošlo. V prípade nezákonného vyvlastnenia sa javí ako primárny spôsob nápravy reštitúcia. Ak reštitúcia nepripadá v úvahu, štát je povinný poskytnúť kompenzáciu, odškodnenie výplatou zodpovedajúcej peňažnej čiastky.

Stály dvor medzinárodnej spravodlivosti vo svojom slávnom rozhodnutí *Chorzów Factory*, jednoznačne rozlíšil medzi legálnou a nelegálnou formou vyvlastnenia. Podľa názoru Stáleho dvora legálne vyvlastnenie vyžaduje vyplatenie sumy, ktoré korešponduje s hodnotou objektu v dobe jeho vyvlastnenia plus úroky za obdobie od vyvlastnenie do dňa vyplatenia náhrady. Kompenzácia ako forma reparačnej povinnosti naopak v sebe nesie povinnosť kompenzácie skutočnej škody a reálne očakávaného uniknutého zisku.

Posledná časť práce sa venuje jednotlivým formám vyvlastnenia, ktoré rozdeľuje na dva základné druhy – priamu a nepriamu formu vyvlastnenia. V rámci nepriamej formy ďalej rozlišuje špecifické podoby vyvlastnenia, a to plíživé a regulačné vyvlastnenie. V centre pozornosti sa v zásade ocitá koncept nepriameho vyvlastnenia, ktorý je rozvedený na základe jeho rozhodujúcich elementov. Na záver kapitoly bola umiestnená stručná analýza tzv. čiastočného vyvlastnenia.

[446] Supra Note 199
[447] Supra Note 214

Medzinárodné právo nepredpisuje povinnú formu, v ktorej by malo byť vyvlastňovacie alebo znárodňovacie opatrenie vykonané.[448] V skutočnosti k vyvlastneniu dochádza v mnohých formách, ktoré sú označené rôznymi názvami. Medzinárodné obyčajové právo rozoznáva základné rozdelenie na priamu formu, pri ktorej štát pristúpi k otvorenému a úmyselnému fyzickému pozbaveniu majetku alebo k formálnemu transferu titulu k nemu a nepriamu formu vyvlastnenia, pri ktorej je vlastník obmedzovaný vo výkone niektorého z právoplatných majetkových práv až do praktickej straty vlastníckeho podielu na danej položke majetku.[449] Inštitút vyvlastnenia medzinárodných investícií prešiel rozsiahlym vývojom, od formy klasického znárodňovania v sedemdesiatych a osemdesiatych rokoch minulého storočia až po sofistikovanejšie formy vyvlastňovacích štátnych regulácií a iné formy nepriameho, príp. faktického odňatia majetku investorov.

Klasickými prípadmi priameho vyvlastnenia sú znárodnenia celých priemyselných odvetví alebo rôznych odvetví ekonomiky. Odňatie majetku a zasahovanie do práv investorov, ktoré prebieha v období vojnového stavu alebo v stave ohrozenia štátu sa označuje ako rekvizícia.[450] Pojem konfiškácia sa používa pri neodvratnom odňatí majetku bez poskytnutia náhrady ako napríklad u prepadnutia majetku v súvislosti so spáchaním trestného činu.[451] Konfiškácie sa niekedy používa i pre označenie vyvlastnenia contra legem, teda v rozpore s normami medzinárodného práva.

Význam nepriameho odňatia majetku investorov a opatrenia majúci účinok rovnajúci sa vyvlastneniu predstihli svojou dôležitosťou dnes už len zriedkavo sa vyskytujúce formálne vyvlastnenia. Koncept nepriamej formy vyvlastnenia v sebe zahŕňa veľké množstvo spôsobov nepriamych zásahov, ktoré narušujú investorove ekonomické záujmy.

Plíživé vyvlastnenie predstavuje jednu z foriem nepriameho vyvlastnenia, ktorá sa odohráva postupne alebo krok za krokom.[452] Môže byť výsledkom série jednaní alebo opomenutí, ktoré v konečnom dôsledku majú za následok odňatie majetku.[453] Podstata plíživého vyvlastnenia spočíva v tom, že postupné kroky, ktoré za sebou nasledujú

[448] Supra Note 264
[449] Supra Note 265
[450] Supra Note 271
[451] Supra Note 272
[452] Supra Note 306
[453] Supra Note 307

v čase nakoniec vyústia vo vyvlastnenie, avšak žiadny z nich posudzovaný sám o sebe by nebol považovaný za vyvlastnenie. Tribunál v prípade *Siemens v Argentina* v tomto kontexte aplikoval metaforu so steblami, ktoré sú postupne pridávané na chrbát ťavy, až jej ho nakoniec zlomia. Napriek tomu, že každé steblo váži rovnako ako to predchádzajúce a nemá na ťaví chrbát badateľný účinok, musíme každé jedno steblo vnímať ako súčasť celku, ktorý viedol k ochrnutiu ťavy.[454]

Rovnako i arbitrážna prax jasne rozlišuje existenciu postupného vyvlastnenia. V prípade *Biloune v Ghana*, úrady vydali zákaz pokračovania v prácach, podrobili investíciu dotieravej finančnej kontrole, zničili časť projektu a nechali zatknúť a vyhostiť investora. Tribunál v tomto prípade skonštatoval, že všetky tieto opatrenia *mali za následok nenapraviteľné zastavenie prác na projekte* a *vláda Ghany sa svojim jednaním a opomenutím, ktoré vyvrcholilo deportáciou p. Biloune, dopustila nepriameho vyvlastnenia*[455].

NAFTA tribunál v prípade *Tecmed v Mexico* došiel k záveru, že odmietnutie predĺžiť žalobcovi povolenie na prevádzkovanie skládky znamenalo porušenie príslušnej zmluvy v súvislosti s ochranou pred vyvlastnením a opatreniami s rovnakým účinkom. Podľa názoru tribunálu, plíživé vyvlastnenie môže byť *vykonané prostredníctvom jediného kroku, radou krokov v krátkom časovom rozmedzí alebo prostredníctvom viacerých súčasne prebiehajúcich krokov*[456].

Z pohľadu vývoja najnovších trendov vývoja foriem vyvlastnenia zastáva dôležité postavenie regulačná forma vyvlastnenia, ktorá úzko súvisí s regulačnými opatreniami štátov, ktoré ich prijímajú ako súčasť svojej štátnej politiky. Je zrejmé, že nie každý zásah štátu, ktorý na nepriamej báze postihuje majetok a majetkové záujmy investorov, súčasne zakladá nepriame vyvlastnenie a s ním spojenú povinnosť štátu poskytnúť náhradu. Dilema spočívajúca vo vytýčení línie medzi legitímnym regulačným opatrením bez nároku na náhradu, ktoré slúži verejnému záujmu a opatrením rovnajúcemu sa vyvlastneniu s nutnosťou poskytnutia náhrady predstavuje v súčasnosti jeden z najpálčivejších problémov.[457]

[454] Siemens A.G. v Argentina, Supra Note 234, para. 263
[455] Biloune, Supra Note 311
[456] Tecmed, Supra Note 317
[457] Supra Note 323

Ústredný problém v rozlíšení medzi regulačným opatrením štátu na jednej strane a regulačným vyvlastnením na druhej spočíva v určení opatrení, ktoré sú legitímnym výkonom politiky vlády. Verejný záujem v tomto prípade nepredstavuje oprávnený postulát, keďže tento predstavuje iba podmienku legality vyvlastnenia. Rozhodnutie tribunálu v kauze *Feldman* poskytlo príklady, ktoré boli v minulosti označené za nepriame vyvlastnenie: konfiškačné zdanenie, odmietnutie prístupu k infraštruktúre či nevyhnutným surovinám a zavedenie neprimeraných regulačných režimov. Ďalšími príkladmi takýchto opatrení sú opatrenia závažným spôsobom rušiace riadenie a kontrolu podniku, odobratie licencie oprávňujúcej k podnikaniu, bezdôvodné odmietnutie obnoviť licenciu po jej vyčerpaní, či zákaz reexportu výrobného zariadenia. Na druhej strane je nutné podotknúť, že široko chápaná ochrana investorov pred nepriamym vyvlastnením by obmedzovala právo štátov v legitímnom rámci regulovať nielen ekonomiku ale napríklad i ochranu životného prostredia či ochranu zdravia občanov.

Rozhodovacia prax arbitrážnych tribunálov v tejto otázke zatiaľ nemá ustálenú podobu. Navyše, keďže v medzinárodnom práve neexistuje doktrína precedensu a každý arbitrážny tribunál aplikuje iné právne normy, rozhodovanie prípadov, i keď porovnateľných, môže skončiť úplne rozdielne.

Empíria investičnej arbitráže opakovane ukazuje, že býva veľmi zložité určiť, či k nepriamemu vyvlastneniu skutočne došlo. Napriek tomu, je možné rozoznať určité abstraktné právne pravidlá, ktoré arbitrážne tribunály pri rozhodovaní berú v úvahu.

Jedným kritériom k posúdeniu toho, či v konkrétnom prípade ide o nepriame vyvlastnenie je intenzita zásahu do investorovej investície. Keďže zanedbateľné, menej dôležité obmedzenia alebo zásahy do majetkových práv investora zvyčajne nenaznačujú, že ide o nepriame vyvlastnenie, medzinárodné právo vyžaduje tzv. významný zásah (*significant interference*), ktorý obvykle má na investíciu rovnaký dopad ako priame vyvlastnenie. V kauze Pope & Talbot, ktorá sa týkala dopadu kanadských vývozných reštrikcií na amerického investora, sa tribunál výslovne vyjadril, že *kritériom je, či je zásah dostatočne reštriktívny na to, aby podporil záver, že majetok bol vlastníkovi odňatý*[458].

[458] Pope & Talbot, Supra Note 358

Tribunál pre riešenie nárokov medzi Iránom a USA (Iran-US Claims Tribunal) sa počas svojej činnosti často vyjadroval k otázke závažnosti zásahu do investície. V prípade *Starrett Housing v Iran*, sa tribunál domnieval, že *menovanie osoby na post manažéra zo strany Iránu zasiahlo majetkové práva do takej miery, že sa stali natoľko neupotrebiteľnými, že museli byť považované za vyvlastnené*[459].

Tribunály v investičných arbitrážach sa taktiež zaoberali otázkou, či môže byť nepriame vyvlastnenie založené opatreniami hostiteľského štátu, ktoré sú iba dočasné. Rozhodovacia prax v tejto otázke nie je úplne jednotná. Na jednej strane sú tribunály, ktoré trvajú na tom, že opatrenia štátu musia byť trvalé alebo aspoň ich dopady musia byť trvalé. V prípade *Tecmed* tribunál konštatoval, že *opatrenia prijaté štátom, nech sú už regulačnej povahy alebo nie, sú nepriamym de facto vyvlastnením, ak sú nezvratné a permanentné*[460].

Na druhej strane stoja tribunály, ktoré pripúšťajú, že i dočasné opatrenie štátu môže byť považované za nepriame vyvlastnenie. V kauze *SD Myers* tribunál pripustil, že *za určitých okolností, by bolo vhodné posudzovať zásah hostiteľského štátu za vyvlastnenie, i keď by bol iba dočasný alebo čiastočný*[461]. V tomto prípade však tribunál dočasné uzatvorenia hraníc po dobu 18 mesiacov, ktoré zasiahlo možnosť investora vyvážať nebezpečná odpad, neposúdil ako nepriame vyvlastnenie.

Druhým dôležitým elementom je poznatok, že vyvlastnenie majetkových práv nevyžaduje ich nadobudnutie štátom (appropriation). Odňaté majetkové práva ako poznamenal tribunál v kauze *Amco* môžu byť po vyvlastnení *prevedené v prospech iných právnických alebo fyzických osôb*[462].

V súčasnosti dominantným prístupom k definovaniu vyvlastnenia je tzv. sole effect doctrine, ktorého základom je absolutizácia efektu štátneho opatrenia vo vzťahu k dotknutej investícii ako kriteriálneho prvku kvalifikácie vyvlastnenia. Dobrým príkladom tohto prístupu v praxi investičnej arbitráže je rozhodnutie v prípade *Metalcad*, v ktorom americká spoločnosť kúpila mexickú spoločnosť spolu s jej povolením postaviť zariadenie určené pre úschovu nebezpečného odpadu a skládku. Mexická vláda však následne oblasť, kde mala prebehnúť plánovaná výstavba, vyhlásila

[459] Starrett v Government of the Islamic Republic of Iran, Supra Note 353
[460] Tecmed, Above n , para. 116
[461] SD Myers, Supra Note 361
[462] Amco, Supra Note 367

za prírodnú rezerváciu na ochranu vzácneho kaktusu a vydala príkaz na zastavenie prác. Tribunál rozhodol, že toto opatrenie prispelo k nepriamemu vyvlastneniu investície a výslovne zároveň uviedol, že nepovažoval za nutné sa zaoberať motívmi zriadenia rezervácie.[463]

Podobne v kauze *Biloune v Ghana,* ktorá súvisela s výstavbou rekreačného komplexu, tribunál konštatoval, že *motívy krokov a opomenutí ghanskej vlády nie sú jasné. Ale tribunál nemusí tieto motívy zisťovať, aby došiel k záveru o tejto kauze*[464].

Kontroverznosť tohto prístupu nespočíva v jeho oprávnenosti, keďže nikto nemôže spochybniť dôležitosť ekonomického dopadu na investora ale skôr v tom, či tento dopad má byť rozhodujúcim faktorom pri určovaní, či došlo k vyvlastneniu. V praxi by totižto mohol viesť k prílišnému obmedzovaniu možnosti štátu vykonávať svoje legitímne a relatívne bežné regulatívne funkcie. Teoreticky každé opatrenie s negatívnymi dopadmi na zahraničné investície by mohlo dať podnet pre vznik nároku na odškodnenie, čo by štátnu reguláciu neúmerne predražilo.

V rámci posudzovania prípadov nepriameho vyvlastnenia tribunály posudzujú i ďalšie faktory ako napríklad rolu investorových legitímnych očakávaní, transparentnosť alebo aplikujú test proporcionality.

Postoj medzinárodného práva k otázke čiastočného vyvlastnenia (*partial expropriation*) je analyzovaný na záver diplomovej práce. Tento postoj sa javí ako ťažko čitateľný, pretože v praxi niektoré tribunáli považovali zvyškovú kontrolu nad investíciou, resp. jej časťou za prekážku pre konštatovanie vyvlastnenia a priznanie náhrady a iné tento koncept naopak akceptovali.

Tribunál v prípade *GAMI v Mexiko* uviedol silný argument v prospech uznania čiastočného vyvlastnenia, kde jasne uviedol, *že by išlo o vyvlastnenie bez ohľadu na to, či je vyvlastnená celá farma alebo iba jej časť o rozlohe 50 akrov*[465]. V tomto prípade ako i v ďalších, ktoré explicitne alebo implicitne uznali čiastočné vyvlastnenie, zaujal tribunál postoj, ktorý chápe celok investície tak, že je zložený z niekoľkých oddeliteľných investícií.

[463] Metalclad, Above n 192, para. 111
[464] Biloune, Supra Note 377
[465] GAMI v Mexico, Supra Note 411

Profesorka Ursula Kriebaum v tejto súvislosti navrhla nasledujúce kritéria, pri ktorých splnení má byť čiastočné vyvlastnenie uznané: (i) celok investície môže byť rozdelený na jednotlivé práva; (ii) hostiteľský štát pripravil investora o také právo, ktoré je kryté definíciou investície v príslušnej dohode o ochrane a podpore investícií; a (iii) toto právo je samostatne ekonomicky využiteľné nezávisle na zvyšku investície. Tento prístup by mal zabrániť zneužívaniu poskytovanej ochrany pred vyvlastnením ako náhrady poistenia pre prípad rizika zníženia hodnoty investície a zároveň umožniť poskytnutie kompenzácie za čiastočné vyvlastnenie v odôvodnených prípadoch.[466] Praxou investičných tribunálov však tento prístup ešte prijatý nie je.

[466] Supra Note 418

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