



FACULTY OF LAW  
University of Lund

Magdalena Pucher Holmer

Regulatory expropriation under  
international investment law  
– A case-law analysis

Master thesis  
20 points

Patrik Lindskoug

International Business Law

Fall 2006

# Contents

<b>CONTENTS</b>	<b>2</b>
<b>SUMMARY</b>	<b>3</b>
<b>PREFACE</b>	<b>4</b>
<b>ABBREVIATIONS</b>	<b>5</b>
<b>1 INTRODUCTION</b>	<b>6</b>
1.1 Background	6
1.2 Purpose, material and terminology	7
<b>2 SELECTED CASE-LAW: GENERAL CONSIDERATIONS</b>	<b>10</b>
<b>3 THE INTERFERENCE CRITERIA</b>	<b>13</b>
3.1 Degree of interference	13
3.2 Duration	23
<b>4 EXPECTATIONS OF THE INVESTOR</b>	<b>26</b>
<b>5 INTENT OF THE STATE</b>	<b>31</b>
<b>6 OBJECT AND PURPOSE</b>	<b>36</b>
6.1 The police power exception	36
6.2 The “sole effects” doctrine	41
<b>7 CONCLUDING ANALYSIS AND ENDING THOUGHTS</b>	<b>45</b>
<b>SUPPLEMENT A</b>	<b>55</b>
<b>BIBLIOGRAPHY</b>	<b>57</b>
<b>TABLE OF CASES</b>	<b>61</b>

# Summary

While regulatory measures are commonly imposed by states for social, environmental, economical or other reasons and are universally accepted as a part of state sovereignty, they may in various ways adversely affect the interests of foreign investments. Current debates under international investment law centre on whether and when such state interferences, although involving no transfer of legal title from the individual owner to the state, should be regarded as compensatory so called indirect or regulatory expropriations. Most investment treaties and free trade agreements concluded worldwide include expropriation provisions covering indirect expropriation implicitly or with specific clauses to that end. As those legal documents generally provide no more than vague and open-ended provisions on the subject, however, the scope of the term has largely been left for international courts and tribunals to determine based on general rules of international law.

The thesis analyses selected case-law on regulatory expropriations under the IUCT, ICSID and UNCITRAL. It explores the standards applied by different tribunals when determining the legal qualification of measures at issue and inquires whether any general guidelines may be found in establishing the line between non-expropriatory regulatory measures and indirect expropriations. The material is divided into four main criteria commonly considered by tribunals and identified in literature on the subject, namely (i) the level of interference, (ii) legitimate expectations of the investor, (iii) state intent; and (iv) object and purpose.

It is concluded that the international jurisprudence in this area seems to be characterized by highly case-specific reasonings and a scarcity of consistent patterns. Although the four outlined criteria may serve as a helpful framework, the extent to which these are considered, as well as their interpreted practical meaning and scope, vary significantly in the analyzed cases.

# Preface

I would like to thank Professor C. Gibson and Professor S. Dillon at Suffolk University Law School in Boston, for two interesting and inspiring classes in international business transactions and international trade law during the school-year of 05/06. Knowledge gained in these classes formed my starting point when choosing the subject of indirect expropriations and has been a useful framework during the work on this paper.

# Abbreviations

ECHR	European Court on Human Rights
ISCID	International Centre for the Settlement of Investment Disputes
IUCT	Iran-US Claims Tribunal
UNCITRAL	UN Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties (1969)

# 1 Introduction

## 1.1 Background

The early modern debate on expropriations in the international investment context has centred largely on outright takings of property and large-scale nationalizations; the conditions to be complied with for such actions to be regarded legal and in particular the appropriate amount of compensation to be paid.<sup>1</sup> During the last decades, however, nationalizations have become rare and the concept of direct expropriation is today considered to be a “well settled issue of international law”<sup>2</sup>, as is, in the general view, the obligatory level of compensation<sup>3</sup>. Current debates in the field of international expropriations centre on state regulations that interfere with private property rights without including any physical state occupation or transfer of legal title from the original owner. While regulatory measures are commonly imposed for social, environmental, economical or other reasons and are universally accepted as a part of state sovereignty, they may in various ways adversely affect the interests of foreign investments. The boilerplate issue has become whether and when such state interferences, although involving no takings in the traditional sense of the term, should be regarded as compensatory so called indirect or regulatory expropriations under international law.

Most investment treaties and free trade agreements concluded worldwide include expropriation provisions covering indirect expropriation implicitly or with specific clauses to that end.<sup>4</sup> Almost all of these documents however provide broad and open-ended provisions and stay silent on the more exact definition of the term, opening up for broad debates on what should be the role and scope of indirect expropriation. Traditionally, capital-importing developing countries wanting to protect their regulatory freedom have been found on one side of the spectrum and capital-exporting developed countries wanting to protect their investments on the other. The debate has however taken an interesting shift after the US and Canada found themselves defending domestic regulations under investor-state arbitration proceedings,

---

<sup>1</sup>Baughen, at 209.

<sup>2</sup>Appleton, at 40. Under current customary law, expropriation is legal if conducted for a public purpose, as provided by law, in a non-discriminatory manner and accompanied by compensation. See further e.g. Yannaca-Small, at 3.

<sup>3</sup>The generally accepted Hull formula requires compensation to be “prompt, adequate and effective”, meaning, *inter alia*, market value compensation and payment in a freely transferable currency. See further e.g. Been & Beauvais, at 47-48. For a critical approach and a discussion on the alternative Calvo formula, see Porterfield, at 38-40.

<sup>4</sup>The number of such legal documents is growing exponentially. 2400 BITs, 219 other bilateral or regional free trade and investment agreements and numerous multilateral documents including provisions on property rights of investors were in force at the end of 2004, see UNCTAD at 3.

largely as a consequence of the NAFTA.<sup>5</sup> Currently, the subject is raised not only in the legal sphere but throughout the society among journalists, environmentalists, politicians, consumer advocates and more.<sup>6</sup> Whatever is to be said of the fact that it took a policy shift of the US to fully awake the international debate on indirect takings, it is now surely awoken. As put by a leading commentator in the field, “the single most important development in state practise has become the issue of indirect expropriation”.<sup>7</sup>

## 1.2 Purpose, material and terminology

As legal documents generally provide no more than vague provisions on the subject, the scope of indirect expropriations has largely been left for international courts and tribunals to determine based on general rules of international law.<sup>8</sup> So far, and although the number of international expropriation cases is growing, the body of jurisprudence on indirect forms of takings is relatively undeveloped, further explaining the broad debates on where international law currently stands on the matter.<sup>9</sup> This paper will analyse selected investor-state arbitral awards concerning indirect expropriations. It will attempt to explore the standards applied by different tribunals when determining the legal qualification of measures at issue and inquire whether any general guidelines may be found in establishing the line between non-expropriatory regulatory measures and indirect expropriations. The legal qualifications relevant for this analysis include whether a measure is to be regarded as expropriation and whether compensation is to be paid on the basis of substantive international law. Procedural aspects will thus be disregarded, as will practical consequences such as awarded levels of compensation.

Regarding terminology, it should be noted that the terms “expropriation” and “taking” will be used as synonyms in the following, as will “regulatory expropriation” and “indirect expropriation”.<sup>10</sup> The scope of “investment” is construed similarly in most agreements, and interpreted broadly to include practically all tangible and intangible property used for business purposes or

---

<sup>5</sup>The US had, as of the end of 2005, the world’s third highest number of foreign investor claims against it (11), after Argentina (42) and Mexico (17). Canada (6) followed as number 10. See UNCTAD Recent, Annex. NAFTA entered into force in 1994 between US, Canada and Mexico. As pointed out by Porterfield, at 39-40, it was first under NAFTA, that the US and Canada became respondents in expropriation disputes, since investments flow both ways between these countries as different from BITs generally concluded between a developed a developing country where, as a practical matter, only the capital-importing developing country will bare the risk of facing claims from foreign investors.

<sup>6</sup>Parisi, at 413-414. See also Goh Chien, at 4.

<sup>7</sup>Dolzer, at 65.

<sup>8</sup>Yannaca-Small, at 6-7, Geiger at 473. Regarding NAFTA, see Appleton, at 40.

<sup>9</sup>Shenkman, at 174.

<sup>10</sup>Although some commentators imply that indirect expropriation is broader in scope than regulatory expropriation (see e.g. Freeman, at 181), the general view seems to be that the terms are synonyms. See e.g. Mouri at 70-72, Newcombe, at 6.

acquired with the expectation of such a use, as well as, to provide a few main examples, interests from capital commitments, securities, contracts and concessions.<sup>11</sup> As the term will be used in the widest sense, this basic exemplification will be sufficient for the purpose of the following work. The question of what specific property rights within an investment that are relevant for the determination of expropriation is however more problematic, and form part of the challenge of defining the scope of indirect expropriation.<sup>12</sup> The latter will therefore be further evolved below. Finally, also the term “measure” will be used in a broad sense, including any law, regulation, procedure, requirement or practise.<sup>13</sup>

It should be noted that the final outcome of most investor-state cases, will be dependent not only on the expropriation issue, but also on additional or alternative protection rules commonly included in international investment agreements, such as national treatment, most favoured nation, and fair and equitable treatment principles.<sup>14</sup> As the aim of this paper is not to look at the full picture of investor protection under international investment law, however, but is limited to the regulatory expropriation rule alone, additional aspects in claims, discussions and court reasonings will be omitted.

The paper will gather most materials from US sources, in the form of law journals, official documents and expert comments. Historically, the US has been the domestic setting where the issue of regulatory takings has been a

---

<sup>11</sup>Under NAFTA, art 1139 an "investment" includes "an enterprise;" "an equity security of an enterprise;" "a debt security of an enterprise;" "an interest in an enterprise that entitles the owner to share in income or profits" (or assets); "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes;" and "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory," including contracts or concessions. As defined in art 201, "enterprise" is "any entity constituted or organized under applicable law including any corporation, trust, partnership, sole proprietorship, joint venture or other association."

<sup>12</sup>For example, even when it is clear that an enterprise forms an "Investment" protected from expropriation, it must still be determined which property rights within the company's business, such as physical assets, IP rights, market share or access, goodwill, etc, that will be relevant in assessing if the investment has been expropriated. See further below in chapter 3.1.

<sup>13</sup>This definition is used in NAFTA, Art 201(1). Taxation, although arguably within the scope of "measure" will be excluded from the scope of this paper, as it raises specific issues that deserved separate considerations. For a comprehensive analysis of the scope of indirect expropriations in the fiscal sphere, see Waelde/Kolo, at <http://www.dundee.ac.uk/cepmlp/journal/html/vol4/article4-17.html>.

<sup>14</sup>National Treatment (NT) and Most Favoured Nation Treatment (MFN) constitute relative standards prohibiting a state from discriminating foreign investors of a State Party in relation to domestic investors or investors from other countries, respectively. A third provision commonly included is the absolute Minimum Standard treatment, which obliges a state to follow international standards of fair and equitable treatment towards foreign investors. Finally, State Parties are often prevented from imposing Performance Requirements, meaning certain conditions for investing in the state such as to include local employees or to conduct business in the currency of the host state. See further Been & Beauvais at 40-41. As pointed out by Dolzer, at 67, the precise scope of those provisions and to what extent they may overlap with expropriation issues is not clear.



matter of much attention, resulting in a rich body of jurisprudence on the subject which, after decades of development, is regarded to be *sui generis*.<sup>15</sup> The US has also been the leading state in the process of drafting and negotiating free trade and investment agreements with strong investor rights. While often being in the favourable negotiating position to impose property protection standards similar to the ones found in American domestic law and/or to model-principles drafted by American actors, recent cases against the US under NAFTA, have as above mentioned caused much controversy as to the appropriateness of those standards.<sup>16</sup> Not surprising in view of all of the above, the issue of regulatory expropriation and the appropriate level of investor protection in current international law is debated most in depth in the US, rendering an examination of predominantly American sources meaningful.<sup>17</sup>

The debate has been centred largely on regulatory expropriations in the context of environmental regulations and public health policies, as most disputes have arisen in these areas of state activity. However, the arguments and concepts discussed below are of general character and, as shown in some of the cases, can also be applied with regard to other forms of state regulations such as measures taken for the public safety, the general welfare etc.

---

<sup>15</sup>Appleton, at 39.

<sup>16</sup>See *supra* note 5. See also Gantz, at 671, pointing out the similarities between NAFTA and US-concluded BITs.

<sup>17</sup>This does not mean that the authors are exclusively of American origin - US publications often include works by foreign scholars.

## 2 Selected case-law: general considerations

In light of the purposes set out above, the paper will analyse case-law from the IUCT and tribunals under the ISCID and UNCITRAL.<sup>18</sup> These sources have been chosen since they are contemporary, have had the most opportunities to deal with international indirect expropriation and are regarded to be most influential in this context. Regarding the IUCT, it has been held that its jurisprudence is of particular importance for future tribunals given the high level of expertise within the body of arbitrators; it is also still the largest body of international precedent on indirect expropriations.<sup>19</sup> Although the validity of the jurisprudence for broader references has been questioned in view of the specific circumstances of the Iranian revolution in which the cases were brought, the predominant view regards general principles outlined by the tribunal as a valuable source of guidance in this context.<sup>20</sup> As to ISCID and UNCITRAL, these are the fora under which the bulk of today's investor-state disputes are brought.<sup>21</sup> The ones analysed in this paper will predominantly be cases arisen under NAFTA, the first multilateral treaty including both a provision on indirect expropriation and a mandatory investor-state dispute mechanism.<sup>22</sup>

While I will mix awards from the above sources, it is to be noted that the legal determinations by tribunals, according to the rules of the fora as well as the agreements that are interpreted, are to be based on principles of

---

<sup>18</sup>The IUCT was established in 1982 to settle claims of American investors in Iran and Iranian investors in the US arising out of the Iranian revolution in 1979. ISCID was founded as a part of the World Bank Group in 1965; UNCITRAL acts under a UN mandate. For more information on the two latter fora, see <http://www.worldbank.org/icsid/> and <http://www.uncitral.org/uncitral/en/index.html> respectively.

<sup>19</sup>The tribunal has rendered approximately 60 awards so far, most of them regarding takings of some sort. See further Aldrich, at 586, Been & Beauvais, at 57.

<sup>20</sup>Been & Beauvais at 57-58. The authors also argue that the IUCT special case as the tribunal holds a broader mandate, extending beyond expropriations to include also rulings on "measures affecting property rights". However, as seems to be recognized by Been & Beauvais, this does not alter the relevance of the IUCT case law on indirect expropriations, i.e. where the reasonings are based on international expropriation standards rather than the additional "affecting property rights" standard. See also Brunetti, at 204-205, holding the same view.

<sup>21</sup>Of the 219 cases known to have been filed under international investment agreements (as of November 2005), 132 were brought under ISCID and 65 under UNCITRAL. See UNCTAD, at 2.

<sup>22</sup>See NAFTA, Chapter 11 and for comments Beauvais, at 254. According to art 1120(1), parties may chose between proceedings under ISCID or UNCITRAL. As at least one of either the host or the home state in a dispute must be party to the ISCID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) for that forum to be applicable, and neither Mexico nor Canada are currently parties (see <http://www.worldbank.org/icsid/constate/c-states-en.htm> for a list of signatory states), disputes between those states may at present only be brought under UNCITRAL.

international law.<sup>23</sup> Consideration of relevant rules of international law is also mandated under the VCLT, widely recognized as international customary law and providing general guidance as to the interpretation of international documents.<sup>24</sup> Thus, the body of international law may be seen as a common core that is both interpreted and evolved by the tribunals in this regard.

An important practical limitation for the purpose of this work arises out of the fact that arbitration claims and awards are generally confidential unless both parties agree to make them public.<sup>25</sup> It is therefore impossible to get the full picture of existing case-law in the expropriation context. Furthermore, even where a case is made public, there is no requirement for a written reasoning explaining the decision.<sup>26</sup> The case discussions below are based on information that has been made public. Even so, however, in many cases the parties have chosen not to make their submissions public, thus the full set of factual circumstances in those cannot be guaranteed.<sup>27</sup>

Rather than detailing each separate case in whole, the material will be divided into four main factors commonly considered by tribunals in this regard and identified in parts of the legal doctrine. These are (i) the level and duration of the interference; (ii) the expectations of the investor; (iii) the intent of the state and finally, (iv) the object and purpose behind a measure

---

<sup>23</sup>See NAFTA art 1131, US-Iran Treaty of Amity, Economic Relations and Consular Rights, Art IV (2). For a definition of International law, see Statute of the International Court of Justice, art 38, which is generally referred to in this context, providing the following hierarchy of sources: international conventions; international custom; general principles of law recognized by civilized nations; and as subsidiary means: judicial decisions and the writings of publicists. It is to be noted, that although earlier decisions thus form a source under international law, they are not binding upon subsequent cases. Nor is a formal stare desisis principle separately included in documents such as NAFTA, or internal rules of the fora. See Gantz, at 716.

<sup>24</sup>According to art 31(2)(c), "any relevant rules of international law applicable in the relations between the parties" shall be taken into account when interpreting a treaty.

<sup>25</sup>Institutions generally do not have any registration of claims. An exception is the ICSID, where all claims made under the institution are maintained in a public register; however there is no information on what grounds the claim was based on or how it proceeded. See UNCTAD, at 2-3. As to the confidentiality of the awards, see the Article 48.4 of the ICSID Rules or art 32.5 of the UNCITRAL Arbitration Rules, both of which permit publication of the award only with the consent of both parties. The NAFTA states have recently agreed to make public all documents submitted to or issued by arbitration tribunals under NAFTA disputes, however with the exception that business information may be kept secret. See NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (2001) at [www.dfait.maeci.gc.ca/tna-nac/NAFTA-interpr-en.asp](http://www.dfait.maeci.gc.ca/tna-nac/NAFTA-interpr-en.asp).

<sup>26</sup>Poirier, at 854.

<sup>27</sup>Wagner notes this problem with regard to NAFTA case law, at 483. Without drawing any general conclusions, he argues that the questions asked in his research article (regarding if NAFTA case law is consistent with American domestic environmental law) may be answered based on the information provided in the cases at hand. A similar approach must arguably have been chosen by the dozens, if not hundreds of authors who comment on the decisions of arbitration tribunals in the legal doctrine, as they draw conclusions based on these decisions. In sum, although one must keep the information problem in mind, it is argued that useful research regarding indirect expropriation has been done and may be done based on emerging international case-law on the subject.

at issue.<sup>28</sup> The two last criteria are often discussed in one context, they will however be separated in this paper in order to keep different aspects clearer apart and make the text easier to follow. Comments and views by scholars will be referred to when found appropriate along the case-law analysis. All relevant texts interpreted by the tribunals are contained in Appendix 1.

---

<sup>28</sup>See e.g. Yannca-Small for a clear outline, see also Baughen, (especially in conclusion at 227), Newcombe. The criteria originate in US domestic jurisprudence on indirect takings, see *Penn Cent. Transp. Co v. New York City*, 438 U.S. 104 (1978).

## 3 The interference criteria

Two important factors used by courts and tribunals in determining whether an indirect expropriation has occurred is the impact of the alleged expropriatory measure on the private property rights in question and the extent to which these rights have been interfered with. These are the central factors within the interference criteria. A matter closely obviously connected to this criteria is the form of economic right a measure is interfering with, i.e. the question of what economic rights are relevant in this context and how they are to be measured.<sup>29</sup> These issues will thus be discussed together. However, as a general analysis of the concept of property is outside the scope of this paper, only the more problematic, grey zone issues with regard to the material scope of "property right" and "property interest" of an investment in expropriation provisions will be highlighted.<sup>30</sup>

### 3.1 Degree of interference

An important early case to mention in this context is the **Starrett Housing Corp. V. Iran**, decided under the IUCT.<sup>31</sup> The issue concerned an appointment by the Iranian government of a "temporary" manager to an Iranian company and its ongoing construction project. According to Starrett, a majority shareholder in the company, this measure constituted an expropriation as it effectively deprived the company of its management rights. The tribunal, ruling in favour of the claimants, based its reasoning largely on the interference criteria. The appointment was found to be an expropriatory action as "*the Government of Iran had interfered with the Claimant's property rights in the project to an extent that rendered these rights so useless that they must be deemed to have been taken, even though... the legal title to the property formally remains with the original owner.*"<sup>32</sup>

Expropriation was found in similar circumstances in the subsequent **Tippetts case**, albeit on slightly different grounds.<sup>33</sup> The Iranian government had appointed a new manager of a partnership that Tippetts has established with an Iranian engineering firm prior to the revolution. The tribunal did not find the appointment of the manager per se to be expropriatory, but regarded the actions of the manager to constitute a taking

---

<sup>29</sup>As put by Been & Beauvais, at 61: "the inquiry in to the economic impact of the regulation depends critically upon how the property is defined".

<sup>30</sup>For a discussion on modern concepts of property, see Sornarajah, at 352 and forward.

<sup>31</sup>Starrett Housing Corp v Iran, Interlocutory Award No ITL 32-24-1, Award Dec 19, 1983, reprinted in 4 Iran-US CTR 122 (hereinafter "Starrett Housing").

<sup>32</sup>Starrett Housing, at para 3 (155).

<sup>33</sup>Tippetts, Abbott, McCarthy, Stratton v TAMS-AFFA, Award No 141-7- 2 June 29, 1984, reprinted in 6 Iran-US CTR 219, 225 (hereinafter "Tippetts").

on the part of the state. The reasoning includes the following, subsequently often quoted, passage: “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, thus requiring compensation under international law, 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.”<sup>34</sup> The grounds were similar to that of Starrett Housing, in that the level of interference with effective control and management of the enterprise was found decisive in the finding of expropriation. Commentators have however recognized a less stringent standard in Tippetts, as the notion of rendering property rights “useless” is not included.<sup>35</sup> Although it has been suggested that the Tippetts standard maintains the requirement of a high level of interference, resulting in “either a substantial, total or effective loss of an alien's property right(s)”, respondents point out that there is no support for such an interpretation in the tribunal’s statement. Under the latter view, commentators conclude that even a partial taking, if affecting “fundamental rights” of property and being not “merely ephemeral”, may amount to an expropriation under the IUCT standard.<sup>36</sup>

As to the meaning of fundamental rights, the case is interesting in view of earlier doctrine, where views on the subject of control and management rights were provided by e.g. prof. Christie in her groundbreaking work on indirect expropriations.<sup>37</sup> The author may at first seem radical in her statement that there may be circumstances where operating control over the enterprise could be completely taken from the owner without rendering the state responsible. At a closer look, however, examples given of such circumstances include valid reasons of gravity amounting to e.g. economic emergency; a temporary nature of the measure and a proper management including the giving of fair profit to the owner.<sup>38</sup> Christie also concludes that “the most fundamental right an owner of property has is the right to participate in its control and management.”<sup>39</sup> The Tippetts case clearly reaffirms the importance given to that right, interestingly in a wording similar to the one in Christie, as one can conclude that deprivation of control and management may equal a deprivation “fundamental rights of ownership”. Among more recent leading works in the field, Sornarajah should be mentioned as holding a similar, even more stringent view, stating that interference by a state whereby management and control over the

---

<sup>34</sup>Tippetts, at 225-226.

<sup>35</sup>Brunetti, at 206.

<sup>36</sup>Gantz, at 724.

<sup>37</sup>Christie, G.: “What Constitutes a Taking of Property under International Law?”, 38 British Yearbook of International Law, 307 (1962).

<sup>38</sup>Christie, at 333-334, 337.

<sup>39</sup>Christie, at 337.

affairs of a foreign investor are taken is prima facie a taking which should be compensated.<sup>40</sup>

Under NAFTA, the economic interference criteria in the context of expropriation have been analysed mainly with regard to the definition of a measure “tantamount to expropriation” in art 1110.<sup>41</sup> In **Pope & Talbot Inc. v. Canada**, the claimants argued for a broad definition of the term “tantamount to expropriation”, including all measures not amounting to direct or indirect expropriation which resulted in denying at least *some* benefit to the property of an investor.<sup>42</sup> The UNCITRAL tribunal however strongly rejected this view of a *lex specialis* creating a new form of expropriation, clarifying that “tantamount to” means nothing more than “equivalent to” and that the wording therefore does not broaden the ordinary scope of regulatory expropriation under international law.<sup>43</sup> The case regarded decreased export quotas for lumber between Canada and the United States, pursuant to which a Canadian daughter company of the claimant, active in the timber exporting industry, had experienced reduced access to the US market and increased expenses for export duties, resulting in substantially reduced profits.<sup>44</sup> The tribunal regarded the claimant’s access to the US market as a property right protected by NAFTA, thus confirming a broad reading of the term. As explained by the tribunal, the ability to export lumber to the US forms “*a very important part of the “business” of the investment. Interference with that business would necessarily have an adverse effect on the property that the Investor has acquired in Canada, which of course constitutes the Investment*”.<sup>45</sup> The tribunal did however not find the Canadian quotas to constitute expropriation, stating in a Tippets case-like wording that “*Mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required*”. And further “*The test is whether the interference by the government is sufficiently restrictive to support a conclusion that the property has been “taken” from the owner...Under international law, expropriation requires a “substantial deprivation”*”.<sup>46</sup> In this case such a substantial deprivation had not occurred

---

<sup>40</sup>Sornarajah, at 387. The author however recognizes that there will be exceptions to this rule, thus the generalisation should serve primary as a starting point for further discussions. See at 388.

<sup>41</sup>See Appendix 1.

<sup>42</sup>Pope & Talbot, Inc. v Canada, UNCITRAL Interim Merits Award June 26, 2000 (hereinafter “Pope & Talbot”), at para 83. The award quoted is interim, as the expropriation claim was not approved to proceed to a final award.

<sup>43</sup>Pope & Talbot, at para 96. For comments of the interpretation of “tantamount to expropriation”, see Shenkman at 177-178.

<sup>44</sup>Under the Softwood Lumber Agreement (SLA) between Canada and the US, Canada was obliged to limit its duty-free lumber exports to the US. This was achieved though quotas allocated among the Canadian provinces as well as individually among exporters. Pope & Talbot argued that the province in which they operated was disadvantaged by receiving lower quotas than other provinces, as well as that their individual quota had been unfairly decreased. See Pope & Talbot, at para 6. See also Final Merits Award, (April 10, 2001), at para 89,121.

<sup>45</sup>Pope & Talbot, at para 96.

<sup>46</sup>Pope & Talbot, at para 102.

as "the sole 'taking' that the Investor has identified is interference with the Investment's ability to carry on its business of exporting softwood lumber to the US. While this interference has, according to the Investor, resulted in reduced profits for the Investment, it continues to export substantial quantities of softwood lumber to the US and to earn substantial profits on those sales".<sup>47</sup> Thus, continuance of control over the business and continued profit-making constituted proof that an expropriation had not taken place.

The tribunal's approach raises some important questions on how to measure property rights and interference in this context. According to some commentators, the reasoning applies the much debated technique of conceptual severance, whereby a part of the "bundle of property rights" that is directly affected by a measure is severed and construed to be separate whole when determining the level of interference. Thereby, even if a only a part of a bundle of rights have been taken from the owner, leaving others intact, it may still be concluded that he has been *wholy* deprived of the "the property rights", as that part constitutes a separate whole for the purpose of the determination.

In the Pope & Talbot case, it has been argued that the tribunal regarded the claimants market access in the US as such a relevant part, which potentially could be considered a separate investment, and which, if substantially interfered with by a state measure, could render the latter expropriatory.<sup>48</sup> Conceptual severance, whether functional such as the one discussed in the concept of Pope & Talbot or spatial severance e.g. where a piece of land is divided into subparts in this context, has met with much critique, mainly from advocators of the so called "parcel as a whole" rule. The latter argue that the concept of ownership should be kept unseparated, so that an owner cannot be said to have been deprived of an investment where only a part of his "bundle" of rights have been affected.<sup>49</sup> Apart from these principal objections, there are also some practical difficulties with severing property rights, especially in view of the complex business formations of today which may include dozens of sub-areas both functionally, such as production, distribution, advertising etc.; and spatially. As there are no clear answers to this issue, determinations seem to be made on a case-by-case basis<sup>50</sup>, some of which will be further analysed below. Returning to Pope & Talbot, it may, however be questioned whether the tribunal applied a conceptual severance approach in a way above referred commentators have suggested. The above quoted statement on interference with export business implies that market access was regarded as forming a part of "the property

---

<sup>47</sup>Popa & Talbot, at para 101.

<sup>48</sup>Porterfield, at 56. See also Been& Beauvais, at 63, 65-67.

<sup>49</sup>The "parcel of a whole" term originates in US domestic jurisprudence where the issue of measuring and defining property rights in the context of takings has been subject to much debates, and where the conceptual severance approach has generally been rejected by the Supreme Court. See Porterfield, at 16-19, 55-58, also Shenkman, at 189-192, Newcombe, at 33.

<sup>50</sup>Newcombe, at 33.



that the claimants has acquired in Canada, which of course constitutes the Investment”, i.e. a part of the investment rather than a separate one. This interpretation does not negate the potential result of the ruling, i.e. that a total deprivation of market access may be regarded as an expropriation even where other parts of the investment remain unaffected. For the sake of legal clarity, however, rather than stating that the tribunal treated a part of the bundle of rights as an investment per se, a more precise conclusion of the ruling is arguably, quoting an interpretation of the current state of law by Sornarajah, that “it is not only the outright taking of the whole bundle of rights but also the restriction of the use of any part of the bundle that amounts to a taking under the law.”<sup>51</sup>

One of the most debated awards under NAFTA is the subsequent **Metalclad v. United Mexican States**<sup>52</sup>. The case concerned an expropriation claim raised by Metalclad, an American waste disposal company, due to measures allegedly taken by a municipal government in Mexico. As claimed, the municipality had invited the Mexican company COTERIN, which Metalclad later bought together with its projects, to build a hazardous waste disposal facility within its borders (the costs of which reportedly amounted to \$ 22 million), whereafter it had refused to permit the opening and operation of the facility although all legal and other requirements had been met.<sup>53</sup> The claimant further argued that an ecological decree issued by Mexico after the initial proceedings had begun constituted expropriation, since, by creating a preserve in the area of the landfill, it effectively prevented the facility from ever being able to operate.<sup>54</sup> In addressing these claims, the ISCID panel initially made a statement regarding the general framework of indirect expropriation, holding that “*expropriation under NAFTA includes not only open, deliberate and acknowledged takings, ...but also covert or incidental interference with the use of property, which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property*”.<sup>55</sup> After having found the conduct of the municipality to breach certain minimum standards under NAFTA<sup>56</sup>, the tribunal went on to conclude that the federal state of

---

<sup>51</sup>Sornarajah, at 368.

<sup>52</sup>Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award Sept 2, 2000 (hereinafter “Metalclad”).

<sup>53</sup>The case involved major communication problems between the claimants, the federal government and the local municipality regarding necessary permits and the appropriate authority to issue them. COTERIN had been refused a municipal construction permit but obtained permits on the federal level and began constructions of the landfill in May 1994. COTERIN was allegedly assured by several federal officials, as was Metalclad after it had purchased COTERIN together with the project, that all steps had been taken to proceed with the investment, i.e. that no further approvals were needed. Metalclad nonetheless applied for a local permit, as was advised by the authorities in order to ease the relations with the municipality; the application that was however denied. Five months later, the project was stopped on the municipality level due to failure to obtain a local permit for the construction and operation of the facility. See Metalclad, at para 28-58.

<sup>54</sup>Metalclad, at para 59-61.

<sup>55</sup>Metalclad, at para 103.

<sup>56</sup>The fair and equitable treatment standard under art 1105 of NAFTA, see supra note 14.

Mexico, by “*permitting or tolerating*” this conduct, had effectively “*participat(ed) or acquiesc(ed) in the denial to Metalclad of the right to operate the landfill*” thereby committing an act tantamount to expropriation.<sup>57</sup> Furthermore, the tribunal pointed out that the municipality had acted outside its limited authority, i.e. *ultra vires*, rendering the denial of the claimant’s project unlawful.<sup>58</sup> This, together with reasonable expectations of the investor, a factor discussed below; and the lack of legitimate grounds for which the permit was denied, amounted to an indirect expropriation.<sup>59</sup>

Finally, the tribunal added in *obiter dicta* that also the ecological decree could be found expropriatory as it practically denied Metalclad of the right to operate its mining activities.<sup>60</sup> In a subsequent part on valuation of the losses, the tribunal regarded both of the NAFTA breaches committed by Mexico as resulting in “*the complete frustration of the operation of the landfill (negating) the possibility of any meaningful return on Metalclad's investment*”.<sup>61</sup>

Several aspects of the Metalclad award are worth examining further. First, the reasoning gives an example of a functional form of conceptual severance, where a specific way to use land was regarded a separate cognizable property interest under the expropriation provision of NAFTA. The tribunal seems to have recognized that the area of the landfill could have been used or for other economically profitable purposes than the landfill, such as “the exploration, extraction or utilization of natural resources”.<sup>62</sup> Nevertheless, it concluded that an expropriation had occurred since the company was deprived of the right to operate the particular business it had intended to. As one may predict, the approach in Metalclad has met with severe criticism from “parcel as a whole”- commentators referred to above, arguing that an owner cannot possibly be said to have been deprived of his property “in whole or in significant part” when only one way of using the property at issue has been taken, leaving other economically beneficial alternatives permissible.<sup>63</sup>

---

<sup>57</sup>Metalclad, at para 104.

<sup>58</sup>Metalclad, at para 106.

<sup>59</sup>Metalclad, at para 107.

<sup>60</sup>Metalclad, at para 109. A portion of the ruling was subsequently set aside by the Supreme Court of British Columbia, on the grounds that the tribunal had exceeded its jurisdiction by incorporating non-Chapter 11 elements into the interpretation of the chapter 11 *inter alia*, by adding a transparency requirement into its reasoning on art 1105. As the expropriation assessment was partly based on that reasoning, it, too, was found invalid by the court. The originally awarded amount of \$ 16.7 million was however only reduced to 15.6 million due to the remaining validity of the ruling on the ecological decree as expropriatory. Although the court found the interpretation of expropriation as “extremely broad”, the definition constituted a question of law which the court did not have jurisdiction to interfere with. See *United Mexican States (2001) B.C.S.C 664*, at para 79, 94, 99, 133 and comments by Mann, at 701-702.

<sup>61</sup>Metalclad, at para 113.

<sup>62</sup>Metalclad at para 110.

<sup>63</sup>See Porterfield, at 55.

Critics have furthermore found in Metalclad what was suspected in Pope & Talbot, namely an opening for partial takings to constitute expropriation. The wording of “significant part”, they argue, implies that post Metalclad, even partial deprivations resulting in a mere reduction of profitability may be sufficient for findings of expropriatory measures.<sup>64</sup> One may ask whether the tribunal meant “a significant part “of the property taken as a whole, or of a separated part such as a specific business. While the latter seems far-going, the former could be seen as a restatement of the conceptual severance approach already used in the case.

As will be further discussed below, the Metalclad award has been held to represent a new line of thinking in which focus is put exclusively on the interference criteria when determining whether an expropriation has occurred, i.e. ignoring other factors commonly considered by tribunals in this regard.<sup>65</sup> While this may be true as to the general statements made in the award and partly quoted above, it is interesting to note that the tribunal barely applied the interference criteria when dealing with the specific circumstances of the case. In fact, the reasoning lacks any substantive analysis of why expropriation was found, instead largely basing its conclusion on the breach of minimum standards. Although the claimant’s loss of the right to operate and make profits of the landfill obviously must have been found to constitute a deprivation “in whole or in significant part” of “the use of or reasonably-to-be-expected economic benefit of property”, a clear conclusion to that end is not included. Rather, the assessment of economic impact is made for the breach of minimum standards and of the expropriation provision together, thereby further blurring the line between the two rules and their respective legal standards.<sup>66</sup>

A final observation to be made regarding the Metalclad award is the way the reasoning on expropriation was divided into two findings: one of measures “tantamount to expropriation”, the second of “indirect expropriation”. Nowhere, however, was the reason for this split terminology or whether there is a substantive difference between the two wordings explained. Implying that there is such a difference, the panel’s approach can hardly be reconciled with what was explicitly held in Pope & Talbot, namely that “tantamount” in this regard means nothing more than “equivalent”.

The next significant ruling to consider in the context of regulatory takings was rendered by an UNCITRAL panel in the **S.D Myers, Inc. v Canada** case.<sup>67</sup> The Canadian government had issued a temporary order whereby exports of the hazardous waste PCB to the United States were banned for a period of almost 16 months.<sup>68</sup> This caused an expropriation claim by the

---

<sup>64</sup>Baughen, at 221.

<sup>65</sup>Dolzer, at 72.

<sup>66</sup>See also Gantz, at 707.

<sup>67</sup>S.D. Myers, Inc. v. Canada, UNCITRAL, Partial Award on the Merits, Nov. 13, 2000 (hereinafter “Myers”).

<sup>68</sup>See at para 108-128.

American company S.D Myers, based on the losses it had sustained through its Canadian subsidiary, the PCB exporting company S.D. Myers Canada. According to the claimant, S.D Myers Canada constituted an “investment” under NAFTA. The tribunal agreed with this notion, adding that S.D Myers could also have chosen to base the claim on its market share of PBC waste disposal in Canada. Thus, applying a conceptual severance approach, the tribunal held that also the market share constituted an investment separately protected under the expropriation provision.<sup>69</sup> In a notably open-ended manner, furthermore, without however expanding on the subject, the tribunal stated that “*in legal theory, (under NAFTA) rights other than property rights can be expropriated*”.<sup>70</sup>

Notwithstanding the broad statements regarding investment interests, the tribunal was not convinced as to that expropriation had occurred, reaffirming initially the statement in Pope&Talbot regarding the meaning of “tantamount” as not more than “equivalent” and thus rejecting the broader interpretation of the term implied in Metalclad.<sup>71</sup> The reasoning in Myers is largely based on the temporary nature of the ban and the lack of transfer of benefit to the Canadian state, both aspects discussed further below. With regard to the assessment of economic impact, it was held that as a general rule, regulatory actions do not amount to expropriation as they involve insufficient interference with private property rights.<sup>72</sup> The tribunal further explained that expropriations normally amount to “*a lasting removal of the ability of an owner to make use of its economic rights*”, arguably a higher threshold than both of the legal standards imposed in Pope&Talbot and Metalclad respectively.<sup>73</sup> Interestingly, however, the tribunal opened up for a less stringent requirement with regard to the interference criteria as it stated that “... *it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if were partial.*”<sup>74</sup> A possibility of partial takings is thereby confirmed, albeit with no further clarification as to the specific “context and circumstances” required.

A final note to be made regarding Myers is the tribunal’s way to handle different legal standards under NAFTA chapter 11 provisions in a seemingly far more structured way than the Metalclad tribunal. While the Canadian measures in Myers were found to constitute discrimination against foreign investors in relation to domestic ones, this conclusion resulted in a found breach of the National Treatment rule in art 1102 and did not affect

---

<sup>69</sup>Myers, at para 231-232. See comment by Porterfield at 50, 56.

<sup>70</sup>Myers, at para 281.

<sup>71</sup>Myers, at para 285-286.

<sup>72</sup>Myers, at 281-283. The tribunal held that “Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference” at para 282. The tribunal did however not “rule out the possibility” that a regulation could be considered expropriatory under art 1110, see at para 281.

<sup>73</sup>Myers, at para 283. See comments in Gantz, at 749-750.

<sup>74</sup>Myers, at para 283.

the analysis of whether the measures constituted expropriation.<sup>75</sup> Thus the line between the two rules was not blurred as was the case regarding minimum standards and expropriation under the Metalclad ruling.

In the **Marvin Roy Feldman Karpa (CEMSA) v United Mexican States** case, a foreign exporter of Mexican cigarettes raised an expropriation claim under NAFTA due to an alleged refusal by the authorities to grant him certain tax rebates and other benefits given to domestic cigarette exporters.<sup>76</sup> The ISCID tribunal initially confirmed the reading of indirect expropriation and measures “tantamount to” expropriation as equivalent terms.<sup>77</sup> As to the substantial analysis, the tribunal pointed out that “*not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business,...is an expropriation*”.<sup>78</sup> In the case at issue, no expropriation had occurred as “*the regulatory action has not deprived the Claimant of control of his company, interfered directly in the internal operations of the company or displaced the Claimant as the controlling shareholder. The Claimant is free to pursue other continuing lines of business activity...Of course, he was effectively precluded from exporting cigarettes...However this does not amount to Claimant’s deprivation of control of his Company*”.<sup>79</sup>

The ruling constitutes a striking difference from previous NAFTA cases, particularly from Metalclad where a deprivation of a chosen business activity, namely the operation of a waste facility, was found to amount to an expropriation. The Feldman panel seems to have imposed a stricter standard towards the investor and did not regard the specific business of exporting cigarettes to be a separately protected right, thereby rejecting a conceptual severance approach. In fact, the panel did not seem to regard the operating of a particular business as a relevant “right” at all.<sup>80</sup> Moreover, rather than focusing on the profitability of an investment, as was done e.g. in Pope & Talbot, the tribunal returned to an IUCT-like standard of “deprivation of control” to be determinative in the context of regulatory expropriations. This standard could not be achieved, as interpreted in Feldman, if “other continuing lines of business” than the taken one remained free for the investor to pursue.

In the NAFTA case **Waste Management, Inc. v United Mexican States** filed under ISCID, the Mexican municipality of Acapulco had allegedly failed to make its payments under a service contract concluded with the claimants, as well as wrongfully transferred the contract rights and

---

<sup>75</sup>Myers, para 256.

<sup>76</sup>Marvin Roy Feldman Karpa (CEMSA) v United Mexican States, ICSID, Case No. ARB (AF)/99/1, Final Award Dec. 16, 2002 (hereinafter “Feldman”).

<sup>77</sup>Feldman, at para 100.

<sup>78</sup>Feldman, at 112.

<sup>79</sup>Feldman, at para 152.

<sup>80</sup>Id. The tribunal held that “...it may be questioned as to whether the Claimant ever possessed a “right” to export that has been “taken” by the Mexican government.”

obligations of the latter to a third party.<sup>81</sup> The claimants argued that these measures amounted to an expropriation as “*the modern definition of tantamount to expropriation must be broad enough to encompass every course of sovereign conduct that unfairly destroys an investor’s contractual rights as an asset.*”<sup>82</sup> In contrast to the tribunals in *Pope & Talbot* and *Myers*, where it was explicitly stated that the wording of “tantamount to” did not expand on the scope of expropriation under international law,<sup>83</sup> the tribunal stated that “evidently”, that phrase “was intended to add to the meaning of the prohibition, over and above the reference to indirect expropriation”.<sup>84</sup> Commentators have pointed out that the ruling thus constitutes a step in a new direction regarding the legal interpretation of “tantamount to expropriation”<sup>85</sup>; however, one should note that a similar approach to the term, although only implied, was to be found also in *Metalclad*.

Although the tribunal would seem to be sympathetic with the broad expropriation definition put forward by the claimants, it did not find expropriation to have occurred as the level of interference with the property rights at issue was not sufficiently proven. The tribunal specifically emphasised the fact that in the case at issue, the claimants retained the control over and use of the property during the whole period of alleged interference. The only thing the claimants had lost, the tribunal concluded, was the “reasonably-to-be-expected economical benefit”.<sup>86</sup> As in *Feldman*, there is a striking inconsistency of the ruling with the *Metalclad* case, where it was explicitly held that even a partial deprivation (“in substantial part”) of reasonably to be expected economical benefit may constitute expropriation. The *Waste Management* tribunal, by contrast, reaffirmed the “control” standard applied in *Feldman*, and refused to regard the measures in question as expropriatory even where the reasonably to be expected benefit was taken from the owner.

---

<sup>81</sup>*Waste Management, Inc. v United Mexican States*, ISCID case No ARB(AF)/00/3, Final Award, April 30, 2004 (hereinafter “*Waste Management*”).

<sup>82</sup>*Waste Management, Investor’s Reply Memorial* (Jan. 22, 2003) at para 4.23, see also Final Award, at para 145.

<sup>83</sup>See *supra* notes 43 and 71 with accompanying texts.

<sup>84</sup>This conclusion was reached *inter alia*, based on an interpretation of art 1110(8) of NAFTA, which states that non-discriminatory measures of general application in relation to debt security or loan are not to be regarded as expropriatory. According to the tribunal, under regulatory international law such measures are in any event outside the scope of expropriation; the fact that they had to be specifically excluded under NAFTA, therefore, implied the broader definition of expropriation under the latter. See at para 144. See also *Gantz*, at 676, recognizing the unclear relation between art 1110 in general and art 1110(8).

<sup>85</sup>*Blades*, at 85. It should be noted that *Sornarajah* holds the same view as the one expressed by the tribunal although on different grounds. Although the author recognizes that it is not a settled issue, he argues that since most international agreements containing expropriation clauses include the three terms, the use of “tantamount to” must “at least be taken to expand the meaning of taking”. *Sornarajah* therefore concludes that there are three different forms of takings: direct, indirect and tantamount to expropriation. See at 349.

<sup>86</sup>*Waste Management*, at para 159.

A last award under NAFTA to be mentioned in this regard, although it never bound the parties to the dispute due to an ultimately found lack of jurisdiction, is the recent **Methanex v. United States**.<sup>87</sup> The case concerned a ban on MTBE, a methanol-based gasoline additive, imposed by the state of California due to health risks associated with the substance<sup>88</sup> and challenged under UNCITRAL by the Canadian company Methanex, the worlds largest methanol producer. As alleged by the claimants, the ban constituted a measure tantamount to expropriation as it deprived the company of the California market share, market access and general goodwill, as well as resulted in dropped stock market value of the company.<sup>89</sup> While further aspects of the case will be discussed below, the ruling constitutes a third example of the application of a “control – standard” in recent NAFTA jurisprudence. The tribunal expressly referred to the above quoted statement in Feldman concerning measures not depriving a Claimant of control over his company. As was further pointed out, the loss of customer base, goodwill and market share, although the affected elements form relevant parts in the valuation of an enterprise, cannot by itself amount to an expropriation.<sup>90</sup>

## 3.2 Duration

In addition to the scope of interference with relevant property rights, i.e. how much of the property that is affected, what rights are lost and how much the value is reduced by the measure at issue; another question that may affect the interference analysis is the time factor.<sup>91</sup>

In the **Tippetts** case cited above, the tribunal stated that expropriation requires a deprivation of fundamental rights of ownership that “*is not merely ephemeral*”<sup>92</sup>. However, the tribunal did at the same time conclude that the appointment by the government of a “temporary” manager for a foreign investor’s company did constitute expropriation.

Conversely, in the **Eastman Kodak Co. v. Government of Iran**, the governmental appointment of a supervisor for the claimant’s business was not regarded expropriatory partly due to the fact that the supervisor was in

---

<sup>87</sup>Methanex Corporation v. United States of America, UNCITRAL Final Award Aug. 9, 2005 (hereinafter “Methanex”). The ruling was issued with a decision on the merits, although the tribunal ultimately concluded that it lacked jurisdiction on the case. See Methanex, Part IV, Chapter E at para 22 and Chapter F at para 5.

<sup>88</sup>A leakage from underground gasoline storage tanks revealed harmful effects of MBTE on drinking water. See Methanex e.g. Part II, Chapter D, at para 15.

<sup>89</sup>Methanex, Part IV Chapter A, at para 2.

<sup>90</sup>Methanex, Part IV Chapter D, at para 16-18.

<sup>91</sup>Duration has been raised as an important factor in the legal doctrine on expropriation. See e.g. Christie, at 331, noting that “it is obvious that, in a doubtful case the passage of time will strengthen the conclusion that the property in question has been expropriated”.

<sup>92</sup>Tippetts, at 225-226.

power only for a brief period of time.<sup>93</sup> In the subsequent **Birnbaum v Iran** case, however, the tribunal stated that the temporary nature of an appointment of manager did not preclude a finding of expropriation.<sup>94</sup> While these rulings may seem inconsistent, as pointed out by Judge Aldrich, the tribunal has focused largely on the true impact of the government measure and on how long its effects were going to last, rather than its label as “temporary” or “provisional”. Aldrich, after having admitted that the term “ephemeral” may be ambiguous, concludes that under the IUCT jurisprudence, measures are not merely ephemeral when it is shown “(a) that no reasonable prospect exists that control will be returned; or (b) that any losses that may ensue during the period of control are not compensable to the property owner; or (c) that the control has continued for a substantial period of time (perhaps several years) in circumstances where the property owner has not behaved in a manner clearly inconsistent with a claim of deprivation.”<sup>95</sup> However, while the first and last circumstance seem reasonable in light of the above case law, the second argument is harder to conceive. If the temporary nature of a measure may determine that it is legally not to be seen as a taking and thus that compensation will not be required, how can the determination of that legal nature be dependent on the payment of compensation?<sup>96</sup>

Further questions arise under NAFTA jurisprudence, where the case to be noted with regard to the duration issue is **S.D Myers**, discussed above. As mentioned, the UNCITRAL tribunal held that an expropriation normally “*amounts to a lasting removal of the ability of an owner to make use of its economic rights*” (underscore added).<sup>97</sup> In light of the temporary nature of the effect which the Canadian closure of the border to PBC wastes had on the complainant’s investment, therefore, the ban did not amount to a measure tantamount to expropriation.<sup>98</sup> What makes the ruling ambiguous regarding the duration criteria is however an additional statement cited partly above, in which the tribunal implied that not only the scope of the interference, but also its duration, may be less strictly looked upon as a required criteria, as “*it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if were (partial or) temporary*” (hyphen added).<sup>99</sup> The tribunal seems to imply that a fact-specific determination has to be made in each case, rendering general rules on the required time span of a measure less meaningful. As noted above with regard to partial interferences,

---

<sup>93</sup>Eastman Kodak Co. v. Government of Iran, Award No 514-227-3, Award July 1, 1991, reprinted in 27 Iran-U.S. Cl. Trib. Rep. 3.

<sup>94</sup>Birnbaum v Iran, Award No 549-967-2, Award July 6, 1993, reprinted in 29 Iran-US CTR 260, at para 28 (hereinafter “Birnbaum”).

<sup>95</sup>Aldrich, at 593 and 602.

<sup>96</sup>Gantz seems to be unaffected by attempts to define “ephemeral”, concluding in view of the imprecise scope that the meaning of the term can probably be found only in specific circumstances. See at 724.

<sup>97</sup>Myers, at para 283.

<sup>98</sup>Myers, at para 284, 287.

<sup>99</sup>Myers, at para 283.



however, guidelines as to what contexts and circumstances that should be relevant in this regard are not provided.

In view of all the above, one may conclude that the degree to which an allegedly expropriatory measure interferes with relevant investor rights and the duration of that interference has proved an important factor in the cases discussed in this chapter. The closer meaning and scope of the criteria, however, remains largely uncertain due to the varying interpretations made by international tribunals in this context. A further analysis on the interference criteria and an attempt to extract guidelines from the above material will be made in the concluding chapter 7.

## 4 Expectations of the investor

Legitimate expectations of non-interference or generally favourable business conditions held by investors have been regarded a relevant factor by international tribunals when assessing alleged expropriations. At the same time, it has been recognized that commercial activity will always be characterised by some degree of uncertainty and risks which the participating parties knew or should have realised and been prepared for when entering the business playing field.

Under the IUCT the latter notion was pointed out also with regard to quite abnormal, at least nowadays, situations, such as occurrences during and after the Iranian revolution in the late 70s. In **Starrett Housing**, a new manager was appointed to a construction project of the claimants by the Iranian government. The case also regarded other factors related to the revolution, which resulted in that the project could not be finished, most notably strikes and the total collapse of the national banking system. The tribunal stated that *“investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of the economic and political system and even revolution. That any of these risks materialized does not necessarily mean that property rights affected by such events can be deemed to have been taken.”*<sup>100</sup>

The notion that investors should expect and be prepared for certain changes in their business conditions as a result of state regulations or related occurrences has been recognised by NAFTA tribunals. In the **Azinian case**, the Mexican state had terminated a waste disposal concession agreement to which a national company, owned by American shareholders, had been a party.<sup>101</sup> The ISCID tribunal, ultimately rejecting an expropriation claim raised by the shareholders, initially pointed out that *“It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. . . . NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.”*<sup>102</sup> According to Mexico, the termination did not constitute expropriation, as the measure was taken due to misrepresentations on the part of the investor and had been approved by Mexican courts. The tribunal was convinced by this argument, stating that in light of the dishonesty showed by the investor company, its failure to perform and the fact that it was largely underfinanced, neither the termination of the licence

---

<sup>100</sup>Starrett Housing, at 156.

<sup>101</sup>Robert Azinian, Kenneth Davitian, & Ellen Bacca v. The United Mexican States, ISCID case No ARB(AF)/97/2, Award Nov.1, 1999 (hereinafter “Azinian”).

<sup>102</sup>Azinian, at para 83.

nor the court ruling upholding the state decision could be regarded as unexpected or unlawful.<sup>103</sup>

The outcome was different in **Metalclad**, discussed above, where the right to operate a landfill was granted by permits and assurances on the state level but subsequently denied by municipal authorities. The tribunal heavily emphasised the reliance of the investor on the assurances from state and federal officials that all necessary legal steps for proceeding with the investment had been taken and regarded the expectations of non-interference to be legitimate, contributing to the finding of expropriation.<sup>104</sup> Although the case did not concern any claims of dishonesty on the part of the investor as was true for Azinian, Metalclad's expressed expectations have been questioned in view of the facts surrounding the dispute.<sup>105</sup> Metalclad explicitly required an assurance from COTERIN that the local permit issue had been solved, as a condition for buying the company together with its project.<sup>106</sup> Thus, the investor was arguably aware of that the issue could cause problems in the future and did not blindly rely on the state assurances as seems to be implied by the tribunal.<sup>107</sup> One possible answer could be that objectively, an investor in Metalclad's situation would reasonably expect that all necessary requirements had been met in light of the given federal assurances. It has been argued, however, that also subjective factual expectations should be taken into regard by tribunals in this context.<sup>108</sup>

Expropriation was found largely based on expectations of the investor also in **Técnicas Medioambientales Tecmed S.A. v. United Mexican States**.<sup>109</sup> The case concerned a refusal by a Mexican state agency to renew a license that the Spanish company Técnicas needed to continue operating the landfill of Las Viboras. The ISCID tribunal, ultimately finding that the measures taken by Mexico amounted to expropriation, observed that "*Even before the claimant had made its investment, it was widely known that the*

---

<sup>103</sup>See at para 103-124. Since the claimant had not even challenged the court rulings but only the termination decision, the tribunal held that it could reject the claim even before assessing the court rulings; however it proceeded with the reasoning as it did not want to "*create the impression that the Claimants fail(ed) on account of an improperly pleaded case*". See at para 101. Commentators have viewed the Azinian case as a "blatantly groundless claim", arguing that it forms an example of the need for a pre-screening procedure whereby improper claims would be excluded by a consensus of the home state and the host state in a given dispute. See Godshall, at 296-298.

<sup>104</sup>Metalclad, at para 107 See also at para 89 (regarding NAFTA art 1105, however relevant in this regard since, as has previously been noted, the expropriation finding rested in part on the previously found breach of art 1105) See comments in Been & Beauvais, at note 153 and at 73-74.

<sup>105</sup>Metalclad, Mexico's Counter-Memorial, Feb. 17, 1998; at para 19-20, 57-60.

<sup>106</sup>Id.

<sup>107</sup>Id, at para 59.

<sup>108</sup>Beauvais suggests such a dual approach consisting of both an objective and a subjective part in the determination of legitimate expectations. See at 291-292.

<sup>109</sup>Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award May 29, 2003 (hereinafter "Técnicas").

*investor expected its investments in the landfill to last for a long term and that it took this into account to estimate the time and business required to recover such investment and obtain expected return...such expectations should be considered legitimate...".*<sup>110</sup> The tribunal thus seems to have focused on the general expectations of the investor regarding a long-term economical commitment rather than the specific reliance on an individual licence. The approach is arguably diverging from earlier cases where an invitation by the state in the form of a concession or assurance has been heavily emphasised as raising legitimate expectations. Additional factors relevant to the case regarded object and purpose considerations will be discussed below.

The subsequent **Middle East Cement Shipping Ltd v. Egypt** award regarded an Egyptian national decree which by its effects rendered a licence previously granted to the investor useless.<sup>111</sup> The dispute concerned also certain administrative measures taken against the investor due to, inter alia, outstanding debts. While the licence was found to have been expropriated, certain expropriation claims connected with the latter measures, regarding costs arising out of a loan in the Egyptian national bank and liquidation procedure costs, were rejected by the tribunal.<sup>112</sup> Such “normal commercial risks” as a loan would not be covered under the expropriation term, according to the tribunal, unless the Egyptian state was found to have acted unlawful, which was not proven in the case. As to the liquidation costs, the tribunal stated that “*Investors have to accept, and do accept by investing in a country, that the local procedures may be different, complicated, bureaucratic and lengthy*”.<sup>113</sup>

Finally, the recent **Methanex case**, referred to above, is instructive in the context of the legitimate expectations criteria. The UNCITRAL Tribunal held that under general international law, non-discriminatory regulations for the public good did not constitute expropriation unless specific commitments were given by the government in question implying that it would refrain from imposing such regulations.<sup>114</sup> Thus, different from Técnicas but consistent with the rest of the above referred cases, the tribunal focused on reliance on specific “invitations” on behalf of the state rather than on business expectations in general. It was explained that to constitute expropriation in this context, a measure must be “*in breach of representations made by the host State, which were reasonably relied upon*

---

<sup>110</sup>Técnicas, at para 150.

<sup>111</sup>Middle East Cement Shipping Ltd v. Egypt, ISCID ARB 99/6, Award April 2, 2002 (hereinafter “Middle East”).

<sup>112</sup>Middle East, at para 107. See also at para 127-128 regarding legitimate expectations of future profits with regard to the licence (discussed in the context of assessing the appropriate level of compensation). As to the rejected claims, see at para 154-155.

<sup>113</sup>Middle East, at para 154-155.

<sup>114</sup>Methanex, Part IV Chapter D, at para 7.

by the Claimant”.<sup>115</sup> As Methanex had not received any commitments from the Californian government, but was on the contrary fully aware of the public debate surrounding MBTE and actively participating in it, there were no grounds for a finding of legitimate expectations and the expropriation claim was rejected.<sup>116</sup> The explicit and clear statements made on the matter in Methanex have not gone unnoticed in the legal doctrine. As put by a one commentator, “the Tribunal’s central focus upon an Investor’s expectations - and whether a state has done anything to foster those expectations - is a new, and perhaps welcome, development in NAFTA expropriation jurisprudence.”<sup>117</sup>

Given the cases above, one may conclude that when state commitments of the kind referred to in Methanex are made, regulations to the contrary will not be held to breach the expectations of an investor if imposed due to unfulfilled conditions by the latter (Azinian, Middle East), but will likely be held to constitute such a breach when the conduct of the investor is satisfactory (Metalclad, Técnicas, Middle East).<sup>118</sup> Absent such a commitment, the tribunals will be reluctant to consider expectations of non-interference as legitimate (Methanex).

Some commentators have argued, that such expectations cannot be regarded legitimate particularly with regard to already highly regulated activities, such as e.g. waste transport or disposal businesses, as existing and future regulations in these areas are of special importance in view of the high risks and/or public interests involved.<sup>119</sup> Others argue to the contrary that it is in those regulated areas of high-risk activity that expectations of non-interference are most crucial to consider and fulfil, as investments in those areas are characterized by high costs and require long-term presence for commitments to be profitable. A stable regulatory framework is thus a crucial condition for such investments.<sup>120</sup> The notion may be convincing, and one could draw parallels to the Tecnicas case above where the tribunal

---

<sup>115</sup>Methanex, Part IV Chapter D, at para 8 (referring to the Waste Management award, in which the issue of representations was considered in relation to an alleged breach of another NAFTA provision, see at para 98).

<sup>116</sup>Methanex, Part IV Chapter D, at para 9-10.

<sup>117</sup>Blades, at 98.

<sup>118</sup>See Sornarajah, at 381, pointing out that to rule otherwise in the former cases would be the same as rewarding fault.

<sup>119</sup>Other examples given are hazardous waste transport, toxic chemical products, tobacco products, large-scale water export, and timber harvesting. See Beauvais, at 282. See also Been & Beauvais at 70-71. That the regulatory level already existing at the time of the made investment is to be taken as a reference point in determinations on legitimate expectations is a widely accepted standpoint, as the investor must have or ought to have known of the relevant legislation when entering the market in question. See Baughen, at 223.

<sup>120</sup>Waelde/Kolo, at <http://www.dundee.ac.uk/cepmlp/journal/html/vol4/article4-17.html>. The authors argue that such regulatory stability is mutually beneficial as both the investor and the state benefit from a resulting larger inflow of investment. Whether stronger expropriation protection increases the inflow of investment is however disputed, see e.g. Sands, at 205 or Been & Beauvais, at 122-125.

seems to have reasoned along similar lines. One may question, however, whether “stabilization” in terms of a regulatory status quo, especially in a long term perspective, is desirable in this context. As society alters and new issues emerge, changes in rules and regulations must inevitably occur. Should an investor have the right to expect the original conditions to be maintained or at least not dramatically changed throughout the life span of his investment? A commentator has stated that “it is not reasonable to expect laws never to change”, further arguing in an exemplifying case that “the mere fact that the activity was legal in the past does not make the regulatory transition arbitrary or give rise to a distinct, reasonable investment-backed expectation that the policy would not change”.<sup>121</sup> These arguments may perhaps hold true even in cases where commitments have been made, e.g. when such commitments have been in force for a long period of time and/or are phased out gradually in pace with societal changes and new policies.<sup>122</sup>

---

<sup>121</sup>Newcombe, at 33 and 36. The author points out that the issue of expectations is fundamentally a question of risk allocation and argues that it could be addressed through market mechanisms, e.g. insurance or contract and minimum standard provisions (see supra note 14). This would make most economic efficiency, he further argues, because investors would not over invest as they may do when compensation can be achieved in cases of new regulations. See Newcombe, at 33-34, 41 and note 163.

<sup>122</sup>The latter approach seems to have been taken by the European Court on Human Rights in this regard. In the *Pinnacle Meat Processors Co v United Kingdom* case, 27 Eur HR Rep CD 217 (1998), the court held that a ban on certain equipment should have been expected as it was preceded by similar restrictions in the industry and thus the development had been gradual. In *Fredin v. Sweden*, Judgement Feb. 23, 2994, Eur HR 283-A, similarly, a refusal to renew certain license by the state could according to the court hardly have come as a surprise to the applicants as it was enforced only after a 10 years notice.

## 5 Intent of the state

An important question with regard to the determination of what constitutes expropriation is whether and how the intent of the state taking the measure at issue is to be regarded as a relevant factor. It should be noted, that this is not the same as asking for the object and purpose behind a state measure.<sup>123</sup> In this chapter, focus will be put on the governmental knowledge or control over the link between the state action at stake and the adverse effects on the interests of an investor.

A first aspect concerns whose actions the state will be responsible for. While a general analysis on state responsibility is outside the scope of this paper, it should initially be noted that measures taken by the government or directly connected state agencies constitute state actions. The degree to what actions of subordinate organs will fall under the same heading is not equally clear under international law.<sup>124</sup> As shown by the tribunal decision in **Metalclad v. United Mexican States**, states are to be held responsible for measures taken on lower government levels such as decisions by municipality authorities which, as discussed above, were the case at issue. Although the tribunal did not give any in-debt reasoning on the issue, it referred to, *inter alia*, a concession granted by Mexico according to which the central government “was... prepared to proceed on the assumption that the normal rule of state responsibility applies; that is that [Mexico] can be internationally responsible for the acts of state organs at all three levels of government [federal, state and local/provincial]”.<sup>125</sup>

While measures interfering with interests of foreign investors will in most cases be dependent on activity attributable to the state, one can imagine situations where omissions by the state could cause similarly adverse effects on private ownership and control.<sup>126</sup> International courts and tribunals have however rejected an interpretation of expropriation which would include state omissions. Under the IUCT, a dispute concerning this matter arose in

---

<sup>123</sup>As mentioned initially, some authors consider the criteria discussed in this part and the object and purpose criteria under one heading, rather than separating the two as done in this paper. See e.g. Baughen at 210-211.

<sup>124</sup>Tollefson, at 228-229. A broad interpretation of covered state organs and entities is provided under the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (e.g. at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)) which are regarded as codifying international customary law in this context.; see art 4 and comments in Hobér, at 4.

<sup>125</sup>Metalclad, at para 73. The tribunal also referred to the former version of the International Law Commission draft articles noted above, see *supra* note 124 and comments in Hobér, at 22-23.

<sup>126</sup>Alvarez & Park, at 387, give examples of such effects when a state does not hinder a popular taking of foreign property or breaches a concession through passivity. The authors argue that expropriation thus may occur through non-action.

the case of **Sea – Lands Service, Inc v Iran**.<sup>127</sup> The claimant had sustained losses due to the deterioration of a situation at the port of Bander Abbas, for which, in turn, he blamed the passivity of the Iranian government. The tribunal, although recognizing that the situation was in fact a result of the government’s failure to act, did not regard this failure as an expropriation measure and rejected the investor’s claim for compensation. As seen by the tribunal, “*a claim founded substantially on omissions and inaction in a situation where the evidence suggests a widespread and indiscriminate deterioration in management disrupting the functioning of the port of Bandar Abbas, can hardly justify a finding of expropriation*”.<sup>128</sup>

The Sea-Land reasoning is of further relevance as it implies that interference by a state must be intentional. As put by the *tribunal* “*a finding of expropriation would require, at the very least, a deliberate governmental interference...*” (underscore added).<sup>129</sup> This view seems however to have been abandoned by the tribunal only a few years later, as in the **Phillips Petroleum Co Iran v Iran** case<sup>130</sup>, it was held that “*a government’s liability to compensate for expropriation of alien property does not depend on proof that the expropriation was intentional*”<sup>131</sup>. The case dealt with the deprivation of the right of Phillips to extract and sell oil through measures conducted by the Iranian government.<sup>132</sup>

Under the ISCID, the latter view was confirmed in the **Metalclad** award. In the widely debated statement on the scope of indirect expropriation, referred to above, the tribunal included “incidental interference” by the state.<sup>133</sup> However, the more recent ISCID case **Eudoro A. Olguín v. Republic of Paraguay** seems to return to the Sea-Land tribunal’s approach of requiring the state action at issue to be intentional, reaffirming also the view of the latter with regard to omissions in this context.<sup>134</sup> The case was brought under the Peru-Paraguay BIT due to the omission of the Paraguayan government to control certain financial institutions, resulting in that one of these institutions closed down while still in debt to a foreign investor, thereby causing losses to the investment of latter.<sup>135</sup> The Tribunal held that no expropriation had occurred and explained that, in view of inter alia the transfer of benefit requirement discussed below, *Expropriation... requires a*

---

<sup>127</sup>Sea-Land Service, Inc v Iran, Award No 135-33-1, Award June 22, 1984, reprinted in 6 Iran-US CTR 146 (hereinafter “Sea-Land”).

<sup>128</sup>Sea-Lands, at 166.

<sup>129</sup>Id.

<sup>130</sup>Phillips Petroleum Co Iran v Iran, Award No 425-39-2, June 29, 1989; reprinted in 21 Iran-US CTR 79, (hereinafter “Phillips”).

<sup>131</sup>Phillips, at 115 (para 98).

<sup>132</sup>For more general information about the case, see Aldrich, at 596-598; regarding the intent issue, at 603.

<sup>133</sup>Metalclad, at para 103.

<sup>134</sup>Eudoro A. Olguín v. Republic of Paraguay, ICSID Case No. Arb/98/5, Award 26 July 2001 (hereinafter “Olguin”).

<sup>135</sup>See Olguin, Part III Summary of Facts, at para 45-59; and at para 64.



*teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place.*<sup>136</sup>

The notion of “teleologically driven”, commentators argue, implies that a measure must be intentional; as further explained, it will be regarded expropriatory only in relation to the person at whom the measure is *directed*, thereby excluding indirect losses suffered by others.<sup>137</sup> As an example, an author describes a situation where a host’s expropriation measure is directed at an investor, in effect causing his supplier to close down his business. Since the measure affected the supplier only indirectly through the investor, his expropriation claims will be rejected. This interpretation does, if proved to be correct, clarify one aspect of the intent analysis. From the perspective of the state, it can only be held responsible under expropriation provisions with regard to investors/investments at whom/which it has directed the measure in question – in relation to all others affected by it, the measure will not be regarded as expropriatory. The view also seems to correspond with case-law under the ECHR, which has been held by commentators to imply that “legislation of a general character...cannot normally be equated with expropriation”; rather, it must “result from a specific measure”.<sup>138</sup> The distinction is crucial as, according to an author, general rules will not be regarded expropriatory even if “some aspect of the property right is thereby interfered with or even taken away”.<sup>139</sup> Thus, it seems, if the speculation that expropriation can consist of partial deprivation proves to be true, the general scope of a measure may exclude its expropriatory nature even where a sufficient level of interference has been found under the above discussed “effects”- criteria. There are however commentators holding the exact opposite view in this regard. Gantz, to name one, argues that when a measure reaches the threshold for expropriation as to its effects, intent is irrelevant.<sup>140</sup>

Another issue in this context is whether any benefit needs to be transferred to the state in order for a measure to be regarded as expropriatory. In the **Tippetts** case, the tribunal did not find any such requirement to exist under international law and added that, for this reason and to avoid further confusion, the term “deprivation of property” rather than “taking” should be used in cases of expropriation. The holding of Tippetts was reaffirmed by the tribunal in **Metalclad**, as it was held that interference could amount to

---

<sup>136</sup>Olguin, at para 84. Sornarajah seems to be of a different view regarding omissions. The author argues that in cases where there is a link between a subject who committed a deprivatory action and the state, the latter may be liable for the deprivation by failing to act in protection of a foreign investor. See at 392. However, one may equally see these instances as liability caused not by the omissions by the state, but by positive actions taken by the state indirectly through groups it has links with and given authority to. Thus it may be regarded as part of the issue of whose actions the state is responsible for, a matter discussed above, rather than one concerning liability for omissions.

<sup>137</sup>Baughen, at 211.

<sup>138</sup>Fabri, at 157.

<sup>139</sup>Fabri, at 157.

<sup>140</sup>Gantz, at 677.

indirect expropriation “..even if not necessarily to the obvious benefit to the state”.<sup>141</sup>

The subsequent **Myers** case arising under NAFTA, however, stands for an opposite view. The absence of a transfer of benefit to the Canadian state in the case was emphasised by the UNCITRAL panel, contributing to the finding that the threshold for expropriation had not been reached.<sup>142</sup> The tribunal also made a general comment, stating that ““*expropriation*” carries with it the connotation of a “*taking*” by a governmental-type authority of a person’s “*property*” with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the “*taking*””.<sup>143</sup>

Moreover, the above mentioned **Olguin** case decided under ISCID should be mentioned, being the most recent of the above cases on the matter. The tribunal 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.*”<sup>144</sup> The notion of “fruits of the property” has been interpreted to imply a transfer of benefit to be required.<sup>145</sup> The jurisprudence of, inter alia, Myers and Olguin, has furthermore been seen as examples of a possible and preferable new conceptual framework, in which tribunals in expropriation cases focus primarily on the transfer of benefit and the appropriation of the state rather than on the deprivation from the owner.<sup>146</sup> As noted by the author in question, support for the approach can be found in a concurring opinion delivered in the Myers case, holding the appropriation of a state to be a dividing line between indirect expropriations and non-expropriatory regulatory measures. As put by the tribunal member, “*there is both unfair deprivation and unjust enrichment when an expropriation is carried out [without] compensation. By contrast, regulatory action tends to prevent an*

---

<sup>141</sup>Metalclad at para 103.

<sup>142</sup>Myers at para 287. The focus of the Myers tribunal on the transfer of benefit criteria has been highlighted and commented by several commentators. See e.g. Newcombe, at 16; Stone, at 779; Been&Beauvais, at 66.

<sup>143</sup>Myers, at para. 280. At para 282, 283, however, as is commented by Newcombe, the tribunal seems to reaffirm the deprivation focus. See Newcombe at 16.

<sup>144</sup>Olguin, at para 84.

<sup>145</sup>See e.g. Newcombe, at 15-16; Baughen, at 211. The latter also links the notion of benefit to the above discussed determination of at whom a measure is directed. The investor whose property’s benefit is transferred, he argues, is the one at whom the state measure is directed, thus the transfer is a proof of whether the measure is expropriatory and in relation to whom. Baughen however recognizes that there may be directed measures without transfer of benefit, thus a clear-cut rule cannot be provided.

<sup>146</sup>See Newcombe generally; regarding the above cases e.g. at 15-17. The author is thus critical of the large weight put on the interference factor often found in expropriation disputes. Although referring to Myers as an example where the benefit criterion was considered, the author recognizes that a majority of the tribunal largely emphasised the owner’s situation in subsequent parts of the reasoning.

*owner from using property in a way that unjustly enriches the owner.... The government that imposes the regulation does not necessarily profit from its intervention”.*<sup>147</sup>

In conclusion, clear answers are hard to find regarding the role of state control, state intent and transfer of benefit to the state in defining indirect expropriations. Again, tribunal decisions on the subject seem to state varying interpretations. The issue will be further elaborated on in chapter 7.

---

<sup>147</sup>Separate Concurring Opinion, 13 November 2000 at Para. 212.

## 6 Object and purpose

In the previous chapter, focus was put on the governmental knowledge and control over the link between the state action at stake and the adverse effects on the interests of an investor. This chapter, while keeping the state angle in focus, will center on the object and purpose behind allegedly expropriatory state actions. The role of the object and purpose criteria in defining indirect expropriation is as will be shown largely unclear and varies among tribunal rulings as well as in the opinions of scholars, some even rejecting it altogether.<sup>148</sup> The following part will attempt to highlight these different approaches.

### 6.1 The police power exception

The notion that states must be free to exercise their police powers and thus that measures taken within this area of activity should be excluded from the expropriation sphere has been widely recognized under international law.<sup>149</sup> The closer meaning of the exception and the type of public purpose activities that are included in the police powers of a state are however matters heavily disputed.<sup>150</sup>

In the **Tippetts** case decided under the IUCT, it was held that both the purpose and form of the measures at issue were criteria less important than the effects they had on the property owner and “the reality of their impact”, i.e. the level of interference discussed above. Whether the term “less important” was used only in a relative meaning, or in one implying that the factor could be left practically without any consideration, is not clear. The latter alternative was arguably chosen in the case at issue. The fact that the governmental appointment of a temporary manager for the claimant’s company was justified under national law due to the need to protect vital

---

<sup>148</sup>One may therefore conclude that several, partly diverging, doctrines exist within the notion of the police power exception. Except for obvious differences that will be outlined in the following, others are less recognized. To take an example, many commentators argue that the factor of public purpose may change the legal qualification of a measure as expropriatory, see e.g. Christie, at 338, or Yannaca – Small, at 16. Others, however, interpret the factor in a more narrow sense, recognizing that it may exclude the measure in question from the obligation to pay compensation, without however affecting its legal qualification as expropriatory per se. See e.g. Baughen, at 211. While the same practical outcome, i.e. a rejected expropriation claim, will be true for both options, the different approaches are arguably a confusing aspect in legal doctrine on the subject.

<sup>149</sup>See e.g. Christie, Aldrich, Baughen, Parisi, Mann, Newcombe.

<sup>150</sup>Broad interpretations include e.g. all measures taken for a “public purpose” (Parisi, at 397) or “to protect public welfare interests” (Mann, at 16). Newcombe, at 23, uses a broad, yet more defined approach, including measures within either the area of “public order and morals”; or the protection of the environment and human health.- On the other side of the spectrum are those who argue for a limited police power, not exceeding beyond general taxation, crime forfeiture and public order (Baughen, at 211, see also Aldrich, at 605-606), or even limiting the exception to states of emergency or necessity only (Vicuna, at 27).

domestic industries and the interests of Iranian workers in those, did not affect the tribunal's reasoning in finding the state measure to be expropriatory.

A different approach, albeit only obiter, was taken in **Sedco, Inc. et al. v. National Iran Oil Co (NIOC)**<sup>151</sup>. The tribunal explicitly recognized the “...accepted principle of international law that a State is not liable for economic injury which is a consequence of 'bona fide' regulation within the accepted police power of the states”.<sup>152</sup> The exception could however not justify the level of interference in the case at issue, concerning compulsory transfer of stock shares to NIOC which were authorized by Iranian law with regard to companies whose debts to banks exceeded their net assets. In the circumstances at issue, only if these measures constituted forfeiture for crime would they be legitimate in the opinion of the tribunal. As this was not the case, the expropriation claims were upheld.<sup>153</sup>

Finally, the police power exception was accepted as a decisive factor in **Emanuel Too v. Greater Modesto Insurance Associates**, concerning the withdrawal by American authorities of certain licenses previously obtained by the Iranian claimants.<sup>154</sup> The tribunal reaffirmed the above general statement made in Sedco regarding bona fide regulations and held the measures taken by the US to fall outside the scope of expropriation.<sup>155</sup> However, important to note is that the licenses were withdrawn as a consequence of the claimants' failure to pay due employee taxes, thus the state measure involved an element close to “forfeiture to crime” recognized in Sedco. As pointed out by commentators, therefore, the Emanuel Too tribunal was put in front of a relatively clear case of police power exercise, as compared to more commonly contested regulations such as environmental policies to be discussed in the following.<sup>156</sup>

In conclusion, the police power exception under the IUCT, notwithstanding broader dicta, has in practice not been taken further than to measures with a punitive element.<sup>157</sup>

Under UNCITRAL, a broad reading of the exception was argued for in **Pope & Talbot**, discussed above. The Canadian government held that because the measures in question (the export quotas on lumber) were cast in

---

<sup>151</sup>Sedco, Inc. et al. v. National Iran Oil Co., Award No ITL 55-129-3 Oct 28, 1985, reprinted in 9 Iran -U.S. C.T.R. 248 (hereinafter “Sedco”).

<sup>152</sup>Sedco, at 275.

<sup>153</sup>Id. See also Aldrich, at 605-606; Gantz, at 725.

<sup>154</sup>Emanuel Too v. Greater Modesto Insurance Associates, Award Dec 29, 1989, 23 Iran-U.S. Cl. Trib. Rep. 378 (hereinafter “Emanuel Too”).

<sup>155</sup>Emanuel Too, at 387-388. See comments by Aldrich, at 605.

<sup>156</sup>Gantz, at 725.

<sup>157</sup>The conclusion is consistent with a point made by Newcombe, at 24, arguing that police power in international case-law is only defined in scope as to the protection of public order such as crime forfeiture, leaving the exception in the remaining spheres (morality, environment, public health) largely undefined in this context.

the form of a regulation, they constituted an exercise of police power and were thus excluded from the expropriation provision of NAFTA.<sup>158</sup> The tribunal however strongly rejected such a general scope of the police power term, stating that Article 1110 covers also "*non-discriminatory regulation that might be said to fall within the police powers,*" as "*a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation*".<sup>159</sup> Although the tribunal recognized the police power notion per se, it based its determination on whether the measures at issue crossed the line to expropriation largely on an interference analysis, outlined above. Thus, similarly to the Tippets case, while the object and purpose factor was not explicitly rejected, it did not play any substantive role in the legal reasoning of the case, an approach that has been criticised in the legal doctrine.<sup>160</sup>

In the subsequent **S.D Myers case**, the UNCITRAL tribunal observed that in determining whether a measure is tantamount to expropriation, it must "*look at the real interests involved and the purpose and effect of the government measure (underscore added)*".<sup>161</sup> It was furthermore made clear that measures taken within the regulatory power of the state would normally not be taken to amount to expropriation. As put by the tribunal, "*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*".<sup>162</sup> However, the tribunal did not make any separate object and purpose analysis regarding the Canadian ban in relation to the expropriation claim nor did it refer to such an analysis made earlier in the case. In an introductory chapter generally assessing the ban, the tribunal had considered the environmental and other justifications brought forward by Canada, in particular the issue of safe waste disposal and Canada's obligations under the Basel Convention<sup>163</sup>, but concluded in

---

<sup>158</sup>Pope & Talbot, Canada Counter Memorial, at para 411,413,426 and Interim Merits Award ("Pope & Talbot"), at para 99.

<sup>159</sup>Pope & Talbot, at para 96, 99. Porterfield interprets the latter statement as rejecting "that there is a police power exception to NAFTA's expropriation provision (see at 49). However, there does not seem to be any support for such a view in the text of the ruling. Rather, the tribunal is narrowing the scope of the exception, so that a mere reference to that a measure is enforced in the form of a regulation wont exclude it from the expropriation sphere.

<sup>160</sup>See Gantz, at 717-718, arguing that the tribunal should also have considered the purposes of the measure at issue and that it ignored legal sources pointing to the relevance of this criterion. See also Blades, at 55, commenting on the tribunal's reasoning in this regard.

<sup>161</sup>Myers, at para 285.

<sup>162</sup>Myers, at para 282.

<sup>163</sup>Canada had asserted that the ban was justified in view of dangers to the environment and human health imposed by PBCs is waste disposal and transportation was not further regulated, as well as that the obligations of Canada under the Basel Convention, including not to export a hazardous waste to another country without assuring that it is going to be disposed in an environmentally sound manner, rendered the ban necessary and waste disposal within Canadian borders to the maximum extent possible preferential (see Myers at para 106-108, 121, 152).

light of all evidentiary documents before it that there was “*no legitimate environmental reason for introducing the ban*” and that the real intention behind the measure, in the eyes of the tribunal, was “*to protect the Canadian PCB disposal industry from US competition*”, thus a disguised protectionism.<sup>164</sup> The tribunal also pointed that even if the strengthening of a domestic waste disposal business indirectly results in environmental benefits, those may be achieved through alternative less trade restrictive means.<sup>165</sup>

It is unclear whether the tribunal, without seeing a need to point it out explicitly, meant the above considerations to have relevance for the expropriation claim. If so, the set standard of state deference is arguably different from what many commentators have viewed in this context. A notable example, although at the far end of the spectrum, is prof. Christie who once concluded that “if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive.”<sup>166</sup>

It may also be, however, that the tribunal did not regard the object and purpose factor at all while determining whether the ban constituted expropriation, as it could reject the claim already based on the previously considered interference criteria, thus there was no taking to be justified through a legitimate purpose. The notion of recognising the factor per se but relying on the interference level of allegedly expropriatory measures would not be a novel approach in this regard, as seen above in *Tippets and Pope & Talbot*.

In sum, it is unclear what weight the Myers tribunal meant to or did assign to the object and purpose criteria in the ruling. The mere fact that the factor was considered in the case, as well as its implied relevance in the expropriation context, has led authors to differentiate Myers from *Pope & Talbot* and *Metalclad*, seeing the former as creating a more nuanced framework for legal determinations of alleged takings and imposing an overall narrower notion of expropriation.<sup>167</sup> On the other hand, the reasons for not finding expropriation, as discussed above, were based largely on

---

<sup>164</sup>Myers, general part on the Ban from para 161, conclusions at para 194-195. One may wonder how a measure taken for several purposes of which only some are seen as legitimate should be regarded, e.g. when both environmental and protectionistic reasons for a measure are found. It has been suggested that if a measure is reasonably necessary with regard to the environmental and health risks involved, any additional motives behind it should not alter its non-compensable nature (although a more thorough investigation of the legitimate purpose may be justified). See Newcombe, at 30. Sornarajah seems however to be of the view that the dominant purpose should be decisive for the determination of a justified taking. The author argues for a similar approach when purposes behind a measure differ over time; although, as is characteristic when attempts are made to create guidelines in this area of law, it is suggested that the determination will be dependent on the specific circumstances in each individual case. See at 387, 399.

<sup>165</sup>Myers, at para 195.

<sup>166</sup>Christie, at 338.

<sup>167</sup>Gantz, at 714, Beauvais, at 273.

scope and duration of *the effects* of the measure, thus the factual reasoning was similar to the ones found in previous cases.<sup>168</sup>

A clearer approach was arguably taken under ISCID in the subsequent **Técnicas** case referred to above. Mexico claimed that the refusal to renew a license for the operation of a landfill was prompted by a massive local opposition growing due to the proximity of the landfill to the city of Hermosillo and that the decision constituted a regulatory measure issued “in compliance with the State’s police power within the highly regulated and extremely sensitive framework of environmental protection and public health.”<sup>169</sup> The Tribunal recognized that regulatory measures taken in the public interest may be excluded from the expropriation sphere, but pointed out that this may be so only if they are deemed *proportional* in relation to their aim, the level of property deprivation involved and the legitimate interests of investors.<sup>170</sup> Here, the tribunal referred to the practise of the European Court of Human Rights, in which such a proportionality test plays a central role in cases of alleged expropriation.<sup>171</sup> The tribunal went on with an examination of asserted purposes behind the permit denial, ruling out the environmental and public health aspects in view of insufficient proof thereof and concluding that the measure had been taken due to the socio-political pressure exercised by the nearby community.<sup>172</sup> As this pressure did not amount to a “serious emergency” or have “public hardship connotations”, however, it could not serve as a justification for a depriving the investor of its property rights, particularly as the investor’s behaviour had not been proven to be in any way decisive for the community opposition.<sup>173</sup> Thus although ultimately interpreting the police power exception rather narrowly in the finding of expropriation, the tribunal assigned a substantial relevance to the object and purpose factor, linking it also to the assessment of interference with relevant rights and the legitimate expectations of an investor.

Finally, two more recent cases should be mentioned in his regard, as they seem to have taken a relatively broad approach with regard to the object and purpose factor. In the **Feldman** case, the ICSID tribunal recognized that “governments must be free to act in the broader public interest, through protection of the environment...the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law

---

<sup>168</sup>Mann, at 18, recognizes this unclarity in the ruling and concludes that the Myers tribunal, by its reasoning, returned “suspiciously close to the degree of impact test in Metalclad”.

<sup>169</sup>Técnicas, at paras, 97, 108-110. See also at para 125-126.

<sup>170</sup>Técnicas, at para 122.

<sup>171</sup>Id.

<sup>172</sup>Técnicas, at para 130-132.

<sup>173</sup>Técnicas, at para 147.



*recognizes this*".<sup>174</sup> The statement takes an important standpoint, however, less clarification was given as to what regulations are to be considered "reasonable" in this context. As recognized by the tribunal itself with regard to differentiating legitimate regulations from compensable takings, "*no one has come up with a fully satisfactory means of drawing this line*".<sup>175</sup>

The claimants in **Methanex** alleged that the measure at issue (a ban on the additive MBTE) was taken by the Californian state in order to support the domestic competitor industry, rather than due to environmental concerns as claimed by the government. In particular, the state was held to be in a conspiracy with a large domestic company in the business and to have been "corrupted" by unfair influences and lobbying activities.<sup>176</sup> Notwithstanding the seriousness of the allegations, the tribunal was convinced as to the true nature of the purposes put forward by the state of California and rejected the notion that hidden protectionism was involved.<sup>177</sup> This finding of a legitimate public purpose (together with non-discrimination and absence of specific commitments from the government) rendered the regulation "lawful" and not expropriatory.<sup>178</sup> A comparison should be made with the Myers reasoning in this regard, where the tribunal inquired into the availability of less restrictive means and made a thorough examination of alleged protectionistic purposes. By contrast, the Methanex tribunal seems to have applied a far less strict approach towards the state. One may here further make a comparison to the European Court and its "margin of appreciation" standard, according to which the state is seen as being in the best position to assess whether and for what purposes regulations are needed in a given case; and where the decisions taken by a government in this regard will be ruled down by the court only if found manifestly unreasonable.<sup>179</sup> Whether the international jurisprudence will be moving towards such ECHR-inspired legal standards in this context, as seen e.g. in Tecmed above, remains to be seen. So far, commentators have studied the Methanex ruling mainly through the prism of early NAFTA cases, in which it appears as "extremely deferential to national governments"<sup>180</sup>

## 6.2 The "sole effects" doctrine

In addition to instances discussed above where the object and purpose criteria has been accepted, although more or less and often only in theory, there are examples of where it has been rejected altogether, implicitly or through explicit statements to that end.

---

<sup>174</sup>Feldman, at para 103.

<sup>175</sup>Feldman, at para 100.

<sup>176</sup>Methanex, Part III Chapter B, see particularly at para 4, 13. See also Part I, Preface, at para 7 and Part IV Chapter D, at para 11.

<sup>177</sup>Methanex, Part III Chapter A, para 101-102; Chapter B, para 60.

<sup>178</sup>Methanex, Part IV Chapter D, at para 15.

<sup>179</sup>See e.g. the James v. United Kingdom Case, 98 Eur.Ct.H.R. (ser. A) 9, 32 (1986), where this approach was applied in a clear manner. See for comments Yannaca-Small, at 17.

<sup>180</sup>Blades, at 97.

A notable example under the IUCT is to be found in **Phelps Dodge Corp v Islamic Republic of Iran**, concerning a transfer of management rights which was found to be expropriatory.<sup>181</sup> The tribunal held that the obligation of Iran to pay compensation as a consequence of the taken measure remained valid regardless of the fact that the measure was taken in accordance with a national law, enforced with financial, economical and social motives in mind.<sup>182</sup> The law in question was created to prevent the closure of factories, ensure the protection of debts owned by the Iranian government and secure payments due to workers.<sup>183</sup> Similarly, in the **Birnbaum v Iran case**, the tribunal stated that in its determination of expropriation, it needed not regard whether the governmental measure of appointing a temporary manager for the investor's business was justified under local laws for the protection of vital domestic industries and their workers.<sup>184</sup>

An even more outright rejection of the purpose criteria was expressed 12 years later under the ICSID in **Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica**.<sup>185</sup> The case concerned a privately owned beach which was taken by the state of Costa Rica to be included in a National Park. While the dispute centred on the compensation amount to be paid by Costa Rica for the outright measure, the ruling nevertheless contains general statements regarding the legal determination of alleged expropriatory measures which are relevant in this context. The host state's defence regarding public purpose rationales, or more specifically regarding environmental concerns, were not considered by the tribunal, as it was held that "*the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid*".<sup>186</sup> The tribunal also added that "*The international source of the obligation to protect the environment makes no difference*"<sup>187</sup>, thereby refusing to regard any environmental treaties

---

<sup>181</sup>Phelps Dodge Corp v Islamic Republic of Iran, Award No 217-99-2, March 19 1986; 10 Iran-U.S. Cl. Trib. Rep. 121, at 130 (hereinafter "Phelps Dodge").

<sup>182</sup>Phelps Dodge, at 130 (para 22).

<sup>183</sup>Id.

<sup>184</sup>Birnbaum, at 270 (para 35). Judge Aldrich seems to be of the opinion that the refusal to regard legitimate purposes as a ground for non-compensation in these cases stems in part from the fact that the managers at issue were not accountable to the original owners, but only to the Iranian government. It is added that this approach is consistent with what was suggested by Christie regarding the legal determination of situations where control and management has been taken over by the state. See at 590. However, although Christie stipulated proper management towards the original owner as a requirement for such takings to be justifiable, she arguably did not connect this requirement to the determination of legitimate purposes behind a measure; see at note 38 above with accompanying text. It is therefore hard to understand Judge Aldrich argument in this context.

<sup>185</sup>Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award February 17, 2000. (hereinafter "Santa Elena").

<sup>186</sup>Santa Elena, at para 71.

<sup>187</sup>Id.

involved.<sup>188</sup> In a subsequent passage, it was further made clear 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 compensation remains*”.<sup>189</sup>

Similarly, although in a less outspoken manner, the purpose factor was ignored in the **Metalclad** case. The circumstances did as mentioned centre around a municipality decision to deny permits for the landfill facility of the claimant, a decision based largely on environmental concerns and including a geological audit showing that the waste at issue could contaminate the local water supply.<sup>190</sup> These reasons were not considered by the tribunal as a possibly justifying factor in its determination on whether an expropriation had occurred. Regarding a separately analysed Ecological Decree imposed by Mexico, moreover, the tribunal expressly held that it needed not to consider the purpose or intent behind its enactment.<sup>191</sup>

The above approaches have become known as “The sole effect doctrine”, due to the absence of object and purpose considerations in favour for a complete focus on the interference criteria.<sup>192</sup> The doctrine has been much criticized, both by authors who accept it as a part of customary international law<sup>193</sup>, and those who argue that it has no such legal support, some also pointing out that the doctrine cannot even be said to yet have become a dominant standpoint.<sup>194</sup> Most of the above commentators seem to recognize a shift towards a sole effects approach in recent case law.<sup>195</sup> The picture is however arguably more split, at least in the NAFTA context. While Metalclad constitutes a proving example of the above statements, Pope and Myers are in a largely unclear “middle-ground”; and Feldman and Methanex, finally, stand for an opposite approach.

---

<sup>188</sup>The complex issue of the interaction between a state’s different international obligations such as under environmental conventions and investment agreements is beyond the scope of this paper. For an interesting analysis on the subject, see e.g. Hirsch, Moshe: *Interactions between Investment and Non-Investment Obligations in International Investment Law*, available at <https://www.ila-hq.org/pdf/Foreign%20Investment/Hirsch%20Interactions.pdf>.

<sup>189</sup>Santa Elena, at para 72. For criticism on the ruling, see Godshall, at 303-304 and Sornarajah, at 358, 374, and 385. The latter argues that no legal support, neither in domestic legal systems nor in international law, can be found for the taken approach.

<sup>190</sup>Metalclad, Mexico’s Counter-Memorial, at para 509-510 and para 48, Wagner at 466.

<sup>191</sup>Metalclad, at para 111. For criticism on this aspect of the case, see Tollefson, at 216-217 and Freeman, at 209.

<sup>192</sup>See Dolzer, e.g. at 90, 93.

<sup>193</sup>See e.g. Godshall, at 303-304.

<sup>194</sup>Sornarajah, at 385, Dolzer, at 90. The latter author sees Sea-Lands and Myers as cases representing a “second strand”.

<sup>195</sup>Sornarajah, at 358, 374, 385, stating that future tribunals will not likely depart from the standpoint taken in Santa Elena; Dolzer, at 93. See also Mann, at 18, seeing a similar development away from the object and purpose criteria in the NAFTA context.

The sole effects doctrine, naturally, also has its advocates. Except for the alleged need to restrict protectionism hidden in purpose justifications<sup>196</sup>, a common argument regards the meaning of the initially mentioned four generally accepted requirements for legal takings of which public purpose constitutes one.<sup>197</sup> In that context, it is recognized, the factor does only determine the legality of a measure already found to be expropriatory and requiring compensation, i.e. does not speak to the legal determination of whether a taking has occurred in the first place.<sup>198</sup> It has been argued that object and purpose cannot have a second role to play in the sphere of indirect expropriations. As held by Appleton, author and member of many investor-state arbitral tribunals, including several NAFTA cases under UNCITRAL: *“It makes no difference from an international law perspective whether a taking be for environmental protection, public health or military purposes. Indeed, international law presumes that every governmental taking will be for a public policy purpose – but international law guarantees compensation.”*<sup>199</sup>

In sum and in light of the above cases, the role and scope of the object and purpose criterion is subject to varying interpretations and theories, as the police power doctrine is by no means defined neither in the discussed case law nor in the legal literature. Moreover, as shown by the sole effects doctrine, there is not even a consensus on whether object and purpose behind a challenged state measure should be regarded as a criterion in defining indirect expropriation at all. These conclusions will be further elaborated on in the next chapter.

---

<sup>196</sup>See e.g. Beauvais, at 283-284, arguing that tribunals should not regard object and purpose justifications as disguised expropriations could otherwise be hidden behind allegedly legitimate purposes. According to the author, moreover, the approach of rejecting object and purpose in this regard is consistent with “the general consensus of scholarship and precedent in this area”.

<sup>197</sup>The other three require that a taking is conducted as provided by law, in a non-discriminatory manner and accompanied by compensation. See supra note 2 with accompanying text.

<sup>198</sup>See e.g. Sornarajah, at 397, discussing when a measure already found to constitute expropriation may be challenged due to the absence of a public purpose. Interestingly, Beauvais has used this discussion as a proof of “general consensus of scholarship” for the sole effects doctrine (see Beauvais, at note 185. Beauvais refers to an older edition of Sornarajah where the relevant passage is at 317). It is hard to see any support for such a conclusion. In the quoted passage, Sornarajah does not even address the question of sole effects versus object and purpose considerations in determinations of whether indirect expropriations have occurred, but, as just mentioned, handles another issue. Furthermore, when the author does address the relevant question, he strongly criticises the sole effects doctrine, stating, inter alia, that it “has no place in the law”. See Sornarajah at 385-386 and supra note 189.

<sup>199</sup>Appleton, at 47.

## 7 Concluding analysis and ending thoughts

In light of the above analysed case-law, there is a notable scarcity of consistent patterns from which general rules may be extracted in the context of regulatory expropriations. Rather, the international jurisprudence in this area seems to be characterized by vague statements and highly case-specific reasonings; as one author pointed out, “one gets the impression that the tribunals are making their decisions primarily by applying broad equitable principles to the particular at hand”.<sup>200</sup> Even so, however, as diverging holdings are to be found in cases where the facts at issue are similar, and as colliding views are to be found in the more explicit statements made by different tribunals, one must conclude that the approaches taken involve considerable inconsistencies. Interestingly, this is so even though the tribunals refer to principles of international law, recognising such a set of relevant and *common* standards.<sup>201</sup> In sum, there seems to be a bothering lack of clear general guidelines in establishing the line between non-expropriatory regulatory measures and indirect expropriations. As to the legal standards actually applied by tribunals, although the four outlined criteria may serve as a helpful framework, the extent to which these are considered as well as their interpreted practical meaning and scope, vary significantly in the above cases. An attempt of outlining the main structures and problem areas of the analyzed material will nonetheless be made.

The determination concerning economic impact of measures at stake on relevant property rights has formed a central part of most reasonings above described, thus it may arguably be said that the current role of the interference criteria in this context is relatively certain. Although the applied standards have been varying, tribunals have generally referred to deprivation of substantial rights of ownership, which, apart from the more obvious notions of access to physical property such as land, assets, etc, has been held to include the right of use, control and management of an investment.<sup>202</sup> Some tribunals have recognised the expected profits from a business as a protected “right” in this context, most notably in *Metalclad* where “reasonably-to-be expected economic benefit of property” was explicitly held to be protected and where regulatory expropriation was found partly based on this notion.<sup>203</sup> The current standing of this approach in case-law should not be regarded settled as it has been met by rejecting views by some of the subsequent tribunals.<sup>204</sup> As has been pointed out by commentators, a more clear definition of protected rights, if hard on a national level, may be practically impossible to achieve in the international

---

<sup>200</sup>Beauvais, at 279.

<sup>201</sup>See supra note 27 with accompanying text.

<sup>202</sup>See Tippetts, Feldman, Waste Management, Methanex.

<sup>203</sup>See also *Starrett Housing*, Pope & Talbot.

<sup>204</sup>Most explicitly in *Waste Management*. See also *Feldman and Methanex*.

context as views on what is to be included varies among different legal cultures.<sup>205</sup> In this regard, the statement made in Myers is interesting, as it holds the protection scope to possibly cover “rights other than property rights”. Although the practical meaning of this statement is unclear, it arguably implies a broad and open-ended definition of what may be a protected in the context of indirect expropriations.<sup>206</sup>

As seen so far, tribunals have regarded the concept of property focusing on relevant rights more than on physical things; consequently the subject of protection has been seen as bundles of such rights rather than defined units. Linked to this concept is the problem of how to define the relevant property when determining the level of interference, as both the whole bundle of rights as well as only those individually affected may serve as a reference point for the analysis. Obviously, how much of the property that may be said to have been interfered with by a measure will diverge depending on the chosen alternative and higher levels of deprivation will be easier to find applying the latter choice, thus being the more favourable alternative for investors.

Some tribunals in the above analysed case-law have taken the more investor-friendly line, through unbundling relevant property rights in the context of the interference determination and treating the affected rights as separate “investments”. This approach, known as conceptual severance, has been shown mainly in its functional form, i.e. where different functions or activities e.g. concerning land or within a business are subjects of the severance. Thus, market access and/or market share was e.g. seen as rights capable of being separated to individual “wholes”, possibly in the Pope & Talbot case and certainly in Myers. In Metalclad, the tribunal recognized the chosen way to use land as a separately protected right and expropriation was found although other businesses remained permissible for the investor.

Again, however, no clear conclusions may be drawn as the taken approaches seem to have been rejected by a couple of the subsequent tribunals. While the Feldman tribunal did not regard the chosen business of exporting cigarettes as a separately protected right, claims raised by the investor concerning the loss of market share and market access were rejected by the tribunal in Methanex. Arguably, a chosen activity amounting to a business seems more reasonable to regard as a separate entity in light of the economical value and functional rights involved, than access to a specific market by such a business. The value of general arguments in this regard may however be doubted in view of different factual scenarios involved. A share or access to a specific market may e.g. form *the* business given the circumstances in a case, rendering its treatment as an entity less doubtful.

---

<sup>205</sup>Been, at 60.

<sup>206</sup>See also Porterfield, at 52.

An author concluded a couple of years ago that “international tribunals have refused to require compensation” when the measure “did not remove all economic value from the property”.<sup>207</sup> Conversely, another commentator has argued that post Metalclad and Myers, compensation will be due when “any part of the commercial value is lost”.<sup>208</sup> In view of the above analysed cases, the truth seems to lie somewhere in between, keeping in mind, however, that the conclusion might depend on how “the property” in the first statement is interpreted. As just discussed, property in this context may be taken as the whole bundle of rights involved or as just the ones directly affected by a measure at issue. The legal standard applied in Starrett Housing implies a practically total deprivation of value (“render rights so useless that they must be deemed to have been taken”). Tippetts, on the other hand, found an expropriation to have occurred based on the deprivation of control and management rights, thus even though the business as such retained at least some economical value. Similarly, the Metalclad tribunal regarded a denial to operate of a landfill expropriatory, although the land in question was not economically wholly useless as it remained in the control of the claimant and could be used for other profitable businesses.<sup>209</sup> Also in cases where expropriation claims have ultimately been rejected, statements dicta imply that complete deprivation of economic value will not be required.<sup>210</sup> Myers may confuse a reader as the tribunal initially stated that a “removal of the ability...to make use of economic rights” was required in this context, in a later passage however recognising that in certain circumstances, takings may be regarded as such even if partial.

While the tribunals thus do not seem to require all economic value to be taken, the determinations have not been as investor-friendly as to find deprivation of any part of such value expropriatory either. In many of the above cases some part of an investment’s value had been lost, e.g. through reduced profits or precluded export businesses, but the claim of expropriation was nevertheless rejected.<sup>211</sup> In general, thus, the legal standards shown above form a higher threshold, requiring as seen at least a significant degree of deprivation. If further clarified and applied in a consistent manner, this threshold could perhaps strike a reasonable middle ground. Interference will also be relevant with regard to its duration, where, as seen in above cases, short-term measures will generally not be regarded as expropriatory. Dicta implying an opening for “temporary” expropriations are however rendering final conclusions impossible in this regard.<sup>212</sup>

---

<sup>207</sup>Wagner, at 513.

<sup>208</sup>Yee, at 89.

<sup>209</sup>One could argue, however, that if the residual value is truly marginal compared to the initial investment and expected profits that have been lost, the deprivation will be practically total. In the discussed cases, too little information on this relation has been publicly available to make any definite argument on the matter.

<sup>210</sup>See Pope & Talbot, Myers, Feldman.

<sup>211</sup>Pope & Talbot, Feldman, Waste Management.

<sup>212</sup>Myers.

A final note to be made in this context is the issue of whether measures “tantamount to expropriation”, included in many expropriation provisions, infer a new category of takings, requiring lower levels of interference with property rights. As has been shown, while this notion have been rejected by tribunals in *Pope & Talbot*, *Myers* and *Feldman*, the role of the above wording as expanding the traditional expropriation sphere has been implied in *Metalclad* and recognized explicitly in *Waste Management*. It is therefore too early to draw any conclusions on the matter. Arguably however, a discussion on expansion becomes rather meaningless when the reference point from which something is to be broadened is itself largely undefined. Thus, the required level of interference should be clarified with regard first of all to the existing law on indirect expropriations, before adding further categories of takings with even less conceivable features.

The factor of legitimate expectations has been less problematic in the above cases. With the exception of one tribunal, such expectations have not been considered absent specific representations made on behalf of the state through concessions or other means. A wider scope of the criteria where tribunals would regard expectations of non-regulation and static business conditions as generally legitimate should be hard to defend in view of the dynamic and developing nature of societal realities. Factors such as new technologies, new risk reports or new economical or social priorities, just to name a few, may call for regulatory or other changes affecting certain investment conditions. Naturally, investors should in all instances have the right to expect protection from discriminatory and unfair treatment. Such protection is however to be found under other principles such as the NT, MFN or minimum treatment requirements and tribunals should in their legal determinations keep the distinction between breaches of those provisions and findings of expropriation. A confusing element in this regard is the fact that non-discrimination is also one of the four above noted requirements for a legal taking.<sup>213</sup> The factor will however in view of most commentators not be relevant for the determination of whether a taking has occurred in the first place, but only as to the legality of a measure already found to be expropriatory.<sup>214</sup> Thus, tribunals finding discrimination or unfair treatment should consider possible breaches of the anti-discrimination principles mentioned above, rather than blur the expropriation definition with those findings. Obviously, the relevant expropriation criteria will be affected by most surrounding circumstances, thus for example the object and purpose determination will likely be less state deferent if discrimination is suspected; but the argument is still made that discrimination and unfair treatment do not form relevant expropriation criteria *per se*. In this regard, the reasoning in *Myers* forms an important precedent, as a breach of the NT provision was found without affecting the tribunal’s determination of the measure at issue as not amounting to a taking.

---

<sup>213</sup>See supra note 2.

<sup>214</sup>See e.g. *Newcombe*, at 27, note 141. For the same view regarding due process, see at 29.



Consistency has not been reached by the above tribunals with regard to whether state intent and transfer of benefit from the investor to the state should be required in the context of regulatory expropriations. The most recent case-law seems to imply an affirmative answer. In light of reasonings requiring transfer of benefit, an interesting approach has been put forward, arguing for a new conceptual approach where the appropriation on behalf of the state rather than the level of interference with rights of the investor is to be decisive when analysing alleged expropriations. The approach is noteworthy as it attempts to create a general rule to separate expropriatory and non-expropriatory regulations and as it does so through a novel point of view, centring on the prevention of unjustified enrichment by the involved parties.<sup>215</sup> However, one may question whether the application of this rule in international investment disputes in practice wouldn't amount to similar fact-specific features and definition problems as has been the fate of other rules in this area of law. According to Newcombe, e.g., "benefit" is to be read broadly as to include where the state acquires public goods such as a national park or a highway through regulatory means. It is also meant to cover *indirect* appropriations through cancellation of previously granted rights, such as some of the above discussed cases where certain concessions or licenses were withdrawn by the state. Arguably, with such a scope of the term, most if not all regulations taken with general interests in mind will be seen as transferring benefit to the state. Although the author limits these results by excluding measures taken within the police powers of the state from the scope of expropriation, this does not necessarily clarify the matter as the meaning of the police power exception and public purpose measures contained therein is largely undefined.<sup>216</sup>

In fact, the object and purpose factor is arguably one of the most unclear of all aspects discussed in this paper. As seen in the above cases, there is no consensus on whether it forms a criterion in defining indirect expropriations at all. Among those tribunals who have considered the police power exception, moreover, recognizing that certain purposes behind a measure may render it non-expropriatory and/or non-compensable, their interpretation of the police power scope vary significantly. While measures including punitive elements or other objects of maintaining public order have been generally accepted, tribunals seem to be less convinced regarding the justifying role of purposes for the protection of the environment or public health.<sup>217</sup> Although general statements to the contrary have been made in some of the above cases, the latter type of purposes has often been disregarded in their factual reasonings.<sup>218</sup>

---

<sup>215</sup>As pointed out by Newcombe at 6 and Wagner, at 503-504, an approach focusing on transfer of benefit has been taken by Canadian courts in this regard, in general rejecting claims of indirect expropriation unless such a transfer from the original owner to the state is shown.

<sup>216</sup>See Newcombe, e.g. in Abstract.

<sup>217</sup>Sedco, Emanuel Too, Técnicas.

<sup>218</sup>Pope & Talbot, Myers.

In a strictly logical-theoretical sense, since it has been held that discrimination is not relevant per se in the determination of whether indirect expropriation has occurred, the same should apply to the object and purpose criteria since it, too, is to be found in the requirements for a legal taking.<sup>219</sup> There are however compelling reasons for avoiding such an approach, as has also been done by some tribunals and in large parts of the legal doctrine. The exclusion of purpose considerations or diminishing their practical value in the expropriation context is problematic in view of the often conflicting principles and interests involved in areas of activity where investments are made, and the balancing role of states in this regard. An aspect often highlighted in recent years is the interaction between investor rights and principles of environmental protection in this regard, particularly since many disputes arise from high-risk investment activities, such as hazardous waste disposal or production of potentially dangerous chemicals, in which the clash of interests is most visible. An opinion on the far end of the spectrum regarding this interaction is to be found in *Santa Elena* where as seen, the tribunal explicitly refused to consider the environmental concerns involved in the case and any international laws obliging the state to act in accordance with those. A less extreme standpoint was taken in *Myers*, where the purposes put forward by the Canadian state and its obligations under the Basel Convention for hazardous waste were taken into account by the tribunal. As seen, however, it is unclear whether the considerations were regarded relevant for the expropriation claim. Also, even if so, high standards of proof regarding involved environmental risks and lack of alternative means were required in the case. According to many commentators, strict standards in this regard may be inconsistent with the Precautionary Principle, widely recognized to be a part of international environmental customary law, under which a state is allowed to regulate before the risks it wants to prevent materialize and can be proved with full scientific certainty.<sup>220</sup> Naturally, as further pointed out, the object and purpose criteria cannot be a shield behind which protectionistic motives may be hidden, thus some sort of scientific or other objective inquiry will arguably be necessary on the part of the tribunal. There should however arguably be room for progressive policies, whether social, environmental or other, which by their very nature may not be supported by mainstream science or a consensus of states. *Methanex* could be seen as a valuable precedent in this regard.

In sum, to disregard the object and purpose criteria in this context will arguably imply a hindering tool on bona fide regulatory activities of states. It may also be at odds with parts of international law, e.g. in the environmental sphere, which as seen may allow or in some circumstances even oblige states to impose certain regulations. Thus, it seems reasonable to argue that the legal analysis of whether a measure amounts to regulatory expropriation should be broad enough to consider the environmental, social and other realities involved rather than exist in a conceptual vacuum.

---

<sup>219</sup>See supra note 2.

<sup>220</sup>See e.g. Wagner at 520-522.

According to one author, we are now experiencing a "historical disconnect, in which international foreign investment protection rules pre-date developments in other areas (such as human rights and the environment) and have not yet taken into account the internationally recognized values reflected in those rules".<sup>221</sup> There may perhaps be a time in the future where the different spheres of international law seem more reconcilable.

In view of all of the above diverging approaches taken under international tribunals, it is not surprising that doctrinal opinions on where current law stands at vary from those noting an expanding scope and successful challenges to legitimate exercises of a states' regulatory powers<sup>222</sup>, through findings that case law shows a relatively narrow interpretation of indirect expropriation<sup>223</sup>, to commentators concluding that the protection given to investors under expropriation provisions is insufficient.<sup>224</sup> Surely, given the leeway for broad or restrictive interpretations in each individual case, there must be a large degree of uncertainty on the matter also among state officials, investors and international lawyers involved in expropriation disputes.

Apart from concerns to be had generally regarding legal inconsistency and the fairness aspects involved, there are obvious practical downsides connected with an unclear state of the law in this context. States may be unwilling to undertake "grey zone" measures for fear of expensive arbitral investor-state proceedings in which the outcome will be unpredictable and may depend on random factors such as the ad hoc composition of members of the tribunal. At the same time, investors will be unable to rely on investment plans and calculations given the uncertain outcome of possible state interferences, and may be particularly reluctant to invest in areas where high inputs of capital are required or where long-term commitment is necessary for returns of profit. Thus, the uncertainty is arguably detrimental to both of the affected parties, creating an unwanted "chilling effect" on their respective activities.<sup>225</sup>

Whether and how more defined guidelines as to the scope of regulatory expropriations under international case-law could emerge in the near future is a disputed matter, and numerous works have been dedicated to possible substantive and procedural legal changes to that end. Many seem to argue that a fact-specific case by case development is the only seizable approach

---

<sup>221</sup>Sands at 201.

<sup>222</sup>See e.g. Yee, at 105-106, Godshall at 264 and forward, Saporita, at 267 and 269. For an opinion at the far end of the spectrum, see Been & Beauvais, who argue that the regulatory expropriation doctrine should be abandoned altogether.

<sup>223</sup>Stone, at 765.

<sup>224</sup>Parisi, at 398.

<sup>225</sup>The term has been used by many authors in this regard, mostly in the context of effects on the state. See, also for further comments on the subject, e.g. Been & Beauvais, at 132-135, Wagner, at 467, Godshall, at 287; Geiger, at 105.

given the complex subject matter and the many aspects involved.<sup>226</sup> Rather than applying general rules, thus, tribunals need to balance involved interests against each other in each specific case, considering all surrounding circumstances to the particular dispute. Naturally, consistent principles may evolve even where the basis of the legal analysis will be highly fact-specific, such as through a comparing and distinguishing process of the kind found in common law systems. However, at least when it comes to the cases discussed in this paper, there has been a notable scarcity of references to previous decisions, both with regard to awards rendered by tribunals under the same fora and other relevant jurisprudence. Thus, it may be questioned whether a case-by case development is appropriate where the very basis of such a method, the consideration of factual similarities and differences between precedents and a case at issue in order to follow evolved principles, is rarely applied. Perhaps a *stare desisis* principle needs to be mandated by law or treaty for precedents to be considered, or perhaps the institutional form of ad hoc tribunals is less optimal for the task overall. The issue is complex and a further analysis on it can, as initially mentioned, not be provided here.

Even among those in favour of a case-by case approach there are some authors doubting whether it may be appropriate in the international sphere. Sornarajah concludes that to limit regulatory powers of states as done in current jurisprudence cannot be the function of international law, as arbitral tribunals are incapable of balancing involved public and private interests in the way done by domestic courts when ruling on alleged expropriations.<sup>227</sup> Poirier, to take another approach, points out that principles regarding property and expropriation cannot be permanently set out on a central level but are continually re-negotiated in response to new views and knowledge within science, technology, custom, etc, which may differ among communities.<sup>228</sup> Thus, according to the author, principles must be allowed to evolve slowly and transparently, reinforcing the sense of community in the process, as by such reinforcement, "regulatory takings doctrine facilitates the generation and acceptance over time of property practices and regulatory practices that are appropriate to a community's circumstances".<sup>229</sup> As is recognized by the author, such an approach may prove hard to fit in a transnational context where expropriation cases are decided by ad hoc tribunals who are often geographically, culturally and otherwise detached from the place of the dispute at issue. The aspect of "transparency" and community participation is nonetheless worth noting, as it raises important questions regarding the overall private versus public nature of arbitration proceedings, the role of third party submissions, the public

---

<sup>226</sup>This opinion was viewed already by Christie, at 338, stating in a much quoted passage that "it is evident that the question of what kind of interference short of outright expropriation constitutes a "taking" under international law presents a situation where the common law method of case by case development is pre-eminently the best method, in fact probably the only method, of legal development."

<sup>227</sup>Sornarajah, at 376.

<sup>228</sup>Poirier, at 858-859. See also at 907-911.

<sup>229</sup>Poirier, at 859.

availability of awards, and more. These mostly procedural issues, crucial as they are for a deeper understanding of expropriation disputes under international arbitration tribunals, are however beyond the scope of this paper.

The overall notion of balancing interests against each other in each specific case has met with scepticism in parts of the literature, notably by Newcombe who argues that the main interests involved, i.e. those of private ownership and the general welfare, are hard, if not impossible to reconcile.<sup>230</sup> Also, the author further points out, the method of justifying regulatory measures when "legitimate", within the "normal" scope of police powers and so forth, is not practically possible since there are not universally accepted definitions of those terms and the interpretations therefore will vary. The above approaches can thus only lead to further inconsistencies and continually murky legal standards.<sup>231</sup> Newcombe's final conclusion is that the purpose of international expropriation law cannot be to provide an ultimate balance between the interests, but rather, through the balancing process, "to provide a minimum level of protection from state appropriations and arbitrary conduct".<sup>232</sup> It is recognized that investors may have protection needs beyond that level; those are however, according to the author, best provided for through private means such as contracts or insurances.<sup>233</sup> As discussed above, the relevant standards applied by Newcombe centre on transfer of benefit from an individual to the state and the unjustified enrichment of the latter. As also noted above, however, findings of such occurrences involve interpretations of legal concepts such as "benefit" or "police powers", which arguably are as vague and cause similar difficulties as the ones pointed out by Newcombe above. It also takes us back to the starting point of case-by case development in this context, the institutional and other problematic aspects of which has been noted. The argument regarding contracts and insurances is however noteworthy as such private mechanisms of risk allocation may prove appropriate for industry- or investment specific solutions that can hardly be provided for in full by general principles of law and that may be more predictable for both parties than current arbitral awards. The practical role of such means is however hard to assess at this point as, at least with regard to insurances, they have been relatively undeveloped in the context of international investment protection so far.

In sum, there are important substantial, procedural and institutional issues to regard if the role and scope of regulatory expropriations is to be clarified under international law. A further discussion on these is as has already been mentioned outside the scope of this paper, but it may once again be pointed out that such changes may prove necessary. As has been shown in the above analysed awards, although certain general criteria may be identified in the

---

<sup>230</sup>Newcombe, at 5.

<sup>231</sup>Newcombe, at 22.

<sup>232</sup>Newcombe, at Abstract.

<sup>233</sup>Id.

legal determinations of international tribunals when considering alleged regulatory expropriations, the degree to which these are regarded, as well as the legal thresholds applied, vary considerably among the tribunals, leaving a largely inconsistent body of case-law on the subject. As put by Appleton, a leading counsel in a number of international arbitration matters including some of the above NAFTA cases, “*expropriation is in the eye of the beholder*”.<sup>234</sup> Arguably, this should not be an acceptable definition of a legal concept in a rule-of-law governed international society.

---

<sup>234</sup>Appleton, at 48. See also Perescano, transcript from roundtable discussion on Domestic Challenges if Multilateral Investment Treaties are Interpreted to expand the Compensation Requirement for Regulatory Expropriations beyond a Signatory State’s Domestic Law, at 217.

# Supplement A

## **NAFTA, Art 1110**

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.

## **Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, U.S.-Iran, Art IV(2), 8 U.S.T. 899, 284 U.N.T.S. 93**

Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation ...

## **The Peru-Paraguay BIT (signed Jan 31, 1994), Article 6(1): Expropriation - Compensation**

No Contracting Party may directly or indirectly nationalize or expropriate an investment in its territory of an investor of another Contracting Party or adopt any other measure of the same nature or effect, except when with motives expressly established by the Constitutions of each Party, on condition that these measures are non-discriminatory and subject to payment of just and timely compensation.<sup>235</sup>

## **The Mexico – Spain BIT (signed June 22, 1995), Article 5(1): Nationalization and Expropriation**

---

<sup>235</sup>This is an unofficial translation made by the author with assistance from the translation service Systran available at <http://www.systranbox.com/systran/box>. The original full-text version of the article in Spanish is available at [http://www.unctad.org/sections/dite/ia/docs/bits/peru\\_paraguay\\_esp.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/peru_paraguay_esp.pdf).

Nationalization, expropriation, or any measures with similar characteristics or effects (hereinafter “expropriation”) may not be conducted by the authorities of a Contracting Party against the investments in its territory of investors of the other Contracting Party, except when for a public purpose, under due process of law, in a non-discriminatory manner and subject to payment of compensation to the investor or his assignee or legal successor...<sup>236</sup>

**Agreement between the Hellenic Republic and the Arab Republic of Egypt for the Promotion and Reciprocal Protection of Investments (Signed July 16, 1993), Art 4: Expropriation**

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

- a) the measures are taken in the public interest and under due process of law
- b) the measures are clear and non-discriminatory; and
- c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation....

---

<sup>236</sup>This is an unofficial translation made by the author with assistance from the translation service Systran available at <http://www.systranbox.com/systran/box>. The original full-text version of the Article in Spanish is available at [http://www.unctad.org/sections/dite/ia/docs/bits/mexico\\_spain\\_sp.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/mexico_spain_sp.pdf). Note, that a new revised BIT between the countries, including certain changes in the expropriation provision has recently been negotiated between the countries but has not yet entered into force. See Investment Treaty News Nov 2, 2006, available at [http://209.85.129.104/search?q=cache:uQubEhsbr2wJ:www.iisd.org/pdf/2006/itn\\_nov2\\_2006.pdf+Mexico+Spain+bilateral+investment+treaty&hl=sv&gl=se&ct=clnk&cd=5](http://209.85.129.104/search?q=cache:uQubEhsbr2wJ:www.iisd.org/pdf/2006/itn_nov2_2006.pdf+Mexico+Spain+bilateral+investment+treaty&hl=sv&gl=se&ct=clnk&cd=5).



# Bibliography

## Official Documents

United Nations Conference on Trade and Development (UNCTAD):  
"Latest Developments in Investor-State Dispute Settlement", IIA Monitor,  
No. 4 (2005)

## Literature

Aldrich, George H: "What Constitutes a Compensable Taking of Property?  
*The Decisions of the Iran-United States Tribunal*", 88 Am. J. Int'l L. 585  
(1994)

Alvarez, Guillermo Aguilar & Park, William W.: "The New Face of  
*Investment Arbitration: NAFTA Chapter 11*", 28 Yale J. Int'l L. 365 (2003)

Appleton, Barry: "Regulatory Takings: the International Law Perspective",  
11 N.Y.U. Env't'l L.J. 35 (2002)

Baughen, Simon: "Expropriation and environmental regulation: the lessons  
*of NAFTA Chapter eleven*", 18 Oxford Journal of Environmental Law, No  
2, 207 (2006)

Beauvais, Joel C.: "Regulatory Expropriations under NAFTA: Emerging  
*Principles and Lingering Doubts*", 10 N.Y.U. Env't'l. L.J. 245 (2002)

Been, Vicky: "Does an international 'Regulatory Takings' doctrine make  
*sense?*", 11 N.Y.U. Env't'l. L.J. 49 (2002)

Been, Vicky & Beauvais, Joel C.: "The Global Fifth Amendment? NAFTA's  
*Investment Protections and the Misguided Quest for an International  
'Regulatory Takings' Doctrine*", 78 N.Y.U. L. Rev. 30 (2003)

Blades, Bryan W.: "The Exhausting Question of Local Remedies:  
*Expropriation under NAFTA Chapter 11*", 8 Oregon Review of Int'l Law  
33 (2006).

Brunetti, Maurizio: "The Iran-US Claims Tribunal, NAFTA Chapter 11 and  
*the Doctrine of Indirect Expropriation*", 2 Chi. J. Int'l L. 203 (2001)

Carss-Frisk, Monica: "The Right to Property: A guide to the implementation  
*of Article 1 of Protocol No.1 to the European Convention on Human  
Rights*", Council of Europe Human Rights Handbooks, No. 4 (2001),  
available at [http://www.coe.int/T/E/Human\\_rights/hrhb4.pdf](http://www.coe.int/T/E/Human_rights/hrhb4.pdf)

- Chien Yen, Goh: “*Expropriation and investor-state disputes: The dangers of international investment agreements*”. Available at [www.twinside.org.sg/title2/resurgence/182-183/Cover04.doc](http://www.twinside.org.sg/title2/resurgence/182-183/Cover04.doc)
- Christie, G.: “*What Constitutes a Taking of Property under International Law?*”, 38 *British Yearbook of International Law* 307 (1962).
- Dolzer, Rudolf: “*Indirect expropriations: New Developments?*”, 11 *N.Y.U. Envt’l L.J.* 64 (2002-2003)
- Freeman, Elyse M.: “*Regulatory Expropriation Under NAFTA Chapter 11: Some Lessons From the European Court of Human Rights*”, 42 *Colum. J. Transnat’l L.* 177 (2003-2004)
- Gantz, David, A.: “*Potential conflicts between investor rights and environmental regulation under NAFTA’s Chapter 11*”, 33 *Geo. Wash. Int’l L.J.* 651 (2001).
- Geiger, Rainer: “*Regulatory Expropriations in International Law: Lessons from the Multilateral Agreement on Investments*”, 11 *N.Y.U. Envt’l L.J.*, No 1, 94 (2002)
- Godshall, Lauren E.: “*In the Cold Shadow of Metalclad: the Potential for Change to NAFTA’s Chapter 11*”, 11 *N.Y.U. Envt’l L.J.* 264 (2002-2003).
- Hirsch, Moshe: “*Interactions between Investment and Non-Investment Obligations in International Investment Law*”. Available at <https://www.ila-hq.org/pdf/Foreign%20Investment/Hirsch%20Interactions.pdf>.
- Prof. Dr. Hobér, Kaj, “*State Responsibility and Investment Arbitration*”, available at <http://www.ila-hq.org/pdf/Foreign%20Investment/ILA%20paper%20Hober.pdf>
- Mann, Kelly M.: “*United Mexican States v. Metalclad Corporation: The North American Free Trade Agreement Provides Powerful Private Right of Action to Foreign Investors*”, 35 *Urb. Law.*, No 4, 697 (2003).
- Mann, Howard & von Moltke, Konrad: “*Protecting Investor Rights and the Public Good: Assessing NAFTA’s Chapter 11*”, at <http://www.iisd.org/trade/ILSDWorkshop>
- Mountfield, Helen: “*Regulatory Expropriations in Europe. The Approach of the European Court of Human Rights*”, 11 *N.Y.U. Envt’l L.J.*, No 1, 136 (2002)
- Newcombe, Andrew: “*The Boundaries of Regulatory Expropriation in International Law*”. Download available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=703244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=703244)

- Parisi, Michael G.: “*Moving toward transparency? An examination of regulatory takings in international law*”, 19 *Emory Int'l L. Rev.* 383 (2005)
- Poirier, Marc R.: “*The NAFTA Chapter 11 Expropriation Debate through the Eyes of a Property Theorist*”, 33 *Env't L.* 851 (2003).
- Porterfield, Matthew C.: “*International Expropriation Rules and Federalism*”, 23 *Stan. Env't L. Journal* 3 (2004)
- Ruiz Fabri, H.: “*The Approach taken by the European Court of Human Rights to the Assessment of Compensation for Regulatory Expropriations of the Property of Foreign Investors*”, 11 *N.Y.U Env't L.J.*, No 1, 148 (2002)
- Sands, Philippe: “*Searching for Balance: Concluding remarks*”, 11 *N.Y.U. Env't L.J.* 198 (2002-2003).
- Saporita, Christopher: “*Reconciling Human Rights and State Sovereignty: A Framework for Global Property Law*”, 10 *Indiana Journal of Global Legal Studies* 255 (2003).
- Shenkman, Ethan: “*Could Principles of Fifth Amendment Jurisprudence be Helpful in Analysing Regulatory Expropriation Claims under International Law?*”, 11 *N.Y.U. Env't L.J.* 174 (2002-2003).
- Sornarajah, M.: “*International Law on Foreign Investment*”, 2<sup>nd</sup> Edition, Cambridge University Press (2004).
- Stone, Madeline: “*NAFTA Article 1110: Environmental Friend or Foe?*”, 15 *Georgetown Int'l Env't L. Law Review* 763 (2002-2003)
- Tollefson, Chris: “*Metalclad v. United Mexican States Revisited: Judicial Oversight of NAFTA's Chapter Eleven Investor-State Claim Process*”, 11 *Minn. J. Global Trade* 183 (2002).
- Vicuna, Francisco Orrero: “*Carlos Calvo, Honorary NAFTA Citizen*”, 11 *N.Y.U. Env't L.J.* 19 (2002-2003).
- Waelde, Thomas; Kolo, Abba: “*Confiscatory Taxation under Customary International Law and Modern Investment Treaties*”, available at <http://www.dundee.ac.uk/cepmlp/journal/html/vol4/article4-17.html>
- Wagner, J.M.: “*International Investment, Expropriation and Environmental protection*”, 29 *Golden Gate University Law Review*, No 3, 465 (1999)
- Yannaca-Small: “*'Indirect Expropriation' and the 'Right to regulate' in International Investment Law*”, OECD Working papers on international investment No. 2004/4.

Yee, Marisa: “*The Future of Environmental Regulation after Article 1110 of NAFTA: A look at the Methanex and Metalclad cases*”, 9 Hastings West-Northwest Journal of Environmental Law and Policy 85 (2002-2003).

### **Other**

NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (2001) at [www.dfait.maeci.gc.ca/tna-nac/NAFTA-interpret-en.asp](http://www.dfait.maeci.gc.ca/tna-nac/NAFTA-interpret-en.asp)

Transcript from Roundtable Discussion on Domestic Challenges if Multilateral Investment Treaties are Interpreted to expand the Compensation Requirement for Regulatory Expropriations beyond a Signatory State’s Domestic Law, 11 N.Y.U. Env’t L.J., 208 (2002-2003).

# Table of Cases

## **National**

Penn Cent. Transp. Co v. New York City, 438 U.S. 104 (1978)

United Mexican States B.C.S.C 664 (2001)

## **International**

Birnbaum v Iran, (“Birnbaum”), Award No 549-967-2, July 6, 1993, reprinted in 29 Iran-US CTR 260

Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, (“Santa Elena”), ICSID Case No. ARB/96/1, Award February 17, 2000

Eastman Kodak Co. v. Government of Iran, Award No 514-227-3, Award July 1, 1991, reprinted in 27 Iran-U.S. Cl. Trib. Rep. 3

Emanuel Too v. Greater Modesto Insurance Associates, (“Emanuel Too”), Award Dec 29, 1989, 23 Iran-U.S. Cl. Trib. Rep. 378

Eudoro A. Olguín v. Republic of Paraguay, (“Olguín”), ICSID Case No. Arb/98/5, Award 26 July 2001

Fredin v. Sweden, Judgement Feb. 23, 1994, Eur. CtH.R 283-A

James v. United Kingdom, Judgement Feb. 21, 1986, 98 Eur.CtH.R

Marvin Roy Feldman Karpa (CEMSA) v United Mexican States ICSID, (“Feldman”), Case No. ARB (AF)/99/1, Final Award Dec. 16, 2002

Metalclad Corporation v. United Mexican States, (“Metalclad”), ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000

Methanex Corporation v. United States of America, (“Methanex”), UNCITRAL Final Award Aug. 9, 2005

Middle East Cement Shipping Ltd v. Egypt, (“Middle East”), ISCID ARB 99/6, Award April 2, 2002

Phelps Dodge Corp v Islamic Republic of Iran, (“Phelps Dodge”), Award No 217-99-2, March 19, 1986; 10 Iran-U.S. Cl. Trib. Rep. 121

Phillips Petroleum Co Iran v Iran, (“Phillips”) Award No 425-39-2, June 29, 1989; reprinted in 21 Iran-US CTR 79

Pinnacle Meat Processors Co v United Kingdom, App. No. 33298/96, Dec. 21, 1998; 27 Eur. CtH.R Rep CD 217

Pope & Talbot, Inc. v Canada, UNCITRAL, (“Pope & Talbot”), Interim Merits Award June 26, 2000

Robert Azinian, Kenneth Davitian, & Ellen Bacca v. The United Mexican States, (“Azinian”), ISCID case No ARB(AF)/97/2, Award Nov.1, 1999

S.D. Myers, Inc. v. Canada, (“Myers”), UNCITRAL, Partial Award on the Merits, Nov. 13, 2000

Sea-Land Service, Inc v Iran, Award No 135-33-1, (“Sea-Land”), Award June 22, 1984, reprinted in 6 Iran-US CTR 146

Sedco, Inc. et al. v. National Iran Oil Co., (“Sedco”), Award No ITL 55-129-3, Oct 28 1985; reprinted in 9 Iran -U.S. C.T.R. 248

Starrett Housing Corp v Iran, Interlocutory Award No ITL 32-24-1, (“Starrett Housing”), Award Dec 19, 1983, reprinted in 4 Iran-US CTR 122

Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, (“Técnicas ”), ICSID Case No. ARB(AF)/00/2, Award May, 29 2003

Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA, (“Tippetts”), Award No 141-7- 2, June 29, 1984, reprinted in 6 Iran-US CTR 219

Waste Management, Inc. v United Mexican States, (“Waste Management”), ISCID case No ARB(AF)/00/3, Final Award April 30, 2004