Indirect Expropriation in International Law: Balancing the Protection of Foreign Investments and Public Interests

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Indirect expropriation is an evolving field in international investment law. The protection of foreign investments against uncompensated direct expropriation has been replaced in practice by claims for the protection against ‘indirect expropriation’ carried out through governmental regulatory measures. The practical implication of the problem, as well as its most contentious aspect, is drawing a dividing line between non-compensable and compensable regulatory takings.

The issue of what constitute expropriation has been of constant concern in recent decades. However, whilst international law on direct takings of foreign property is fairly settled, the treatment and, most importantly, the qualification of an act as indirectly expropriatory is to date unresolved, as inconsistencies in the international pronouncements clearly show.

This study aims to determine whether ‘indirect expropriation’ qualifies as an autonomous category, or rather it has to be acknowledged as a species of the genre ‘expropriation’. The goal is to establish the applicable legal regime, and to analyze the implications on public international law. To this end, the study will consider the behavior of significant actors—i.e. investors, host States, third parties (home States, international community, peoples)—as well as the interplay between private (investment-related) rights, domestic purposes, and international rights and duties of host States.

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I. Introduction

The topic of ‘expropriation’ of foreign property has been on the international law agenda since the early days of colonization and European domination, when rules on foreign investments first emerged.\(^1\) International investment law, more specifically, developed during the first half of the twentieth century as a response to the needs of the industry. The activities of investors in capital-exporting countries were protected by means of the doctrine of diplomatic protection by the home State, which was progressively complemented by the so-called international minimum standard of civilization.\(^2\) This standard covered the protection not only of foreign investments, but also of property rights, human rights and protection against disorder, safeguarding judicial proceedings. It was forcefully opposed by Latin American and other developing countries, which supported the application of a national standard of treatment\(^3\) (the Calvo Doctrine) to be accorded to foreign investors, in light of principles such as political and economic sovereignty, domestic jurisdiction, territorial integrity and permanent sovereignty over natural resources.\(^4\)

Due to the implementation of these principles, and especially the establishment of the permanent sovereignty over natural resources\(^5\), newly-independent States initiated a wave of expropriations and nationalizations of (national and) foreign property located within their territories. This course of action, however, was fairly settled through the adoption of a number

\(^1\) N. Schrijver, Sovereignty Over Natural Resources - Balancing Rights and Duties, Cambridge, Cambridge University Press, 1997, pp. 173-174: the author explains that already during the eighteen and nineteen century moving of persons and of capital from the European to the North American continent took place, as a result of the industrialization process. Later on, capital-importing sovereign States stimulated foreign investments through bilateral treaties and concessions.


\(^4\) N. Schrijver, Sovereignty Over Natural Resources, op. cit., p. 177.

of General Assembly resolutions establishing the principles and the rules to be followed in case of expropriatory measures. Multilateral codes of conduct for foreign investments and multilateral instruments for promotion and protection of foreign investments were also pursued by the international community; yet, the most important transformation has been the post-1960s’s growth in negotiations of Bilateral Investment Treaties (BITs), that continue to be the most diffuse instruments to regulate foreign investments.

Against the relatively stable background of ‘expropriation’ based on customary rules requiring public purpose, non-discrimination, due process of law, and payment of compensation, ‘indirect expropriation’ increasingly became an issue. To attract foreign investors and thereby participating in the international market economy, developing States had to guarantee the health of the investment climate in their territories, to which frequent outright seizures of property were obviously not conducive. Hence, given that expropriatory measures might be necessary for the State to fulfill its public duties, new methods—not necessarily entailing the transfer of the title to property from the investors to the State (or to

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6 Particularly, GA Resolution 1803(XVII) establishes: “Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law [...]”.


8 BITs replaced the ‘Treaties of Friendship, Commerce and Navigation’ (FNC treaty). H. Walker, “Modern Treaties of Friendship, Commerce and Navigation”, in Minnesota Law Review, Vol. 42, 1957-1958, p. 805, explaining that the ‘bilateral treaty of friendship, commerce and navigation’ is one of the most familiar instruments known to diplomatic tradition. The title, commonly used to describe a basic accord fixing the ground-rules governing day-to-day intercourse between two countries, designates the medium par excellence through which nations have sought in a general settlement to secure reciprocal respect for their normal interests abroad, according to agreed rules of law”; N. Schrijver, Sovereignty Over Natural Resources, op. cit., p. 190; R. Dolzer, “Indirect Expropriations: New Developments?”, in N. Y. U. Environmental Law Journal, Vol. 11, 2002, pp. 64-93: The concept of ‘expropriation of foreign property’ has traditionally involved issues of sovereignty, compensation and expropriated value, and obviously the notion of property. Judicial and arbitral bodies referring to international customary law and Bilateral Investment Treaties (BITs) tackle these aspects, giving new practical significance to the debate about the relationship between customary and treaty law.

third parties)—were employed to achieve this purpose. As a consequence, diverse measures interfering with the economic value of ownership were adopted.

This study examines the divide between regulatory and indirect expropriatory measures, by focusing on both theoretical and practical problems that this distinction raises. The aim is to clarify the boundaries, the definition, and the applicable legal regime of indirect expropriation, starting from the analysis of the category of expropriation *tout court*.

On the one hand, in fact, there is controversy about the definition of ‘indirect expropriation’: what measures could constitute indirect expropriatory acts? And, is it a new, autonomous category or rather a *minoris generis* of the *species* ‘expropriation’? On the other hand, there has been controversy on the interaction between the right to be compensated *vis-à-vis* the sovereign power to regulate: to what extent can one interest prevail over the other? And, what are the criteria to strike the balance between private and public claims?10

The answer to these questions may clarify to what situations the international ‘law of expropriation’ can be appropriately applied and with what results; moreover, it may shed light on the status of public international law and its possible role—or impact—in determining which interest should prevail.

Indeed, these questions reflect the aims of the study, which focuses on indirect expropriation and its impact on the evolution of public international law. Notably, the kind of interference with property rights known as ‘indirect expropriation’, is not new in the field of international investment law; however, it is argued that it continues to pose questions and doubts for legal scholars. The threshold beyond which an act could be deemed as indirectly expropriatory or, conversely, regulatory and in respect of public purposes, is far from being determined.11 Furthermore, the dividing line between what might amount to (indirect) expropriation and to regulation continues to be blurred, as the inconsistencies in the international and domestic jurisprudence on this point clearly show. In addition, the search for a general theory and principles to, firstly, classify an act as indirectly expropriatory and, secondly, apply the proper legal framework to it, is still open to debate; specifically, it entails serious practical aspects such as investors’ rights to be compensated when deprived of property, a claim that cannot find acceptance where the State successfully demonstrates its regulatory intent.


The goal of this study could well be explained, on the one hand, through the analysis of the legal framework and its historical development; and, on the other, through the review of a number of key issues on indirect expropriation. Therefore, these issues will be addressed in the following sections. The analysis will develop from the examination of customary and treaty-based norms, as well as from the (national) and international jurisprudence of arbitral courts and tribunals. Particularly, the role of BITs and of international awards will be considered: BITs, in fact, are significant because they seem to foster the evolution of international law to the extent that they signal the emerging acceptance of common standards for the treatment of foreign investments, and particularly with regard to the implications for non-parties; international awards, on the other hand, may account for the manner in which rules are interpreted and enforced.

To conclude, the research design section will underline the conflicting and defective elements that will be further examined in the development of the study, giving an outline of the structure to be followed in the future stages of the research. Furthermore, the methodology will be accounted for: it will be pinpointed the relevance of combining the traditional legal approach with the inductive method, when conducting a survey in this complex field.

II. Legal Framework

Every national legal system recognize the right of the sovereign authority to regulate private property in order to fulfill public needs: this is in line with the social function of property as it emerged already in the 1789 French Declaration of the Rights of Man and of the Citizen, and which provides the rational for measures of ‘expropriation’ or ‘nationalization’ of foreign and national property. The right of the State to expropriate national and alien property located within its territory, hence, is not disputed in international law: it is an expression of the economic sovereignty and the regulatory powers of the State, and is

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recognized as reflecting customary law. Nonetheless, the exercise of expropriatory measures encapsulates the tension between two, interdependent and contrasting, positions, namely the sovereign powers of the host State vis-à-vis the foreign investors’ rights over their property and investments.

The interplay between these perspectives could be read in light of the development of foreign investment law, in which a colonial and a post-colonial period are distinguishable. The colonial approach is accounted for by the inter-war, political controversy opposing the United States and Latin America: the dispute showed the contrasting views of the two parties on the treatment of aliens and their property abroad, and it was to be replayed on a global scale in the post colonial period. The protection of foreign investment indeed, came intensely to the fore after the II World War, leading to three phases of developments. The period immediately following the end of colonialism was characterized by antagonism towards foreign investment generated by nationalist fervor: newly independent States aimed to recover control over vital sectors of their economies from foreign investors and this resulted in a wave of nationalizations of foreign property. During the second period more pragmatic approaches to issues of foreign investments took place. Although developing States were collectively continuing to call for changes in the conduct of international economic relations at the international level, at the domestic level they autonomously sought to attract foreign capital, also by signing bilateral investment treaties that could partially contradict their international stances. The modern period, finally, has been characterized by shifts in the international economic scene: open policies on foreign investment have been introduced in developing

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14 This is a corollary of the Principle of Permanent Sovereignty over Natural Resources as it is expressed in GA Resolution 1803 (XVII), 14 December 1962, which establishes at its para. 4 that: “Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication”.


countries, and a willingness to attempt compromise positions has started to emerge. A growing market-oriented approach to the problems of the world has apparently been advanced, being reflected in international law. However, while economic liberalism has been undermined by economic crises in Russia, Mexico, Asia and Argentina, globalization in itself has released forces hostile to liberalization, as well as spread the sensitivity towards human rights and environmental issues.\textsuperscript{19}

Hence, the uncertainties in striking the balance between the rights of foreign investors and those of the host country in controlling their activities, are historically traceable.\textsuperscript{20} It is beyond doubt the international legal concern for the treatment and the protection of aliens\textsuperscript{21}; yet, the methods for such a protection, as well as the identification of the actions from which investors should be protected, are the problematic aspects to date.\textsuperscript{22}

\textsuperscript{19} M. Sornarajah, \textit{The International Law on Foreign Investment}, op. cit., pp. 25-27.

\textsuperscript{20} R. S. Miller and R. J. Stanger (eds. by), \textit{Essays on Expropriation}, Ohio State University Press, 1967, p. VI; P. Muchlinski, “The Diplomatic Protection of Foreign Investors”, \textit{op. cit.}, p. 341: the author continues by making reference to the diplomatic protection as an instrument to recur to in exceptional situations, when no treaty-based regime of rights and remedies exists. Particularly, the ICJ, \textit{Case Concerning Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo)}, preliminary objections, judgment, 24 May 2007, General List n. 103, is commented; On 30 November 2010 the ICJ delivered its judgment on the \textit{Case Concerning Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo)}, in which the ICJ unanimously found that the expulsion of Mr. Diallo from the Democratic Republic of the Congo was a violation of its rights under Art. 13 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 13(4) of the African Charter on Human and Peoples’ Rights. In addition, the Court found the violation of Art. 9(1) and (2) ICCPR, and Art. & of the African Charter. Moreover, the violation of Vienna Convention on the Consular Relations by the DRC has also been found by the ICJ.

\textsuperscript{21} See, M. Sornarajah, \textit{The International Law on Foreign Investment}, op. cit., pp. 37-38. The author describes the system of state responsibility for injuries to aliens and their property as first established in the part of the world that was not under the colonial rule. Moreover, the genesis of early rules on diplomatic protection is described as to be found in the relationship between United States and Latin America. United States supported an international minimum standard as the criterion to treat foreigners, and promoted the ‘prompt, adequate and effective’ compensation for the investor, based on an external standard (The Hull Formula). The Latin American States opposed this view by underlining that the foreign investor entered the host State voluntarily, thereby bearing all the correlative risks of the investment. The investor, therefore, could be entitled to the same treatment accorded to nationals by the local laws of the State (The Calvo Doctrine). Later on both stances were internationalized and this account for the political divergence between developed and developing countries on this regard. The disagreement lasted until around 1990, when new emphasis were put on the private sector in the process of development. See, World Bank Group, “Guidelines on the Treatment of Foreign Direct Investment”, in \textit{Legal Framework for the Treatment of Foreign Investment}, Vol. 2: Guidelines, 1992, pp. 35-44.

\textsuperscript{22} For instance, “existing customary international law poses obstacles to the protection of foreign investors. This is due to the lack of distinct legal personality for corporations, the relative ineffectiveness of diplomatic protection as a method for safeguarding the rights of foreign investors, the lack of agreement between States on applicable legal standards for the treatment of foreign investors under customary international law”. P. Muchlinski, “The Diplomatic Protection of Foreign Investors”, \textit{op. cit.}, p. 341.
Cases of ‘direct expropriation’, aiming at the forced transfer of property of a private person to a State (or through the State, for the benefit of another private person)\(^{23}\) are nowadays rare\(^{24}\); they have been replaced by governmental measures that interfere with alien property, and oftentimes give indirectly rise to situations ‘tantamount to expropriation’, but that apparently do not affect the health of the ‘investment climate’ in the host State\(^{25}\). Actions *de facto* corresponding to expropriation, hence, find various denominations in both the dominant jurisprudence and the doctrine: ‘indirect expropriation’, ‘*de facto* expropriation’, ‘disguised expropriation’, ‘constructive expropriation’, ‘creeping expropriation’, ‘measures equivalent to expropriation’, ‘measures tantamount to expropriation’, or ‘measures having an effect equivalent to expropriation’, appear.\(^{26}\) Yet, such classifications of acts do not solve the problems related to the recognition and qualification of the measure carried out by the governmental authority, as indirect form of expropriation or as exercise of regulatory powers.

The search for a general theory and definition of indirect expropriation is not new in international investment law literature.\(^{27}\) It is, nonetheless, still open. Although many commentators are of the opinion that a case-by-case approach is the most appropriate one in this field\(^{28}\), the need for a clear-cut definition and stable criteria seems impelling. Answering the question on ‘what constitute an indirect taking’ is in fact not purely academic concern: it


touches upon the issue of the compensation to be paid to the deprived foreign investor, a right that represents the major safeguard against the host State’s arbitrary exercise of powers. In the recent literature, therefore, much of the work focuses on the distinction between ‘indirect expropriation’ and ‘non-compensable regulation’: the dividing line, however, is still undetermined, in the absence of stable criteria and rules to be followed even for differentiating between direct and indirect expropriation. Notably, international investment law covers issues of economic, human rights, environmental, and responsibility-related nature; moreover, it touches upon (host/home) States’ domestic interests, and private rights. The interaction between all these facets confuses the applicable legal framework, especially with regard to the phenomenon of indirect expropriation. Indeed, while the system of protection against governmental acts that are directly expropriatory are relatively well-defined, the same cannot be argued with regard to indirect expropriation and its distinction from non-compensable regulatory measures.

As a last remark, it should be noted that expropriation—direct or indirect—is a phenomenon that opposes a private investor to a (host) State; hence, it is an economic relationship established between actors whose nature is inherently different—private v. public. The legal framework regulating such partnership does inevitably encompass international and domestic law: the role and the extent to which international law may supersede (and be influenced by) domestic legal orders, is thus a further element to be analyzed when studying (indirect) expropriatory issues. Apparently, the internal legislation of

29 W. M. Reisman and R. D. Sloane, “Indirect Expropriation and Its Valuation in the BIT Generation”, op. cit., p. 121, arguing that ‘expropriation must be analyzed in consequential rather than in formal terms’, the authors underlines that direct or indirect expropriation are protected under international law respectively through paying compensation or making adequate reparation; it is for ‘illegal takings’, regulated by the rules on state responsibility, to alter the legal category applied for protecting investments, pinpointing the accountability aspect that characterized the conduct of the State actor; S. P. Subedi, International Investment Law - Reconciling Policy and Principle, Oxford, Hart Publishing, 2008, p. 125. See also, Government of Kuwait And American Independent Oil Company, in ILM, Vol. 21, 1982, p. 976. [Aminoil case]


32 (emphasis added).

the State is subject to the compelling authority of international conventions, (investment) treaties, principles and rules, in light of which the conduct of the State should be evaluated; yet, it is how arbitral organs determine and enforce the applicable law, that in fact establishes and strengthen the existing rules.

Given the interrelatedness of international and domestic elements, the legal framework applicable to indirect expropriation could not but be very convoluted: to date, more precisely, it is far from clear which is the legal regime governing the phenomenon.

Thus, it seems plausible to start the examination from the law of expropriation, in order to determine whether its rules and principles may operate also in cases of indirect expropriatory measures, and to what extent. Indeed, it has been argued that indirect expropriation is mainly performed through a series of governmental acts that interfere with investors’ property rights, in contrast to the outright seizure of property that is caused through direct expropriation. Following this approach, indirect expropriation could be perceived as either an autonomous category or an adaptation of the comprehensive category of expropriation: the analysis of customary and treaty-based law governing direct expropriation would possibly provide the basis for an answer to this first question. Furthermore, account will be given for the notions of ‘property’ and ‘taking’ in international law, with the purpose to clarify the interaction between these concepts, respectively concerned with the object to be protected, and the act causing the interference.

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35 On the role of domestic courts in respect of issue of State responsibility for internationally wrongful acts see, C. Liebscher, “Monitoring of Domestic Courts in BIT Arbitrations: A Brief Inventory of Some Issues”, in C. Binder, U. Kriebaum, A. Reinisch, S. Wittich (ed. by), International Investment Law for the 21st Century, Oxford Scholarship Online Monographs, 2009, pp. 105-128; on the role of the requirement to exhaust local remedies and the tribunal approach to its possible invocation as a condition for the violation of a substantive standard, see U. Kriebaum, “Local Remedies and the Standards for the Protection of Foreign Investment”, in C. Binder, U. Kriebaum, A. Reinisch, S. Wittich (ed. by), International Investment Law for the 21st Century, Oxford Scholarship Online Monographs, 2009, pp. 417-462: the author seems to adopt the view that the ‘exhaustion of local remedies’ is currently perceived as a procedural rule. However, it is observed that to require the resort to local remedies narrows the scope of protection of investment protection standard: requiring a denial of justice to turn State conduct into a violation of fair and equitable treatment, undermines such a standard. The same could be argued for legitimate expectations and protection against unfair procedures. This argument is particularly significant with regard to cases of expropriation of contractual rights, since the due process required for the legality of the expropriation would serve also as a condition for the existence of expropriation itself.
I. The International Law of Expropriation: Introductory Remarks

International law concerning the protection and treatment of aliens and their property developed primarily as customary international law, resulting from the first wave of globalization. Customary rules were further complemented by bilateral and multilateral treaty rules, with the aim of encouraging secure and peaceful international relations in the investment field. Accordingly, the host State was compelled to grant to foreign investors the same treatment applicable to nationals, at the minimum: therefore, the national treatment was to be deemed insufficient insofar as it did not reach the standards generally accepted by civilized nations. As a result, the international minimum standard was to protect alien property against expropriation.

The existence of the international minimum standard formed the object of the exchange of notes concerning the standard of compensation between the U.S. Secretary of State, Cordell Hull, and the Mexican Minister of Foreign Affairs in 1938. Yet, the early law on taking was developed against the background of this relationship, and justified by the American necessity to secure the protection of its nationals’ investments in the Latin American States, where expropriatory measures were occurring. The Hull Formula, calling for ‘prompt, adequate, and effective payment’ in case of expropriation of private property, was at odds with the Mexican position, that challenged both the existence of an international minimum standard and the requirement of prompt compensation. Latin American States, finding support in the communist rejection of private property, adopted the Calvo doctrine, according to which foreign investors could only invoke national treatment, and only before the host States’ competent courts. In the inter-war period, international courts and tribunals did not accept the national standards of treatment as compatible with international law: this

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36 Originally this was the expression used to the category of ‘foreign/international investment law’, as we now describe it. See, T. W. Wälde, “The Specific Nature of Investment Arbitration”, op. cit., pp. 73-74: the author continues by explaining the historical and political reasons for this change in terminology.


39 Ivi, p. 27.


41 S. W. Schill, The Multilateralization of International Investment Law, op. cit., p. 27.

42 S. Montt, State Liability in Investment Treaty Arbitration, op. cit., pp. 33-34, 38, arguing that the Calvo doctrine presents important lesson for developing countries in the BIT generation. However, the Calvo doctrine is still described as “the finest legal/political product to be developed in this regional crusade against diplomatic protection”.

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controversy, furthermore, reflects the disputes that presently continues to going on about the standard of the compensation due to expropriated investors.\textsuperscript{43}

Attempts were made to multilaterally regulate investment protection through the Havana Charter and the 1967 OECD Convention on the Protection of Foreign Property, as a reaction to the worldwide increase in expropriations.\textsuperscript{44} However, multilateral efforts were not favored by the international climate of the time, in which developing countries were overtly challenging customary international law rules on property protection in the UN General Assembly.\textsuperscript{45} UN General Assembly Resolution 3201 encapsulating the ‘Declaration on the Establishment of a New International Economic Order’, declared indeed the right to nationalize or transfer of ownership to nationals, as an expression of the decolonized countries’ permanent sovereignty over their natural resources, omitting any reference to the obligation to pay compensation.\textsuperscript{46} This result was further reinforced in GA Resolution 3281, which although alluding to compensation, established the competence of host States’ domestic courts.\textsuperscript{47} Besides these endeavors against international investments’ protection, the practice of international arbitration reveals that only GA Resolution 1803 that provided for adequate compensation in case of expropriation, was regarded as an authoritative expression of customary international law.\textsuperscript{48}

Whilst GA Resolutions refer to cases of nationalization or (direct) expropriation, this concept has undergone a metamorphosis over time, due to a shift towards a more interventionist approach in the attitude of States.\textsuperscript{49} New types of claims of expropriation have emerged, although the questions concerning policies and factors that should guide tribunals in


\textsuperscript{44} S. W. Schill, \textit{The Multilateralization of International Investment Law}, \textit{op. cit.}, pp. 35-36.

\textsuperscript{45} \textit{i}vi, p. 37.

\textsuperscript{46} GA Resolution 3201 (S-VI), 1 May 1974, para 4.e.

\textsuperscript{47} S. W. Schill, \textit{The Multilateralization of International Investment Law}, \textit{op. cit.}, pp. 37-38.

\textsuperscript{48} (emphasis added). \textit{i}vi, p. 38.

deciding regulatory expropriation cases, seems to remain unanswered.\textsuperscript{50} Evidently, “by no means the scope of expropriation in international law is unexamined”\textsuperscript{51}; yet, no definite guidance it is provided “on how to distinguish between expropriation and regulation”.\textsuperscript{52} This issue, particularly, has been amplified by the explosion of bilateral and multilateral investment treaties in the investment field.\textsuperscript{53}

One may question whether it is the concept of expropriation that has been exposed to a transformation or, rather, it is a new, autonomous phenomenon that has been developed. Answering to this question could evidently affect any conclusion concerning the legal regime to be applied. Notably, both direct and indirect expropriation are to be distinguished from ‘regulatory acts’ of the host State: hence, provided that only in the case of ‘direct’ expropriation an established system of rules and principle seems available, its review and the examination of its limitations, may help in replying to this first, pivotal question.

\textbf{II. The International Law of Expropriation: Customary and Treaty-based Norms}

The international ‘law of expropriation’ is composed of three fundamental branches. First the rules must define the object of protection—i.e., the concept of property; second, ‘expropriation’ must be identified\textsuperscript{54}; third, when expropriation has been found, the rules on compensation apply.\textsuperscript{55} As Dolzer points out, the identification of expropriation—and as a consequence, the question of compensation—is the most challenging issue, particularly since States’ measures having an indirect\textsuperscript{56} impact on property rights have become prominent. Hence, this branch of the law of expropriation deserves specific examination, especially from the point of view of legal security and clarity in the evaluation of state practice.\textsuperscript{57}

Expropriation is not illegal \textit{per se} in international law. States have in principle the power and the right to (legally) expropriate the property of nationals and aliens, provided that

\begin{itemize}
\item \textsuperscript{51} \textit{Id}.
\item \textsuperscript{52} \textit{Id}.
\item \textsuperscript{53} W. M. Reisman and R. D. Sloane, “Indirect Expropriation and Its Valuation in the BIT Generation”, \textit{op. cit.}, p. 142.
\item \textsuperscript{54} R. Dolzer, “Indirect Expropriation of Alien Property”, in \textit{ICSID Review-Foreign Investment Law Journal}, 1986, p. 41, specifies that the thorny issues arise when the title remains with the owner but the measure significantly affects the legal status of the owner’s property rights.
\item \textsuperscript{55} \textit{Id}.
\item \textsuperscript{56} (emphasis added).
\item \textsuperscript{57} R. Dolzer, “Indirect Expropriation of Alien Property”, \textit{op. cit.}, p. 42.
\end{itemize}
certain conditions are respected.\textsuperscript{58} This right can be considered as the outcome of the interplay of three basic principles\textsuperscript{59}: 1) the economic self-determination of States, nations, and peoples\textsuperscript{60}; 2) the right of nations to (economic) development; and, 3) the Permanent Sovereignty\textsuperscript{61} of States, nations, and peoples over their natural wealth and resources.\textsuperscript{62} Hence, the right to expropriate is part of the economic sovereignty of States\textsuperscript{63}, as it abruptly emerged

\textsuperscript{58} For the analysis of the conditions according to which an expropriation could be deemed as lawful see further below; H. W. Baade, “Permanent Sovereignty Over Natural Wealth and Resources”, in R. S. Miller and R. J. Stanger (eds. by), Essays on Expropriation, Ohio State University Press, 1967, pp. 17-18; C. Schreuer, The Concept of Expropriation under the ECT, 2005, p. 2, available at http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf, (last visited: 20 November 2010); S. Montt, State Liability in Investment Treaty Arbitration, op. cit., pp. 165-166, arguing that the “regulatory State has the constitutional power, recognized by international law, to harm citizens, including investors. This does not mean that citizens and investors must always bear the consequences of State action or inaction. Yet, neither does it mean that all injuries must be compensated”; T. Gazzini, “Drawing the Line between Non-Compensable Regulatory Powers and Indirect Expropriation of Foreign Investment: An Economic Analysis of Law Perspective", op. cit.

\textsuperscript{59} A. Reimisch, “Legality of Expropriations”, in A. Reimisch (ed. by), Standards of Investment Protection, Oxford, Oxford University Press, 2008, p. 174. See, Resolution 1803(XVII), para 4, establishing the need to combine public interest and compensation, for the expropriatory measure to be in compliance with international law; UN GA Resolution 3171(XXVIII), 17 December 1973, para 3; UN GA Resolution 3281( XXIX), 12 December 1974, art. 2(2), which clearly shows in their texts the opposing views of developed v. developing countries.


\textsuperscript{61} S. P. Subedi, International Investment Law, op. cit., p. 122; N. Schrijver, Sovereignty Over Natural Resources, op. cit., pp. 369 et seq., arguing that is a well-established principle of international law that the PSNR reflects customary international law; the customary nature of the principle of permanent sovereignty over natural resources has been also recognized in ICI, Case Concerning the Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda), judgment, n. 116, 19 December 2005.


following the decolonization period: the demands of newly independent States were intertwined with the treatment to be accorded to foreign investments and the law applicable in the relations between private investors and host States. The quest for self-determination and sovereignty initially led those States to invoke the supremacy of their domestic legislation which, as noted, found partial acceptance in GA Resolutions 3201 and 3281. Yet, as States cannot invoke their domestic legislation to avoid international responsibility, they cannot in the same way refer to their internal legal order to deprive foreign investors of their rights under public international law.

Customary international law seems to provide well-established principles to govern any expropriatory measure deemed to be lawful: ‘public purpose’, ‘non-discrimination’, ‘due

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65 GA Resolution 1314(XIII), 12 December 1958.
68 S. P. Subedi, International Investment Law, op. cit., pp. 120-121; M. Sornarajah, “The Taking of Foreign Property”, op. cit., p. 57. The ‘public purpose’ is a controversial requirement, on which also the pronouncements of Courts and Tribunals are equivocal; however, it continues to be employed in Bilateral Investment Treaties (BITs), as a ‘time-tested formula’ governing interstate and intrastate relations. For instance, both United States and United Kingdom protested to the Libyan oil nationalization, adducing the lack of public purpose as a motive. It may serve as a criterion for distinguishing between regulatory and non-regulatory taking, although the opinions of arbitrators differs on this point. The requirement is also mentioned in the American Law Institute’s Restatement on Foreign Relations Law. The BP award and the Liamco case, offer an instance of the disagreement on the role of public purpose. In addition, the view of the ECHR follows the trend of not questioning the state’s opinion on the public purpose of the taking.; See, British Petroleum v. Libya, award, 10 October 1973 and 1 August 1974, in ILR, Vol. 53, p. 297, 1979; Libyan American Oil Company (Liamco) v. Libya, award, 12 April 1977, in ILM, Vol. 20, 1981, in which the sole arbitrator upheld that no separate public purpose was need according to international law, for the nationalization to be lawful. Moreover, some scholars do not agree that nationalizations to be lawful should be non-discriminatory; See, PCIJ, Oscar Chinn Case, judgment, Series A/B, n. 63-79, 12 December 1934.
69 M. Sornarajah, “The Taking of Foreign Property”, op. cit., p. 58: Discriminatory takings arise when the expropriation is targeting a individual as a consequence of his race or of his belonging to a specific group. The principle against racial discrimination has indeed a jus cogens nature in international law, so that any taking in contrast to it is evidently unlawful. Yet, difficulties arise when both racial and economic reasons found the taking. In this case, the trend is to initiate a separate cause of action questioning the racial discrimination provoked by the taking, so that the responsibility of the host State could be pegged; P. D. Cameron, International Energy Investment Law, Oxford, Oxford University Press, 2010, pp. 220-221.
process of law’\textsuperscript{70}, and payment of ‘prompt, adequate, and effective\textsuperscript{71} compensation’.\textsuperscript{72} Following these principles, the conclusions of the Special Rapporteur of the International Law Commission (ILC) on State Responsibility clarified that expropriation of foreign property may lead to the international responsibility of the expropriating State, unless carried out according to specific conditions, namely ‘public utility’, ‘non-discrimination’, and ‘lack of arbitrariness’.\textsuperscript{73} Particularly, ‘unlawful expropriations’ would require \textit{restitutio in integrum} or a financial equivalent, whereas ‘lawful expropriations’ would imply the payment of ‘fair


\textsuperscript{71} This is known as the ‘Hull Formula’ and was developed in correspondence from former U.S. Secretary of State Hull to the Mexican government. The U.S. Secretary asserted that ‘under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose without provision for prompt, adequate and effective payment therefor.’ W. M. Reisman and R. D. Sloane, “Indirect Expropriation and Its Valuation in the BIT Generation”, \textit{op. cit.}, p. 135. The \textit{locus classicus} on compensation in international law is the PCIJ, \textit{Factory at Chorzów}, judgment, Series A, n. 17, 13 September 1928, p. 47; for a review of the issue of compensation see, C. F. Amerasinghe, “Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice”, in \textit{The International and Comparative Law Quarterly}, Vol. 41(1), 1992, pp. 22-65.


compensation’ or ‘the just price of what was expropriated’. In addition, when a taking is in breach of contractual or treaty obligations, it has to be considered illegal.

The principles according to which illegal expropriation—or confiscation—would attract the rules on state responsibility was established in the Chorzow Factory case and followed also in the Amoco and Texaco v. Libya awards. The attribution of a customary nature to these criteria has been achieved through a long process of (political) debate, in which the obligation to fully compensate the expropriated investor, represented the most controversial requirement. Evidence on this regard, could be found in United Nations practice and the process that led to the adoption of the UN General Assembly Resolutions that confirmed the right to expropriate as an expression of the Permanent Sovereignty over Natural Resources.

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74 E. Paasivirta, “Internationalization and Stabilization of Contracts versus State Sovereignty”, in The British Yearbook of International Law, Vol. 60, 1990, p. 334, noting that the lack of payment might affect the legality of the taking, although the standard of compensation is debated in international law. See, Libyan American Oil Company (Liamco) v. Lybia, op. cit., p. 1;

75 M. Sornarajah, “The Taking of Foreign Property”, op. cit., p. 55; See, Art. 10 Harvard Law School Draft Convention on the International Responsibility of States for Injuries to Aliens, which explains that a taking is wrongful “if it is not for public purpose clearly recognized as such by a law of general application in effect at the time of the taking, or if it is in violation of a treaty”; moreover, “even if the taking is for public purpose, it must be accompanied by prompt payment of compensation ..”. This passage is quoted in B. H. Weston, “Community Regulation of Foreign-Wealth Deprivations: A Tentative Framework for Inquiry”, in R. S. Miller and R. J. Stanger (eds. by), Essays on Expropriation, Ohio State University Press, 1967, p. 119.

76 PCIJ, Case Concerning Certain German Interests in Polish Upper Silesia, Ser. A., n. 7, 25 May 1926.


80 M. Sornarajah, The International Law on Foreign Investment, op. cit., p. 149.
(PSNR).\textsuperscript{81} Hence, while it is accepted that PSNR encompasses the States’ right to expropriate or nationalize foreign and national property found within their jurisdiction, the issues of compensation and definition of what amounts to a taking under international law remain to a great extent controversial.\textsuperscript{82}

In general terms, expropriation could be defined as the “taking of the assets of foreign companies or investors by a host State against the wishes or without the consent of the

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\item \textsuperscript{81} See, N. Schrijver, \textit{Sovereignty Over Natural Resources, op. cit.}, Controversial, it is the PSNR nature as \textit{jus cogens} norm. On the meaning and formation of \textit{jus cogens} see: Art. 53 VCLT; see also Arts 64, 71 VCLT; on the consequences arising out of the violation of a \textit{jus cogens} norm see the Art. 41(2) of the Draft Articles on State Responsibility; on the relationship between \textit{jus cogens} norms and the UN Charter see Art. 103 of the UN Charter and \textit{Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measure, Order of 13 September 1993}, I.C.J. Reports 1993, 325, 440 [Bosnia case]. With regard to the ICJ jurisprudence one could note that the Court used to refer to ‘intransgressible principles of international law’ or to ‘peremptory norms’: See, \textit{Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports} 1996; \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J.Reports}, 2004. Its endorsement of the ‘\textit{jus cogens}’ denomination is very recent and can be found in both the \textit{Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment, 26 February 2007}, General List n. 91 [Bosnia Genocide case], and \textit{Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, 22 July} 2010, General List n. 141 [Kosovo Advisory Opinion]; G. M. Danilenko, ”International \textit{jus Cogens: Issues of Law-Making”}, in \textit{European Journal of International Law}, Vol. 2, 1991, pp. 42-65: A concerted effort aimed at elevating a particular norm to the rank of \textit{jus cogens} is provided by the negotiations at the Vienna Conference on Succession of States in Respect of State Property, Archives and Debts. One of the most controversial issues at the Conference was the legal nature of the principle of the permanent sovereignty over natural resources proclaimed in a number of the UN General Assembly resolutions. Art. 15(4) requires agreements between a predecessor state and a newly independent state concerning succession to state property not to ‘infringe the principle of the permanent sovereignty of every people over its wealth and natural resources’. Relying on the ILC commentary, which observed that some of the members of the Commission were of the opinion that the infringement of the principle of permanent sovereignty in an agreement between the predecessor state and the newly independent state would invalidate such an agreement, the developing states claimed that the principle of permanent sovereignty over wealth and natural resources was a principle of \textit{jus cogens}. However, lacking the support of the Western states, which maintained that these efforts were ‘an attempt to give legal force to mere notions to be found in various recommendatory material emanating from the General Assembly’, is not possible to ultimately argue in favor of a \textit{jus cogens} nature of the permanent sovereignty; N. Schrijver, \textit{Sovereignty Over Natural Resources, op. cit.}, pp. 374-377: arguments to support the \textit{jus cogens} nature of the PSNR are to be found in the frequent identification of permanent sovereignty as ‘inalienable’ or ‘full’, or in the arts 25 and 47 of the two International Covenants on Human Rights. However, in light of the art. 53 of the VCLT, which establishes the mechanism for the formation of a \textit{jus cogens} norm, the PSNR is yet to be accorded a \textit{jus cogens} nature, failing to be supported by many states ‘principally concerned’. Additionally, also its non-derogable character is questionable. See also UN, \textit{Vienna Convention on Succession of States in respect of State Property, Archives and Debts}, 1983 (not yet in force), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf, (last visited: 8 September 2010).
\item \textsuperscript{82} G. C. Christie, “What Constitute a Taking of Property under International Law?”, \textit{op. cit.}, pp. 307-338.
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company or investor concerned, and it includes the deprivation of the right to property”.

However, as will be examined in the following section, the concept of taking is inherently intertwined with that of property, which is mutable in nature, according to the national jurisdiction concerned.

From the point of view of treaty-based investment law, the requirements for an expropriation to be lawful seem to be clearly identified as well: public purpose, non-discrimination and compensation are typically cited. Thus, numerous BITs or International Investment Agreements’ (IIAs) provisions recognize the admissibility of expropriation provided that the above mentioned requirements are respected. BITs, in particular, in addition to substantive provisions concerning their scope of application, the conditions for the entry of foreign investment, the general standards of treatment, the monetary transfer, the operational conditions for the investment, the compensation for losses from armed conflict or internal disorder, and the settlement of the disputes, include also rules on the protection against dispossession. These provisions fulfill the primary functions of BITs, namely, on the

83 S. P. Subedi, *International Investment Law*, op. cit., p. 120; B. Stern, “In Search of the Frontiers of Indirect Expropriation”, op. cit., pp. 30 et seq.; the author suggests that International Investment Agreements (IIAs) do not provide definitions of expropriation; rather, they employ several terms in a generic manner, as to designate dispossession. See also, *Ronald S. Lauder v. Czech Republic*, (UNCITRAL), award, 3 September 2001, para. 200.


85 *Id.*: the author clarifies that the level of compensation demanded varies from treaty to treaty, and that the requirement concerning that expropriation is made in due process is not always mentioned and could vary. See, R. D. Edsall, “Indirect Expropriation under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations”, in *Boston University Law Review*, Vol. 86, 2006, pp. 931-962; NAFTA, art. 1110, ‘Expropriation and Compensation’: ‘1. 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.[...]'.

86 The minimum standards of treatment generally comprises: fair and equitable treatment, full protection and security, non-discrimination, national treatment and most favored national treatment.

87 Many BITs allow the investor to choose the bodies before which bringing their disputes (e.g.: ICSID, International Court of Arbitration (ICA), Stockholm Chamber of Commerce (SCOC), London Court of International Arbitration (LCIA), all of which have its own rules; the United Nations Commission on International Trade (UNCITRAL) Law Rules are also available and commonly used). This opportunity could facilitate forum shopping. In this regard, see, S. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions”, in *Fordham Law Review*, Vol. 73, 2005, p. 1521; Moreover, BITs could also include provisions concerning the settlement of disputes related not only to the violation of the BIT, but also arising out of an investment-related State contract. These provisions are known as ‘generic’ or ‘broad’ dispute settlement clause, whereas potential claims under it as ‘purely contractual claims’. See A. Sinclair, “Bridging the Contract/Treaty Divide”, in C. Binder, U. Kriebbaum, A. Reinisch, S. Wittich (eds. by), *International Investment Law for the 21st Century - Essays in Honor of Christoph Schreuer*, Oxford, Oxford University Press, 2009, pp. 92-103.

one hand, the protection of investments against arbitrary conducts of the host States that could affect private property located within their jurisdiction\(^89\); and, on the other, the improvement of the investment climate in the host countries, encouraging investors’ confidence.\(^90\) The underlying rationale of BITs, therefore, is creating the legal framework to govern investments by nationals of one country in the territory of the other country: the fundamental objective of capital-exporting States is to establish clear rules and thereby secure the protection of the investments of their nationals abroad; whereas, the goal pursued by developing, capital-importing States is to encourage investments in their territory and attract foreign capital.\(^91\) Entering into a BIT is therefore conducive to both these purposes, since it establishes a ‘symmetrical legal relationship’ between the contracting States.\(^92\)

BITs have been oftentimes described as expressing the linkage between treaty law and customary international law. It has been argued that the multitude of BITs concluded since 1960 have reshaped the international law of foreign investment: although they are instruments of public international law binding two State-actors, BITs introduce rules for private foreign investment that not only have come to be shared by the majority of (contracting) States, but have also an impact on the disputes between investors and host States.\(^93\) Such treaties constrain their scope of application by defining ‘nationals’, ‘territory’ of the contracting

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\(^89\) P. Makanczuk, *Akehurst’s Modern Introduction to International Law*, 7th Revised Ed., Routledge, London and New York, 1997, pp. 109 *et. seq*:\ According to the author, the term ‘jurisdiction’ has to be cautiously used, having a number of different meaning. The ‘specialized meaning’ of domestic jurisdiction in the UN Charter is complemented by the use of the term to refer to the ‘powers exercised by a State over, persons, property, or events’. In addition, one has to distinguish according to the type of powers that are under scrutiny (*i.e.*: legislative, prescriptive or enforcement jurisdiction).


parties, ‘investor’ and, most importantly, ‘investment’ that benefit of the protection. Most BITs, moreover, contain ‘umbrella clauses’, which generally require each contracting party to ‘observe any obligations it may have entered into with regard to investments of nationals or companies’ of the other contracting party. Indeed, since BITs incorporate substantially similar obligations, the interpretation of the obligations of one State by ad hoc arbitrators, could affect the obligations of all signatories States, prompting the evolution of international law.

BITs are furthermore conceived of as “straddl[ing] the divide between public and private international law”: while any obligation owed by the host State to investors is private

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in nature, “the conflict between a host State’s BIT obligations and its other international law obligations cannot simply be resolved by declaring public international law triumphant”.98 Rather, there should be balance between the rights of the investors and those of both the host State and the international community as a whole.

The tension between private and public rights can be explained by referring to Art. 4299 in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter, ICSID Convention).100 The article specifies the substantive law to be applied by ICSID Tribunals, and provides that, failing any agreement between the parties, “the Tribunal shall apply ... such rules of international law that may be applicable”.101 The jurisprudence of ICSID Tribunals, though, shows that investment disputes are not treated in light of the wider corpus of international law; moreover, even when the issue of applicable law is overtly discussed, international law is considered mainly for treaty interpretation and in cases in which the host State attempts to avail itself of conflicting international law obligations to justify the violation of the BIT.102 Even in the latter case, however, ICSID Tribunals tend to give preference to investment obligations, deviating from the wording of Art. 42.103

These elements that emanate from the jurisprudence of international investment law are important since investment arbitration is a growing phenomenon which affects the interests of States. From this, it follows that investment arbitration cannot be undertaken in isolation, but rather should be incorporated into the framework of public international law.104

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99 ICSID, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, available at http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp, (last visited: 9 November 2010), art. 42: “(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. (2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law. (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.”. The ICSID Convention came into force on October 14, 1966; The ICSID was indeed created under this Convention and founded by the World Bank.
104 Id.
To this end, secondary sources of international law have also been proposed as a possible instrument for relating the two branches. General principles of international law\textsuperscript{105} could play a role in the field of the ‘law of expropriation’: they could leave a margin of appreciation to the host States in every circumstance in which there are inconsistencies in state practice, but also fill the possible lacunae—e.g.: in the distinction between regulation and expropriation—by performing their supportive role.\textsuperscript{106}

Yet, it is arduous to specify a divide between expropriation and regulation. Indeed, determining the international legal instruments that could provide protection to property follows the definition of the object of such protection, that is property itself, as well as the qualification of an act as interfering with this object, that is expropriation or taking, in all its forms. These two issues will be dealt with in the following sections.

\textit{III. The Concept of Property and the Meaning of ‘Taking’: Interrelated Notions}

The interest in defining a ‘taking’ is primarily motivated by the investors’ pursuit for compensation. Indeed, only the deprivation of property will give rise to compensation\textsuperscript{107}, and the tribunals need to identify the object of protection and qualify the governmental action, in order to grant the correlative safeguard. The issue is even more complicated by its multifaceted nature: ‘international damages’, ‘nationalization of foreign property’, ‘State responsibility’, are all intertwined aspects in this regard.\textsuperscript{108} In addition to that, difficulties arise in conceiving property in an unitary manner: not only the notion \textit{per se} is varying

\textsuperscript{105} T. W. Wälde, “The Specific Nature of Investment Arbitration”, \textit{op. cit.}, pp. 100-103: the author refers to the role of general principles as sources of international investment law. He recognizes the importance of UNIDROIT principles; the activity and the law emerging from administrative or general courts exercising powers of judicial review of government acts, which is performed at the international level by the WTO judicial bodies, the ECI, the ECtHR and the LACHR; comparative law of civil and administrative procedure.


\textsuperscript{107} R. Higgins, “The Taking of Property by the State: Recent Developments in International Law”, \textit{op. cit.}, p. 279.

\textsuperscript{108} Id.
according to the national jurisdictions considered\textsuperscript{109}, but also the number of objects that could be termed as foreign ‘property’, and be thereby entitled to international protection, changes in light of the legal framework that is applied. The objects eligible for protection, indeed, have also to satisfy the requirements to be categorized as ‘investment’\textsuperscript{110}; bilateral or multilateral treaties could provide disparate definitions of what they legally consider a ‘property’ for the purpose of investment protection, the degree of which is not in itself predetermined. Admittedly, BITs tend to espouse basically similar provisions, so that in general terms the threshold of the protection provided is by and large shared in the international community. Nonetheless, the definition of investment is unstable, and consequently it becomes difficult to predict how otherwise ‘shared standards’ would be applied in order to meet societal, governmental and investors’ demands. Furthermore, this international threshold has to be accommodated with the local laws in the host State, which regulate the admission of foreign investments as well.\textsuperscript{111}

The definition of taking in international investment law has become problematic as a result of the interchangeable use of the terms ‘expropriation’, ‘confiscation’ and ‘nationalization’.\textsuperscript{112} These concepts, however, refer to different situations, among which only the “targeting of individual business for interference, for specific, economic or other reasons”, mainly involving existing regulatory mechanisms, amounts to ‘expropriation’.\textsuperscript{113} A number of categories of takings can nonetheless be identified: outright nationalizations in all economic sectors, resulting in the termination of all foreign investment in a host country and involving the takeover of all privately-owned means of production; outright nationalizations on an


\textsuperscript{112} M. Sornarajah, “The Taking of Foreign Property”, \textit{op. cit.}, p. 19.

\textsuperscript{113} Ivi, p. 20.
industry-wide basis, which is conducive to the reorganization of a particular industry and the creation of a State monopoly; large-scale taking of land by the State, usually to redistribute it among population; specific takings, targeting a foreign firm or a specific lot of land; creeping expropriation 114, implying the incremental State’s interference with the ownership rights of the foreign investor as to diminishing the value of the investment but not depriving the investor of the legal title to the property; regulatory takings, which fall within the police powers of a State or arise from welfare measures of a State (environment, health, morals, economy, culture). 115

In any event, the interpretation of ‘taking’ depend upon the philosophical understanding of property. There is a virtual consensus on the meaning of property: it entitles the owner with a bunch of rights that are protected by the law, allowing him to use its property, to absolutely dispose of it, without any limit in time (positive aspect), and to exclusively alienate it (negative aspect). 116 Not only physical objects, but also intangible rights, or rights emerging out of a contract (choses in action), could be qualified as property, if they can be transferred from one person to another—e.g. debts, shares in companies, intellectual property. 117 Yet, classifying particular bundles of rights is contentious, as well as according and quantifying compensation for the loss of choses in action. 118 The ‘social function’ of property, moreover, as an inherent aspect of it, is what should entitle the State to interfere with the private right in order to answer to public needs. Therefore, a taking shall only be for public use and compensation shall be paid: however, ‘appropriate’ compensation as the result of a balancing

114 This expression is frequently used interchangeably or as a synonym with ‘indirect expropriation’; according to some authors, however, it represents a subcategory of ‘indirect expropriation’ which emanates from a chain of actions that incrementally give rise to expropriatory effects against private property.
115 UNCTAD, Taking of Foreign Property, op. cit., pp. 11-12.
116 R. Higgins, “The Taking of Property by the State: Recent Developments in International Law”, op. cit., p. 270; M. Sornarajah, “The Taking of Foreign Property”, op. cit., p. 61, note 22: In Roman Law ownership constituted ius utendi, ius fruendi et ius abutendi, This formula is the source of inspiration for the definition of ‘taking’ in the Harvard Draft Convention on International Responsibility for Injuries to Aliens, whose art. 10 states that a taking of property includes ‘not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify and inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference’.
117 R. Higgins, “The Taking of Property by the State: Recent Developments in International Law”, op. cit., p. 271.
118 Ivi, p. 272. The author refers explicitly to the problems that are posed by the legal nature of petroleum concessions: establishing ‘whether they are property rights or mere contract rights is a critical issue affecting the right of the State to interfere with such rights’. See also, A. S. El-Kosheri, “Le Régime Juridique Créé par Les Accords de Participation dans le Domaine Pétrolier”, in Recueil des Cour, Hague Academy of International Law, Vol. IV, n. 147, 1975, pp. 218-405.
test between the private loss and the social good, could often result in a lump sum or be equal to zero. Higgins, in this regard, pinpoints the inappropriateness of this method to distinguish between measures requiring compensation from those not requiring it. Conversely, the author suggests that the benefits and burdens are equally distributed between individuals and society.\textsuperscript{119}

Through the emersion of modern law, the idea that when the government interferes with property rights it touches only some of the rights of which property is composed of, has been rediscovered.\textsuperscript{120} The consequence of this approach is that the value of ownership in the property is reduced\textsuperscript{121}: however, the boundary beyond which a right to compensation materializes, remains contentious.

Both the United States Courts and the Iran-US Claims Tribunal’s jurisprudence concentrated on dissecting the notion of property, redefining the types of taking accordingly. In US law, the protection of individual and absolute property became a hallmark, following the Lockean philosophy on the function of the political society. However, the US Courts did not favor the adoption of a general rule entitling for compensation in case of regulatory takings; rather, they tended to weigh the relevant circumstances of each case to determine whether compensation should be paid.\textsuperscript{122} This understanding of ownership were also transplanted in colonial contexts where, consequently, the communitarian understanding of property has been progressively narrowed down. The Iran-US Claims Tribunal was largely influenced by the legal techniques developed in US law, and its awards adhered to US views thereby influencing the approach held in arbitral pronouncements.\textsuperscript{123}

\textsuperscript{119} R. Higgins, “The Taking of Property by the State: Recent Developments in International Law”, \textit{op. cit.}, p. 278.

\textsuperscript{120} S. Montt, \textit{State Liability in Investment Treaty Arbitration, op. cit.}, pp. 175-176: It is argued that constitutional interpretations tend to follow a “two-tiered strategy”, according to which a “strong protection is provided to property rights at their core or essence, and a weak protection is granted to them at their periphery”. This would avoid “either an overprotection of the status quo, or the evisceration of acquired rights through an overreliance on legislatures”. It is also underlined that this dual treatment receives explicit constitutional recognition for instance in Germany—art. 14(2) and art. 19(2) of the German Constitution—, Spain—art. 33(2) and art. 53(1) of the Spanish Constitution—, and Chile—art. 19 n. 24 and n. 26 of the Chilean Constitution. In other countries, such as the United States, the result was achieved through the constitutional jurisprudence. (emphasis in the original)

\textsuperscript{121} M. Sornarajah, “The Taking of Foreign Property”, \textit{op. cit.}, p. 24.

\textsuperscript{122} \textit{Ivi}, pp. 24-25.

\textsuperscript{123} \textit{Id.}
The decisions made under NAFTA and the US treaties are as well considered to accelerate the tendency to disaggregate the ownership of property into its components.\footnote{M. Sornarajah, “The Taking of Foreign Property”, op. cit., p. 26. The author explains that the notion of ‘creeping expropriation’ hinges upon the idea of the unbundling of property rights. It entails the reduction of foreign investors’ interests while preserving their direct ownership over the investment, and hence it could take place under a number of circumstances. The recurring element is the decrease in the value of the interest in the long-run.} Apparently, awards made under NAFTA endorse absolute theories of property rights: not only an expansive scope of application is given to the notion of expropriation, but also wide formulations concerning expropriatory measures\footnote{Reference is made to formulae such as ‘tantamount to a taking’, ‘equivalent to a taking’. The expansionary approach causes concern in developed States which are convened as defendants in expropriation claims, so that they tend to contest broad definition of taking.} are adopted in treaties, thereby enlarging the breadth of the term—and of the ground for claiming compensation.\footnote{G. Van Hecke, “Agreements Between a State and a Foreign Private Person”, in 57-I Annuaire de L’Institute de Droit International, 1977, p. 195, quoted in M. Sornarajah, “The Taking of Foreign Property”, op. cit., p. 26; and Id., V. Bean and J. Beauvais, “The Global Fifth Amendment? NAFTA's Investment Protection and the Misguided Quest for an International Regulatory Takings Doctrine”, in New York University Law Review, Vol. 78, 2003, p. 30. See, ICSID, Metalclad Corporation v. United Mexican States, award, case n. ARB(AF)/97/1, 30 August 2000; Ethyl Corporation v. Canada (UNCITRAL), award, 24 June 1998; and, Methanex Corporation v. United States, (NAFTA/UNCITRAL), award, 3 August 2005, in ILM, Vol. 44, 2005, p. 1345; However, in Pope & Talbot Inc. v. Government of Canada, (UNCITRAL/NAFTA), interim award, 26 June 2000, the tribunal upheld the view that ‘tantamount to a taking’ does not add anything to the concept of taking.}

In the European context, instead, property has been traditionally conceived as serving a social purpose, and thereby, as dominated by prior societal interests for the fulfillment of a
common goal. Similar approach used to be reflected in the jurisprudence of the European Court for Human Rights.\(^{127}\)

Notably, a broad interpretation of the notion of ‘expropriation’ could counterbalance asymmetries in the distribution of power: foreign investors, in fact, face public actors that could on the one hand have contributed to the drafting of the international rules to be applied; or, on the other, could shield themselves and their violations behind the exercise of regulatory powers, according to their local legislation and with the alleged aim to satisfy a public need. The following section will explain this point in more detail, underscoring the number of substantive and procedural issues that result from the distinct nature of the actors involved.

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IV. Property Matters: Differences in the State v. State, and Investors v. State Relations

As Higgins explains, when the property of a State is physically in the territory of another, the two principles of territorial jurisdiction and sovereign immunity coexist. However, it is established that a State may ‘take’ the property located within its territory and belonging to a foreign State only in fulfillment of a judgment execution or order against that State in respect of acts that were jure gestionis. It is the nature of the contending actors, in

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128 P. Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th Edition, London and New York, Routledge, 1997, pp. 110-111; see also, *Island of Palmas case*, op. cit., at 839, stating that “territorial sovereignty involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory ... Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between the nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian”; See also, V. Lowe, “Jurisdiction”, in M. D. Evans (ed. by), *International Law*, 2nd Ed, Oxford, Oxford University Press, 2006, pp. 342-345.

129 P. Malanczuk, *Akehurst’s Modern Introduction to International Law*, op. cit., pp. 118-119: ‘state immunity refers to legal rules and principles determining the conditions under which a foreign state may claim freedom from jurisdiction of another state’. The author continues by identifying two levels at which state immunity could arise: the first level concerns the immunity of a foreign state from the jurisdiction of municipal courts of another state to adjudicate a claim against it; the second level concerns the exemption of a foreign state from enforcement measures against its state property. Rule on state immunity are regarded as reflecting customary international law. The basis for state immunity has to be found in the independent and legally equal nature of state, which results in the inability of states to exercise jurisdiction over another state without its consent. Currently, the states tend to adopt the ‘doctrine of qualified immunity’, according to which immunity is granted to foreign states only with regard to their governmental acts (acts iure imperii), not with regard to their commercial acts (acts iure gestionis); M. Koskenniemi, *From Apology to Utopia - The Structure of International Legal Argument*, 2nd Ed., Cambridge, Cambridge University Press, 2007, pp. 486-488: the author suggests that the problem with this rule is in limiting or balancing the conflicting sovereignties. Although the standard rule is to distinguish between ‘public’ and ‘private’ acts, Koskenniemi points to the varying jurisprudence that it has given rise to.

130 This is recognized as the doctrine of qualified immunity, according to which foreign States are granted immunity only in respect of their governmental acts (acts iure imperii) and not in respect of their commercial acts (acts iure gestionis); P. Malanczuk, *Akehurst’s Modern Introduction to International Law*, op. cit., p. 119; A. S. El-Kosheri, “Le Régime Juridique Créé par Les Accords de Participation dans le Domaine Pétrolier”, op. cit., pp. 242 et seq., describing the States’ ‘accords de participation dans le domaine pétrolier’, explains that the host State as private person participate to the industrial and commercial operations led by foreign investors in its territory, outside the realm of public law and this is the core of the participation agreement. More precisely, this act of participation entails either the exercise of a sovereign act—de jure imperii— consisting in the State participation decision, and the exercise of a de jure gestionis act, comprising all the activities to be performed as a consequence of the participation decision. Yet, the author concludes that one cannot argue that the sovereign function of the State is overshadowed by the property-related one; however, the author presented the opportunity for a new scheme involving a complementary understanding of sovereignty and property in the management of oil resources. Moreover, the author envisaged the capacity of this ‘joint venture’ to overcome the ‘droit de l’éphémère’ as resulting from the inception of the principle of permanent sovereignty over natural resources; R. Higgins, “The Taking of Property by the State: Recent Developments in International Law”, op. cit., p. 280.
light of the principle of the equality of States allowing them not submit themselves to the local jurisdiction, that intensifies the protection accorded to their property. Conversely, when States conclude agreements for the protection of foreign property, the object of such protection is the property of private persons whom they diplomatically represent, and which will be submitted to the jurisdiction of the host State.

The answer to the question whether, by virtue of its territorial sovereignty, the State is entitled to interfere with foreign (non-State) property rights, focuses on the nature of the property and not of the actor involved. Provided that the requirements for a lawful expropriation are met, it is controversial whether the host State is free to take foreign property. The notion of ‘acquired rights’ has been proposed as a boundary to host State’s sovereign expansion, and it shall be coupled with the already mentioned movement began in 1960s, through the UN Resolutions on ‘the New International Economic Order’ and

133 Id.
135 Id.
136 Island of Palmas case, op. cit., p. 829; PCIJ, Case Concerning Certain German Interests in Polish Upper Silesia, op. cit., p. 36; E. Paasivirta, “Internationalization and Stabilization of Contracts versus State Sovereignty”, op. cit., p. 330. The issue of acquired rights emerges especially with regard to stabilization clauses. They consist in provisions included in the contract between the host State and the foreign investor, that aim to stabilize their relation by controlling the legal power of the host State and freezing its law. These clauses could considerably limit the prerogatives of the State so that a compromise has been identified in their capacity to accord compensation to private party that covers also its prospective gains. However, one should observe that it is within the sovereign power of the State to decide to limit or renounce to specific aspects of it. Indeed, any State may validly commit itself not to nationalize for a defined period of time, and thereby, the State grants irrevocable rights to the private investor, that have the character of acquired rights. See, Texaco award, establishing that the right to nationalize is a rule of customary international law, which is transformed in the case in which the State has concluded and internationalized agreement with a foreign contracting party; See also, PCIJ, Wimbledon case, judgement, 17 August 1923, Series A, n. 1, p. 25; PCIJ, Exchange of Greek and Turkish Populations, Ad. Opinion, 21 February 1925, Series B, n. 10, p. 21: the conclusion of the agreement is manifestation of the sovereignty of the State, so that it “cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty and cannot through measure belonging to its internal order make null and void the rights of the contracting party which has performed various obligations under the contract”; See, ICSID, AGIP S.p.a. v. People’s Republic of the Congo, case n. ARB/77/1, award, 30 November 1979, Rivista di diritto internazionale, Vol. 64, 1981, p. 863; Revue critique de droit international privé, Vol. 71, 1982, p. 92; English translations of French original in ILM, Vol. 21, 1982, p. 726; ICSID, Amco Asia Corporation and others v. Republic of Indonesia, op. cit., p. 1029, and Government of Kuwait And American Independent Oil Company, op. cit., p. 976 [Aminoil case], support an objective interpretation of the notion of sovereignty, which has led to opposite results, allowing the State to exercise its sovereign powers to the extent of depriving the contracting party of the rights previously granted.
‘Permanent Sovereignty over Natural Resources’. However, as Baade noted, “it seems perfectly logical to require that nationalization be in the public interest. The question is, of course, whose public interest, as determined by whom". This statement is topical and clarifies the gist of the problem at hand, that is the polarity between investors’ property rights and States’ sovereignty, in a globalized world. As has been argued, however, “the very raison d’être of compensation for expropriation ordered in the public interest is the idea that the State—i.e. the community—must not benefit unduly at the expense of private individuals”.

The relationship between State and investors is generally embodied in the so-called State contracts. The qualification of a taking, therefore, comes to the fore also as a possible breach of those contracts, and the question emerged in the doctrine as to the law governing this public v. private relation. It has been proposed to distinguish between situations in which

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137 GA Res. 1803(XVII), 14 December 1962; UNTDB 88 (XII), 19 October 1972, para. 2; GA Res. 3171 (XXVIII), 17 December 1973; GA Res. 3201 (S-VI), 1 May 1974; GA Res. 3281 (XXIX), 12 December 1974.


140 UNCTAD, State Contracts, 2004, p. 3, available at http://www.unctad.org/en/docs/iteit200411_en.pdf, (last visited: 10 November 2010). A ‘State contract’ is defined as “a contract made between the State, or an entity of the State, which, for present purposes, may be defined as any organization created by the statute within a State that is given control over an economic activity, and a foreign national or a legal person of foreign nationality”. They are generally considered as being different from ordinary commercial contracts, since elements of public law regulation and governmental discretion are often identified in the host State’s decision to negotiate, conclude and terminate such contracts; see also, G. Kojanec, “The Legal Nature of Agreements Concluded by Private Entities with Foreign States”, in International Trade Agreements, Colloquium, Hague Academy of International Law, Sijthoff, Leiden, 1969, pp. 299-341.

141 Violations of international law in the investment field do not automatically amount to expropriation. Indeed, the State could have well breached specific standards, such as the fair and equitable treatment one, or have interfered with the investor’s legitimate expectations: yet, for this misbehavior to give rise to an expropriatory action, a certain degree of impact on the investment is required, failing which the investor’s claim could nonetheless be autonomously focused on the breach, with no further requirements on expropriation. ICSID, Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, case n. ARB/84/3, decision on jurisdiction, 27 November 1985, paras. 262 et seq.; London Court of International Arbitration, Ecuador v. Occidental Exploration & Prod. Co. (UNCITRAL), n. UN 3467, award, 1 July 2004: the tribunal dismissed the claim for expropriation due to the lack of ‘substantial deprivation’ but it found that the host State had breached the fair and equitable treatment standard (paras 180 ss.). A. Siwy, “Indirect Expropriation and the Legitimate Expectations of the Investor”, in Austrian Arbitration Yearbook, Vol. 2007, 2007, p. 376.
the State acts in its public (de iure imperii) or private (de iure gestionis)\textsuperscript{142} capacity, in order to establish the applicable law. Two options were then developed: either the law of the host State was to be applied, or the contract was considered as internationalized\textsuperscript{143}. In the former case, domestic legislation applied as a consequence of the principle of PSNR for investments in resource-related spheres; remedies had to be searched for in the local laws, covering also claims that the violation of the contract amounted to a taking.\textsuperscript{144} According to the internationalization doctrine, instead, the inclusion of arbitration, choice of law and stabilization clauses\textsuperscript{145} in the document accounted for the will of the parties to treat the contract as internationalized, so that breaches of its provisions entail international responsibility\textsuperscript{146}. As a result, the violation of foreign investment agreements by State-induced measures, would qualify as a taking that is compensable. This theory, moreover, implied that the obligations arising from the contract may reside in an external system, to be variously

\textsuperscript{142} E. Paasivirta, “Internationalization and Stabilization of Contracts versus State Sovereignty”, \textit{op. cit.}, p. 342. The distinction between \textit{acta de jure imperii} and \textit{de iure gestionis} constitutes also the basis for narrowing the scope of PSNR as to exclude ‘downstream’ activities. Indeed, arbitral tribunals do accept a plea of sovereign immunity when production activities are at stake, whereas in cases of ‘sale of natural resources’ the same plea has been rejected. See, National Iranian Oil Company Revenues from Oil Sales case, 12 April 1983, in ILR, Vol. 65, 1984, pp. 215 \textit{et seq.}; ICSID, \textit{AGIP S.p.a. v. People's Republic of the Congo}, \textit{op. cit.}, paras 79-88 (on applicable law); \textit{Saudi Arabia v. Arabian Am. Oil Co. (Aramco)}, in ILR, Vol. 27, 1958, p. 117; \textit{Sapphire International Petroleum v. National Iranian Oil Co.}, in ILR, Vol. 35, 1963, p. 136, where no mention is made of the principle of permanent sovereignty over natural resources, and this is of significance particularly having regard to the dates of the awards.


\textsuperscript{144} E. Paasivirta, “Internationalization and Stabilization of Contracts versus State Sovereignty”, \textit{op. cit.}, p. 330.

\textsuperscript{145} \textit{Ivi}, pp. 330-331. Stabilization clauses perform an important market function since they attract foreign investors. They consist in provisions included in the contract between the host State and the foreign investor, that aim to stabilize their relation by controlling the legal power of the host State and freezing its law. The major issue that the inclusion of stabilization clauses triggers, concerns their compliance with State’s sovereignty, particularly over its natural resources. As it has been noticed, these clauses could considerably limit the prerogatives of the State so that a compromise has been identified in their capacity to accord compensation to private party that covers also its prospective gains; F. V. Garcia-Amador, “State Responsibility in Case of ‘Stabilization’ Clauses”, in A. H. Qureshi, X. Gao (ed. by), \textit{International Economic Law}, Vol. IV, London, Routledge, 2011, pp. 70-93.

termed as transnational law of business, general principles of law, *lex mercatoria*\textsuperscript{147}, international law\textsuperscript{148}.

The distinction between ‘contract-claims’ as opposed to ‘treaty-claims’ is of particular significance also in the current BITs generation of investment law\textsuperscript{149}, having obvious


\textsuperscript{149} ICSID, *Gustav F. W. Hamester GmbH & Co. K. G. v. The Republic of Ghana*, *op. cit.*, at para. 327: “ICSID tribunals have given different answers to the question whether contractual behavior attributed to the State according to international rules of attribution can be, either ipso facto or under certain circumstances, not only a contract claim but also a violation of the BIT, and hence a ‘treaty claim’.”
repercussions on the role attributed to public international law in this context.\textsuperscript{150} BITs confine

\textsuperscript{150} S. P. Subedi, \textit{International Investment Law, op. cit.}, pp. 120-122: International law prescribes that when a State gives consent to the presence of a foreign actor within its territory, the exercise of its economic sovereignty is automatically constrained by this decision, having the State voluntarily subjected itself to the rules of international foreign investment law; S.K.B. Asante, “International Law and Foreign Investment: A Reappraisal”, in \textit{International and Comparative Law Quarterly}, Vol. 37, 1988, p. 59: it is noted that the minimum standard of protection that international law establishes with respect to alien property, is based on the principles of inviolability or private property and the sanctity of contract; on the minimum standard see, R. Dolzer and C. Schreuer, “Customary International Law-The Emergence of a Minimum Standard”, \textit{op. cit.}, pp. 3-9: Until the 1917 Russian Revolution there was the implicit assumption in the international system that the domestic scheme of protection of the State would have offered sufficient guarantees to the foreign investors as well. After the Russian upheaval the Calvo doctrine and the opposing Hull doctrine emerged, giving rise to a harsh political debate about the status of the alien in general. The result of these disputes was a ‘widespread sense that the alien is protected from unacceptable measures of the host State by rules of international law that are independent from those of the host State. The sum of these rules became known as the international minimum standard’. See in particular Lena Goldfield v. USSR, award, 2 September 1930, in \textit{Cornell Law Quarterly}, Vol. 36, 1950, p. 51: in which the Tribunal required the Soviet Union to pay compensation to the alien investor, based on the notion of unjust enrichment. The Judgement is analyzed in \textit{ECtHR, James & Others v. UK}, 21 February 1986, Appl. n. 8793/79, para 63: “Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals”; R. Dolzer, “Contemporary Law of Foreign Investment: Revisiting the Status of International Law”, \textit{op. cit.}, p. 828, arguing that international law operates as a framework which domestic law must respect; the function to limit domestic law seems to have been performed long before the Serbian Loans case decided by the Permanent Court of International Justice in 1929; F. Orrego Vicuña, “Of Contracts and Treaties in the Global Market”, in \textit{Max-Planck United Nations Yearbook}, Vol. 8, p. 341, 2004, suggesting that the “general safeguard of international law will always be at hand”; See also, on the role of international law as normative system, P. Weil, “Towards Relative Normativity in International Law?”, in \textit{The American Journal of International Law}, Vol. 77(3), 1983, pp. 413-442; S. M. Schwebel, \textit{Justice in International Law, op. cit.}, pp. 425 et seq.; PCIJ, Serbian Loans case, Series A, n. 20, 21, 41, 1929; See also, art. 42 of the ICSID Convention, in C. Schreuer, \textit{The ICSID Convention: A Commentary, op. cit.}, pp. 613 et seq.; ICSID, Liberian Eastern Timber Corporation (LETCO) v. Liberia, case n. ARB/83/2, award, 31 March 1986; ICSID, Amco Asia Corporation and others v. Republic of Indonesia, \textit{op. cit.}; ICSID, Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, \textit{op. cit.}; ICSID, Duke Energy International Peru Investments N. 1, Ltd v. Peru, case n. ARB/03/28, award, 18 August 2008, in which, however, no explanation is given about the decision to apply international law;See, ICJ, Ambatielos Case (Greece v. United Kingdom), pleadings, in RIAA, Vol 12, 1956, p. 83; PCIJ, Losinger & Co. Case, Series C, n. 78, 27 June and 14 December 1936, p. 32; See also, UNCTAD, \textit{Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, 2007}, available at http://www.unctad.org/en/docs/iteia20065_en.pdf, (last visited: 9 November 2010), arguing that the role of international law is confirmed by the number of Bilateral Investment Treaties (BITs) concluded not only between developed and developing States, but also between developing States.
their scope of application to situations falling within their definition of ‘investments’\textsuperscript{151}, in which state contracts may often come to be included. Hence, the breach of a contract\textsuperscript{152} might qualify as expropriation—or as a measure equivalent to it—, being therefore compensable within the treaties’ framework\textsuperscript{153}. BITs and IIAs, thus, aim to provide a scheme that could ensure the stability of the investment within the host country.\textsuperscript{154} As a result, any action of the State as private subject, may be projected on the international scene, being included within the realm of the obligations assumed in its interstate relations; conversely, investors’ obligation \textit{vis-à-vis} the host State may be transformed into claimable international rights.\textsuperscript{155} The investor benefits of procedural and substantive safeguards not only by virtue of the host State’s local

\textsuperscript{151} This results from the definition of ‘investment’ that is adopted in the treaty. Since such definitions evolve continuously in order to meet the need of the parties and of the market, the breach of contractual obligations has been included within the ‘protected assets’ that are covered by the notion of investment in bilateral or multilateral treaties. A. Roberts, “Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States”, in \textit{American Journal of International Law}, Vol. 104, 2010, pp. 183-184: Originally, in case of investor-host state disputes, the home state initiated proceedings against the latter on the basis of the diplomatic protection model, clearly fitting into the public international law regime. In modern investment treaties two options could be available, commonly: treaty parties (states) can bring arbitral claims against each other on the interpretation/application of the treaty; and investors can bring arbitral claims against the host State for treaty violations adversely affecting the investment.


\textsuperscript{153} UNCTAD, \textit{Taking of Foreign Property, op. cit.}, pp. 37-38.

\textsuperscript{154} UNCTAD, \textit{State Contracts, 2004, op. cit.}, p. 6.

\textsuperscript{155} G. Kojanec, “The Legal Nature of Agreements Concluded by Private Entities with Foreign States”, \textit{op. cit.}, p. 314.
laws, but also through the sovereign capacity of its home State, thereby blurring the
distinction between domestic-international domaine, and private-public spheres.\textsuperscript{156}

This state of affairs results in an unbalanced attribution of power between treaty parties
and tribunals, as well as in the tribunals’ overwhelming authority in interpreting investment
treaties.\textsuperscript{157} The dual role of States as treaty parties and actual or potential respondents in
investor-state disputes, is an expression of a twofold interest: respectively, an interest in the
interpretation of the treaty’s broad clauses—that they contributed to create during the state-to-
state negotiations; and an interest in avoiding liability.\textsuperscript{158} This, clearly, further complicates the
investment issue either practically and theoretically: expansive interpretation of tribunals, in
favor of protecting investors’ rights, could cause states’ disincentives in concluding
investment treaties, leading to unstable and pejorative market conditions; moreover, the
treatment as equals of investors and States before an international arbitrator, would obscure
the asymmetries in the distribution of power between the two parties.\textsuperscript{159}

In the absence of a well-defined legal framework the opportunities for tribunals to
decide inconsistently do increase, and this assumption finds confirmation in the arbitral
decisions especially concerned with indirect expropriation. It will be shown that tribunals tend

\textsuperscript{156} A. Roberts, “Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States”, \textit{op. cit.}, pp. 184-185. Three alternatives are currently debated in the doctrine: a) investment treaties grant substantive and procedural rights to treaty parties and investors are permitted for the sake of convenience to enforce their states’ substantive rights; b) investment treaties grant substantive rights to the treaty parties only, and investors are granted the procedural right to enforce their states’ substantive rights; c) investment treaties grant substantive and procedural rights to investors, giving investors a procedural right to enforce their own substantive rights. For case law on the different positions, the author suggests to compare ICSID, \textit{Corn Products International v. United Mexican States}, case n. ARB(AF)/04/01, decision on responsibility, 15 January 2008, paras. 166-169; and, London Court of International Arbitration, \textit{Ecuador v. Occidental Exploration & Prod. Co.} (UNCITRAL), \textit{op. cit.}, paras. 14-22, where investors are granted substantive and procedural rights; with, ICSID, \textit{Loewen Group, Inc. & Raymond L. Loewen v. United States}, case n. ARB(AF)/98/3, 26 June 2003; and, ICSID, \textit{Archer Daniels Midland Co. v. Mexico}, case n. ARB(AF)/04/5, 21 November 2007, where investors are granted procedural, not substantive rights. Similar debates occurred with respect to whether individual claims could be brought before the Iran-U.S. Claims Tribunal.

\textsuperscript{157} A. Roberts, “Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States”, \textit{op. cit.}, p. 179.

\textsuperscript{158}Id.

\textsuperscript{159} On this regard see, A. Sinclair, “Bridging the Contract/Treaty Divide”, \textit{op. cit.}, pp. 92-104, arguing that “investment treaties contain broad dispute settlement clauses that appear to indicate that the Contracting Parties intended unilaterally to offer to submit to a tribunal constituted under the treaty, disputes arising out of an investment-related State contract with the foreign investor. This , even though the claims do not involve any allegation that the treaty itself has been violated”; see, ICSID, \textit{Impregilo S.p.A. V. Pakistan}, case n. ARB/03/3, decision on jurisdiction, 22 April 2005, upholding the view that normal contractual principles apply to determine the parties to a contractual dispute that may be submitted to a treaty-based tribunal, and not international law rules of attribution.
to apply international law or principles, treaties or conventions, or rather host States’ laws, at
their discretion, frustrating both predictability and firmness of their pronouncements.\textsuperscript{160}

III. Key Issues on Indirect Expropriation

The question of what constitute ‘expropriation’, as observed, is a vexed one.\textsuperscript{161} The
classic notion describes expropriation as the outright seizure of property, which has to meet
well-defined requirements to be lawful and is often achieved by transferring the property title.
Evidently, though, the possibility of being expropriated is not appealing for investors; States
aiming to attract investments in their territory, should offer a safe, profit-oriented climate.\textsuperscript{162}
This by the way does not mean that expropriatory measures do not anymore take place; rather,
it suggests that the methods and forms through which they are carried out have been refined\textsuperscript{163}.

To date, many expressions are used to refer to forms of expropriation that do not
manifest themselves as outright seizure of property\textsuperscript{164}: indirect expropriatory measures are
intended to have the equivalent effect of expropriation, depriving however the owner of the
substantial benefits of ownership.\textsuperscript{165} According to Schreuer, they may include: the taking of a
third Party’s property which renders worthless the patents and contracts of a managing
company (\textit{Chorzów Factory})\textsuperscript{166}; an increase in taxes to the extent that the investment becomes
economically unsustainable (\textit{Revere Copper})\textsuperscript{167}; the expulsion of a person who plays a key
role in the investment (\textit{Biloune})\textsuperscript{168}; the replacement of the owner’s management by

\textsuperscript{160} On applicable law in investor-state arbitration see, A. R. Parra, “Applicable Law in Investor-State
 Arbitration”, in A. W. Rovine (ed. by), \textit{Contemporary Issues in International Arbitration and Mediation -The

\textsuperscript{161} S. Montt, \textit{State Liability in Investment Treaty Arbitration}, \textit{op. cit.}, p. 231.

\textsuperscript{162} A. K. Hoffman, “Indirect Expropriation”, \textit{op. cit.}, p. 151.

\textsuperscript{163} M. Guthbrod and S. Hindelang, “Externalization of Effective Legal Protection against Indirect Expropriation”,
\textit{op. cit.}, p. 59.

between Non-Compensable Regulatory Powers and Indirect Expropriation of Foreign Investment: An Economic
Analysis of Law Perspective”, \textit{op. cit.}

\textsuperscript{165} S. P. Subedi, \textit{International Investment Law}, \textit{op. cit.}, pp. 76-77; C. Schreuer, \textit{The Concept of Expropriation
under the ECT and other Investment Protection Treaties}, 2005, p. 4, available at http://www.univie.ac.at/intlaw/

\textsuperscript{166} PCIJ, \textit{Case Concerning Certain German Interests in Polish Upper Silesia}, \textit{op. cit.}

\textsuperscript{167} \textit{Revere Copper & Brass Inc. v. Overseas Private Investment Corporation}, award, 24 August 1978, in ILM,
Vol. 56, p. 258.

\textsuperscript{168} \textit{Antoine Biloune (Syria) and Marine Drive Complex Ltd (Ghana) v. Ghana Investments Centre and the
209.
government imposed managers (Starrett\textsuperscript{169}, Tippett\textsuperscript{170}); revocation of a free zone permit (Goetz\textsuperscript{171}, Middle East Cement\textsuperscript{172}); denial of a construction permit contrary to prior assurances (Metalclad\textsuperscript{173}); interference with contract rights leading to a breach or termination of the contract by the investor’s business partner (CME)\textsuperscript{174}; revocation of an operating license (Tecmed).\textsuperscript{175} Additionally, also the concept of ‘creeping expropriation’ is used to allude to forms of indirect expropriation that take place incrementally, through a series of actions whose aggregate effect is to destroy the value of the investment.\textsuperscript{176} They poses questions concerning the determination of liability and valuation, and are characterized by the fact that none of the actions could per se constitute the international wrong\textsuperscript{177}; furthermore, such actions may be interspersed with lawful governmental regulatory measures and thus attempting to discern the precise moment of expropriation may be extremely tough, requiring a meticulous fact-sensitive inquiry as to enable the tribunal to give full effect to the compensation principles.\textsuperscript{178}

International law scholars have also developed the concept of ‘consequential or de facto expropriation’, apparently resulting from misfeasance, malfeasance and nonfeasance of the host State\textsuperscript{179}. Reisman and Sloane define it as involving “deprivations of the economic value of a foreign investment, which within the legal regime established by a BIT, must be deemed expropriatory because of their casual links to failures of the host state to fulfill its paramount

\textsuperscript{169} Iran-United States Claims Tribunal, Starrett Housing Corp v. Iran, op. cit.
\textsuperscript{170} Iran-United States Claims Tribunal, Tippets v. TAMS-AFFA Consulting Engineers of Iran, award n. 141-7-2, 22 June 1984.
\textsuperscript{171} ICSID, Goetz and others v. Republic of Burundi, case n. ARB/95/3, award, 10 February 1999.
\textsuperscript{172} ICSID, Middle East Cement Shipping and Handling Co. S.A v. Arab Republic of Egypt, case n. ARB/99/6, award, 12 April 2002.
\textsuperscript{173} ICSID, Metalclad Corporation v. United Mexican States, op. cit.
\textsuperscript{174} CME (The Netherlands) v. Czech Republic (UNCITRAL), partial award, 13 September 2001.
\textsuperscript{175} C. Schreuer, The Concept of Expropriation under the ECT and other Investment Protection Treaties, op. cit., pp. 13-14.
\textsuperscript{178} M. Reisman and R. D. Sloane, “Indirect Expropriation and Its Valuation in the BIT Generation”, op. cit., p. 128.
\textsuperscript{179} S. P. Subedi, International Investment Law, op. cit., pp. 78-79.
obligations to establish and maintain an appropriate legal, administrative, and regulatory formative framework for foreign investment”.¹⁸⁰

The question in cases of indirect expropriation is how to distinguish it from the exercise of regulatory powers by the host State. More precisely, the category of ‘regulatory taking’ should be explained. A regulatory taking has been regarded as an additional form of indirect expropriation which is enacted for regulatory purposes and affects the economic value of the investment to such an extent that it could be considered as expropriation. It should be distinguished from the sovereign and legitimate exercise of governmental regulatory powers, since only in the former case compensation is required.¹⁸¹ One criterion which has been proposed for differentiating between the two cases, focuses on the discriminatory nature of the measure.¹⁸² Traditionally, however, ordinary taxation, imposition of criminal penalties or export controls are not perceived as takings, and therefore they do not entitle the foreign investor to compensation¹⁸³. Moreover, when public harm or concerns are to be avoided or addressed, legislation creating regulatory regimes in areas such as antitrust, consumer protection, environmental protection, planning and land use, do not form compensable taking, since they are conducive to the efficient functioning of the State.¹⁸⁴ On the whole, the notion of ‘police powers’ seems to be interpreted broadly, so that bona fide regulations and other actions of the kind exclude the right to compensation.¹⁸⁵ Arguably, hence, the debate has shifted from the assessment of the legality of the expropriation and the valuation of investors’ property for the purpose of compensation¹⁸⁶, to the qualification of the governmental act as welfare-apt, and thereby non-compensable, or as

¹⁸⁰ M. Reisman and R. D. Sloane, “Indirect Expropriation and Its Valuation in the BIT Generation”, op. cit., p. 130. The authors specify that consequential expropriations lack overt “markers to enable a tribunal to set the moment of valuation at some point before the investor’s contemporaneous conclusion that it had been expropriated”.

¹⁸¹ S. P. Subedi, International Investment Law, op. cit., p. 77. According to M. Sornarajah, “The Taking of Foreign Property”, op. cit., p. 28: one can single out the circumstances in which a taking could arise: 1) forced sales of property; 2) forced sales of shares; 3) indigenisation measures; 4) taking over management control over investment; 5) introducing other to taking over the property physically; 6) failure to provide protection in case of interference with the property of foreign investors; 7) administrative decisions that canceled licenses necessary for the foreign business to function within the state; 8) exorbitant taxation; 9) expulsion of the foreign investor contrary to international law; 10) acts of harassment—i.e.: freezing of bank accounts, promoting strikes, lockouts and labour shortages.


¹⁸⁴ Id.


'tantamount to expropriation', and therefore worthy of compensation. Clearly, it is controversial to what extent governments may affect the value of private property through regulatory measures for a legitimate public purpose, without effecting a 'taking' and being thereby called for compensation.

Recent awards seem to increase the number of takings that are eligible for compensation. For instance, the *Saluka Investments BV (The Netherlands) v. Czech Republic case*, regards the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens as reflecting customary international law, where it describes an uncompensated taking as lawful if resulting “from the execution of tax laws; from a general change in the currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State”. However, international tribunals have variously decided cases involving issues of indirect expropriation: in fact, no general theory to classify and separate regulation from expropriation is on the horizon, and the case-by-case approach seems to be the more inflated one. Whilst such approach may tailor the judgment to the specific circumstances of the case, it is also true that it may open up the opportunity for a fluctuating jurisprudence, detrimental to the assertion of stable principles on the point. Nevertheless, international decisions and doctrine point to recurrent criteria that suggest a dominant trajectory used to single out cases of indirect expropriatory measures. The major sources are the Iran-United States Claims Tribunal, the decisions taken under the NAFTA and the European Court of Human Rights, with regard to the understanding of ‘property’.

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192 OECD, “Indirect Expropriation and the Right to Regulate in International Investment Law”, op. cit., p. 3.

A review of the criteria that seem to guide the reasoning of tribunals will be provided below, following the approach adopted by the OECD. Of course, this is not the only scheme that has been employed: Stern, for instance, advocates a two-step procedure, founded firstly on a quantitative, and secondly on a qualitative, evaluation of the measure concerned. However, although being formally different, the substance of these methods converges, tackling: the degree of interference with the property right; the nature of governmental measures; the interference of the measure with reasonable and investment-backed expectations.

As will be explained, these criteria correspond to leading ‘doctrines’, but no consensus or coherence is reached in the jurisprudential results. The ‘sole effect doctrine’ concentrates on the effect of the measure, in order to evaluate whether the restrictive effect of the governmental action could have engendered an expropriation; conversely, the ‘purpose test’ analyzes the aim of the measure, determining whether it falls within the sovereign police powers of the State. In such a situation, no right to be compensated would arise for investors, irrespectively of the severity of the governmental measure. The purpose test is multifaceted, and provides a number of remarkable indicators of an effected expropriation: the enrichment of the host State, the deliberate targeting of the investor and, finally, the promotion of the general welfare. The last point, seems particularly disputed since determining what are the possible ‘regulatory’ purposes that a State may avail itself of, is contentious.

195 B. Stern, “In Search of the Frontiers of Indirect Expropriation”, op. cit., p. 38: in order to draw the line between regulatory measures imposed by governments and illegitimate interference with investors’ property rights, the author poses two questions. The first aims to identify the occurrence of expropriation, and in order to do so the effects of the governmental measure are assessed; the second, aims to verify whether there could be legitimate reasons not to compensate the investor, which is considered ascertainable by evaluating the nature of the measure. (emphasis in the original).
198 L. Y. Fortier, and S. L. Drymer, “Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor”, op. cit., pp. 314-315. The case law seems to have abandoned the idea that expropriation must entail an enrichment for the host State, because this would imply no protection in cases of indirect expropriation. However, there are discordant opinions. See, ICSID, Eudoro A. Olguín v. Republic of Paraguay, Case n. ARB/98/5, award, 26 July 2001, para. 84; Ronald S. Lauder v. Czech Republic (UNCITRAL), op. cit., para. 203. The gist of the issue, however, is that the measure should be capable of evaporating the economic value of the investment. V. Heiskanen, “The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation”, in International Law Forum, Vol. 5(3), 2003, p. 180.
There is also a third approach: it balances purposes and effects of the host State’s act in order to qualify it as regulation or expropriation and therefore grant compensatory rights to the foreign investor: this seems to be the more logical tendency to weigh all the circumstances of the case.\textsuperscript{200}

These canons are dealt with hereinafter.

\textit{(i) Degree of Interference With Property Rights}

To determine whether the act amounts to expropriation and brings about a right to compensation, tribunals could evaluate the impact of the host State’s measure on the investor’s property. The severity of the measure should be weighed, and in this regard it seems that a ‘substantial interference’ is generally considered as involving expropriation: it occurs when the investor is deprived of fundamental rights, or when the duration of the interference is significant\textsuperscript{201} or, additionally, when economic rights of the investor are fundamentally impaired\textsuperscript{202}. This approach considers that in order to constitute indirect expropriation, a measure should have the same effects on property rights as a direct expropriation\textsuperscript{203}; in spite of the fact that it is generally accepted, however, this approach does not provide any response to the fundamental question posed by Dolzer. As he noted, the problem is whether there is a point at which, or beyond which, either compensation is required regardless of the objective nature of the governmental measure, or the governmental measure is justified regardless of the impact on the private investor\textsuperscript{204}. The balance is not consistently settled in the courts and doctrine, showing the difficulties in weighing and prioritizing the values at stake.


\textsuperscript{202} OECD, “Indirect Expropriation and the Right to Regulate in International Investment Law”, \textit{op. cit.}, pp. 10-11; C. Schreuer, “The Concept of Expropriation under the ECT and other Investment Protection Treaties”, in C. Ribeiro (ed.), \textit{Investment Arbitration and the Energy Charter Treaty}, 2008, p. 145; ICSID, \textit{Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States}, \textit{op. cit.}: in the \textit{Tecmed v. Mexico} case the tribunal investigated whether ‘due to the action of the host State the assets involved have lost their value or economic use for their holder and the extent of the loss’. The tribunal qualifies this criterion as the rule to distinguish between a regulatory measure and a \textit{de facto} expropriation.

\textsuperscript{203} B. Stern, “In Search of the Frontiers of Indirect Expropriation”, \textit{op. cit.}, p. 39.

\textsuperscript{204} R. Dolzer, “Indirect Expropriations: New Developments”, \textit{op. cit.}, p. 80.
The first modern international taking decision, the **Norwegian Shipowners’ case**\(^\text{205}\), underlined the duty to respect ‘friendly alien property’\(^\text{206}\). The Permanent Court of International Justice (PCIJ) found an indirect expropriation in the **Factory Chorzów case**\(^\text{207}\), while the claim was rejected in the **Oscar Chinn case**\(^\text{208}\), on the basis that business conditions depends on inevitable changes.\(^\text{209}\) The **Barcelona Traction case**\(^\text{210}\) posed a taking issue before the International Court of Justice (ICJ), as well as the **Elettronica Sicula case**\(^\text{211}\), but in both cases the claim for expropriation failed.\(^\text{212}\) In **Biloune v. Ghana**\(^\text{213}\), the governmental acts entailing the irreparable cessation of work on the MDCL’s project for Mr Biloune, were classified by the arbitral tribunal as ‘constructive expropriation’ of MDCL’s contractual rights in the project, and as expropriation of the value of Mr Biloune’s interest in MDCL.

The severity of the deprivation were also assessed by the Iran-United States Claims Tribunal in **Starrett Housing v. Iran**\(^\text{214}\), in **Tippetts**\(^\text{215}\), and in the **Phelps Dodge case**\(^\text{216}\). More precisely, adjudicating in the **Starrett Housing case**, the Iran-United States Claims Tribunal concluded in favor of an expropriation noting that State’s measure had rendered property rights useless *de facto*, although the title continued to be vested in the foreign investor.\(^\text{217}\) Conversely, in the **Sea-Land case** the tribunal did not find any substantial deprivation or interference, rejecting the claim for expropriation.\(^\text{218}\) In the **Tippetts case**, the tribunal focused on the activity of the government-appointed manager and classified it as a deprivation of


\(^{206}\) *Id.*, at 323.

\(^{207}\) PCIJ, *Case Concerning Certain German Interests in Polish Upper Silesia*, *op. cit.*


\(^{210}\) ICJ, *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 3 February 1970, paras 7-8. The merit was not reached, however separate opinions of judges Fitzmaurice, Gros, and Tanaka put emphasis respectively on the ‘disguised expropriation’ that took place, the ‘total loss of assets’ resulting from unlawful acts and remained unindemnified, and the lack of proof concerning the bad faith of the government. These are all issues that remain unanswered and of legal concern today.


\(^{212}\) R. Dolzer, “Indirect Expropriations: New Developments”, *op. cit.*, p. 82.

\(^{213}\) Antoine Biloune (Syria) and Marine Drive Complex Ltd (Ghana) v. Ghana Investments Centre and the Government of Ghana (UNCITRAL), *op. cit.*, p. 209.

\(^{214}\) Iran-United States Claims Tribunal, *Starrett Housing Corp v. Iran*, *op. cit.*, at 154.

\(^{215}\) Iran-United States Claims Tribunal, *Tippetts v. TAMS-AFF A Consulting Engineers of Iran*, *op. cit.*, at 225.


\(^{217}\) Iran-United States Claims Tribunal, *Starrett Housing Corp v. Iran*, *op. cit*.

property. Under the NAFTA context, the Pope & Talbot case mentioned expressly the requirement of a ‘substantial deprivation’, and denied therefore the occurrence of expropriation in a case in which the investor alleged the diminution of its profits due to the Export Control regime introduced by the host State. In S.D. Myers it was contended Canada’s violation of NAFTA Chapter 11 by banning the export of PCB waste to United States for 18 months. The tribunal addressed the meaning of expropriation, described as a ‘lasting removal’ of owner’s ability to make use of its economic rights, and specified that at times deprivation, either partial or temporary, could also be considered as amounting to expropriation depending on the circumstances of the case. The Metalclad case, moreover, provided the occasion to clarify the meaning of expropriation under the treaty, including ‘covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in part, of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State’. It has to be noted that when the investment is not substantially neutralized and deprived of value as a result of the measure, tribunals seem to refuse to find expropriation. This was

219 Iran-United States Claims Tribunal, Tippetts v. TAMS-AFFA Consulting Engineers of Iran, op. cit.
220 ECHR, Sporrong and Lönnroth v. Sweden, op. cit.
224 In that case the tribunal did not find the temporary interference at issue as amounting to expropriation. A. K. Hoffman, “Indirect Expropriation”, op. cit., pp. 158-159; OECD, “Indirect Expropriation and the Right to Regulate in International Investment Law”, op. cit., pp. 11-12.
225 ICSID, Metalclad Corporation v. United Mexican States, op. cit., para. 103.
226 B. Stern, “In Search of the Frontiers of Indirect Expropriation”, op. cit., p. 40; Generation Ukraine Inc. V. Ukraine, award, 16 September 2003, para 20.32: the failure of the Kyiv City State Administration to provide lease agreements was qualified as not creating a ‘persistent or irreparable obstacle to the claimant’s use, enjoyment or disposal of its investment’; See also, ICSID, PSEG Global Inc. The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey, case n. ARB/02/5, award, 19 January 2007, paras 272 et seq., following this approach. The same could be argued in the case ICSID, Enron Corporation and Ponderosa Assets, L. P. v. Argentine Republic, case n. ARB/01/3, award, 22 May 2007, paras 234 et seq.; ICSID, Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (Vivendi II), case n. ARB/97/3, award, 20 August 2007, paras 7.5.1. It has also been recognized that the substantial deprivation can be of a ‘partial nature’: see, S.D. Myers Inc. v. Government of Canada, op. cit.; ICSID, Metalclad Corporation v. United Mexican States, op. cit.; Stockholm Chamber of Commerce, Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v Republic of Moldova, award, 22 September 2005, at 17; see also, ICSID, Biwater Gauff (Tanzania) Ltd v. Tanzania, case n. ARB/05/22, award, 24 July 2008, paras 464-465, establishing that the determination of ‘substantial deprivation’ is a legal issue and that all economic considerations should be treated as questions of causation and damage, being the suffering of an economic loss by the investor not a pre-condition for the finding of an expropriation [under art. 5 of the BIT]; Stockholm Chamber of Commerce, Nykomb Synergetics Technology Holding AB v. Latvia (Energy Charter Treaty), award, 16 December 2003, para. 4.3.1.
the case in *Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States*\(^\text{227}\): the registered foreign trading company CEMSA claimed expropriation for having been denied tax refunds, but its claim was rejected by the tribunal which found that the company had not been deprived of its control, nor it had been interfered upon by the regulatory action of the host State.\(^\text{228}\) The European Court of Human Rights in *Sporrong and Lönnroth v. Sweden*\(^\text{229}\) rejected as well the claim for indirect expropriation on the basis that the right of peaceful enjoyment of possession had merely lost some of its substance, but had not disappeared.

To assess the degree of interference, the duration of the regulatory measure is equally of relevance. Also in this case there is no universal approach: some tribunals held that deprivation is substantial and significant when it is ‘permanent’ and ‘irreversible’;\(^\text{230}\) others, as in *S.D. Myers* cited above, or in *Wena Hotels v. Egypt*\(^\text{231}\), or in *Middle East Cement*\(^\text{232}\), evaluated temporary measures and reached incoherent conclusions. In the first case, 18 months of interference were considered not sufficient to entail expropriation; in the second, conversely, the seizure of two hotels for one year was found a non ‘ephemeral’ measure amounting to expropriation; in the third case, the tribunal considered the suspension of an export license for four months as not merely ‘ephemeral’.\(^\text{233}\) Evidently, the rationale of the reasoning is vague.

Other important arbitral awards are *Revere Copper case*\(^\text{234}\), in which the arbitral tribunal acknowledged a taking by the government, which was in breach of a stabilization clause.

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\(^{227}\) ICSID, case n. ARB(AF)/99/1, award of 16 December 2002, pp. 39-67 at 59.

\(^{228}\) OECD, “Indirect Expropriation and the Right to Regulate in International Investment Law”, *op. cit.*, pp. 11-12.

\(^{229}\) ECHR, *Sporrong and Lönnroth v. Sweden*, *op. cit.*


\(^{234}\) *Revere Copper & Brass Inc. v. Overseas Private Investment Corporation*, *op. cit.*, p. 258.
(ii) Nature of Governmental Measures

Governmental measures could be justified under the sovereign right of the state to act for a social purpose.\textsuperscript{235} In these occasions compensation is excluded, since States “cannot be held responsible for economic consequences resulting from the State’s adoption of general regulatory measures, taken in good faith, in the pursuit of a legitimate interest and in a non-discriminatory manner”.\textsuperscript{236} This approach has been referred to as the ‘police powers’ doctrine entailing a purpose test, and has been exposed to criticism since it seems to automatically exempt the State from the obligation to compensate, without the incurring of its decision in the balancing test with all the other factors.\textsuperscript{237}

The Restatement (Third) of the Foreign Relations Law of the United States comments on the law of expropriation and the State’s ‘police powers’\textsuperscript{238}. It relies on the concepts of unreasonable interference, undue delay and effective enjoyment of property\textsuperscript{239}; furthermore, it refers also to the so-called creeping expropriation\textsuperscript{240}, thereby expanding the factors to be included in the weighing and balancing exercise. Hence, the promotion of the general welfare is not assessed \textit{per se}, as the rationale of the State’s measure; rather, it is considered against all the circumstances of the case, probably to obviate the State’s misbehaviors that the public purpose’s justification could easily cover.\textsuperscript{241} The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens as well clarifies that international law prohibits ‘unreasonable interference with the use, enjoyment, or disposal of property ...’.\textsuperscript{242} Despite the apparent clarity of the doctrine, the sheer challenge for tribunals is to set the threshold beyond which the measure amounts to an unreasonable interference,

\textsuperscript{235} CME (The Netherlands) v. Czech Republic, \textit{op. cit.}, para 591, p. 166, defining regulatory measures as aimed to “avoid use of private property contrary to the general welfare of the host State”.
\textsuperscript{236} B. Stern, “In Search of the Frontiers of Indirect Expropriation”\textit{, op. cit.}, pp. 45-46.
\textsuperscript{237} OECD, “Indirect Expropriation and the Right to Regulate in International Investment Law”, \textit{op. cit.}, p. 18; A. Newcombe, “The Boundaries of Regulatory Expropriation in International Law”, \textit{op. cit.}, pp. 420-421: the author suggest that while arbitral tribunals seem to share the view that States are exempted from paying compensation under such circumstances, the application of this ‘indisputable’ principle “is anything but clear”.
\textsuperscript{238} OECD, “Indirect Expropriation and the Right to Regulate in International Investment Law”, \textit{op. cit.}, p. 18.
\textsuperscript{240} The concept, which is at times used as a synonym for indirect expropriation, alludes to ‘the slow and incremental encroachment on one or more ownership rights of a foreign investor that diminishes the value of its investment’. UNCTAD, \textit{Key Terms and Concepts in IIAs: A Glossary, UNCTAD Series on Issues in International Investment Agreements}, United Nations Publication, UNCTAD/ITE/IIT/2004/2, 2004, p. 69.
substantially impairing investors’ property rights; similarly, the tribunals need to distinguish ‘bona fide regulation[s]’ falling within the police powers of the host State and excluding its economic liability.\textsuperscript{243}

The European Court of Human Rights seems to leave a wide margin of appreciation to States as for determining the scope of their welfare-oriented decisions.\textsuperscript{244} National authorities are in charge of effecting the initial assessment on the existence of a public concern, which should be accepted unless manifestly unlawful.\textsuperscript{245} Both for ‘deprivations’ and ‘controls’ of use of property, there has to be a reasonable and foreseeable national legal basis for the taking; the balance struck between the private and the public interest should be reasonable, the principles of transparency and the rule of law should be respected, and the measures adopted proportionate. The Court proceeds case-by-case\textsuperscript{246} and follows a ‘three-steps’ test, according to the three rules contained in art. 1, Protocol 1 of the European Convention of Human Rights.\textsuperscript{247}

Under the NAFTA as well, the substantial analysis of what the measure has caused is called for\textsuperscript{248}, whereas the ICSID tribunal cited the ECtHR jurisprudence in the case \textit{Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States}, to determine whether governmental measures, and the public interest that they aimed to protect, could be considered proportionate\textsuperscript{249} to the burden imposed upon the foreign investor.\textsuperscript{250} Particularly,

\begin{itemize}
  \item \textsuperscript{244} OECD, “Indirect Expropriation and the Right to Regulate in International Investment Law”, \textit{op. cit.}, pp. 16-17.
  \item \textsuperscript{245} \textit{Id.}
  \item \textsuperscript{246} See, \textit{ECtHR, James & Others v. UK, op. cit.; ECtHR, Sporrong and Lönnroth v. Sweden, op. cit.}
  \item \textsuperscript{247} OECD, “Indirect Expropriation and the Right to Regulate in International Investment Law”, \textit{op. cit.}, pp. 17-18.
  \item \textsuperscript{248} \textit{S.D. Myers Inc. v. Government of Canada (UNCITRAL), op. cit.}
  \item \textsuperscript{249} See, B. Kingsbury and S. Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law”, in Kingsbury B. et al., (eds. by), \textit{El Nuevo Derecho Administrativo Global en América Latina}, Buenos Aires, Rap, 2009, pp. 265 \textit{et seq.}: The Tribunal seem to have used “the proportionality analysis to manage tensions between investment protection and competing public policies”. Following a two-step analysis to determine the intensity and the effects of the measure, the Tribunal “aimed at achieving ‘Konkordanz’ of the various rights and interests affected”, so that a compensable indirect expropriation could occur “only when State measures lead to disproportional restrictions of the right to property”. See also, ICSID, \textit{LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, op. cit.}, para. 194, quoting from ICSID, \textit{Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, op. cit.}, para 115.
  \item \textsuperscript{250} ICSID, \textit{Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, op. cit.}
\end{itemize}
in this latter case, the tribunal, while finding an expropriation, specified that it is indisputable the principle according to which the State in the exercise of its sovereign police powers may cause economic damages to investors without entitling them to compensation.\footnote{ICSID, Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, op. cit.; see also, ICSID, Archer Daniels Midland Co. v. Mexico, op. cit., para. 250.}

(iii) Governmental Measure’s Interference with Reasonable Expectations of Investors

When deciding to invest in a particular country, the investor weigh the profits-related pro and cons of its decision. Thus, the supervening governmental regulatory measure could frustrate such expectations, thereby consuming the investor’s interest, also in remaining within the country. Was the private actor to prove that the investment was based on a state of affairs that did not include the challenged regulatory regime, the State had to be considered liable for having affected the investor’s reasonable expectations.\footnote{OECD, “Indirect Expropriation and the Right to Regulate in International Investment Law”, op. cit., p. 19.}

The gist of the issue is to identify the degree of interference on reasonable expectations\footnote{emphasis added.} as to possibly recognize the compensable nature of the governmental regulatory act. It is a question of fairness in balancing opposing interests, a judgment that is clearly inseparable from the concept of private property rights—rights to use, enjoy the fruits of, and alienate one’s property.\footnote{L. Y. Fortier, and S. L. Drymer, “Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caevat Investor”, op. cit., pp. 306-307.}

Evidently, a certain degree of risk is part of business conditions, which are transient and ‘subject to inevitable changes’\footnote{PCIJ, Oscar Chinn Case, op. cit., p. 65; see also, Iran-United States Claims Tribunal, Starrett Housing Corp v. Iran, op. cit., at 1117.}; however, the investor’s landfill project cannot but rely on the assurance that it satisfies all the local laws and regulations.\footnote{T. Waelde and A. Kolo, “Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law”, in International and Comparative Law Quarterly, Vol. 50, 2001, p. 844. The reference is to the Metalclad award.}

\footnote{B. Kingsbury and S. Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law”, op. cit., p. 272: “The main difference between the concept of indirect expropriation and the protection of legitimate expectations under fair and equitable treatment is that indirect expropriation requires interference with a property interest or entitlement, whereas the protection of legitimate expectations under fair and equitable treatment is broader and can encompass the expectation in the continuous existence and operation of a certain regulatory or legislative framework. Balancing tests of different sorts are also beginning to be used in the jurisprudence of investment tribunals on other issues, including in the interpretation of umbrella clauses”.

This means that legitimate expectations\footnote{B. Kingsbury and S. Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law”, op. cit., p. 272: “The main difference between the concept of indirect expropriation and the protection of legitimate expectations under fair and equitable treatment is that indirect expropriation requires interference with a property interest or entitlement, whereas the protection of legitimate expectations under fair and equitable treatment is broader and can encompass the expectation in the continuous existence and operation of a certain regulatory or legislative framework. Balancing tests of different sorts are also beginning to be used in the jurisprudence of investment tribunals on other issues, including in the interpretation of umbrella clauses”.

 may form a part of the investment protected by international law, stemming
from the international legal principle of good faith, and that they could therefore influence a finding of expropriation; conversely, it is also arguable that not every investor expectation deserves to be protected under international law.

In the Waste Management award the claimant argued that the host State’s breach of the contract constituted an expropriation. The tribunal stated that the loss of benefits or expectations is a necessary criterion to qualify expropriation, although not a sufficient one. According to the tribunal, thus, only an ‘expropriation under the contract’, meaning the “effective repudiation of a right, unredressed by any remedies available to the claimant, which has the effect of preventing its exercise entirely or to a substantial extent”, entails the right to be compensated. In this light, it seems that objectively assessable expectations created in the investor as a consequence of the host State’s conduct, may entail the protection of foreign private actors in case of governmental regulatory acts. According to a different approach, instead, investors’ expectations may also favor the host State: particularly, when environmental standards are at stake, “one cannot postulate that the environmental regime should be absolutely frozen ...”, and this argument may serve as a rationale or justification for (arbitrary) governmental regulatory acts.

Foreign investors cannot aim to a ‘blanket protection’ from the dissatisfaction with their expectations due to regulatory changes in the host State’s legislation. Nonetheless, the process through which tribunals come to ascertain the legitimacy of investors’ expectations with respect to the (non)reasonable nature of the State’s measure, appear controversial.

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263 ICSID, Robert Azinian and Others v. United Mexican States, case n. ARB(AF)/97/2, award (NAFTA), 1 November 1999, para. 83.
entered the host State, and which might have been inevitably determined by contracts or licenses; additionally, also informal assurances to investors, or governmental attempts to create an investment-friendly environment, are regarded as binding upon the States: that said, the tribunal is faced with the thorny issue of evaluating the legislation in force at the time the investment was originally made, drawing from it the reasonable expectations that it could have created on investors. Decidedly, neither a banal task, nor leading to predictable results.

The contribution of the Iran-United States Claims Tribunal on this regard is particularly important. Indeed, the Tribunal measured the deprivation of property on the ‘attributability’ of the loss to an act or omission of the host State; moreover, it confirmed that in cases of direct nationalizations and expropriations, the State is compelled to pay compensation to the investor, irrespectively of the public purpose of the measure and of the proof of a discriminatory nature. This result shows that, when there is a clear evidence of expropriation, the method (discrimination) or the rationale (public purpose) for it could merely be conceived of as aggravating or de facto circumstances that do not alter the judgment on the investor’s right to be compensated.

Along the same line, the case Compañía del Desarrollo de Santa Elena v. Costa Rica, was decided by stating that “the purpose of protecting the environment [of Costa Rica], did not alter the legal character of the taking for which adequate compensation must be paid”. The ICSID panel emphasized that expropriatory environmental measures are similar to any other expropriatory measure that a state may take; hence, the expropriation of property for environmental purposes, either of domestic or international nature, demands payment of compensation.

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266 V. Heiskanen, “The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation”, op. cit., pp. 186-187. See, Iran-United States Claims Tribunal, Phillips Petroleum Co. Iran v. Islamic Republic of Iran, award n. 425-39-2, 29 June 1989. According to the author, one could distinguish between expropriations that have taken place without a formal legislative decree but to the economic benefit of the State—and these do not seem to be appropriately qualified as ‘indirect expropriations’; and, deprivations of property that are directly or approximately attributable to the host State but are effected in a manner that does not economically benefit the host State per se; A. Newcombe, “The Boundaries of Regulatory Expropriation in International Law”, op. cit., pp. 411-412: the author underlines that the Iran-United States Claims Tribunal has expressly rejected unjust enrichment as the basis of State Responsibility for deprivations; On unjustified enrichment see also, C. H. Schreuer, “Unjustified Enrichment in International Law”, in The American Journal of Comparative Law, Vol. 22(2), 1974, pp. 281-301.
268 Id., at paras. 68-95.
The reasoning of the tribunal conveys the idea that domestic or international public purposes cannot deprive investors of their right to be compensated in case of expropriation.\textsuperscript{269} Although correct in principle, this assumption threaten the hierarchy of values that exists through the sources of international law, downgrading the global concerns \textit{vis-à-vis} private economic interests; and this seems to result from the absence of stable and guiding, common principles in this context.

It is beyond doubt that governmental measures are hardly predictable, being accorded to the modifications of the economic, social and political circumstances and demands of the country. Hence, focusing exclusively on the purpose or on the effects of the measure may turn into a partial judgment on the characteristics of the case as to constitute a ‘taking’. Indeed, the intention to expropriate of the host Government does not seem a relevant or reliable parameter\textsuperscript{270}; similarly, the expectations of the investors cannot be deemed as crystallized, being conversely tailored to the shifts in the market economy.

These are the main reasons why many commentators uphold a case-by-case approach in this field, being skeptical about the possibility to outline a general theory and single out firm principles for identifying a ‘taking’. Furthermore, on this basis it is also shown how arduous it is in practice, and for the jurisprudence, to apply the doctrine of indirect expropriation: competing doctrinal strains, favoring or the interests of property owners or the regulatory authority of the States, evidently demonstrate this.\textsuperscript{271}

\textsuperscript{269} In contrast, in \textit{International Thunderbird Gaming Corp. v. Mexico}, (UNCITRAL/NAFTA), award, 26 January 2006, para. 208, it is argued that “compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited”; Y. Nouvel, “L’indemnisation d’une expropriation indirecte”, \textit{op. cit.}, pp. 198-204, who argues that “si les effets de la mesure gouvernent l’éclosion de l’obligation d’indemniser, l’objet de la mesure importe dans le calcul du montant de l’indemnisation”.

\textsuperscript{270} G. C. Christie, “What Constitutes a Taking of Property under International Law?”, \textit{op. cit.}, p. 310; R. Dolzer, “Indirect Expropriation: New Developments?”, \textit{op. cit.}, p. 90, stating that the ‘post-event statement of a government that a taking was not intended’ cannot be decisive; C. Schreuer, \textit{The Concept of Expropriation under the ETC and other Investment Protection Treaties}, \textit{op. cit.}, p. 36, arguing that “international judicial practice is almost unanimous in holding that an intention of the host State to expropriate is not essential”; an exception is ICSID, \textit{Eudoro A. Olguín v. Republic of Paraguay}, \textit{op. cit.}; G. H. Aldrich, “What Constitutes a Compensable Taking of Property?”, \textit{op. cit.}, p. 603: the author refers to the contrasting opinions held by the Iran-United States Claims Tribunal in \textit{Tippets} and \textit{Sea-Land Service}, concerning the role of the intention of the State in determining the finding of expropriation.

(iv) The Definition of Indirect Expropriation in BITs

The literature review has underlined the variety of terms that are usually employed to refer to the phenomenon of indirect expropriation. Typically, international investment treaties do not define expropriation, but rather they refer to governmental measures that are ‘equivalent to’ or ‘tantamount to’ expropriation, containing guarantees against indirect expropriation. Hence, neither appropriation nor unjust enrichment seems to be appraised to determine the occurrence of expropriation.

One could examine whether the scope of expropriation in modern BITs has become broader than that recognized in customary international law; yet, the opinions of commentators in this regard are discordant. For instance, the phrase ‘Measure tantamount to nationalization or expropriation’ in Article 1110 of the North America Free Trade Agreement (NAFTA), has been interpreted not as broadening the concept of expropriation, but rather as meaning ‘equivalent to’ expropriation.

One approach, consequently, argues that there is no evidence that the States intended to expand the meaning of indirect expropriation beyond that recognized in customary

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276 R. Suda, “The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization”, in O. De Schutter (ed. by), Transnational Corporations and Human Rights, Portland, Hart Publishing, 2006, p. 83, arguing that the relationship of BITs to public international law is unclear and that the questions as to whether they simply codify international law or rather they provide stronger protections to investors than those found in international law, are still unresolved; R. Dolzer, “The Impact of International Investment Treaties on Domestic Administrative Law”, in International Law and Politics, Vol. 37, 2005, pp. 958-959.

277 North American Free Trade Agreement, 1995, art. 1110: “Article 1110: Expropriation and Compensation: 1. 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; 2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.”

international law; rather, provided the uncertainties about the scope of (direct) expropriation in customary international law, ‘effect-based’ definitions of the term have been extensively used. In addition, it underlines that States willing to expand the scope of expropriation have explicitly included a provision in their BITs. On the other hand, other scholars have drawn the expansion of the notion of expropriation from the inclusion per se of the ‘tantamount clause’ in investment treaties. By noting that BITs aim to create favorable conditions for foreign investments that contemplates, among others, an “effective normative framework”, Reisman and Sloane look at the ‘tantamount clause’ as the instrument to extend the “scope of indirect expropriation to an egregious failure to create or maintain the normative ‘favorable’ conditions in the host State”. Yet, as Dolzer observes, the wording of these formula fall below the threshold of clarity and preciseness and could plausibly be aimed to leave the issue of ‘under what conditions indirect expropriation takes place’ open, until it practically arises. This obviously underscores the impact of arbitral decisions in international investment law, whose role in interpreting investment treaties, and state-contracts in light of IIAs, cannot be underestimated. It is argued, moreover, that the use of this formula is conducive to attracting the application of international law on expropriation to the phenomenon under scrutiny: this assumption is noteworthy since it incidentally qualifies ‘indirect expropriation’ as a minoris generis of ‘expropriation’, and not as an autonomous category, endowed with a specific international law regime.

To date, however, varying approaches have been applied to deal with claims of ‘indirect expropriation’; furthermore, the criteria singled out by the tribunals as well as their application, do not provide a clear-cut mechanism leading neither to the qualification of the phenomenon, nor to the smooth application of the ‘law of expropriation’. Although the latter is a plausible and consequential result, it is not the only viable path, and the inconsistencies in

279 A. Newcombe, “The Boundaries of Regulatory Expropriation in International Law”, op. cit., p. 415: the author makes reference to the US Model BIT which provides in Annex B that the definition of expropriation “is intended to reflect customary international law”.

280 Ivi, p. 416.


283 Ivi, p. 56; T. W. Wälde, “The Specific Nature of Investment Arbitration”, op. cit., p. 95; P. D. Cameron, International Energy Investment Law, op. cit., p. 222: the author pinpoints that while the drafters could be persuaded that customary international law is codified in the treaties, the wide definition of expropriation that is generally adopted allows for changes that are aimed to be tailored to the modern economic conditions.

the jurisprudence show the difficulties in opting for such a categorical conclusion. Hence, this
question is one of the leading rationale for this proposal, which aims to clarify the legal
foundations for the treatment of indirect expropriation in international law. These aspects will
be further discussed in the Research Design.

IV. Research Design and Methodology

The primary aim of this study is to investigate and clarify the existing international law
on ‘indirect expropriation’, a phenomenon that, although not new in international law\textsuperscript{285},
represents one of its topical evolving fields.\textsuperscript{286}

As noted, the protection of foreign investments against uncompensated direct
expropriation—i.e.: nationalizations, direct seizures of property— has been replaced in
practice by claims for the protection against ‘indirect expropriation’ through governmental
regulatory measures. Drawing a dividing line between non-compensable and compensable
regulatory takings is evidently the practical implication of the problem, as well as its most
controversial aspect.\textsuperscript{287} It is beyond doubt that compensation “cannot be claimed in every case
where a host State adopts regulatory measures to protect its key interests”\textsuperscript{288}; yet, the
difficulties that emanate from this, show the tension between host States’ sovereign authority
within their territory v. the investors’ property rights.

Admittedly, the issue of what constitute expropriation has been of a constant concern in
recent decades\textsuperscript{289}. However, whilst international law on direct takings of foreign property is
fairly settled\textsuperscript{290}, the treatment and, most importantly, the qualification of an act as indirectly
expropriatory is to date unresolved. Pushed by the need to assure the ‘health’ and stability of
the economic climate, host States currently avoid direct seizures of foreign property: this
attitude, nonetheless, does not eliminate the phenomenon, but rather vests it with refined
semblances, under which basically the same effects on investors’ property could be achieved.

\textsuperscript{285} See, PCIJ, \textit{Factory at Chorzów, op. cit.}, and ICJ, \textit{Barcelona Traction, Light & Power Co. (Belgium v. Spain),
op. cit.}, for instance; A. K. Hoffman, “Indirect Expropriation”, \textit{op. cit.}, p. 152.

\textsuperscript{286} \textit{Ivi}, p. 170.

\textsuperscript{287} T. Gazzini, “Drawing the Line between Non-Compensable Regulatory Powers and Indirect Expropriation of
Foreign Investment: An Economic Analysis of Law Perspective”, \textit{op. cit.}

\textsuperscript{288} G. S. Akpan, “Host State Regulation of Foreign Investment and Indirect Expropriation in International Law”,

\textsuperscript{289} A. K. Hoffman, “Indirect Expropriation”, \textit{op. cit.} p. 151.

\textsuperscript{290} G. S. Akpan, “Host State Regulation of Foreign Investment and Indirect Expropriation in International Law”,
\textit{op. cit.}, p. 121.
Scholarly attempts oriented at defining ‘indirect expropriation’ have already demonstrated the number of forms that the phenomenon could take. What remains controversial in either the doctrine and the tribunals’ pronouncements adjudicating on investors’ claims for compensation, is the method—and its fundamental criteria—to evaluate a finding of indirect expropriation.

Although a ‘more-inflated’ trend could be recognized in the ‘sole effect’ doctrine, and although the judicial assessment of governmental measures is performed by focusing mainly on their economic impact, reasonableness, and foreseeability in light of the foreign investor’s legitimate expectations, the outcome of Tribunals’ reasoning is on the whole inconsistent. The prejudice is either to the host State in its regulatory powers or, conversely, to the foreign investors’ incentive in pursuing economic activities, which is diminished by denying the right to be compensated.

Against this background, this proposal aims to qualify ‘indirect expropriation’ as to determine whether it proves to be an autonomous category, or rather it has to be acknowledged as a species of the genre ‘expropriation’. The goal is primarily to establish the applicable legal regime, and secondarily to analyze its implications on public international law. The study will take into consideration the behavior of significant actors and their rights and duties, in order to appraise the implications of indirect expropriation from all the possible perspectives.

Evidently, the focus will be on host States and foreign investors, which confront themselves before national and international tribunals and courts on the finding of (non-) compensable regulatory takings. Particularly, host States are bound by customary international law and treaty-based law concerning the treatment of aliens and their property within their territory. The proliferation of BITs has amplified the standards of protection that are to be granted, since these instruments include provisions especially calling for stability

291 R. Dolzer, “The Impact of International Investment Treaties on Domestic Administrative Law”, op. cit., pp. 957-958: the author underlines that “three types of clauses typically contained in investment treaties have the most severe impact on domestic legal system. These are a) clauses providing for rules on indirect expropriation; b) clauses on fair and equitable treatment of foreign investors; and, c) clauses on the protection of investment agreements concluded between a foreign investor and the host country (‘umbrella clauses’)”.
in domestic legislation, fair and equitable treatment (FET)\textsuperscript{292}, Most-favored-nation (MFN) treatment\textsuperscript{293}, and compensation. The system thereby created is symmetrical in the signatory countries, harmonizing the level of protection for investors, as well as the burdens and the restrictions in the exercise of sovereign powers for States.\textsuperscript{294} Yet, notwithstanding these duties imposed on States, their regulatory powers are not obliterated, but rather they continue to be executable. As for foreign investors, they maintain the right not to be arbitrarily deprived of their property rights through governmental measures; however, at the same time, substantial interferences aimed not to dispossess the investor of the title to its property, but \textit{de facto}

\textsuperscript{292} See, K. Yannaca-Small, “Fair and Equitable Treatment Standard: Recent Developments”, in A. Reinisch (ed. by), \textit{Standards of Investment Protection}, Oxford, Oxford University Press, 2008, pp. 114, 124: the author refers to the binding interpretation of art. 1105 (NAFTA), issued by the NAFTA Free Trade Commission, which explained that the customary international law minimum standard of treatment of aliens is the minimum standard of treatment to be afforded to investments of investors of another Party; See, ICSID, \textit{Mondev International Ltd. v. United States of America}, case n. ARB(AF)/99/2, award, 11 October 2002; see also, ICSID, \textit{Sempra Energy v. The Argentine Republic}, case n. ARB/02/16, 28 September 2007, para. 296; furthermore, the author observes that how investors perceive the governmental activity and their legitimate expectations in this regard, influence the evaluation of the host country’s ordering function of law. Particularly, the legitimate expectation principle becomes an independent basis for a claim under the fair and equitable treatment standard. The reason could be found in the capacity of this standard to provide appropriate remedy to the investor while avoiding the more drastic determination and remedy inherent in the concept of regulatory expropriation. It is argued that obligations implied in the expropriation clause and those of fair and equitable treatment do not necessarily differ in quality, but just in intensity, see, \textit{International Thunderbird Gaming Corp. v. Mexico}, (NAFTA), Waelde Separate Opinion (Dissent in part), 26 January 2006, para 37; ICSID, \textit{CMS v. Argentina}, \textit{op. cit.}


\textsuperscript{294} R. Dolzer, “The Impact of International Investment Treaties on Domestic Administrative Law”, \textit{op. cit.}, p. 972.
diminishing or removing the investment’s economic value, frustrate the investors legitimate expectations undermining the basis for its decision to enter the host State.\(^{295}\)

In addition, attention will be paid to the implications of indirect expropriation for ‘third parties’. This category may be composed of the home State of the investor, which having concluded a BIT with the host State might have an interest in asserting the treaty’s violation before an international Court or Tribunal; furthermore, the category could include the nationals of the host State in pursuance of self-determination through, for instance, indigenization processes\(^{296}\), or the international community as a whole, whose core values—

\(^{295}\) T. Waelde and A. Kolo, “Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law”, op. cit., p. 827, making the argument that the criteria for qualifying the governmental measure as reasonably regulatory (in the environmental field) are: “1) the regulation must be ‘proportionate and necessary’ for a legitimate purpose; 2) it must not be discriminatory; 3) it must not be in breach of an agreement or of legitimate, investment-backed expectations”; Noteworthy is the recent ICSID, Alpha Projektholding Gmbh v Ukraine, op. cit.: the panel found the government of Ukraine liable for the expropriation of rights held by the Austrian property developer in a Ukrainian hotel refurbishment project. In particular, Ukraine has been found to have violated its obligation to provide fair and equitable treatment, as established in the Austrian-Ukraine BIT. The tribunal stated that the Austrian company had a “legitimate expectation that the government would not interfere with the contractual relationship between Alpha and its local business partner”, and that this expectation was frustrated by the actions of state authorities. At para 408: “It is well-established that a government action need not amount to an outright seizure or transfer of title in order to amount to an expropriation under international law. As the Iran-United States Claims Tribunal found in Starrett Housing “it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner”. Thus, even if the 1998 and 1999 JAAs remain nominally in force, Claimant’s investment may still have been expropriated if the contracts have been been “rendered useless” by the actions of the Ukraine government. However, in order to establish an indirect expropriation of this sort, it is necessary to demonstrate that the investment has been deprived of a significant part of its value”; at para 411: “With respect to Respondent’s first objection, the Tribunal has already determined that the stop in payments was caused by Ukraine’s conduct. ...Whether Claimant could have enforced its rights in local courts, and whether the JAAs are technically still in effect as Respondent alleges, is not relevant to this question. Claimant chose to seek a remedy through international arbitration instead, as it is entitled to do”; at para 412: “ The Tribunal questions whether any distinction between ‘sovereign’ and ‘commercial’ actions is relevant to the question of whether Ukraine’s actions expropriated Claimant’s investment. However, even assuming a distinction is relevant, the Tribunal nevertheless concludes that Ukraine expropriated Claimant’s investment”; at para 420, it is argued: “governments must avoid arbitrarily changing the rules of the game in a manner that undermines the legitimate expectations of, or the representations made to, an investor”; ICSID, Metalclad Corporation v. United Mexican States, op. cit., para. 103.

\(^{296}\) R. Suda, “The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization”, op. cit., p. 122; the term ‘indigenization’ refer to the progressive transfer of ownership from foreign interests into local shareholders. The property is not vested in the State or its organs, and the foreign investors could remain in the control of his venture: this element has been considered as a criterion to set indigenization measures apart from outright takings of property. See, M. Sornarajah, The International Law on Foreign Investment, op. cit., p. 365.
expressed in terms of duties and rights for State-actors—could be influenced by how States act domestically.

It has been argued that the compensation requirement “can prevent States from implementing large-scale reforms”, adversely affecting, among others, human rights- or environmental-related progresses in the host State; on the other hand, host States’ recourse to the regulatory powers’ defense at their discretion may undermine the reliability of investments. Hence, one point that will certainly deserve thorough examination is the significance of the area in which regulatory measures are undertaken for their classification as compensable or non-compensable. Indeed, human rights, environmental or even labour rights-oriented regulations carried out by the host State may satisfy core international values: thus, private property is not to be “elevated at the point that it makes impossible for States to perform their basic functions of protecting the public interest especially where the use of such property has resulted or would result in injury to members of the public”. Consequently, the interplay between private (investment-related) rights, domestic purposes, and international rights and duties of host States, will be researched on.

297 Particularly, one could refer to erga omnes obligations: “this concept concerns the scope of application of the relevant rule, that is the extent to which States as a generality may be subject to the rule in question and may be seen as having a legal interest in their protection. See, M. N. Shaw, International Law, op. cit., p. 124; D. Shelton, “International Law and ‘Relative Normativiy’”, in M. D. Evans (ed. By), International Law, 2nd Ed, Oxford, Oxford University Press, 2006, p. 163, stating that “erga omnes obligations have specific and broad procedural consequences because of the substantive importance of the norms they enunciate”.


299 H. W. Baade, “ Permanent Sovereignty Over Natural Wealth and Resources”, op. cit., p. 30, already argued that: “The issue is whether foreign private interests should ever be permitted to obstruct local public interests ... My answer, at least, is clear: The right of a country to nationalize its natural resources is not debatable under customary international law; only the consequences of the exercise of this right are. And if, in conclusion, a modest prediction may be permitted: Debated, and debated, and debated they will be”.

300 R. Suda, “The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization”, op. cit., p. 130; See, PCIJ, Oscar Chinn Case, op. cit.; See, T. Waelde and A. Kolo, “Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law”, op. cit., p. 813, arguing that “ the definition of the boundary between legitimate regulation expressing inherent limitation of property and the state’s police powers on the one hand and excessive regulation equivalent to a full or partial expropriation on the other will be major challenges for international economic lawyers”.

301 G. S. Akpan, “Host State Regulation of Foreign Investment and Indirect Expropriation in International Law”, op. cit., p. 136; M. Sornarajah, The International Law on Foreign Investment, op. cit., p. 376: “It should not be the function of international law to insulate the foreign investor from the regulatory regime of the host State’s laws”; Rather international law could “serve the purpose of reconciling heterogeneous values and expectations”. This argument is made in B. Simma, “Universality of International Law from the Perspective of a Practitioner”, in The European Journal of International Law, Vol. 20(2), 2009, p. 266.
In the field of indirect expropriation of foreign investments, therefore, international law plays a peculiar role, since the actors involved have both State and non-State nature, so that individuals and especially corporations—which are not regarded as subjects in international law—may sue State-subjects. The divide between domestic and international law is thereby straddled, bringing additional complexity to the issue. Particularly, a side-effect of non-State actors’ participation in the international system may be their (unintended) contribution to the development of international law: arbitral awards, of which they are parties and addressee, may have an impact on the formation of the *opinio juris* of States; moreover, (whether and) how general principles of international law are applied or referred to, could on the whole affect their understanding at the international level. As a consequence, this area appears as convoluted, both in terms of actors and sources of law; in addition, the scheme is further complicated by the need to assess the value of arbitral awards *per se* and in their interplay—in terms of propensity to self-referrals and citing of precedents—as possible sources of international law. The appraisal of all these elements will be instrumental to the progress of the research.

To this end, the project will be developed in view of the traditional legal approach, according to which the content of a rule is established by analyzing the material sources of international law, namely treaties and custom, and by focusing on the conduct of the international actors. This entails that in order to identify existing international law on indirect expropriation and assess its current status, the study will follow the structure of the sources of international law as enshrined in art. 38 of the Statute of the International Court of Justice, which serves as a parameter for the identification of those sources.

Moreover, taking into consideration that international investment law and especially the field of indirect expropriation evolve continuously, it is assumed that legal rules, as well, rapidly change. Indeed, account of this evolution is mainly to be found in the international

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303 Id.
304 *Statute of the International Court of Justice*, annexed to the Charter of the United Nations, San Francisco, 26 June 1945: “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto”.
jurisprudence, particularly enshrined in the opinions of international judges on the status of international law, which constitute and indirect source of international law.\textsuperscript{306} However, since judges are called to interpret—and not create—international law, their decisions are deemed as merely ratifying the evolution of the existing rule(s).\textsuperscript{307} Additionally, also national decisions could be regarded as forming a jurisdiction whose jurisprudence is of significance for international law, to the extent that the actors involved are internationally recognized as subjects and are treated according to the international legal framework.\textsuperscript{308}

As a consequence, the study will also employ an inductive or bottom-up approach that, starting from the observation of the ‘legal reality’—i.e. international awards, judgments, treaties and agreements—will account for how international rules are interpreted and enforced in international law, to draw the existence of new norms while studying rules already consolidated. More precisely, the case-law of the Iran-United States Claims Tribunal, the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (IChC), the Permanent Court of Arbitration (PCA), and moreover, the decisions under the NAFTA and those applying the United Nations Commission on International Trade Arbitration Rules (UNCITRAL), will be primarily reviewed.

The missing link between formal law and the result it is aimed to, is the professional activity of ascertaining and expressing such ideals; the ‘justice administrators’ and their reasonings fill the gap, whereas their \textit{modus operandi} together with the verdicts they come up with, may account for the \textit{de facto} outcomes of that flat surface that is the law \textit{in abstracto}.\textsuperscript{309} A court’s decision tends to be a choice between alternatives that claims to be universal and objective, although being partial and subjective.\textsuperscript{310} Hence, finding and re-constructing international law from such decisions could offer an understanding of the real stage of development of international law, dissecting the principles that informs not only the responses of tribunals, but also the demands that actors feel entitled to pose in order to have their rights asserted.

\textsuperscript{306} O. Corten, \textit{Méthodologie du Droit International Public}, op. cit., p. 198; M. N. Shaw, \textit{International Law}, op. cit., p. 109; “judicial decisions are utilized as a subsidiary means for the determination of rules of law rather than as an actual source of law”.

\textsuperscript{307} O. Corten, \textit{Méthodologie du Droit International Public}, op. cit., p. 198.

\textsuperscript{308} Ivi, p. 200.


\textsuperscript{310} Ivi, p. 72.
Furthermore, other methods may be beneficial to this study: indeed, as international law will be studied within its context, multidisciplinary approaches\textsuperscript{311} may be usefully applied, to consider economic and political elements that may influence the formation and implementation of norms in this field.

To conclude, providing both investors and host States with a stable and clear legal framework to regulate indirect expropriatory measures and distinguish them from regulatory acts has significant, practical implications: it will encourage transparency and efficacy in parties’ political, economic and moral choices, balancing the antagonism between public and private claims.

\textsuperscript{311} O. Corten, \textit{Méthodologie du Droit International Public}, op. cit., p. 39, \textit{et seq.} The reference is to approaches such as critical legal studies, law and economics, international law and international relations.
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<td>Benvenuti &amp; Bonfanti v. People’s Republic of the Congo</td>
<td>Congo</td>
<td>8 August 1980</td>
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<tr>
<td>Biwater Gauff (Tanzania) Ltd v. Tanzania</td>
<td>Tanzania</td>
<td>24 July 2008</td>
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<tr>
<td>Camuzzi International S.A. v. Argentina</td>
<td>Argentina</td>
<td>11 May 2005</td>
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<tr>
<td>CMS Gas Transmission Corp v. The Argentine Republic</td>
<td>Argentina</td>
<td>12 May 2005</td>
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<tr>
<td>CMS v. Argentina</td>
<td>Argentina</td>
<td>24 August 2001</td>
</tr>
<tr>
<td>Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina (Vivendi II)</td>
<td>Argentina</td>
<td>20 August 2007</td>
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<tr>
<td>Consortium RFCC v. Morocco</td>
<td>Morocco</td>
<td>22 December 2003</td>
</tr>
<tr>
<td>Corn Products International v. United Mexican States</td>
<td>Mexico</td>
<td>18 August 2009</td>
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<tr>
<td>Duke Energy International Peru Investments N. 1, Ltd v. Peru</td>
<td>Peru</td>
<td>18 August 2008</td>
</tr>
<tr>
<td>Enron Corporation Ponderosa Assets, L.P. v. Argentina</td>
<td>Argentina</td>
<td>22 May 2007; decision on annulment of the Argentine Republic, 30 July 2010</td>
</tr>
<tr>
<td>Eudoro A. Olguín v. Republic of Paraguay</td>
<td>Paraguay</td>
<td>26 July 2001</td>
</tr>
<tr>
<td>Feldman v. Mexico</td>
<td>Mexico</td>
<td>16 December 2002</td>
</tr>
<tr>
<td>Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines</td>
<td>Philippines</td>
<td>16 August 2007</td>
</tr>
</tbody>
</table>
ICSID, Gas Natural SDG, S.A. v. Argentina, case n. ARB/03/10, decision on preliminary questions on jurisdiction, 17 June 2005.
ICSID, Goetz and others v. Republic of Burundi, case n. ARB/95/3, award, 10 February 1999.
ICSID, Ioannis Kardassopoulos v. Georgia, case n. ARB/05/18, decision on jurisdiction, 6 July 2007.
ICSID, Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia, case ns. ARB/05/18 and ARB/07/15, award, 3 March 2010.
ICSID, Klöckner Industrie-Anlagen Gmbh and others v. Cameroon, case n. ARB/81/2, award, 21 October 1983.
ICSID, Loewen Group, Inc. & Raymond L. Loewen v. United States, case n. ARB(AF)/98/3, 26 June 2003.
ICSID, Mr. Saba Fakes v. Republic of Turkey, case n. ARB/07/20, award, 14 July 2010.
ICSID, Malaysian Historical Salvors & Phoenix Action, Ltd., case n. ARB/05/10, award, 17 May 2007, and decision on the application for the annulment,16 April 2009.
ICSID, Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States, case n. ARB(AF)/99/1, award, 16 December 2002.
ICSID, Metcalclad Corporation v. United Mexican States, award, case n. ARB(AF)/97/1, 30 August 2000.
ICSID, Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, award, case n. ARB/99/6, 12 April 2002.
ICSID, Mobil Oil v. New Zealand, case n. ARB/87/2, findings on liability, interpretation and allied issues, 4 May 1989.
ICSID, Mondev International Ltd. v. United States of America, case n. ARB(AF)/99/2, award, 11 October 2002.
ICSID, Piero Foresti et al. v. The Republic of South Africa, case n. ARB(AF)/07/01, award, 4 August 2010.
ICSID, Plama Foresti et al. v. The Republic of Turkey, case n. ARB/03/24, decision on jurisdiction, 8 February 2005; award, 27 August 2008.
ICSID, Robert Azinian and Others v. United Mexican States, case n. ARB(AF)/97/2, award (NAFTA), 1 November 1999.
ICSID, Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, case n. ARB(AF)/00/2, award, 29 May 2003.


ICSID, *Yang Chi Oo Trading Pte Ltd v. Myanmar ASEAN ID*, case n. ARB/01/1, award, 31 March 2003.

**Iran-US Claims Tribunal**


Iran-United States Claims Tribunal, *Dallas v. Islamic Republic of Iran*, award n. 53-149-1, 10 June 1983.


**Permanent Court of Arbitration and International Court of Justice**


ICJ, Case Concerning Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo), judgment, 30 November 2010, General List n. 103.


PCIJ, Case Concerning Certain German Interests in Polish Upper Silesia, judgment, Series A., n. 7, 25 May 1926.


PCIJ, German Settlers in Poland Case, Ad. Opinion, Series B., n. 6, 10 September 1923.

PCIJ, Factory at Chorzów, judgment, Series A., n. 17, 13 September 1928.

PCIJ, Oscar Chinn Case, judgment, Series A/B, n. 63-79, 12 December 1934.

PCIJ, Serbian Loans case, Series A., n. 20, 21, 41, 12 July 1929.


Other Investment Arbitrations

Antoine Biloune (Syria) and Marine Drive Complex Ltd (Ghana) v. Ghana Investments Centre and the Government of Ghana (UNCITRAL), award on jurisdiction and liability, 27 October 1989.


de Sabla Claim (US v. Panama), award, 29 June 1933, in UNRIAAR, Vol. 6, p. 358.

Encana Corporation v. Republic of Ecuador (UNCITRAL), LCIA case n. UN 3481, award, 3 February 2006.


International Thunderbird Gaming Corp. v. Mexico, (UNCITRAL/NAFTA), award, 26 January 2006.


Japan—Alcoholic Beverages, WT/DS38/AB/R, 1 October 1996.

Lena Goldfield v. USSR, award, 3 September 1930.


PCA, Eureko B.V. v. The Slovak Republic, award on jurisdiction, arbitrability and suspension, 26 October 2010.


PCA, Saluka Investments BV (The Netherlands) v. Czech Republic (UNCITRAL), partial award, 17 March 2006.


Ronald S. Lauder v. Czech Republic (UNCITRAL), award, 3 September 2001.


European Court of Human Rights

ECtHR, Belvedere Alberghiera Srl v. Italy, Appl. n. 31524/96, 30 May 2000.
ECtHR, Bimer v. Moldova, Appl. n. 15084/03, 10 July 2007.
ECtHR, Bosphorus Hava Yollari v. Ireland, Appl. n. 45036/98, 30 June 2005.
ECtHR, Bronowski v. Poland, Appl. n. 31443/96, 22 June 2004.
ECtHR, Carbonara and Ventura v. Italy, Appl. n. 24638/94, 30 May 2000.
ECtHR, Intersplav v. Ukraine, Appl. n. 803/02, 9 January 2007.
ECtHR, James & Others v. UK, 21 February 1986, Appl. n. 8793/79.
ECtHR, Marini v. Albania, Appl. N. 3738/02, 18 December 2007.
ECtHR, Sporrong and Lönnroth v. Sweden, Appl. ns. 7151 and 7152/75, Series A n. 52, 23 September 1982.

European Court of Justice

Legal Documents

UN General Assembly Resolutions

523 (VI), 12 January 1952.
626 (VII), 21 December 1952.
837 (IX), 14 December 1954.
1314 (XIII), 12 December 1958.
1720 (XVI), 19 December 1961.
1803 (XVII), 14 December 1962.
2158 (XXI), 25 November 1966.
2386 (XXIII), 19 November 1968.
2692 (XXV), 11 December 1970.
3016 (XXVII), 18 December 1972.
3171 (XXVIII), 17 December 1973.
3201 (S-VI), 1 May 1974.
3202 (S-VI), 1 May 1974.
3281 (XXIX), 12 December 1974.
1514 (XV), 14 December 1960.
1515 (XV), 15 December 1960.
1813 (XVII), 16 December 1962.
2626 (XXV), 24 October 1970.
2894 (XXVI), 20 December 1971.
2995 (XXVII), 15 December 1972.
3362 (S-VII), 16 September 1975.
3517 (XXX), 15 December 1975.
34/186, 18 December 1979.
35/7, 30 October 1980.
35/56, 5 December 1980.
37/7, 28 October 1982.
41/65, 3 December 1986.
41/128, 4 December 1986.
S-18/3, 1 May 1990.
45/199, 21 December 1990.

UNCTAD Selected Documents

TDB Res. 88(XII), 19 October 1972.


UNCTAD, *Foreign Investment in Developing Countries - Does It Crowd in Domestic Investment*, n. 146, UNCTAD/OSG/DP/146, February 2000.


**OECD Selected Documents**


References


Van Hecke G., “Agreements Between a State and a Foreign Private Person”, in *57-I Annuaire de L’Institute de Droit International*, 1977, p. 195


