THE OXFORD HANDBOOK OF

INTERNATIONAL INVESTMENT LAW

Edited by

PETER MUCHLINSKI
FEDERICO ORTINO
AND
CHRISTOPH SCHREUER

OXFORD
UNIVERSITY PRESS

CONTENTS

PART III PROCEDURAL ISSUES

CHAPTER 11

EXPROPRIATION

AUGUST REINISCH*

* The author wishes to thank Christina Knahr for her research assistance as well as Peter Muchlinski, Christoph Schreuer, and Matthew Weiniger for their comments on earlier drafts of this chapter.

EXPROPRIATION in the sense of an outright taking of private property by the state, usually involving a transfer of ownership rights to the state or to a third person, has been a major public international law issue throughout the 20th century. The Communist and Mexican nationalization measures in the 1920s, followed by socializations[1] of private property in Eastern European countries after World War II and takings of foreign investments in developing countries in the course of the decolonization process, as well as the oil concession disputes of the 1960s and 1970s, mark the most important waves of expropriations of foreign property.[2]

The ensuing legal controversies about the requirement and amount of compensation to be paid to expropriated investors led to different modes of settlement. Some claims were joined and negotiated by the home states of investors, ultimately leading to global settlement agreements providing for the payment of a lump-sum by the expropriating state to be distributed to the former property owners by their home state.[3] Others, and initially a fraction of all cases, were resolved through direct dispute settlement, usually arbitration, between investors and expropriating states.[4]

In recent times, there have been few cases of direct expropriation in the sense of an outright taking of property.[5] Of course, there is the important exception of the 1979 Iranian nationalization of banks and insurance companies which gave rise to a number of cases brought before the Iran–US Claims Tribunal.[6] In the course of the new wave of investment arbitration since the mid-1990s the *Sedelmayer* case,[7] in which an arbitral tribunal found that a Russian presidential decree constituted an act of direct expropriation, appears to be the exception proving the rule.[8] Recent developments in Bolivia and Venezuela concerning governmental plans

[1] I Brownlie, *Principles of Public International Law* (Oxford, Oxford University Press, 6th edn, 2003) at 509.

[2] See the historical overview in A Lowenfeld, *International Economic Law* (Oxford, Oxford University Press, 2002) at 392.

[3] R Lillich and B Weston, *International Claims: Their Settlement by Lump-Sum Agreements* (Charlottesville, Va, University Press of Virginia, 1975).

[4] C Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001); Stephen J Toope, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (Cambridge, Grotius Publishers, 1990).

[5] See K Yannaca-Small, '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law', in OECD, *International Investment Law A Changing Landscape* (Paris, OECD, 2005) at 44. Some authors link this phenomenon to the eclipse of socialism. See W Michael Reisman and Robert D Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation', 74 BYIL 115 (2003) at 118.

[6] CN Brower and JD Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998). See also *American International Group Inc, et al v Islamic Republic of Iran, et al*, Award No. 93-2-3, 19 December 1983, 4 Iran–US CTR 96; *INA Corp v Government of the Islamic Republic of Iran*, Award No. 184–161-1, 13 August 1985, 8 Iran–US CTR 373.

[7] *Sedelmayer v Russian Federation*, Arbitral Award of 7 July 1998, available at <http://ita.law.uvic.ca/documents/investment_sedelmayer_v_ru.pdf>.

[8] See also K Hobér, 'Investment Arbitration in Eastern Europe: Recent Cases on Expropriation', 14 Am Rev Int'l Arb 377 (2003) at 388.

to expropriate foreign investors in the energy sector may illustrate a move back to direct expropriations.[9]

Today, the predominant form of expropriation is indirect expropriation. It has thus been rightly said that 'the single most important development in state practice has become the issue of indirect expropriation'.[10] Before questions of indirect expropriation are dealt with in this chapter, another more preliminary aspect that has equally received renewed attention in recent arbitral practice should be addressed: the question of the scope of protected property rights, in particular, whether intangible rights, such as contract rights, can be expropriated and may thus be protected by investment instruments. Issues concerning the consequences of direct or indirect expropriations, such as compensation or damages, in particular the precise amounts due, will not be dealt with here since they are covered by a separate chapter of this book.[11]

The problem of indirect expropriation will be addressed by focusing on the actual judicial and, to a large extent, arbitral practice in the respective fields. At the heart of the investigation will be the increased case-law under the ICSID Convention[12] and the ICSID Additional Facility[13] (in particular under NAFTA[14] Chapter 11). The practice of the Iran–US Claims Tribunal, ad hoc investment arbitrations and judgments of international courts, such as the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ), will also be looked at. Equally, the jurisprudence of human rights bodies, in particular of the European Court of Human Rights (ECtHR), on the protection of property rights, which has been considered to be of particular relevance to modern investment arbitration,[15] will be analysed. Wherever feasible the case-law analysis will be preceded by an examination of the applicable investment instruments.

[9] See Bolivia: Supreme Decree No. 28701, Nationalization of Hydrocarbons Sector, 1 May 2006, 45 ILM 1020 (2006).

[10] R Dolzer, 'Indirect Expropriations: New Developments?', 11 NYU Envl J 64 (2002) at 65.

[11] See further Thomas Wälde and Borzu Sabahi, 'Compensation, Damages and Valuation', Ch 26 below.

[12] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159; 4 ILM 532 (1965).

[13] Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings, ICSID Doc 11, 1979, available at <http://www.worldbank.org/icsid/facility/facility.htm>.

[14] North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (NAFTA), 17 December 1992, 32 ILM 289 (1993).

[15] In *Tecmed*, an ICSID tribunal referred to the practice and case-law of the European Court of Human Rights when determining whether or not a course of conduct constituted an 'expropriation' in violation of a bilateral investment treaty. *Tecnicas Medioambientales Tecmed SA* v *The United Mexican States*, ARB(AF)/00/2, Award, 29 May 2003, 43 ILM 133 (2004) para 122. The *Tecmed* approach of looking at ECtHR jurisprudence was also followed by the *Azurix* tribunal, *Azurix Corp v Argentine Republic*, ICSID ARB/01/12, Award, 14 July 2006, available at <http://www.investmentclaims.com/decisions/Azurix-Argentina-Final.pdf>.

(1) Scope of Protected Property Rights

It is generally asserted that expropriation may affect not only tangible property but also a broad range of intangible assets of economic value to an investor. Property that may be expropriated by states thus comprises immaterial rights and interests, including in particular contractual rights.[16]

Whether expropriation, including indirect expropriation, may concern intangible property is, in the first instance, a question of the applicable definition of 'property' or 'investment'.[17] Since most BITs, and the majority of other investment instruments, contain broad definitions of what constitutes an 'investment', anything covered by such definitions will be protected not only against direct but also against indirect expropriation.

The typical BIT contains investment definitions that include intangible property rights and contractual rights along the following lines:

> the term 'investments' comprises every kind of asset, in particular: (a) movable and immovable property as well as other rights in rem, such as mortgages, liens and pledges; (b) shares of companies and other kinds of interest in companies; (c) claims to money which has been used to create an economic value or claims to any performance having an economic value; (d) copyrights, industrial property rights, technical processes, trade-marks, trade-names, know-how, and good-will; (e) business concessions under public law, including concessions to search for, extract and exploit natural resources ...[18]

Other BIT definitions of investments expressly include 'claims to any performance having an economic value'[19] or 'claims to money or to any performance under contract having a financial value'.[20] Article 1139 NAFTA defines investment as covering,

[16] R Higgins, 'The Taking of Property by the State: Recent Developments in International Law', 176 Recueil des Cours 263, 271 (1982-III) ('... the notion of "property" is not restricted to chattels. Sometimes rights that might seem more naturally to fall under the category of contract rights are treated as property'); G Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection', 269 Recueil des Cours 251, 381 (1997) ('All rights and interests having an economic content come into play, including immaterial and contractual rights'); S Alexandrov, 'Breaches of Contract and Breaches of Treaty, The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*', 5 JWIT 555, 559 (2004) ('it is well established under international law that the taking of a foreign investor's contractual rights constitutes expropriation or a measure having an equivalent effect').

[17] UNCTAD, *Taking of Property*, Series on issues in international investment agreements (New York and Geneva, United Nations, 2000) at 36. See also Engela Schlemmer, 'Investment, Investor, Nationality, and Shareholders', Ch 2 above.

[18] Germany–Guyana BIT 1989, cited in R. Dolzer and M Stevens, *Bilateral Investment Treaties* (The Hague, Nijhoff, 1995) at 27.

[19] Art 1(1)(c) German Model BIT 1991, cited in Dolzer and Stevens, ibid at 188.

[20] Art 1 Hong Kong and Art 1 UK Model BIT, cited in Dolzer and Stevens, ibid at 201, 229.

inter alia, 'real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes'.[21] A direct relation between the definition of an investment and the object of expropriation can be found in some of the recent US Free Trade Agreements, which make it clear that intangible property rights or interests can be expropriated by providing that '[a]n action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment'.[22]

In addition to investment treaties, there is also ample evidence that under customary international law, the scope of foreign property protected against expropriation measures includes intangible rights. Traditionally, arbitral tribunals have dealt with contractual rights under the rubric of 'acquired' or 'vested rights' and have been willing to accept that certain governmental interference with such rights may amount to expropriatory action.[23] 'Acquired' or 'vested rights' are even considered to survive the extinction of states as a result of state succession rules which provide that successor states have to honor the 'vested rights' of foreigners 'acquired' from or under their predecessors.[24]

In the case-law analysed below, courts and tribunals did not always clearly explain whether they based their decisions on customary international law notions of property or on treaty definitions of investments contained in BITs or other investment instruments. It is clear, however, that these differences in the various legal bases may frequently be decisive for the judicial and arbitral decisions reached.[25] Thus, tribunals deciding on the basis of NAFTA may reach different results from ICSID tribunals deciding on the basis of BITs. Nevertheless, there appears to be a growing convergence concerning a wide interpretation of the notion of property and property-related rights that may be expropriated.

One of the important precedents on indirect expropriation and the scope of what may be considered property for purposes of expropriation is the *Norwegian Shipowners' Claims* case.[26] The dispute arose from a series of legislative and

[21] Art 1139 NAFTA, above n 14.

[22] Annex 10-D US–Chile FTA 2004, available at <http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html>.

[23] *Rudloff Case*, US–Venezuelan Claims Commission, Interlocutory Decision, 9 RIAA 244, 250 (1903) ('[T]he taking away or destruction of rights acquired, transmitted, and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property').

[24] *German Settlers' Case* (Germany v Poland), Advisory Opinion of 10 September 1923, PCIJ Ser B, No. 6 (1923), at 36 ('private rights acquired under existing law do not cease on a change of sovereignty ... even those who contest the existence in international law of a general principle of state succession do not go so far as to maintain that private rights, including those acquired from the state as the owner of the property, are invalid as against a successor in sovereignty').

[25] See text above at n 17.

[26] *Norwegian Shipowners' Claims* (Norway v USA), Permanent Court of Arbitration, Award of 13 October 1922, 1 RIAA 307.

administrative measures taken by the USA during World War I in preparation for US participation in that war. The measures included the requisition and seizure of ships built in US shipyards, even if built to the order of foreign nationals. The legislation also provided for the cancellation of existing contracts for the building of ships which were taken over by a US government-established entity, the so-called 'Fleet Corporation'. A number of shipbuilding orders previously made on the part of Norwegian nationals with US shipbuilders were affected by these measures. When efforts of the Norwegian government to claim compensation for their nationals, in addition to that provided for by US law, failed, the matter was referred to arbitration in order to 'decide the aforesaid claims in accordance with the principles of law and equity and determine what sum if any' was to be paid as compensation.

The USA argued that the particular facts could not be regarded as an expropriation of contractual rights. On a more general level, the USA asserted that contractual rights could not be considered as property rights for purposes of international law. The arbitral tribunal rejected this broad assertion, referring to both US and Norwegian domestic law. With regard to the particular facts, the tribunal found that '... the Fleet Corporation took over the legal rights and duties of the shipowners toward the shipbuilders'[27] and that the cancellation of existing contracts for the building of ships by Norwegian contractors had amounted to a *de facto* expropriation.[28]

In addition, the case-law of the PCIJ supports the view that non-tangible assets may qualify as property that may be subject to expropriation. The *Oscar Chinn* case[29] and the *German Interests in Polish Upper Silesia* (*Chorzów Factory*) case[30] are important precedents in this regard. Though in the former case the PCIJ rejected the claim for compensation in its often quoted statement that '[f]avourable business conditions and goodwill are transient circumstances, subject to inevitable changes',[31] it apparently accepted the underlying concept of vested rights that may be expropriated. In the Court's view, the speculative possibility of future profit-making was not covered by this concept. Instead of denying the possibility that vested rights might be expropriated, the PCIJ refused to regard the commercial situation of Oscar Chinn as a vested right. The Court said that it was '... unable to see in his original position—which was characterized by the possession of customers and the possibility of making a profit—anything in the nature of a genuine vested right'.[32]

The *Oscar Chinn* case concerned the operating conditions for shipping services in the Belgian Congo. Oscar Chinn, a UK national, had operated a shipping business

[27] *Norwegian Shipowners' Claims*, above n 26 at 323.

[28] Ibid, at 325 ('... whatever the intentions may have been, the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be construed').

[29] *Oscar Chinn Case* (UK v Belgium), Judgment, 12 December 1934, PCIJ Ser A/B, No. 63 (1934).

[30] *Case concerning certain German interests in Polish Upper Silesia* (Germany v Poland), Judgment, 25 May 1926, PCIJ Ser A, No. 7 (1926).

[31] *Oscar Chinn Case*, above n 29 at 88.

[32] Ibid.

in the Belgian Congo in competition with 'Unatra', a company partly owned by the Belgian state. Unatra was obliged to maintain a transport fleet capable of meeting the needs in the Congo. Its transport rates required approval by the Belgian authorities. As a response to serious economic difficulties in the Congo in 1930, Belgium tried to foster export business by lowering transport costs. It did so by considerably reducing Unatra's rates under the assurance of reimbursement of lost profits. As a result of these changes, which seriously undermined his competitive position, Oscar Chinn decided to cease his business operations. Espousing his claim, the UK government argued that the Belgian measures amounted to the creation of a *de facto* monopoly for Unatra contrary to treaty and customary international law.

The PCIJ rejected this view and characterized the Belgian compensation measures *vis-à-vis* Unatra as being 'rather in the nature of an act of grace' than an obligation. With regard to the decline of the profitability of the transport business in the Congo, the Court did not support the idea that this decline might be attributed to the Belgian government. Thus, no violation of any potential vested rights of Oscar Chinn took place. The Court reasoned as follows:

> No enterprise—least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rates—can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State.[33]

A broad approach to the scope of property rights can also be found in the *German Interests in Polish Upper Silesia* case where the PCIJ affirmed the 'rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights'.[34] One of the many issues of this case, which forms part of the larger dispute between Germany and Poland over German interests in Upper Silesia in the post-World War I period, concerned the effect of the Polish measures on a German company ('Bayerische') which had contractual rights of managing and operating the nitrate plant, the Chorzów Factory, owned by another German company ('Oberschlesische'). The Court held that not only the owner of the factory, but also the company holding contractual rights was expropriated:

> ... it is clear that the rights of the Bayerische to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents, licences, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland. As these rights related to the Chorzów factory and were, so to speak, concentrated in that factory, the prohibition contained in the last sentence of Article 6 of the Geneva Convention applies in all respect to them.[35]

[33] Ibid.

[34] *Case concerning certain German interests in Polish Upper Silesia*, above n 30 at 22.

[35] Ibid at 44.

Article 6 of the Geneva Convention concerning Upper Silesia established a right of expropriation in favour of Poland, which constituted an exception to the general principle of respect for vested rights.[36]

The relevance of the *Chorzów Factory* case for modern investment disputes has been emphatically reaffirmed by the Iran–US Claims Tribunal.[37] It is thus not surprising to find that the Iran–US Claims Tribunal also recognized that intangible property, such as shareholder rights and contractual rights, could be expropriated. In *Starrett Housing* it expressly mentioned that claimants, 'rely on precedents in international law in which cases measures of expropriation or taking, primarily aimed at physical property, have been deemed to comprise also rights of a contractual nature closely related to the physical property'.[38] In the *Amoco* case the Iran–US Claims Tribunal very broadly asserted: 'Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction ...'[39] In the *Phillips* case it found a compensable expropriation 'whether the expropriation is formal or *de facto* and whether the property is tangible, such as real estate or a factory, or intangible, such as the contractual rights involved in the present Case'.[40]

Also ICSID tribunals have recognized that contractual rights may be expropriated. In the *SPP* case, also known as the *Pyramids* case, the arbitral tribunal rejected

> the argument that the term 'expropriation' applies only to *jus in rem*. The respondent's cancellation of the project had the effect of taking certain important rights and interests of the Claimants. What was expropriated was not the land or the right of usufruct, but the rights that SPP(ME), as a shareholder of ETDC, derived from EGOTH's right of usufruct, which had been 'irrevocably' transferred to ETDC by the State. Clearly, those rights were of a contractual rather than *in rem* nature. However, there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefor.[41]

In *Wena Hotels v Egypt*, a subsequent ICSID tribunal expressly espoused the reasoning of the *Pyramids* case in its finding that '[i]t is also well established that an expropriation is not limited to tangible property rights'.[42] In *Pope & Talbot*, an

[36] 'Poland may expropriate in Polish Upper Silesia, in conformity with the provisions of Articles 7 to 23, undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in these clauses, the property, rights and interests of German nationals may not be liquidated in Polish Upper Silesia.' Geneva Convention concerning Upper Silesia, 15 March 1922, *Martens*, Nouveau Recueil Général de traites XVI, No. 80, 645; English version of Art 6 cited in *Case concerning certain German interests in Polish Upper Silesia*, above n 30 at 21.

[37] In the *Amoco* case the tribunal considered that '[i]n spite of the fact that it is nearly sixty years old, this judgment is widely regarded as the most authoritative exposition of the principles applicable in this field, and is still valid today ...' *Amoco International Finance Corp v Iran*, 15 Iran–US CTR 189 (1987) para 191.

[38] *Starrett Housing Corp v Government of the Islamic Republic of Iran*, 4 Iran–US CTR 122, 156 (1983).

[39] *Amoco International Finance Corp v Iran*, above n 37 at para 108.

[40] *Phillips Petroleum Co v Iran*, 21 Iran–US CTR 79 (1989) para 76.

[41] *SPP v Egypt*, Award, 20 May 1992, 3 ICSID Reports 189, at 228, para 164.

[42] *Wena Hotels Ltd v Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Reports 68, para 98.

investor's access to the US softwood lumber market was regarded as a property right protected by the NAFTA. However, Canada's temporary imposition of a quota regime did not qualify as a substantial deprivation.[43] Also the NAFTA arbitral tribunal in *SD Myers*, dealing with access to markets, affirmed that not only tangible property may be subject to expropriation. It expressly said, 'The Tribunal accepts that, in legal theory, rights other than property rights may be "expropriated" ....'[44] Expressly endorsing the broad investment notion of *Pope & Talbot*, another NAFTA tribunal in the *Methanex* case stated that '... the restrictive notion of property as a material "thing" is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing'.[45]

The view that intangible rights too may be expropriated also finds support in a number of other investment arbitration cases. In the *Biloune* case, an UNCITRAL ad hoc arbitration, the tribunal clearly viewed the contractual rights of an investor in an investment as constituting a potential object of indirect expropriation through various acts and omissions of governmental authorities.[46] The tribunal said:

> such prevention of [an investor] from pursuing its approved project would constitute constructive expropriation of [the investor]'s contractual rights in the project ... unless the Respondents can establish by persuasive evidence sufficient justification for these events.[47]

In the more recent *CME* case, another UNCITRAL ad hoc arbitration, the tribunal upheld the investor's claim that its contractual rights had been expropriated by the interference of a regulatory body of the host state. With regard to the question of whether intangible assets may be expropriated the tribunal held:

> The Respondent's view that the Media Council's actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State ... is irrelevant. What was touched and indeed destroyed was the Claimant's and its predecessor's investment as protected by the Treaty. What was destroyed was the commercial value of the investment ... by reason of coercion exerted by the Media Council ...[48]

[43] *Pope & Talbot, Inc v Government of Canada*, Interim Award of 26 June 2000, available at <http://www.naftalaw.org>, para 96: 'The Tribunal concludes that the Investment's access to the U.S. market is a property interest subject to protection under Article 1110 and that the scope of that article does cover nondiscriminatory regulation that might be said to fall within an exercise of a state's so-called police-powers. However, the Tribunal does not believe that those regulatory measures constitute an interference with the Investment's business activities substantial enough to be characterized as expropriation under international law.'

[44] *SD Myers, Inc v Government of Canada*, Partial Award of 13 November 2000, 40 ILM 1408 (2001) para 281.

[45] *Methanex Corporation v United States of America*, NAFTA Arbitral Tribunal, Final Award on Jurisdiction and Merits, 3 August 2005, available at <http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf> at IV D para 17.

[46] See below text at n 122 for the facts of this case.

[47] *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL ad hoc Tribunal, Award on Jurisdiction and Liability of 27 October 1989, 95 ILR 183, 209.

[48] *CME Czech Republic B V v The Czech Republic*, UNCITRAL Arbitral Tribunal, Partial Award of 13 September 2001, reprinted in: 14(3) *World Trade and Arbitration Materials* 109 (2002) para 591.

Finally, a broad concept of protected property is also confirmed by the approach taken by the ECtHR. The Strasbourg Court has extensively interpreted the notion of 'possessions' protected by Article 1 of the Additional Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[49] Article 1 of the First Additional Protocol provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

According to the case-law of the ECtHR, 'possessions' include, in addition to tangible property, among other things, licences,[50] shareholder rights,[51] patents,[52] tort

[49] First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, signed 20 March 1952, ETS No. 9, entered into force 18 May 1954.

[50] *Tre Traktörer AB v Sweden*, ECtHR, Ser A No. 159 (1989) para 53: 'The Government argued that a licence to serve alcoholic beverages could not be considered to be a "possession" within the meaning of Article 1 of the Protocol (P1–1). This provision was therefore, in their opinion, not applicable to the case. Like the Commission, however, the Court takes the view that the economic interests connected with the running of Le Cardinal were "possessions" for the purposes of Article 1 of the Protocol (P1–1). Indeed, the Court has already found that the maintenance of the licence was one of the principal conditions for the carrying on of the applicant company's business, and that its withdrawal had adverse effects on the goodwill and value of the restaurant (see paragraph 43 above). Such withdrawal thus constitutes, in the circumstances of the case, an interference with TTA's right to the "peaceful enjoyment of [its] possessions"; *Fredin v Sweden*, ECtHR, Ser A No. 192 (1991) para 47: 'In the light of the above considerations, the revocation of the applicants' permit to exploit gravel cannot be regarded as amounting to a deprivation of possessions within the meaning of the first paragraph of Article 1 of Protocol No. 1 (P1–1-1). It must be considered as a control of use of property falling within the scope of the second paragraph of the Article (P1–1-2).'

[51] In the *Lithgow* case, applicants complained about the level of compensation following the nationalization of shares as a result of the UK Aircraft and Shipbuilding Industries Act 1977. That shares could be 'expropriated' was not in dispute: 'The applicants were clearly "deprived of (their) possessions", within the meaning of the second sentence of Article 1 (P1–1); indeed, this point was not disputed before the Court. It will therefore examine the scope of that sentence's requirements and then, in turn, whether they were satisfied.' *Lithgow v United Kingdom*, ECtHR, Ser A No. 102, (1986) para 107; also in *Bramelid and Malmström v Sweden*, European Commission of Human Rights, Applications Nos. 8588/79 and 8589/79 (1982), 29 Decisions & Reports 64, at 81 (1982), the property character of shares was acknowledged by the Commission: 'A company share is a complex thing: certifying that the holder possesses a share in the company, together with the corresponding rights (especially voting rights), it also constitute [*sic*], as it were, an indirect claim on company assets. In the present case, there is no doubt that the NK shares had an economic value. The Commission is therefore of the opinion that, with respect to Article 1 of the First Protocol, the NK shares held by the applicants were indeed "possessions" giving rise to a right of ownership.'

[52] In *Smith Kline and French Laboratories v The Netherlands*, European Commission of Human Rights, Applications Nos. 12633/87, Decision, 4 October 1990, '[t]he Commission notes that under Dutch law the holder of a patent is referred to as the proprietor of a patent and that patents are deemed, subject to the provisions of the Patents Act, to be personal property which is transferable and

claims,[53] claims arising from an enforceable arbitral award,[54] the value and goodwill of a business,[55] and a professional clientele.[56]

(2) Breach of Contract Versus Expropriation of Contractual Rights

If intangible assets, including contract rights, are protected property rights, then they may be subject to expropriation which, in turn, may lead to an obligation to compensate. The difficulty lies in distinguishing between an ordinary breach of contract, which may entail legal consequences according to the applicable law, frequently national law, on the one hand, and the expropriation of contract rights, which entails consequences under international law, on the other hand.

assignable. The Commission finds that a patent accordingly falls within the scope of the term "possessions" in Article 1 of Protocol No. 1.'

See also *British-American Tobacco Company Ltd v The Netherlands*, ECtHR, Ser A No. 331, at 90, 91 (1995): 'The applicant company argued that the denial of access to an independent and impartial tribunal for the determination of its entitlement to a patent meant that they had been deprived of a "possession" without any judicial examination. Neither the Commission nor the Government concurred with this view. In the Court's opinion, there is no call in the instant case to decide, as the Commission did, whether or not the patent application lodged by the applicant company constituted a "possession" coming within the scope of the protection afforded by Article 1 of Protocol No. 1 (P1–1).'

[53] In *Pressos Compania Naviera SA v Belgium*, ECtHR, Ser A No. 332, (1995) para 31, the ECtHR held: 'The rules in question are rules of tort, under which claims for compensation come into existence as soon as the damage occurs. A claim of this nature "constituted an asset" and therefore amounted to a possession within the meaning of the first sentence of Article 1 (P1–1). This provision (P1–1) was accordingly applicable in the present case.'

[54] *Stran Greek Refineries and Stratis Andreadis v Greece*, ECtHR, Ser A No. 301, para 62: 'At the moment when Law no. 1701/1987 was passed the arbitration award of 27 February 1984 therefore conferred on the applicants a right in the sums awarded. Admittedly, that right was revocable, since the award could still be annulled, but the ordinary courts had by then already twice held—at first instance and on appeal—that there was no ground for such annulment. Accordingly, in the Court's view, that right constituted a "possession" within the meaning of Article 1 of Protocol No. 1 (P1–1).'

[55] In *Iatridis v Greece*, ECtHR 1999-II, para 54, noting that the clientele of a cinema could be considered a possession, '[t]he Court reiterates that the concept of "possessions" in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision.'

[56] See *Van Marle v The Netherlands*, ECtHR, Ser A No. 101, (1986) para 41: 'The Court agrees with the Commission that the right relied upon by the applicants may be likened to the right of property embodied in Article 1 (P1–1): by dint of their own work, the applicants had built up a clientèle; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (P1–1). This provision was accordingly applicable in the present case.'

The guiding principle in locating an expropriation appears to be whether a state has acted in its sovereign capacity, exercising its governmental or public power or authority. This criterion, which had already been relied upon in the *Shufeldt Claim*,[57] was elaborated further in the *Jalapa Railroad* case.[58] In that case, the American–Mexican Claims Commission regarded a legislative decree, declaring a clause in a contract between the state and the investor to be void, as an act of expropriation. It held:

> In the circumstances, the issue for determination is whether the breach of contract alleged to have resulted from the nullification of clause twelfth of the contract was an ordinary one involving no international responsibility or whether said breach was effected arbitrarily by means of a governmental power illegal under international law ... the 1931 decree of the same Legislature, ... was clearly not an ordinary breach of contract. Here the Government of Veracruz stepped out of the role of contracting party and sought to escape vital obligations under its contract by exercising its superior governmental power. Such action under international law has been held to be a confiscatory breach of contract ....[59]

This distinction was also relied upon by the Iran–US Claims Tribunal. In *Phillips Petroleum Co*, the tribunal agreed with the claimant's argument that the termination of contract rights under a concession agreement constituted an expropriation of contract rights. The tribunal said:

> The Tribunal considers that the acts complained of appear more closely suited to assessment of liability for the taking of foreign-owned property under international law than to assessment of the contractual aspects of the relationship, and so decided to consider the claim in this light.[60]

The differentiation between mere breach of contract and an expropriation of contract rights has also been addressed in NAFTA arbitrations. In *Waste Management II*[61] an arbitral tribunal expressly stated that 'an enterprise is not expropriated just because its debts are not paid or other contractual obligations towards it are breached'.[62] The case concerned a dispute over a waste disposal concession involving, among other things, the failure to make payments. The tribunal held:

> The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts.[63]

[57] *Shufeldt Claim*, Award, 24 July 1930, 2 RIAA 1079.

[58] *Jalapa Railroad and Power Co*, American–Mexican Claims Commission, 1948, 8 Whiteman, Digest of International Law 908 (1976).

[59] Ibid, at 908–9.

[60] *Phillips Petroleum*, above n 40 at para 75.

[61] *Waste Management, Inc v United Mexican States*, ARB(AF)/00/3, Award, 30 April 2004.

[62] *Waste Management II*, ibid para 160.

[63] *Waste Management II*, ibid para 174.

In the tribunal's view an 'outright repudiation', for instance in the form of a 'decree or executive act' could have qualified as an expropriation. According to the tribunal 'the outright refusal by a State to honour a money order or similar instrument payable under its own law may well constitute either an actual expropriation or at least a measure tantamount to an expropriation of the value of the order'.[64]

Also a number of ICSID tribunals had the opportunity to elaborate on this issue. Most recently, the *Azurix* tribunal held that '[w]hether one or a series of [contractual] breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as a party to a contract'.[65]

Similar reasoning has been adopted in *SGS v Philippines*[66] where an ICSID tribunal, for the purposes of prima facie jurisdiction, declined to regard the refusal to make contractual payments as an expropriation. The tribunal said:

> In the Tribunal's view, on the material presented by the Claimant no case of expropriation has been raised. Whatever debt the Philippines may owe to SGS still exists; whatever right to interest for late payment SGS had it still has. There has been no law or decree enacted by the Philippines attempting to expropriate or annul the debt, nor any action tantamount to an expropriation. The Tribunal is assured that the limitation period for proceedings to recover the debt before the Philippine courts under Article 12 has not expired. A mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal. *A fortiori* a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable.[67]

The distinction between an (ordinary) breach of contract and an expropriatory action directed against contractual property rights is sometimes also addressed in terms of whether a contract breach may amount to a violation of international law.[68] The ILC has referred to this issue in its Commentary to the Articles on State Responsibility confirming that:

> the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.[69]

In addition, the distinction between breach of contract and expropriation has become relevant in the related jurisdictional debate about contract versus treaty

[64] Ibid, at para 168.

[65] *Azurix v Argentina*, above n 15 para 315.

[66] *SGS v Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>.

[67] *SGS v Philippines*, Decision on Jurisdiction, above n 66 at para 161.

[68] See S Schwebel, 'On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law' in S Schwebel, *Justice in International Law* (Cambridge, Cambridge University Press, 1994) 425.

[69] Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third, session (2001), *Official Records of the General Assembly, Fifty-Sixth session, Supplement No. 10* (A/56/10), ch IV.E.2, p 87.

claims in international investment arbitration.[70] In this context the ICSID tribunal in the *Impregilo* case held that:

> [i]n order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ['*puissance publique*'], and not as a contracting party, may breach the obligations assumed under the BIT.[71]

The tribunal continued to assert that '[t]he threshold to establish that a breach of the Contracts constitutes a breach of the Treaty is a high one'.[72] And, with a view to the issue of breaches of contract as expropriations, it expressly 'recognize[d] that the taking of contractual rights could, potentially, constitute an expropriation or a measure having an equivalent effect'.[73]

Similarly, in *Consortium RFCC v Morocco*, an ICSID panel insisted that a breach of contract would not normally constitute a breach of treaty provisions 'unless it be proved that the state or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign'.[74]

Thus, it is not surprising that the ad hoc arbitral tribunal in the *Eureko* case concluded that:

> [t]here is an amplitude of authority for the proposition that when a State deprives an investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation, in violation of the type of provision contained in [a BIT] Article [protecting against expropriation]. The deprivation of contractual rights may be expropriatory in substance and in effect.[75]

Nevertheless, there are few cases of actual findings of expropriation of contractual rights because the threshold of governmental action appears to be very high.

(3) Indirect Expropriation

It is on the whole undisputed that the prohibition of expropriation of foreign property, both under customary international law and under applicable treaty law, covers

[70] See Alexandrov, above n 16; Bernardo M Cremades and David JA Cairns, 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes', in N Horn (ed), *Arbitrating Foreign Investment Disputes* (The Hague, Kluwer Law International, 2004) 325–51.

[71] *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, available at <http://ita.law.uvic.ca/documents/impregilo-decision.pdf>, para 260.

[72] Ibid para 267.

[73] Ibid para 274.

[74] *Consortium RFCC v Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003, available at <http://ita.law.uvic.ca/documents/ConsortiumRFCC-Award_000.pdf>, para 65.

[75] *Eureko BV v Republic of Poland*, Partial Award, 19 August 2005, available at <http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf>, para 241.

not only formal takings but also indirect expropriation. This is clearly evidenced by language prohibiting both direct and indirect expropriation or making clear that the notion of expropriation includes indirect expropriation. For instance, the 1967 OECD Draft Convention on the Protection of Foreign Property provided in Article 3 that '[n]o Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with ...'.[76]

Most BITs prohibit 'direct' and 'indirect' expropriations or expropriations and 'measures having equivalent effect'.[77] Sometimes they even use a combination of both prohibitions—a possibility that was also adopted in the Draft MAI:

> A Contracting Party shall not expropriate or nationa ise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as 'expropriation').[78]

Similarly, Chapter 11 of the NAFTA prohibits 'measure[s] tantamount to nationalization or expropriation':

> 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...[79]

The Energy Charter Treaty provides:

> (1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'Expropriation') except where such Expropriation is: ...[80]

In addition, other investment relevant instruments speak of 'expropriations or other measures affecting property rights'.[81]

(a) The Notion of Indirect Expropriation

As opposed to direct expropriation, which involves the taking of property, indirect expropriation may occur when measures short of an actual taking 'result in the

[76] OECD Draft Convention on the Protection of Foreign Property, 12 October 1967, 7 ILM 117 (1968).

[77] See Art 5 UK Model BIT, cited in Dolzer and Stevens, above n 18 at 232.

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

[79] Art 1110 NAFTA, above n 14.

[80] Art 13 Energy Charter Treaty, Annex 1 to the Final Act of the European Energy Charter Treaty Conference, 17 December 1994; 34 ILM 381 (1995).

[81] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, reprinted in 1 Iran–US CTR 9.

effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor'.[82] Though there have been various attempts at clarifying and differentiating between different types of indirect expropriations, it appears that the term is frequently used interchangeably with expressions such as *de facto*, disguised, constructive, regulatory, consequential, or creeping expropriation.[83]

Attempts to define indirect expropriations focus on the 'unreasonable interference',[84] with the 'prevention of enjoyment'[85] or the 'deprivation'[86] of property rights.

Most investment treaties do not expressly address the issue of indirect expropriation. Usually, they only contain a general clause laying down the conditions under which an expropriation will be considered lawful.[87] Some may include a reference to indirect expropriations by declaring the same conditions applicable to them. But, in general, investment treaties rarely try to define indirect expropriations. If they attempt to do so they sometimes do it in a negative way, describing state measures that may not be considered to constitute indirect expropriation.[88]

The commentary to the 1967 OECD Draft Convention is an example of one of the rare attempts to define indirect expropriation. It characterizes indirect expropriation as measures applied in such a way,

[82] UNCTAD, *Taking of Property*, above n 17 at 2.

[83] Dolzer and Stevens, above n 18 at 99.

[84] The 1961 Harvard Draft on International Responsibility of States for Injuries to Aliens defined indirect expropriation as 'any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference'. Draft Convention on International Responsibility of States for Injuries to Aliens, Art 10(3)(a), in LB Sohn and RR Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens', 55 AJIL 545, 553 (1961).

[85] 'Subsection (1) applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation"). A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory.' Restatement (Third) of the Foreign Relations Law of the United States, § 712 comment g (1986).

[86] 'The essence of the matter is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control.' Brownlie, above n 1 at 508.

[87] The Draft MAI provided, for instance: 'A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation") except: a) for a purpose which is in the public interest, b) on a non-discriminatory basis, c) in accordance with due process of law, and d) accompanied by payment of prompt, adequate and effective compensation.' MAI Draft Consolidated Text, above n 78. See also US Model BIT, cited in Dolzer and Stevens, above n 18 at 245: 'Investments shall not be expropriated or nationalized either directly of indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2).'

[88] See below text at n 96.

as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation. As instances may be quoted excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusal of access to raw materials or of essential export or import licenses.[89]

Many BITs use language prohibiting expropriations and 'measures having equivalent effect'[90]—an expression that was also used in the Draft MAI.[91] Other instruments relevant to investment use the notion of 'expropriations or other measures affecting property rights,'[92] while NAFTA Chapter 11 speaks of 'measure[s] tantamount to nationalization or expropriation'.[93] Certain defining elements of expropriation can be found in the MIGA Convention which characterizes 'expropriation and similar measures' in the context of risks covered by investment insurance in the following way:

> any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment...[94]

A number of recent US and Canadian investment-related treaties contain more specific language addressing the delimitation between indirect expropriation and regulatory measures.[95] For instance, the 2004 Canadian Model BIT provides as follows:

> The Parties confirm their shared understanding that:
> a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
> b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
> i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

[89] Notes and Comments to Art 3 OECD Draft Convention on the Protection of Foreign Property, above n 76 at 126.

[90] See eg Art 5 Hong Kong Model BIT, cited in Dolzer and Stevens, above n 18 at 204; Art 5 UK Model BIT, ibid 232.

[91] 'A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation") except ...', MAI Draft Consolidated Text, above n 78.

[92] Claims Settlement Declaration, above n 81.

[93] '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 ...' Art 1110 NAFTA.

[94] Art 11 Convention Establishing the Multilateral Investment Guarantee Agency of 1985, 11 October 1985, 24 ILM 1598 (1985).

[95] See below text at n 148.

ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and
iii) the character of the measure or series of measures;

c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[96]

Some US Free Trade Agreements, containing investment chapters, include the following language:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[97]

Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[98]

While most bi- and multilateral investment agreements just acknowledge the possibility of indirect expropriation, some recent ones attempt to provide more detail for the identification when state measures amount to such indirect expropriation. These attempts may be seen as a 'legislative' response to the growing field of investment dispute settlement involving an interesting mix of aiming at correcting judicial and arbitral findings and at the same time codifying judicial and arbitral trends.

Various international judicial and arbitral bodies have also addressed the notion of indirect expropriation. In the rich jurisprudence of the Iran–US Claims Tribunal, the concept of an indirect expropriation has been repeatedly addressed. In the *Tippetts* case the tribunal remarked:

The Tribunal prefers the term 'deprivation' to the term 'taking,' although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required. A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.[99]

In the *Starrett* case, another chamber of the Iran–US Claims Tribunal said that:

...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

[96] 2004 Canadian Model BIT, Annex B 13(1) on the clarification of indirect expropriation, available at <www.naftalaw.org>.

[97] Art 10.12 US–Chile FTA 2004.

[98] Annex 10-B US–Chile FTA 2004.

[99] *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran*, 6 Iran–US CTR 219, 225 (29 June 1984).

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.[100]

In the *ITT* case, the Iran–US Claims Tribunal found that a governmental interference may amount to an expropriation if it denies property owners 'fundamental rights of ownership, use, enjoyment or management of the business'.[101]

Also the ECtHR recognizes the concept of indirect or *de facto* expropriations. In the leading case of *Sporrong and Lönnroth v Sweden*, it held:

> In the absence of formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of... Since the Convention is intended to guarantee rights that are 'practical and effective'..., it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants.[102]

In the field of traditional investment arbitration panels characterized indirect expropriation in a largely similar way. In *Metalclad*, a NAFTA award, for instance, indirect expropriation was broadly characterized as follows:

> Thus, expropriation...includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[103]

In the *Feldman* case, another NAFTA panel characterized the following types of measures as possessing an expropriatory quality: 'In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions'.[104]

[100] *Starrett Housing Corp v Government of the Islamic Republic of Iran*, 4 Iran–US CTR 122, 154 (19 December 1983).

[101] *ITT Industries Inc v Government of the Islamic Republic of Iran*, 2 Iran–US CTR 348 (1983).

[102] *Sporrong and Lönnroth v Sweden*, Judgment of 23 September 1982, Ser A No. 52, para 63. Similarly *Papamichalopoulos and Others v Greece*, Judgment of 24 June 1993, Ser A No. 260-B, para 42, where the Court stated: 'Since the Convention is intended to safeguard rights that are "practical and effective", it has to be ascertained whether the situation complained of amounted nevertheless to a de facto expropriation ...'. Also in *Brumărescu v Romania*, Judgment of 28 October 1999, Application No. 28342/95, ECtHR 1999, para 76, the Court held that 'it is necessary not only to consider whether there has been a formal taking or expropriation of property but to look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are "practical and effective", it has to be ascertained whether the situation amounted to a de facto expropriation ...'.

[103] *Metalclad Corp v United Mexican States*, ARB(AF)/97/1, Award, 30 August 2000, 16 ICSID Rev–FIL J 168, 195 (2001) para 103.

[104] *Marvin Feldman v Mexico*, ARB(AF)/99/1, 16 December 2002, 18 ICSID Rev–FILJ 488 (2003) para 103.

In the *CME* case,[105] an ad hoc UNCITRAL arbitral tribunal relied on the broad concepts of destruction of the commercial value of an investment and denial of benefits to the investor in its finding of an indirect expropriation:

> What was touched and indeed destroyed was the Claimant's and its predecessor's investment as protected by the Treaty. What was destroyed was the commercial value of the investment ...[106]
>
> *De facto* expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims.[107]

In the *CMS v Argentina* case,[108] an ICSID tribunal endorsed the concept of 'substantial deprivation' as determinative for establishing whether an indirect expropriation had taken place. Specifically relying on cases like *CME*,[109] *Metalclad*,[110] and *Pope & Talbot*,[111] the *CMS* tribunal thought that the essential question was 'to establish whether the enjoyment of the property has been effectively neutralized'.[112]

The concept of indirect expropriation is clearly recognized in the practice of international courts and tribunals. The more difficult issues arise when it becomes necessary to identify the factual elements that constitute an indirect expropriation.[113] The general description of indirect expropriation as wealth deprivation or denial of benefits employed by many arbitral tribunals is of limited value in this respect. While it is true that many findings of indirect expropriations are necessarily very fact-specific and may best be rationalized on a case-by-case basis,[114] a scholarly analysis should not dispense with identifying those elements and factors that are crucial for a finding of an indirect expropriation.

(b) Creeping Expropriations

Expropriation may occur in the absence of a single decisive act that implies a taking of property. It could result from a series of acts and/or omissions that, in sum, result in a deprivation of property rights. This is frequently characterized as a 'creeping'

[105] *CME v The Czech Republic*, Partial Award, 13 September 2001, above n 48.
[106] Ibid para 591.
[107] Ibid para 604.
[108] *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, available at <http://ita.law.uvic.ca/documents/CMS_FinalAward_000.pdf>.
[109] *CME v The Czech Republic*, above n 48.
[110] *Metalclad*, above n 103.
[111] *Pope & Talbot, Inc v Government of Canada*, above n 43.
[112] *CMS*, above n 108 at para 262.
[113] See below text starting at n 179.
[114] See ibid.

expropriation,[115] sometimes also referred to as 'constructive' expropriation.[116] The focus is on the cumulative effect of various acts and omissions, which may sometimes allow their characterization as an expropriation only in retrospect.[117] According to an UNCTAD Study on *Taking of Property* the term creeping expropriation

> may be defined as the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment. The legal title to the property remains vested in the foreign investor but the investor's rights of use of the property are diminished as a result of the interference by the State.[118]

According to the ICSID tribunal in *Generation Ukraine, Inc v Ukraine*:

> Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State *over a period of time* culminate in the expropriatory taking of such property.[119]

That expropriation may occur as a result of a series of measures is also corroborated by a number of investment instruments. Many investment agreements include express language referring to a 'series of actions'[120] or 'series of measures'[121] which may constitute expropriation.

The concept of 'creeping' or 'constructive' expropriation is widely endorsed by arbitral practice. In the *Biloune* case the arbitration panel found that a series of governmental acts and omissions which 'effectively prevented' an investor from pursuing his investment project constituted a 'constructive expropriation'. Each of these actions, viewed in isolation, may not have constituted expropriation. But the sum of them caused an 'irreparable cessation of work on the project'.[122] The case concerned

[115] Higgins, above n 16; Restatement (Third) of the Foreign Relations Law of the United States, § 712 comment g (1986) ('Subsection (1) applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation").').

[116] BH Weston, '"Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation"', 16 Va J Int'l L 103, 109, 148–51 (1975).

[117] Reisman and Sloane, above n 5 at 123 ('Discrete acts, analyzed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights.').

[118] UNCTAD, above n 17 at 11 ff.

[119] *Generation Ukraine, Inc v Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003, 44 ILM 404 (2005), para 20.22.

[120] Annex 10-D US–Chile FTA 2004, above n 97, states that 'An action or *series of actions* by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment' (emphasis added).

[121] Annex B.13(1) on the clarification of indirect expropriation, 2004 Canadian Model BIT, above n 96, provides: 'Indirect expropriation results from a measure or *series of measures* of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure' (emphasis added).

[122] *Biloune*, above n 47 at 209.

an investment of a Syrian national, Biloune, in the form of the construction of a hotel and recreational facility in Accra, Ghana. The actual construction work was to be carried out through a joint venture, Marine Drive Complex Ltd (MDCL), in which Biloune held a majority interest. After substantial progress had been made in the development of the site, government officials issued a stop work order on the basis of missing construction permits. Subsequently, part of the project was demolished and Biloune was subjected to investigation and arrest, which ultimately led to his deportation. In the tribunal's opinion it was clear that:

> the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune's interest in MDCL, unless the Respondents can establish by persuasive evidence sufficient justification for these events.[123]

Since no such justification was found, the tribunal concluded that 'the Government of Ghana, by its acts and omissions culminating with Mr Biloune's deportation, constructively expropriated MDCL's assets, and Mr Biloune's interest therein'.[124]

The Iran–US Claims Tribunal has also held that an expropriation may be effected by a 'series of concrete actions rather than [by] any particular formal decree'.[125] In the *Phillips Petroleum* case the tribunal concluded that the claimant had been deprived of its property as a result of a series of Iranian steps such as the announcement of a future nationalization of the oil industry, reductions of production rates, the appointment of Iranian managers, and the nullification of a joint venture agreement.[126] This view was also stressed in the concurring opinion of Howard M Holtzmann in the *Starrett Housing* case who underlined that '[t]he appointment of the manager was not, however, the first or only act of expropriation; in fact it was the last of a series of such measures'.[127]

In addition, in *Benvenuti and Bonfant*,[128] an early ICSID case, the tribunal concluded that the cumulative effect of a series of governmental acts and omissions *de facto* expropriated the shares of Benvenuti and Bonfant in the PLASCO company.

[123] Ibid.

[124] Ibid at 210.

[125] *Phillips Petroleum Co v Iran*, above n 40 at 115.

[126] Ibid at paras 90–6.

[127] *Starrett Housing Corp v Government of the Islamic Republic of Iran*, above n 100; 23 ILM 1090, 1125 (1984) (Howard M Holtzmann concurring).

[128] *Benvenuti and Bonfant v Congo*, ICSID Case No. ARB/77/2, Award of 8 August 1980, 1 ICSID Reports 330 (1993).

The case concerned a joint venture between an Italian investor and the Congolese government creating a company, PLASCO, intended to manufacture plastic bottles and produce mineral water. After the start of the operations of the bottling factory, the government intervened by fixing maximum prices for the sale of mineral water and dissolving a Congolese marketing company of PLASCO products. It also failed to take measures to exclude foreign competition and to provide a preferential tax status for PLASCO. Subsequently, criminal proceedings were instituted against Mr Bonfant, who left the country upon the Italian embassy's advice, and finally the Congolese army occupied the premises of PLASCO's head office.

The tribunal rejected the respondent state's assertion that it did not formally carry out any confiscation or nationalization and that the investor was free to return and recover its share of the joint venture. Instead, it found that 'a whole series of facts [were] contrary to the Government's case'. After reciting some of the above-mentioned facts the arbitrators concluded:

> The tribunal therefore considers that the Government did, in fact, appropriate B&B's share in PLASCO and owes it damages.... This principle of compensation in case of nationalization is in accordance with the Congolese Constitution and constitutes one of the generally recognized principles of international law as well as of equity.[129]

Similarly, another ICSID tribunal held in the *Letco* case[130] that the sum of a government's acts and omissions constituted an indirect expropriation. The case concerned a concession agreement between the parties for the exploitation of timber from Liberian forests concluded in 1970, which was intended to be in force for a period of at least 20 years after the start of logging operations in 1972. Subsequent to the signing of the concession agreement, the territorial scope of the concession area was unilaterally reduced by the government several times. Upon a further reduction by more than half of the concession area in 1980, Letco ceased its activities, claiming that it was deprived of any meaningful operations. The tribunal considered whether the 'action taken by the Liberian Government in depriving LETCO of its concession might be considered as an act of nationalization' and—after rejecting any possible justifications for the Liberian acts—it concluded that, 'the taking of LETCO's property was not for a *bone fide* [*sic*] public purpose, was discriminatory and was not accompanied by an offer of appropriate compensation'.[131]

In the *Tradex* Case,[132] another ICSID tribunal accepted the possibility of a creeping expropriation as a result of a 'combination of the decisions and events... in a long, step-by-step process by Albania'.[133] However, it did not view the events complained

[129] Ibid at 357.

[130] *Liberian Eastern Timber Corporation v Republic of Liberia*, ICSID Case No. ARB/83/2, Award of 31 March 1986, 2 ICSID Reports 343 (1994).

[131] Ibid at 367.

[132] *Tradex Hellas SA v Republic of Albania*, Award, 29 April 1999, 5 ICSID Reports 70.

[133] Ibid, para 191.

about, such as announcements concerning future land reform and crop destruction and the land occupation by villagers, to constitute expropriation.

In the *Santa Elena* case,[134] the notion of creeping expropriation was also endorsed. According to the ICSID tribunal:

> ...the period of time involved in the process may vary—from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership. It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title.[135]

Also, in a series of NAFTA Chapter 11 awards administered under the ICSID Additional Facility, arbitral tribunals had recourse to the concept of creeping expropriation. In his dissenting opinion in *Waste Management*, Keith Highet characterized an indirect expropriation as a series of governmental measures that, in sum, constitute a deprivation of property. He reasoned that:

> a 'creeping' expropriation is comprised of a number of elements, none of which can—separately—constitute the international wrong. These constituent elements include non-payment, non-reimbursement, cancellation, denial of judicial access, actual practice to exclude, non-conforming treatment, inconsistent legal blocks, and so forth.[136]

In *Metalclad*, an indirect expropriation was found not as a result of a single act, but rather on the basis of the accumulation of acts and omissions which amounted to an indirect expropriation.[137] In the *Feldman* case, another NAFTA award, the notion of creeping expropriation as a form of indirect expropriation was confirmed:

> If the measures are implemented over a period of time, they could also be characterized as 'creeping', which the Tribunal also believes is not distinct in nature from, and is subsumed by, the terms 'indirect' expropriation or 'tantamount to expropriation' in Article 1110(1).[138]

In *Tecmed*, a NAFTA tribunal found that the revocation of a licence for the operation of a landfill constituted an indirect expropriation. With regard to the concept of measures 'equivalent to expropriation' it made the following remarks:

> This type of expropriation does not necessarily take place gradually or stealthily—the term 'creeping' refers only to a type of indirect expropriation—and may be carried out through a single action, through a series of actions in a short period of time or through simultaneous actions. Therefore, a difference should be made between creeping expropriation and

[134] *Compañía del Desarrollo de Santa Elena, SA v Republic of Costa Rica*, Award, 17 February 2000, 5 ICSID Reports 153.

[135] Ibid para 76.

[136] *Waste Management, Inc v United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award of 2 June 2000, 40 ILM 56, 73 (2001) (Keith Highet, dissenting).

[137] *Metalclad Corp v United Mexican States*, above n 103, para 107. See also, in detail, below at n 276.

[138] *Marvin Feldman v Mexico*, above n 104 at para 101.

de facto expropriation, although they are usually included within the broader concept of 'indirect expropriation' and although both expropriation methods may take place by means of a broad number of actions that have to be examined on a case-by-case basis to conclude if one of such expropriation methods has taken place.[139]

In a similar vein, the ECtHR has held that a series of governmental measures falling short of explicit expropriation may still be qualified as an indirect expropriation. The *Papamichalopoulos* case is a good case in point. The Greek military government took possession of a privately owned land in order to set up a naval base and a holiday resort for officers and their families. Though no formal expropriation took place, the ECtHR noted that, as a result of the Greek measures, the 'applicants were unable to make use of their property or to sell, bequeath, mortgage or make a gift of it' and they were 'even refused access to it'.[140] In the Court's view:

> ... the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants de facto to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions.[141]

In addition to including a series of acts as well as omissions in the broad notion of indirect expropriation tribunals have also stressed that the measures equivalent to an expropriation need not be 'legal acts' or acts having an immediate legal effect. For instance, the NAFTA tribunal in the *Ethyl* case held that '[c]learly something other than a "law", even something in the nature of a "practice," which may not even amount to a legal stricture, may qualify [as such a] measure'.[142] Investment tribunals frequently have to address issues of creeping expropriation, which is a reflection of the development that direct expropriation has been rare at present.

(c) Omissions as Indirect Expropriations

As can be seen from the case-law concerning creeping expropriations, an indirect expropriation may result from a series of acts and omissions. However, various investment tribunals have also held that omissions alone may in certain circumstances amount to an expropriation. For instance, in the *Amco* case an ICSID tribunal expressly found that omissions may constitute an expropriation. The tribunal said that:

> [e]xpropriation in international law also exists merely by the state withdrawing the protection of its courts from the owner expropriated, and tacitly allowing a *de facto* possessor to

[139] *Tecmed*, above n 15 at para 114.

[140] *Papamichalopoulos and Others v Greece*, above n 102 at para 43.

[141] Ibid para 45.

[142] *Ethyl Corp v The Government of Canada*, Award on Jurisdiction, 24 June 1998, 38 ILM 708 (1999) para 66.

remain in possession of the thing seized, as did the Roman praetor in allowing *longi temporis praescripto*.[143]

Similarly, in the *Eureko* case an ad hoc tribunal rejected the textual argument that a BIT provision protecting against expropriatory 'measures' was meant to exclude omissions from the ambit of the treaty. According to the tribunal, it was 'obvious that the rights of an investor can be violated as much by the failure of a Contracting State to act as by its actions'.[144] That such an interpretation has been made is perhaps unsurprising, as it ensures the effective protection of an investor's property and investments. Nevertheless, there are also counter-examples. In the *Olguín v Paraguay* case, an ICSID tribunal openly rejected the idea that an expropriation may take place via omissions. The tribunal stated: 'Expropriation therefore requires a teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place'.[145]

(d) The Problem of Regulatory Expropriations

While the concept of indirect expropriation is generally accepted—as is the idea of legitimate regulatory action which does not give rise to claims of compensation—the precise delimitation between these two, theoretically distinct, concepts is hard to establish. Clearly, the crucial difficulty lies in establishing the exact borderline between an indirect expropriation and a regulatory measure. The quest for a generally applicable test for this distinction, and, at the same time, the futility of such pursuit, has been aptly described by the ICSID tribunal in the *Generation Ukraine* case:

> It would be useful if it were absolutely clear in advance whether particular events fall within the definition of an 'indirect' expropriation. It would enhance the sentiment of respect for legitimate expectations if it were perfectly obvious why, in the context of a particular decision, an arbitral tribunal found that a governmental action or inaction crossed the line that defines acts amounting to an indirect expropriation. But there is no checklist, no mechanical test to achieve that purpose. The decisive considerations vary from case to case, depending not only on the specific facts of a grievance but also on the way the evidence is presented, and the legal bases pleaded. The outcome is a judgment, *i.e.* the product of discernment, and not the printout of a computer programme.[146]

[143] *Amco Asia Corporation v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, 1 ICSID Reports 413, 455 (1993).

[144] *Eureko BV v Poland*, above n 75 para 186.

[145] *Eudoro A Olguín v Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, 6 ICSID Reports 164 (2004) para 84.

[146] *Generation Ukraine, Inc v Ukraine*, above n 119 at para 20.29.

Similarly, the UNCITRAL tribunal in the *Saluka* case considered that:

> ... international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered 'permissible' and 'commonly accepted' as falling within the police or regulatory power of States and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.[147]

The judicial and arbitral debate is framed by assertions that, on the one hand, legitimate regulatory measures are outside the scope of indirect expropriation and that a too far-reaching protection against expropriation should not serve as *de facto* substitute for investment insurance. On the other hand, it is said that any substantial deprivation of value regardless of its purposes should be considered expropriatory.

In principle there is a widespread consensus that regulatory measures pursued for legitimate objectives cannot be regarded as indirect expropriation. This view has been endorsed by the Iran–US Claims Tribunal[148] as well as by NAFTA panels.[149] It has also found clear expression in the OECD Ministerial Statement attempting to save the MAI.[150] It has equally been adopted in a number of recent investment awards. Some of them have characterized the principle that legitimate regulatory action cannot be regarded as compensable 'expropriation' as a firmly established rule of customary international law. For instance, in the *Saluka* case an UNCITRAL tribunal held that:

> [i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.[151]

A different approach has been taken by the ECtHR, which does not regard lawful regulatory measures to be wholly outside judicial scrutiny. Rather, the European Court also subjects regulatory 'use control measures' to a proportionality test. This is based on the textual differentiation, made in Article 1 Additional Protocol I to the ECHR, between deprivations of property and mere use controls.[152] According to

[147] *Saluka Investments BV (The Netherlands) v The Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para 263, available at <http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf> and <http://www.investmentclaims.com/decisions/Saluka-CzechRep-Partial_Award.pdf>.

[148] In *Sedco, Inc v National Iranian Oil Co*, 9 Iran–US CTR 248, 275 (1985), the Tribunal spoke of 'an accepted principle of international law that a State is not liable for economic injury which is a consequence of a bona fide "regulation" within the accepted police power of states'.

[149] According to *SD Myers*, above n 44 at para 281, 40 ILM 1408 (2001), '[t]he general body of precedent usually does not treat regulatory action as amounting to expropriation'.

[150] 'The MAI would establish mutually beneficial international rules which would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation.' OECD, Ministerial Statement on the Multilateral Agreement on Investment (MAI) (Paris, 27–28 April 1998) para 5, <http://www.oecd.org/media/release/nw98-50a.htm>.

[151] *Saluka v Czech Republic*, above n 147 at para 255.

[152] For the text of Art 1 Additional Protocol I ECHR, see above n 49.

the ECtHR, the property rights guarantee of Article 1 Additional Protocol I ECHR comprises three distinct rules:

> The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.[153]

Partly based on the famous statement of the PCIJ in the *Oscar Chinn* case that '[f]avourable business conditions and goodwill are transient circumstances, subject to inevitable changes',[154] international courts and tribunals have repeatedly stressed that property rights and investment protection may not serve as insurance against ordinary commercial risks.[155]

One of the central difficulties in distinguishing a regulatory measure from a regulatory expropriation lies in the identification of legitimate purposes of regulatory measures. However, there appears to be an emerging consensus that certain types of state measures are considered legitimate.[156] In searching for such an international consensus, environmental agreements, ILO labour standards, and the like may provide useful guidance.[157]

[153] *Sporrong and Lönnroth v Sweden*, n 102 above at para 61.

[154] *Oscar Chinn* case, above n 29 at 88.

[155] According to the Iran–US Claims Tribunal, 'investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lockouts, disturbances, changes of the economic and political system and even revolution. That any of these risks materialized does not necessarily mean that property rights affected by such events can be deemed to have been taken. A revolution as such does not entitle investors to compensation under international law.' *Starrett Housing Corp*, above n 100 at 156. Similarly, the UNCITRAL arbitration panel in the *CME* case affirmed that 'the purpose of an investment treaty is not to put the investor into a more favourable position than he would have been in the normal development of his investment within the circumstances provided by the host country'. *CME Czech Republic BV v The Czech Republic*, UNCITRAL Arbitral Tribunal, Final Award of 14 March 2003, available at <http://www.cetv-net.com/ne/articlefiles/439-Final_Award_Quantum.pdf> para 562. A NAFTA tribunal stated 'that not every business problem experienced by a foreign investor is an indirect or creeping expropriation ... not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation under Article 1110. Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.' *Marvin Feldman v Mexico*, above n 104 para 112.

[156] According to Brownlie, 'state measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.' Brownlie, above n 1 at 509.

[157] See AS Weiner, 'Indirect Expropriations: The Need for a Taxonomy of "Legitimate" Regulatory Purposes', 5 International Law FORUM du droit international 166 (2003).

In this context, the Restatement (Third) speaks of 'bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states'.[158] Taxation and other contributions or penalties are also mentioned in Additional Protocol I of the ECHR.[159] In addition, the ECtHR has identified a number of regulatory activities which it has held to be covered by the notion of 'use control' of property. These include the prohibition of construction on land,[160] planning controls,[161] and rent control.[162] Although, in the jurisprudence of the ECtHR, these use control measures do not constitute (indirect) expropriation, the Strasbourg Court has clarified that they do not fall entirely outside the scope of property protection.

Some recent US and Canadian free trade and investment agreements try to formulate a generally acceptable definition of legitimate regulatory measures outside the scope of indirect expropriation. They do so by identifying certain 'legitimate public welfare objectives, such as public health, safety, and the environment'.[163]

Investment arbitration practice has equally recognized taxation and environmental concerns as legitimate purposes.[164] ICSID practice shows that the protection of cultural property may also be considered a legitimate regulatory purpose. In the *Pyramids* case, the Egyptian termination of a contract providing for the construction of a hotel and tourist site close to the pyramids of Giza was held to constitute a compensatory taking although the tribunal expressly acknowledged that 'as a matter of international law, the Respondent was entitled to cancel a tourist development project situated on its own territory for the purpose of protecting antiquities.... The decision to cancel the project constituted a lawful exercise of the right of eminent domain'.[165] Nevertheless, it was clearly regarded as an expropriation.

[158] Restatement (Third) of the Foreign Relations Law of the United States, above n 85 at 201.

[159] Art 1(2) of Additional Protocol I ECHR recognizes a number of accepted regulatory activities: 'The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

[160] *Sporrong and Lönnroth v Sweden,* above n 102.

[161] *Pine Valley Developments Ltd v Ireland,* Judgment of 29 November 1991, Ser A No. 222 (1991).

[162] *Mellacher v Austria,* Judgment of 19 December 1989, Ser A No. 169 (1989).

[163] The US–Singapore FTA provides that '[e]xcept in rare circumstances, non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations'. Para 4(b) of exchange of letters on expropriation between US Trade Representative Robert B Zoellick and Singapore Minister for Trade and Industry George Yeo (construing Art 15(1) of the US–Singapore FTA), available at <http://www.mti.gov.sg/public/PDF/CMT/FTA_USSFTA_Agreement_Exchange_Letter_CIL.pdf>.

[164] In the *Feldman* case, a NAFTA tribunal recognized that 'governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like'. *Marvin Feldman v Mexico,* above n 104 at para 103.

[165] *SPP v Egypt* above n 41 at 226.

Although it is sometimes asserted that 'bona fide general taxation'[166] belongs to the category of non-compensable regulatory measures, this does not mean that taxation is entirely insulated from expropriation claims. Excessive taxation, transgressing the bona fide qualification, may be viewed as indirect expropriation. This has been confirmed in the *Feldman* case, where a NAFTA tribunal stated:

> By their very nature, tax measures, even if they are designed to and have the effect of an expropriation, will be indirect, with an effect that may be tantamount to expropriation. If the measures are implemented over a period of time, they could also be characterized as 'creeping,' which the Tribunal also believes is not distinct in nature from, and is subsumed by, the terms 'indirect' expropriation or 'tantamount to expropriation' in Article 1110(1).[167]

In the recent *Occidental* case, the arbitral tribunal confirmed that:

> expropriation need not involve the transfer of title to a given property, which was the distinctive feature of traditional expropriation under international law. It may of course affect the economic value of an agreement. Taxes can result in expropriation as can other types of regulatory measures.[168]

At present environmental regulation poses some of the most difficult questions with regard to the proper delimitation between compensable expropriatory and legitimate regulatory measures. At one extreme, arbitral tribunals may totally disregard the intention of national legislators and look only at the effect of environmental measures—an approach that may be induced by the sole effect doctrine outlined below.[169] In this sense, an ICSID tribunal has held in the *Santa Elena* case:

> Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[170]

This finding was specifically endorsed by the *Tecmed* tribunal, which said in its award on the merits that it found

> no principle stating that regulatory administrative actions are per se excluded from the scope of the [applicable BIT], even if they are beneficial to society as a whole—such as environmental protection –, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever.[171]

[166] Restatement (Third) of the Foreign Relations Law of the United States, above n 85 at 201.

[167] *Marvin Feldman v Mexico*, above n 104 at para 101.

[168] *Occidental Exploration and Production Co v Ecuador*, LCIA No. UN 3467, Award, 1 July 2004, available at <http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf>, para 85.

[169] See below text at n 217.

[170] *Compañia del Desarrollo de Santa Elena, SA v Republic of Costa Rica*, above n 134 at 192.

[171] *Tecmed*, above n 15 at para 121.

A more nuanced approach was pursued by the NAFTA panel in the *SD Myers* case. It did not regard the temporary export prohibition on waste from Canada to the USA to amount to an indirect expropriation. However, it did second-guess the Canadian measures and found a violation of NAFTA's 'fair and equitable' and 'national treatment' standards because the environmental measures were 'intended primarily to protect [Canadian industry] from U.S. competition'.[172]

At the other end of the spectrum lie decisions like the *Methanex* Award which generally exclude non-discriminatory, regulatory measures from the scope of indirect expropriations. According to this NAFTA tribunal,

> ...as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[173]

This reasoning was also followed in the *Saluka* Award where an UNCITRAL tribunal, heavily relying on *Methanex*, found that:

> the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today.[174]

As a consequence, the tribunal focused on the permissibility of the regulatory state action which, in its view, removed it from the ambit of an indirect expropriation even though in effect it destroyed the value of the investment affected.[175] As a result, the forced administration of a bank in which the Dutch investor had invested was not considered a breach of the prohibition against expropriation contained in the applicable BIT.

The broad implication of the *Methanex* and the *Saluka* approach, more or less removing any non-discriminatory regulatory action for a public purpose from the scope of compensable regulatory takings, has given rise to an intense debate. It is too early to say whether legitimate regulatory purposes will in the future serve as an easily available escape from a potential finding of a regulatory expropriation. It should be noted, however, that some investment tribunals have voiced concern over the appropriateness of a public purpose as a (sole) criterion to remove government

[172] *SD Myers*, above n 44 at para 194.

[173] *Methanex*, above n 45, IV D para 7.

[174] *Saluka v Czech Republic*, above n 147 at para 262.

[175] '... in imposing the forced administration of IPB on 16 June 2000 the Czech Republic adopted a measure which was valid and permissible as within its regulatory powers, notwithstanding that the measure had the effect of eviscerating Saluka's investment in IPB.' Ibid, at para 276.

action from the scope of indirect expropriation. For instance, the ICSID tribunal in the *Azurix* case, without openly referring to *Methanex* or *Saluka*, found that 'the issue was not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim'.[176] The *Azurix* tribunal found that the public purpose criterion alone would be 'insufficient'.[177] Instead, it suggested that the public purpose criterion should be complemented by other criteria, such as proportionality and non-discrimination, in order to provide 'useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation'.[178]

(e) Crucial Elements of Indirect Expropriation

It is frequently asserted that the identification of indirect expropriation measures cannot be achieved through abstract legal principles, but will depend on a case-by-case analysis of the specific facts. For instance, in the *Feldman* case a NAFTA tribunal thought 'that each determination under Article 1110 is necessarily fact-specific'.[179] A case-by-case approach is also supported by modern investment agreements, such as the 2004 Canadian Model BIT which provides that '[t]he determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry ...'.[180]

On the basis of the sometimes very fact-specific determinations by international arbitral and judicial bodies having to decide whether an indirect expropriation actually took place, one may identify an emerging trend of using certain abstract legal rules that may assist decision-makers in their task of differentiating. Certain *topoi* have been developed that may help identify whether a government engaged in an expropriatory action or exercised its legitimate regulatory authority.

(i) *Intensity of Interference with Property Rights*

Usually, an insignificant, minor restriction or interference with property rights does not constitute indirect expropriation. There is broad consensus that a certain degree or level of interference is required in order to qualify as expropriation. What

[176] *Azurix v Argentina*, above n 15 at para 310.
[177] Ibid.
[178] Ibid para 312.
[179] *Marvin Feldman v Mexico*, above n 104 at para 107.
[180] 2004 Canadian Model BIT, Annex B 13(1)(b) on the clarification of indirect expropriation, above n 96.

is required is at least a 'substantial loss of control or value'[181] or 'severe economic impact'.[182] The difficulty again lies in establishing the exact level of interference.

The arbitral tribunal in *Revere Copper* found an expropriation by looking at the 'impact on effective control over use and operation'[183] of an investor's property. Though formal ownership was not affected by the governmental measures, in the tribunal's view the investor's control of use and operation was regarded as no longer 'effective'.

The Iran–US Claims Tribunal found in a number of cases that this level is reached when property rights are interfered with 'to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated'[184] or when 'the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral'.[185] In *Starrett Housing*, the tribunal concluded that an expropriation had taken place as a result of the appointment of Iranian managers to the housing project. In *Tippetts*, the tribunal did not regard the government appointment of an Iranian manager itself as an expropriation. Rather, the actions of the government-appointed manager, because of the intensity with which they interfered with the owners' property rights, constituted a taking of property:

> While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government... such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.[186]

In the particular case, the tribunal found that 'the complete absence of answers to letters and telexes and of any communication from [a government-appointed manager] to the Claimant, effectively ended such cooperation and deprived the Claimant of its property interest'.[187]

In the *Sea-Land* case, the tribunal refused to recognize an indirect expropriation of a bank account because the interference did not amount to a substantial deprivation. The tribunal rejected the contention that refusal to grant permission to convert the deposits at a Tehran branch into US dollars amounted to an expropriation of the bank account. It found that the competent Iranian authority

> was invested with a certain margin of discretion in granting permission for such transfers into foreign currency, and it is not possible to derive from the evidence available before the Tribunal any indication that it was seeking to exercise this discretion in an unreasonable or discriminatory way...[188]

[181] UNCTAD, above n 17 at 41.

[182] Yannaca-Small, above n 5 at 55.

[183] *In the Matter of Revere Copper and Brass Inc v Overseas Private Investment Corporation*, Award, 24 August 1978, 56 ILR 258, 271.

[184] *Starrett Housing Corp v Government of the Islamic Republic of Iran*, above n 100 at 156.

[185] *Tippetts*, above n 99.

[186] Ibid.

[187] Ibid.

[188] *Sea-Land Serv, Inc v Iran*, 6 Iran–US CTR 149, 167 (1984).

It concluded that since '[t]he account remains in existence and available in Rials, at Sea-Lands disposal... no international liability on the part of the government has been satisfactorily proven'.[189]

In *Pope & Talbot* a NAFTA tribunal required that 'measures affecting property interests' had to be of a certain 'magnitude or severity'[190] in order to qualify as indirect expropriation. With regard to the Canadian contention that 'mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required',[191] the tribunal held:

> ...While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner. Thus, the *Harvard Draft* defines the standard as requiring interference that would 'justify an inference that the owner *** will not be able to use, enjoy, or dispose of the property.' The *Restatement*, in addressing the question whether regulation may be considered expropriation, speaks of 'action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property'. ...under international law, expropriation requires a 'substantial deprivation'.[192]

In the specific case, the Canadian export restrictions on softwood lumber were considered to constitute an interference which resulted in reduced profits. However, the panel noted that the investor continued to export substantial quantities of lumber and to earn substantial profit on those sales. It thus concluded 'that the degree of interference with the Investment's operations due to the Export Control Regime [did] not rise to the level of expropriation (creeping or otherwise)'.[193]

The *Pope & Talbot* standard has been specifically endorsed in the *Occidental* case where the tribunal found that, solely by the fact that a VAT refund had been refused to the investor,

> there has been no deprivation of the use or reasonably expected economic benefit of the investment, let alone measures affecting a significant part of the investment. The criterion of 'substantial deprivation' under international law identified in *Pope & Talbot* is not present in the instant case. If narrower definitions of expropriation under international law are examined, the finding of expropriation would lie still farther away.[194]

The ICSID tribunal in the *CMS* case also endorsed the 'substantial deprivation' standard as described in the *Pope & Talbot* case. As in the *Occidental* case, the tribunal found that the various governmental measures did not amount to such a 'substantial deprivation' and thus did not constitute an indirect expropriation. In arriving at this conclusion the tribunal stressed, among other things, that '[t]he

[189] Ibid 167.
[190] *Pope & Talbot*, above n 43 at para 96.
[191] Ibid para 88.
[192] Ibid para 102.
[193] Ibid.
[194] *Occidental*, above n 168 at para 89.

investor is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment'.[195]

In *SD Myers* the degree of governmental interference was also apparently crucial. The NAFTA tribunal held:

> Expropriations tend to involve the deprivation of ownership rights; regulations [are] a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.[196]

It reinforced this distinction by focusing on the degree and intensity of the interference:

> An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary.[197]

In the particular case, the tribunal did not consider the temporary export ban on certain hazardous waste to amount to expropriation.

In the *Feldman* case the governmental interference with the foreign investor's rights was also not significant enough to amount to expropriation.[198] Although the tribunal acknowledged that the investor lost the effective ability to export cigarettes and any profits derived therefrom as a result of Mexican measures denying certain tax refunds, it held that:

> the regulatory action (enforcement of longstanding provisions of Mexican law) has not deprived the Claimant of control of the investment, CEMSA, interfered directly in the internal operations of CEMSA or displaced the Claimant as the controlling shareholder.... Thus, this Tribunal believes there has been no 'taking'...[199]

In a similar fashion, the Stockholm Chamber of Commerce arbitral tribunal in the *Nycomb* case considered that '[t]he decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail'.[200] Using this test, the tribunal concluded that the non-payment of a contractually stipulated 'double tariff' for

[195] CMS, above n 108 at para 263.

[196] *SD Myers*, above n 44 at para 282.

[197] Ibid para 283.

[198] The tribunal speaks of 'indirect expropriation and measures "tantamount to expropriation," which potentially encompass a variety of government regulatory activity that may *significantly* interfere with an investor's property rights' (emphasis added). *Marvin Feldman v Mexico*, above n 104 at para 100.

[199] Ibid para 152.

[200] *Nykomb Synergetics Technology Holding AB, Stockholm v Latvia*, Stockholm Chamber of Commerce, Award, 16 December 2003, para 4.3.1; available at <http://ita.law.uvic.ca/documents/

energy provisions did not qualify as an expropriation or the equivalent of an expropriation because there was

> no possession taking of [...] assets, no interference with the shareholder's rights or with the management's control over and running of the enterprise—apart from ordinary regulatory provisions laid down in the production licence, the off-take agreement, etc.[201]

In a similar vein, another Stockholm Chamber of Commerce tribunal held in the *Petrobart* case that various acts of state intervention in judicial proceedings at the national level, while constituting a violation of the 'fair and equitable treatment standard' of Article 10(1) of the Energy Charter Treaty, did not amount to an indirect expropriation 'although they had negative effects for Petrobart' because they were not 'directed specifically against Petrobart's investment or had the aim of transferring economic values from Petrobart to the Kyrgyz Republic'.[202] Specifically referring to the intensity of interference, the arbitral tribunal, 'consider[ed] that the measures taken by the Kyrgyz Republic, while disregarding Petrobart's legitimate interests as an investor, did not attain the level of *de facto* expropriation'.[203]

The intensity requirement has been described by an ICSID tribunal in the *Impregilo* case in the following words: 'the effect of the measures taken must be of such importance that those measures can be considered as having an effect equivalent to expropriation'.[204]

In the *Azurix* case, another ICSID tribunal found that the management of a company was affected by the actions of provincial authorities of the respondent state, but 'not sufficiently for the Tribunal to find that Azurix's investment was expropriated'.[205]

(ii) *Expropriatory Measures Need Not Benefit the State*

That expropriation may take place without any 'wealth increase' on the part of the expropriating state was acknowledged by the Iran–US Claims Tribunal in an incidental fashion when the tribunal stated that it preferred 'the term "deprivation" to the term "taking", although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required'.[206]A similarly indirect acknowledgement of the possibility

Nykomb-Finalaward.doc#_Toc59278334>. See also T Wälde and K Hobér, 'The First Energy Charter Treaty Arbitral Award', 22 J Int'l Arb 83–104 (2005).

[201] Ibid.

[202] *Petrobart Limited v The Kyrgyz Republic*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration No. 126/2003, Award, 29 March 2005, available at <http://www.investment-claims.com/decisions/Petrobart-kyrgyz-rep-Award.pdf, p 77>.

[203] Ibid.

[204] *Impregilo SpA v Pakistan*, above n 71 at para 279.

[205] *Azurix v Argentina*, above n 15 at para 322.

[206] *Tippetts*, above n 99.

of expropriations to the benefit of third parties can be found in the *SD Myers* case where a NAFTA tribunal stated that takings aim at the transfer of ownership 'usually' to the expropriating authority:

> In general, the term 'expropriation' carries with it the connotation of a 'taking' by a governmental-type authority of a person's 'property' with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the 'taking'.[207]

This implies, of course, that property may also be expropriated in order to be transferred to other third parties. An ICSID tribunal in the 1984 *Amco* case expressly held that:

> it is generally accepted in international law, that a case of expropriation exists not only when a state takes over private property but also when the expropriating state transfers ownership to another legal or natural person.[208]

In *Tecmed*, an ICSID tribunal held in a more explicit fashion:

> Although formally an expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect, the term also covers a number of situations defined as de facto expropriation, where such actions or laws transfer assets to third parties different from the expropriating State or where such laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the Government.[209]

According to *Tecmed*, it is the effect on the investor, not the benefit to the state, that will determine whether a measure equivalent to an expropriation has taken place. In *Tecmed*, the tribunal held that in order to establish an indirect expropriation

> it must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto—such as the income or benefits related to the Landfill or to its exploitation—had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss.[210]

Also the ECtHR has found that expropriation may take place where the benefit of a deprivation does not accrue to the state but to (private) third parties. In the *James* case,[211] the court found that legislation aimed at permitting certain long-term tenants to acquire leased property at prices below market value constituted a taking of property. The court did so implicitly by rejecting the applicants' argument that 'the

[207] *SD Myers*, above n 44 at para 280.

[208] *Amco Asia Corporation v Republic of Indonesia*, ICSID Award, 20 November 1984, 1 ICSID Reports 413, 455 (1993).

[209] *Tecmed* above n 15 at para 113.

[210] Ibid at para 115.

[211] *James v United Kingdom*, 8 European Human Rights Reports 123–64 (1986), Judgment of 21 February 1986, Ser A No. 98.

transfer of property from one person to another for the latter's private benefit alone can never be "in the public interest"'.[212] It found the underlying policy goals sufficient to justify the measures and reasoned that:

> a taking of property effected in pursuance of legitimate social, economic or other policies may be 'in the public interest', even if the community at large has no direct use or enjoyment of the property taken. The leasehold reform legislation is not therefore ipso facto an infringement of Article 1 (P1–1) on this ground.[213]

Despite these findings that an expropriation may take place without a corresponding gain or 'appropriation' on the part of the state, there are a few arbitral decisions that seem to deviate from this 'orthodox approach'.[214] For instance, the UNCITRAL tribunal in the *Lauder* case denied an indirect expropriation, *inter alia*, because the measures complained of did 'not amount to an appropriation or the equivalent—by the State, since it did not benefit the Czech Republic or any person related thereto'.[215] Similarly, the ICSID tribunal in the case of *Olguín v Paraguay* required an acquisition or appropriation in order to find an expropriation. The tribunal held:

> For an expropriation to occur, there must be actions that can be considered reasonably appropriate for producing the effect of depriving the affected party of the property it owns, in such a way that whoever performs those actions will acquire, directly or indirectly, control, or at least the fruits of the expropriated property.[216]

(iii) *Effect on Investor as Main Criterion—The 'Sole Effect' Doctrine*

It has been asserted that the effect of governmental action, rather than its purpose or intent, is 'a major factor, or even the sole factor, in determining whether or not a taking has occurred'.[217] Arguably, the predominance of the effect of a governmental measure over the intent of the government was already apparent in the *Norwegian Shipowners'* and the *Chorzòw Factory* case.[218] An express emphasis on the effect of governmental measures, coupled with a corresponding de-emphasis of

[212] Ibid para 39.

[213] Ibid para 45.

[214] A Newcombe, 'The Boundaries of Regulatory Expropriation in International Law', 20 ICSID Rev–FILJ 1, 5 (2005).

[215] *Final Award in the Matter of an UNCITRAL Arbitration: Ronald S. Lauder v The Czech Republic*, 3 September 2001, reprinted in: 14 World Trade and Arbitration Materials 35 (2002), para 203.

[216] *Olguín v Paraguay*, above n 145 at para 84.

[217] Dolzer, above n 10 at 78.

[218] According to Christie, these cases establish that 'a State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention'. G Christie, 'What Constitutes a Taking of Property Under International Law?', 38 BYIL 307, 311 (1962). According to Higgins, 'these two cases certainly indicate that expropriation of a given property may in fact—regardless of stated intention—involve a taking of closely connected ancillary rights'. Higgins, above n 16 at 323.

governmental intentions, came to the fore in a number of Iran–US Claims Tribunal awards. For instance, in the *Tippetts* case the tribunal said:

> While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.[219]

In *Phelps Dodge*, the Iran–US Claims Tribunal expressly stated that even acceptable motivations would not change its view that certain measures had an expropriatory effect:

> The Tribunal fully understands the reasons why the Respondent felt compelled to protect its interests through this transfer of management, and the Tribunal understands the financial, economic and social concerns that inspired the law pursuant to which it acted, but those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss.[220]

Most other Iran–US Claims Tribunal cases also adhere to a jurisprudence emphasizing the effect over the intentions of governmental behaviour.[221]

There is, however, one important case to the contrary where the Iran–US Claims Tribunal underlined the importance of governmental motivation for the finding of indirect expropriation. In the *Sea-Land* case, the tribunal held that:

> [a] finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-Land's operation, the effect of which was to deprive Sea-Land of the use and benefit of its investment. Nothing has been demonstrated here which might have amounted to an intentional course of conduct directed against Sea-Land. A claim founded substantially on omissions and inaction in a situation where the evidence suggests a widespread and indiscriminate deterioration in management, disrupting the functioning of the port of Bandar Abbas, can hardly justify a finding of expropriation. Thus the claim against the Government of Iran based on expropriation must be dismissed.[222]

[219] *Tippetts*, above n 99.

[220] *Phelps Dodge Corp. et al v Iran*, 10 Iran–US CTR 121, 130 (1986-I).

[221] *Sedco, Inc, et al v National Iranian Oil Co, et al*, Award No. ITL 55–129-3 (28 October 1985), 9 Iran–US CTR 248, 276–9; *Tehran, Inc, et al v Government of the Islamic Republic of Iran, et al*, Award No. 220–37/231–1 (11 April 1986), 10 Iran–US CTR 228, 249–52; *Thomas Earl Payne v Government of the Islamic Republic of Iran*, Award No. 245-335-2 (August 8, 1986), 12 Iran–US CTR 3, 11; *Harold Birnbaum v Islamic Republic of Iran*, Award No. 549–967-2 (6 July 1993), 29 Iran–US CTR 260, 267–8.

[222] *Sea-Land*, above n 188.

Of course, one has to take into account that the *Sea-Land* case concerned a case of governmental inaction or omissions where intent may have been required in order to prove or at least indicate the expropriatory character of measures.

However, even in cases of omissions, a governmental intention to expropriate is not regularly required. For instance, in the *Generation Ukraine* case an ICSID tribunal held that certain omissions 'did not have the express intention of depriving the Claimant of the legal basis of [his] right to proceed to construction'. It then expressly continued to check whether the cumulative interference 'nevertheless constituted an "indirect" expropriation'.[223] In the *Biloune* case, an ad hoc arbitration on the basis of a direct investor–host state agreement, the arbitration panel emphasized the effect of a series of governmental measures over the underlying motivations:

> The *motivations* for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry had the *effect* of causing the irreparable cessation of work on the project. Given the central role of Mr Biloune in promoting, financing and managing MDCL, his expulsion from the country *effectively* prevented MDCL from further pursuing the project.[224]

ICSID tribunals have also stressed the importance of the effect of governmental measures in determining whether an expropriation has taken place. For instance, in the *Santa Elena* case the tribunal opined that:

> there is ample authority for the proposition that a property has been expropriated when the effect of the measure taken by the states has been to deprive the owner of title, possession, or access to the benefit and economic use of his property.[225]

Similarly, the *Tecmed* tribunal in an almost literal quote taken from the *Tippets* case held:

> The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects.[226]

On the basis of these cases, it is not surprising to find a conclusion in an UNCTAD study on BITs according to which 'indirect expropriation may occur even though the host country disavows any intent to expropriate the investment'.[227] Similarly, it has been asserted that:

[223] *Generation Ukraine, Inc v Ukraine*, above n 119 para 20.28.

[224] *Biloune*, above n 47 at 209 (emphasis added).

[225] *Santa Elena*, above n 134 at para 77.

[226] *Tecmed*, above n209 at para 116.

[227] UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (New York and Geneva, United Nations, 1998) at 66.

[w]hat matters is the effect of governmental conduct—whether malfeasance, misfeasance or nonfeasance, or some combination of the three—on foreign property rights or control over an investment, not whether the state promulgates a formal decree or otherwise expressly proclaims its intent to expropriate.[228]

Nevertheless, where there is clear evidence of intent to expropriate this may assist tribunals in their assessment of facts.[229]

(iv) *Legality, Transparency, and Consistency*

It has been recently said that '[t]he need for an "orderly process" of government and respect for the rule of law as a protection against the danger of favoring or disproportionally burdening one or the other segment of society may underlie this trend to require a fair process of decision-making in the context of the law governing regulation and expropriation'.[230]

Transparency as required in *Metalclad* can lead to a finding of an expropriation where a government acts in a non-transparent way:

> These measures, taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation.[231]

After the partial set-aside of the *Metalclad* award by the Supreme Court of British Columbia, which did not affect the expropriation finding in the award,[232] tribunals have become more cautious in detecting an expropriation on the basis of non-transparent government behaviour.

In the *Feldman* case, the tribunal did not find an indirect expropriation in bureaucratic behaviour that fell short of what one would reasonably expect. An implicit transparency obligation was discussed in this case where certain actions of the Mexican tax authorities were allegedly 'so arbitrary as to constitute expropriatory action'. The tribunal, however, rejected this claim, not because it did not believe in the lack of transparency of the governmental actions, but rather because it considered it, 'doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law, particularly given the complexities not only of Mexican but most other tax laws'.[233]

[228] Reisman and Sloane, above n 5 at 121.

[229] Newcombe, above n 214 at 25; see also KA Byrne, 'Regulatory Expropriation and State Intent', 38 Canadian YB of Int'l L 89 (2000).

[230] Dolzer, above n 10 at 75.

[231] The requirement of an 'orderly process' was noted with regard to the measures of the Mexican environmental authorities, *Metalclad Corp v United Mexican States*, above n 103 at para 107.

[232] *The United Mexican States v Metalclad Corporation*, 2 May 2001, 2001 BCSC 664.

[233] *Marvin Feldman v Mexico*, above n 104 at para 133.

The tribunal found it 'undeniable that the Claimant has experienced great difficulties in dealing with [tax] officials, and in some respects has been treated in a less than reasonable manner'. Nevertheless, it thought that such treatment did not rise to the level of a violation of international law under Article 1110 NAFTA. It merely added that '[u]nfortunately, tax authorities in most countries do not always act in a consistent and predictable way'.[234]

(v) *Protection of Legitimate Investor Expectations*

Legitimate expectations, as an important aspect of property protection, have been acknowledged by ad hoc arbitral tribunals,[235] the Iran–US Claims Tribunal,[236] and the European Court of Human Rights.[237] In the context of investment disputes, the disappointment of legitimate investor expectations by host states may play a crucial factor not only with regard to the fair and equitable treatment standard, but also in the determination of whether an expropriation has taken place. This approach has been recently codified in an investment agreement text. The 2004 Canadian Model BIT expressly mentions 'the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations' as one of the factors which should guide arbitral tribunals in '[t]he determination of whether a measure or series of measures of a Party constitute an indirect expropriation ...'.[238]

The NAFTA tribunal in the *Metalclad* case expressly relied for its finding of an indirect expropriation also on the 'reasonably-to-be-expected economic benefit'.[239] It stressed the good faith reliance of the investor that was disappointed by the host state authorities. It was a crucial aspect of the tribunal's finding that Metalclad had relied on the representations of the Mexican federal government of its exclusive authority to issue permits for hazardous waste disposal facilities.

Investment tribunals apparently use a rather high threshold concerning investor expectations for purposes of expropriation claims. Where investors are not specifically made to believe in certain state assurances, as in the *Metalclad* case, or where they are entering a particularly high-risk market, their expectations appear to be regarded as less legitimate for property protection purposes. This does not, of course, exclude the possibility that other investment standards might come into play, as can be seen in the *MTD* case.[240] In this case, an ICSID tribunal found that

[234] Ibid at para 113.

[235] *Kuwait v Aminoil*, Final Award of 24 March 1982, 21 ILM 976, 1034 (1982).

[236] *INA Corp v Iran*, 8 Iran–US CTR 373, 385 (1985) (Lagergren J, separate opinion).

[237] *Nat'l & Provincial Bldg Soc'y v United Kingdom*, Judgment of 23 October 1997, Reports 1997-VII, 2325, 2347–50; *Prince Hans-Adam II of Liechtenstein v Germany*, Judgment of 12 July 2001, Application No. 42527/98, 83.

[238] Annex B 13(1)(b) on the clarification of indirect expropriation, 2004 Canadian Model BIT, above n 96.

[239] *Metalclad*, above n 103 at para 103.

[240] *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, Case No. ARB/01/7, Final Award of 25 May 2004, 44 ILM 91 (2005).

Chile had violated the fair and equitable treatment obligation under the applicable BIT when it approved of MTD's investment, which was inconsistent with the urban policy of the government and which was subsequently upheld so that the intended construction work could not proceed. The tribunal did not make a finding of an indirect expropriation, however, because it agreed with the respondent state that 'an investor does not have a right to a modification of the laws of the host country'. Rather, according to the tribunal,

> [t]he issue in this case is not of expropriation but unfair treatment by the State when it approved an investment against the policy of the State itself. The investor did not have the right to the amendment of the PMRS. It is not a permit that has been denied, but a change in a regulation. It was the policy of the Respondent and its right not to change it. For the same reason, it was unfair to admit the investment in the country in the first place.[241]

The lack of any specific host state commitments to an investor, which would create legitimate expectations of the latter, was evidently also decisive in the *Methanex* case. Here a NAFTA tribunal rejected the claim, that a Californian ban on certain gasoline additives produced and marketed by the investor, constituted, *inter alia*, an indirect expropriation. The tribunal stressed that Methanex was fully aware of constantly changing environmental and health protection measures at the federal and state level. In its view, the investor

> did not enter the United States market because of special representations made to it. Hence this case is not like *Revere*, where specific commitments respecting restraints on certain future regulatory actions were made to induce investors to enter a market and then those commitments were not honoured.[242]

Also the ICSID tribunal in the *Generation Ukraine* case relied on the reasonableness of an investor's expectations in order to assess whether an indirect expropriation had taken place. In the tribunal's view, it was 'relevant to consider the vicissitudes of the economy of the state that is host to the investment in determining the investor's legitimate expectations'.[243] Because it found that the specific investment was made in a high-risk environment with a potential of above-average return, it found that there was no indirect expropriation when the investor encountered various forms of 'frustration and delay'.

(vi) *Proportionality*

Proportionality figures prominently in the jurisprudence of the ECtHR. In the *Case of the former King of Greece*, the court summarized its jurisprudence in the following words:

> An interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of

[241] Ibid, para 214.
[242] *Methanex*, above n 45 IV D para 10.
[243] *Generation Ukraine, Inc v Ukraine*, above n 119 at para 20.37.

the protection of the individual's fundamental rights (see, among other authorities, the Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, 26, § 69). The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see the Pressos Compania Naviera S.A. and Others v. Belgium judgment of 20 November 1995, Series A no. 332, p. 23, § 38).[244]

In the *Sporrong and Lönnroth* case, the ECtHR found that such proportionality was lacking. Instead, the Swedish measures, imposing a long-term construction prohibition and a notice that owners may be formally expropriated in the future,

upset the fair balance which should be struck between the protection of the right of property and the requirements of the general interest: the Sporrong Estate and Mrs Lönnroth bore an individual and excessive burden which could have been rendered legitimate only if they had had the possibility of seeking a reduction of the time-limits or of claiming compensation.[245]

Although a proportionality analysis carried out in the context of expropriation is typical for the case-law of the ECtHR, such a balancing approach may be regarded as inherent in the tests relied upon by many investment arbitral tribunals. It is likely to become evident over time whether and to what extent the inspiration taken by investment tribunals from the jurisprudence of the ECtHR will also extend to the latter's proportionality analysis for the purposes of determining acts of indirect expropriation. Cases like *Tecmed*[246] and, more recently, *Azurix*[247] show that this is a probable development.[248]

(vii) *Discrimination*

It has been suggested that the discriminatory effect/intent of a governmental action may be relevant in order to establish whether such action constitutes indirect expropriation. For instance, the US Restatement speaks of a 'test suggested for determining whether regulation and taxation programs are intended to achieve expropriation is whether they are applied only to alien enterprises'.[249]

Such a test has been apparently relied upon by the ad hoc tribunal in the *Eureko* case. For its finding of an expropriatory action, it stressed the discriminatory intent of the state measures aimed at excluding foreign control from the host state

[244] *Case of the former King of Greece and Others v Greece*, Judgment of 23 November 2000, ECtHR, Application No. 25701/94, para 89.

[245] *Sporrong and Lönnroth v Sweden*, above n 102 at para 73.

[246] *Tecmed*, above n 15.

[247] *Azurix v Argentina*, above n 15.

[248] See also text at n 176 above.

[249] Restatement (Third) of the Foreign Relations Law of the United States, above n 85, Reporters' note 6.

market.[250] The element of discriminatory intent was also particularly stressed in the *Methanex* case, where a NAFTA tribunal was of the opinion 'that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation'.[251] In the absence of any clear evidence of such intent it denied an indirect expropriation. In this context, discriminatory intent or effect only serves as a subsidiary or additional element evidencing indirect expropriation. As such it must be distinguished from other discriminatory state measures contrary to investment standards, such as most-favoured-nation or national treatment, which are usually contained in BITs and other investment agreements.

(4) Actual Findings of Indirect Expropriation in Arbitral and Judicial Practice

Though the issue of indirect expropriation has been raised and discussed in many cases, only a fraction of them have led to an actual finding of such an expropriation. The following survey based on the preceding analysis summarizes the relevant acts and/or omissions that have been qualified as indirect expropriation in judicial and arbitral practice.

First, disproportionate tax increases can be held to be acts of indirect expropriation. Although 'excessive or arbitrary taxation'[252] is sometimes mentioned as an example of an indirect expropriation, there are few cases that have actually held a taxation measure to constitute an unlawful infringement of property rights as such. An indirect expropriation was found in *Revere Copper v OPIC*[253] as a result of a tax increase to an extent that the investment became economically unsustainable. The award arose from a dispute between an American investor in Jamaica and the US foreign investment insurance agency, OPIC, from which the investor sought to recover compensation for expropriatory action by the host state. Initially, the investor had entered into an agreement with the government of Jamaica, which contained a stabilization clause concerning taxes and other financial burdens. Subsequently, the government drastically increased the taxes and royalties in violation of that agreement. When OPIC refused to make payment under the insurance contract providing

[250] *Eureko BV v Poland*, above n 75 at para 242. See in detail, below at n 260.
[251] *Methanex*, above n 45, IV D para 7.
[252] OECD Draft Convention on the Protection of Foreign Property, above n 76 at 126.
[253] *Revere Copper*, above n 183.

cover for 'expropriatory action', arguing that there was no deprivation of effective control, Revere Copper instituted arbitral proceedings. The tribunal qualified the Jamaican measures in the following way:

> In our view the effects of the Jamaican Government's actions in repudiating its long term commitments to RJA have substantially the same impact on effective control over use and operation as if the properties were themselves conceded by a concession contract that was repudiated ... OPIC argues that RJA still has all the rights and property that it had before the events of 1974: it is in possession of the plant and other facilities; it has its Mining Lease; it can operate as it did before. This may be true in a formal sense but ... we do not regard RJA's 'control' of the use and operation of its properties as any longer 'effective' in view of the destruction by Government actions of its contract rights.[254]

Secondly, the taking of a third party's property which renders worthless the patents and contracts of a managing company may be a form of indirect taking. In the *Case concerning certain German interests in Polish Upper Silesia* (*Chorzów Factory*) the PCIJ held that Polish expropriation measures directed against the German owner of a factory also constituted an indirect expropriation of another German company which had contractual rights of managing and operating the plant. The Court held that not only the owner of the factory, but also the company holding contractual rights was expropriated:

> ... it is clear that the rights of the Bayerische to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents, licences, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland. As these rights related to the Chorzów factory and were, so to speak, concentrated in that factory, the prohibition contained in the last sentence of Article 6 of the Geneva Convention applies in all respect to them.[255]

Thirdly, interference with contract rights leading to a breach or termination of the contract by the investor's business partner may consitute an indirect taking. The *CME* decision[256] embodies a very indirect finding of an indirect expropriation. The tribunal held that there was 'no physical taking of the property by the State.... What was touched and indeed destroyed was ... the commercial value of the investment ... by reason of coercion exerted by the Media Council ...'.[257]

The Czech Media Council, a regulatory authority, was held to have interfered with the investor's investment by having created a legal situation that enabled the investor's local partner to terminate the contract on which the investment depended. The tribunal found that the Media Council had acted contrary to its earlier position and

[254] *Revere Copper*, ibid at 291–2.
[255] *Case concerning certain German interests in Polish Upper Silesia*, above n 30 at 44.
[256] *CME v The Czech Republic*, Partial Award, 13 September 2001, above n 48.
[257] Ibid para 591.

had coerced the investor into changing its contract with its business partner, leading to a loss of legal security.[258]

A fourth instance of indirect taking may arise out of the breach of contractually acquired rights where this is accompanied by discriminatory intent. In the *Eureko* case, an ad hoc tribunal found an indirect violation of contractual rights on the part of the Polish state. The case involved the privatization of a state-owned insurance company. The tribunal found that after an initial 30 per cent share purchase by a Dutch company, this investor had contractually acquired the right to purchase a further portion of shares through a first addendum to the initial share purchase agreement. These rights were specifically characterized as 'assets' of which the investor was 'deprived' by action of the host state.[259] According to the tribunal:

> the measures taken by [Poland] in refusing to conduct the [further sale of shares] [we]re clearly discriminatory. As the tribunal noted earlier, these measures have been proclaimed by successive Ministers of the State Treasury as being pursued in order to keep [the Polish insurance company] under majority Polish control and to exclude foreign control such as that of Eureko. That discriminatory conduct by the Polish Government is in blunt violation of the expectations of the Parties in concluding the [share purchase agreement] and the First Addendum.[260]

A fifth example of indirect taking occurs where there is interference with the management of an investment. In a number of cases the indirect expropriation has been effectuated by government action that removes actual management control over the investment by either physically and/or legally impeding the investor to continue his or her management tasks or by replacing the investor-controlled management by government-appointed management. An example of the former can arise from the arrest and expulsion of an investor or other persons who play key roles in the investment. The *Biloune* case illustrates this situation. The host state was held *de facto* to have expropriated the investment by physically arresting and deporting the investor who was crucial for the management of the investment. In conjunction with a stop work order and the demolition of part of the investment project, this was regarded as a constructive expropriation:

> Given the central role of Mr Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune's interest in MDCL...[261]

[258] *CME v The Czech Republic*, n 48 above, at paras 591–609.
[259] *Eureko BV v Poland*, above n 75 at para 240.
[260] Ibid at para 242.
[261] *Biloune*, above n 47 at 209.

In *Benvenuti and Bonfant*,[262] an ICSID tribunal concluded that the cumulative effect of a series of governmental acts and omissions, among them intervention with marketing of the investors' products through fixing sales prices, dissolving a marketing company, instituting criminal proceedings against the investor who then left the country, and finally the physical takeover of the investors' premises, amounted to a *de facto* expropriation.[263]

Another form of direct interference with the management options of an investment that may amount to an indirect expropriation is the appointment of managers by the host government. In the jurisprudence of the Iran–US Claims tribunal, the government appointment of managers has been qualified as indirect expropriation either by itself,[264] as a result of the actions of the government-appointed managers,[265] or in conjunction with a series of other acts effectively depriving an investor of its property rights.[266] The crucial element for a finding of an indirect expropriation in these cases evidently was the intensity of the interference resulting from the imposition of managers.[267]

A sixth set of examples of indirect taking arise out of the revocation or denial of government permits or licences, where this amounted to an interference with an investor's property interests to such an extent that it was regarded as an indirect expropriation. However, not only the revocation of existing rights, but also the denial of permits, the granting of which could have been legitimately expected, has been held to constitute an indirect expropriation in arbitral practice.

The *Goetz*[268] and the *Middle East Cement*[269] cases are examples of ICSID awards where the revocation of an investor's free zone benefits was considered to constitute measures having similar effect to expropriation. In both cases, the property rights of the investors had not been directly affected. Rather, the state measures amounting to expropriation were import prohibitions. In the *Goetz* case, the tribunal held:

> Since ... the revocation of the Minister for Industry and Commerce of the free zone certificate forced them to halt all activities ..., which deprived their investments of all utility and deprived the claimant investors of the benefit which they could have expected from their investments, the disputed decision can be regarded as a 'measure having similar effect'

[262] *Benvenuti and Bonfant*, above n 128.
[263] See also text at above n 128.
[264] *Starrett Housing*, above n 100 at 156.
[265] *Tippetts*, above n 99.
[266] *Phillips Petroleum Co v Iran*, above n 40.
[267] See text at n 184 above.
[268] *Goetz and Others v Republic of Burundi*, Award, 2 September 1998, 6 ICSID Reports 5.
[269] *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, Award, 12 April 2002, 7 ICSID Reports 178.

to a measure depriving of or restricting property within the meaning of Article 4 of the Investment Treaty.[270]

In the *Middle East Cement* case, the tribunal said:

> When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation ... This is the case here, and, therefore, it is the Tribunal's view that such a taking amounted to an expropriation within the meaning of Art. 4 of the BIT and that, accordingly, Respondent is liable to pay compensation therefor.[271]

In both cases, the reason why the denial of import privileges, through the revocation of free zone benefits, was held to constitute indirect expropriation was obviously the intensity of the interference and the particular (reasonable) investor expectations resulting from the earlier grant of special import treatment. It was exactly this intensity and legitimacy of expectations which was apparently lacking in the otherwise similar NAFTA cases of *Pope & Talbot*[272] and *SD Myers*.[273] In both cases, Canadian export regulations were regarded as an interference with investor rights protected by the NAFTA. However, Canada's temporary imposition of export restrictions did not qualify as substantial deprivation reaching the level of (indirect) expropriation.

Next to export/import licences, general operating licences are crucial for the economic use of investments. Their denial or revocation may be fatal to the entire investment. This is illustrated by the *Tecmed* case[274] which arose from the revocation of a licence for the operation of a landfill. An ICSID tribunal found that the failure to renew the operating permit constituted an expropriation or equivalent measure.[275] The *Metalclad* case[276] has become the NAFTA *cause célèbre* of a Chapter 11 award, which has actually found an indirect expropriation as a result of the denial of a construction permit necessary for the erection of a landfill to operate a waste disposal facility. Clearly, it was not the mere denial of a construction permit that led the tribunal to the finding of an expropriation. Rather, it was the

[270] *Goetz v Burundi*, above n 268 at para 124.

[271] Ibid para 107.

[272] *Pope & Talbot*, above n 43.

[273] *SD Myers*, above n 44.

[274] *Tecmed*, above n 15.

[275] Ibid at para 151. ('Based on the above; and furthermore considering that INE's actions (an entity of the United Mexican States '... in charge of designing Mexican ecological and environmental policy and of concentrating the issuance of all environmental regulations and standards') are attributable to the Respondent under international law and have caused damage to the Claimant, and [...] the Arbitral Tribunal finds and resolves that the Resolution and its effects amount to an expropriation in violation of Article 5 of the Agreement and international law.')

[276] *Metalclad Corp v United Mexican States*, above n 103.

disappointment of legitimate investor expectations created by the host state that was crucial for this result. In this case, the investor had been specifically assured by the Federal government that his project for a landfill had complied with all relevant environmental and planning regulations. It was against this background that the subsequent local and regional measures of denying the construction permit and declaring the land in question a national area for the protection of rare cactus were qualified as indirect expropriation:

> By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).[277]

Concluding Remarks

To a considerable extent, the recent practice of international courts and tribunals dealing with expropriation issues has concentrated on the problem of the scope of rights that are protected as property rights and may thus be expropriated, on the one hand, and on determining whether an indirect expropriation has taken place, on the other hand. With regard to the former issue and especially in the practice of investment treaty arbitration, the discussion frequently combines notions of property rights under general international law with the applicable definitions of investment under BITs. Especially in the latter field, an analysis of the pertinent case-law indicates that courts and, in particular, arbitral tribunals are developing elements to concretize the elusive concept of indirect expropriation in a way that may eventually crystallize in a coherent jurisprudence. In general, courts and tribunals have attempted to strike a fair balance between investor rights and the right of states to regulate. While the analysis of the case-law may suggest that states are gradually deprived of their freedom to regulate, in fact, most investment disputes do not end in a finding of regulatory expropriation. This general reluctance of investment dispute settlement institutions to make such findings is likely to be re-enforced by the more recent trends in the field of BITs and other investment agreements which provide for rather detailed rules concerning the occurrence of indirect expropriation.

[277] *Metalclad Corp v United Mexican States*, above n 103 at para 104.

Select Bibliography

Alexandrov, S, 'Breaches of Contract and Breaches of Treaty, The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*', 5 JWIT 555 (2004)

American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St Paul, Minn, American Law Institute, 1987)

Brower, CN, and Brueschke, JD, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998)

Brownlie, I, *Principles of Public International Law* (Oxford, Oxford University Press, 6th edn, 2003)

Byrne, KA, 'Regulatory Expropriation and State Intent', 38 Canadian YB Int'l L 89 (2000)

Christie, G, 'What Constitutes a Taking of Property under International Law?', 38 BYIL 307 (1962)

Cremades, BM, and Cairns, DJA, 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes', in N Horn (ed), *Arbitrating Foreign Investment Disputes* (The Hague, Kluwer Law International, 2004)

Dolzer, R, 'Indirect Expropriations: New Developments?', 11 NYU Env LJ 64 (2002)

——, and Stevens, M, *Bilateral Investment Treaties* (The Hague, Nijhoff, 1995)

Higgins, R, 'The Taking of Property by the State: Recent Developments in International Law', 176 Recueil des Cours 263 (1982-III)

Hobér, K, 'Investment Arbitration in Eastern Europe: Recent Cases on Expropriation', 14 Am Rev Int'l Arb 377 (2003)

Lillich, R, and Weston, B, *International Claims: Their Settlement by Lump-Sum Agreements* (Charlottesville, Va, University Press of Virginia, 1975)

Lowenfeld, A, *International Economic Law* (Oxford, Oxford University Press, 2002)

Newcombe, A, 'The Boundaries of Regulatory Expropriation in International Law', 20 ICSID Rev–FILJ 1 (2005)

Reisman, WM, and Sloane, RD, 'Indirect Expropriation and its Valuation in the BIT Generation', 74 BYIL 115 (2003)

Sacerdoti, G, 'Bilateral Treaties and Multilateral Instruments on Investment Protection', 269 Recueil des Cours 251 (1997)

Schreuer, C, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001)

Schwebel, S, 'On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law', in S Schwebel, *Justice in International Law* (Cambridge, Cambridge University Press, 1994)

Sohn, LB, and Baxter, RR, 'Responsibility of States for Injuries to the Economic Interests of Aliens', 55 AJIL 545 (1961)

Toope, SJ, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (Cambridge, Grotius Publishers, 1990)

UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (New York and Geneva, United Nations, 1998)

——, *Taking of Property* (New York and Geneva, United Nations, 2000)

Wälde, T, and Hobér, K, 'The First Energy Charter Treaty Arbitral Award', 22 Jo Int'l Arb 83 (2005)

Weiner, AS, 'Indirect Expropriations: The Need for a Taxonomy of "Legitimate" Regulatory Purposes', 5 International Law FORUM du droit international 166 (2003)

Weston, BH, '"Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation"', 16 Va J Int'l L 103 (1975)

Yannaca-Small, K, '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law', in OECD, *International Investment Law: A Changing Landscape* (Paris, OECD, 2005)

This offprint is taken from:

Muchlinski, Ortino and Schreuer

The Oxford Handbook of International Investment Law

ISBN: 9780199231386 Pub date: 26 June 2008 1352pp

For more information on this offprint or the editorial process, please contact:

Gwen Booth
Development Editor, Academic Law
Oxford University Press
Great Clarendon Street
Oxford OX2 6DP
Email: gwen.booth@oup.com

To order your copy:

By telephone: +44(0) 1536 741017

By fax: +44(0) 1536 454518

By email:
bookorders.uk@oup.com

By Post:
OUP
Saxon Way West
Corby, Northamptonshire
NN18 9ES

If you would like more information on this or any other OUP title, or would like to receive the latest OUP law catalogue, please contact:

Chris Wogan
Marketing Manager, Academic Law
Oxford University Press
Great Clarendon Street
Oxford OX2 6DP

Email: law.uk@oup.com

Visit our website at http://www.oup.com/uk/law