EXPROPRIATION IN INVESTMENT TREATY ARBITRATION

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THE CONCEPT OF EXPROPRIATION IN INVESTMENT TREATY ARBITRATION

A. An Evolving Concept

4.01 The concept of expropriation in investment treaty arbitration is still evolving. Deeply rooted in the past, certain aspects of the concept are recognized in customary international law such as the distinction between lawful and unlawful expropriation and the sovereign right of a State to expropriate property subject to certain conditions. However, there are numerous aspects in which international tribunals are split. These include fundamental issues such as whether omissions can amount to expropriation and to what extent the intent of the State matters. They also include concepts such as partial expropriation, legitimate expectations, and proportionality. Still other aspects are being revisited, namely, the nature of 'substantial deprivation'. This chapter explores the concepts of direct and indirect expropriation and the conditions for lawfulness of expropriation. Evidencing the evolving nature of expropriation, other aspects of the concept are dealt with in Chapter 5 (The Test for Expropriation). This is because, in many respects, when investment treaty tribunals decide cases, they are, in fact, shaping the concept.

B. Direct and Indirect Expropriation

4.02 A starting point in defining the concept of expropriation is the distinction between direct and indirect expropriation. International legal doctrine has traditionally distinguished between these two broad categories of expropriation.[1] Today, most takings of foreign investments are indirect. As Schreuer observes 'direct and overt expropriations have become rare.

[1] UNCTAD Report, *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, 2007, p. 56 available at www.unctad.org.

The typical form in which expropriations take place nowadays is indirect expropriations or measures having an equivalent effect.'[2]

4.03 Alongside the terms 'nationalisation' and 'expropriation', modern day investment treaties include phrases such as 'tantamount to a taking' or 'equivalent to a taking', which cover indirect takings.[3] Nearly almost all bilateral investment treaties (BITs) include these terms. The North American Free Trade Agreement (NAFTA),[4] Article 1110, refers to measures that are 'tantamount to nationalisation or expropriation'. Similarly, the Energy Charter Treaty (ECT),[5] Article 13, refers to measures 'having the effect equivalent to nationalisation or expropriation'. Investment treaty tribunals generally do not distinguish between indirect expropriation and measures 'tantamount' or 'equivalent' to a taking. An exception is *Waste Management Inc. v. Mexico* where the tribunal expressed the view that the phrase 'tantamount to nationalisation or expropriation' in NAFTA Article 1110(1) was intended to *add* to the reference to indirect expropriation[6]—a view rejected by subsequent tribunals.[7]

4.04 The majority of investment treaties do not include a definition for expropriation in their expropriation protection but this is changing with the new generation of BITs, some of which attempt to limit the scope of indirect expropriation or even exclude it. For example, the Brazil–Ethiopia BIT signed on 11 April 2018 provides that 'Each Contracting Party shall not *directly* nationalize or expropriate investments of investors of the other Contracting Party, except' and clarifies: 'For greater certainty, this Article only provides for direct expropriation, where an investment is nationalised or otherwise directly expropriated by way of formal transfer of title or ownership rights.'[8] The United States–Oriental Republic of Uruguay BIT signed on 4 November 2005 includes at its Annex B (which forms an integral part of the BIT)[9] a definition for both direct and indirect expropriation. Direct expropriation is defined as: 'where an investment is nationalised or otherwise directly expropriated through formal transfer of title or seizure' and indirect expropriation as: 'where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer or outright seizure'. The Annex lists a number of factors

[2] Schreuer, Chapter 3, The Concept of Expropriation under the ETC and other Investment Protection Treaties, *Investment Arbitration and the Energy Charter Treaty*, edited by Clarisse Ribeiro, JurisNet, 2006, p. 108.

[3] In a Letter of Submittal to the United States' President dated 1 May 2000, Madeleine Albright on behalf of the State Department, explains that the United States–Mozambique BIT is based on the 1994 US prototype and its Article III (Expropriation), para. 1, describes the obligations of Parties with respect to expropriation and nationalization of a covered investment. Ms. Albrights continues: 'These obligations apply to both direct and indirect expropriations through measures "tantamount to expropriation and nationalisation" and thus apply to "creeping expropriations"—a series of measures that effectively amounts to an expropriation of a covered investment without taking title.'

[4] North American Free Trade Agreement signed on 17 December 1992.

[5] Energy Charter Treaty signed on 17 December 1994.

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

[7] *Pope & Talbot v. Government of Canada*, UNCITRAL, Interim Award of 26 June 2000, para. 104, '"Tantamount" means nothing more than equivalent. Something that is equivalent cannot logically encompass more.' The tribunal in *SD Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award on the Merits of 13 November 2000, agreed with this analysis (para. 286). In *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Final Award of 16 December 2002, the tribunal deemed the scope of the expressions 'indirect taking' and 'tantamount to expropriation' to be 'functionally equivalent' (para. 100).

[8] Brazil–Ethiopia BIT, Article 7(5).

[9] United States–Oriental Republic of Uruguay BIT, Article 35.

to be considered on a case-by-case and fact-based inquiry to determine whether a measure, or series of measures, constitutes an indirect expropriation and caveats that, except in rare circumstances, non-discriminatory regulatory actions will not constitute an indirect expropriation. Another example is the Canada–Hong Kong BIT signed on 10 April 2016 which also lists factors at its Annex 1 to be considered in determining whether there has been an indirect expropriation.[10]

1. Direct expropriation

4.05 Direct expropriation entails the transfer of title and physical taking or seizure of property by a host State, for example, through legislative or administrative acts.[11] Direct expropriations were commonplace in the early twentieth century, in the period following the Second World War, and in the 1970s, however, as one tribunal observed a decade ago, 'nowadays direct expropriation is the exception rather than the rule, as States prefer to avoid opprobrium and the loss of confidence of prospective investors by more oblique means'.[12] Since then, although indirect expropriation continues to be the more common type of expropriation there has been a resurgence of direct expropriation in industries such as telecoms, electricity, oil and gas, and gold mining, particularly in Latin America and Africa.

4.06 Depending on the nature of the measures taken, direct expropriation can manifest in several different ways including by nationalization, specific takings, requisition, and confiscation. Specific takings have been described as cases in which a foreign firm (such as a firm dominating a market or industry) or a specific lot of land (such as necessary to build a road) is the target of the taking.[13] Nationalization is 'the expropriation of one or more major national resources as part of a general programme of social and economic reform'.[14] It has also been described as, 'the transfer to the State, by a legislative act and in the public interest, of property or private rights of a designated character, with a view to their exploitation or control by the State, or to their direction to a new objective by the State'[15] and 'massive or large-scale takings of private property in all economic sectors or on an industry—or

[10] Canada–Hong Kong, China SAR BIT, Article 10(1) (Expropriation) provides that 'for greater clarity, this paragraph shall be interpreted in accordance with Annex 1'.

[11] UNCTAD defines direct expropriation as 'a mandatory legal transfer of the title to the property or its outright physical seizure. Normally, the expropriation benefits the State itself or a State-mandated third party. In cases of direct expropriation, there is an open, deliberate and unequivocal intent, as reflected in a formal law or decree or physical act, to deprive the owner of his or her property through the transfer of title or outright seizure.' UNCTAD, *Expropriation: A Sequal*, 2012, page 6.

[12] *Telenor Mobile Communications AS v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, para. 69.

[13] UNCTAD Report *Taking of Property*, 2000, p. 11.

[14] Brownlie's *Principles* of *Public International Law*, 7th Edition, 2008, p. 532.

[15] Definition tentatively adopted by the Institute de Droit International in 1952 and citied by Domke in *Foreign Nationalisation—Some Aspects of Contemporary International Law*, 55 American Journal of International Law, 585–90, 1961, p. 588. Domke argues that nationalization differs from other types of expropriation in its scope and extent rather than its juridical nature, and the doctrinal distinction may have little practical effect in the reality of international legal relations. He further argues that the term 'expropriation', though usually applied to measures taken in individual cases, is sometimes used in instances where the word 'nationalization' as a measure of general change in the State's economic and social life would be more appropriate; however, the doctrinal viewpoint of distinguishing 'nationalization' from 'expropriation' may indeed have little practical effect in the reality of international relations and it might be preferable to use the more general term 'taking of property'.

sector-specific basis'.[16] Requisition is an official order laying claim to the use of property[17] and confiscation is the seizure and appropriation of property as a punishment for breach of the law, whether municipal or international.[18]

4.07 A hallmark of direct expropriation is the transfer of ownership to the State.[19] In *Sempra Energy International v. Argentina,*[20] the tribunal rejected a claim of direct expropriation of the claimant's indirect investment in two natural gas distribution licensees. The tribunal considered that for there to be a direct expropriation there must be at least some essential component of the property right transferred to the State, whereas, in the case at hand, there had been no effect on the legal element of the property, such as title to the property:

> The Tribunal does not in fact believe that there can be a direct form of expropriation if at least some essential component of the property right has not been transferred to a different beneficiary, in particular the State. In this case, it can be argued that economic benefits may have to some extent been transferred from the industry to consumers, or from the industry to another industrial sector, and that this will ultimately benefit society and the State as a whole. This does not, however, amount to an effect upon a legal element of the property held, such as title to property.[21]

The tribunal noted that in spite of all the difficulties which the licensees and the investors had experienced, they were still the rightful owners of the companies and their business. Whilst persuaded that many damages can be inflicted unintentionally and that the investor will be entitled to compensation if liability is found to exist, the tribunal concluded that a transfer of property and ownership requires positive intent and that this is not a question of formality, but rather one of establishing a causal link between the measure in question and the title to property.[22]

4.08 McLachlan, Shore, and Weiniger comment that arbitral tribunals have considered direct expropriation as being relatively easy to recognize: for example, 'government authorities take over a mine or factory, depriving the investor of all meaningful benefits of ownership and control' or 'there has been a compulsory transfer of property rights'. They note that 'one of the central elements of direct expropriation is that property must be "taken" by State authorities or the investor must be deprived of it by State authorities'.[23] Rather than recognising there has been an expropriation, in cases of direct takings, the issue normally turns on the legality of the expropriation and, in particular, whether compensation or adequate compensation has been paid.

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[16] UNCTAD Series on Issues in International Investment Agreements II, *Expropriation: A Sequel*, p. 5, available at www.unctad.org.

[17] Definition of 'requisition' in Oxford Dictionaries online.

[18] *Osborn's Legal Dictionary*, 10th Edition.

[19] Dolzer and Schreurer note 'the difference between a direct or formal expropriation and an indirect expropriation turns on whether the title of the owner is affected by the measure in question'. Dolzer and Schreurer, Principles of International Investment Law, Second Edition, 2012, OUP, p. 101.

[20] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007.

[21] Ibid, para. 280.

[22] Ibid, para. 282.

[23] McLachlan, Shore, and Weiniger, *International Investment Arbitration, Substantive Principles*, 2nd Edition, Oxford University Press, 2017, para. 8.68.

a. Specific takings

4.09 The case of *Ioannis Kardassopoulos v. Georgia*[24] is an example of a direct expropriation by way of a specific taking. The dispute concerned actions taken by Georgia in respect of the interests held by the claimants, Mr. Ioannis Kardassopoulos and Mr. Ron Fuchs, in an investment vehicle, GTI, which was devoted to the development of an oil pipeline for the transport of oil from the Azeri oil fields on the Caspian Sea through Georgia to the Black Sea, known as the 'Western Route'. The development of the Western Route was of significant national and strategic importance for Georgia as a means of securing its sovereignty following the breakup of the Soviet Union.[25] The claim was brought under the ECT and the BITs entered into between the Republic of Georgia and Greece and Israel, respectively.

4.10 In November 1991, the Georgian Cabinet of Ministers adopted Resolution No. 834 'About Some Activities Related to the Oil and Gas Production and Refining in the Republic of Georgia' authorizing the joint venture between Tramex, a company jointly owned by the claimants, and SakNavtobi, a Georgian State-owned oil company, for the purpose of exploiting the Georgian oil fields of Ninotsminda, Manavi, and Rustavi, as well as the export of oil under licence.[26] In the spring of 1992, Tramex and SakNavtobi signed a Joint Venture Agreement which created GTI, a joint venture vehicle owned in equal shares by Tramex and SakNavtobi. The Joint Venture Agreement provided for an initial term of twenty-five years, automatically renewable for a second twenty-five-year term unless either party notified its intention to terminate the agreement to the other party within six months of the expiry of the agreement.[27] A year later, GTI entered into a Deed of Concession by which it was granted a thirty-year concession over Georgia's pipelines.[28]

4.11 Thereafter, in December 1994, AIOC was formed by thirteen multinational oil companies as a 'no profit/no loss' joint oil operating company.[29] On 11 November 1995, President Shevardnadze adopted Decree No. 477 establishing the State-owned company, Georgian International Oil Corporation (GIOC).[30] On 20 February 1996, the Cabinet of Ministers adopted Decree No. 178 'for the purposes of creating essential favourable conditions for the transportation of oil and gas within the territory of Georgia'. The Decree provided that GIOC would represent Georgia in a contract with the AIOC, amongst other entities, for the construction and exploitation of the Samgori–Batumi pipeline. Its final provision cancelled 'all rights (given earlier by the Georgian government to any of the parties) contradicting the present Decree', thereby bringing to an abrupt end Tramex/GTI's rights in Georgia.[31]

4.12 The tribunal decided that Georgia had expropriated Mr. Kardassopoulos' investment in violation of Article 13(1) of the ECT. In its view, the claim presented a classic case of direct expropriation with Decree No. 178 having deprived GTI of its rights in the early

[24] *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, ICSID Case No. ARB/07/15, Award, IIC 458 (2010), 28 February 2010, dispatched 3 March 2010.
[25] Ibid, paras 2 and 3.
[26] Ibid, para. 74.
[27] Ibid, para. 77.
[28] Ibid, para. 95.
[29] Ibid, para. 135.
[30] Ibid, para. 147.
[31] Ibid, paras 155–7.

oil pipeline and Mr. Kardassopoulos' interest therein. The tribunal opined that the taking was not an exercise of the State's bona fide police powers and held that the deprivation was unlawful in that it was not in accordance with the requirements of lawful expropriation under the ECT. These were that the taking be in the public policy; non-discriminatory; with due process; and on the payment of payment of prompt, adequate, and effective compensation.[32]

4.13 The tribunal considered that it was arguable that the expropriation had been in the public interest and that there was a broader context to the expropriation, namely the need to find someone who could deliver a pipeline solution on a scale required to satisfy the prevailing geopolitical and economic concerns of Georgia during the mid-1990s.[33] The tribunal also accepted that there had been no discrimination. Although GTI's rights were taken away and handed to GIOC to the detriment of both Tramex and SakNavtobi, GIOC subsequently struck up a partnership with AIOC, another foreign entity. In other words, this was not a case in which the Georgian government discriminated against Tramex or Mr. Kardassopoulos as foreign investors, but rather a case in which it determined that there was a better deal to be had with a different foreign investor.[34] The tribunal held however that there had been a violation of due process in that Georgia had failed to ensure that there was a procedure or mechanism in place, either before the taking or thereafter, which allowed Mr. Kardassopoulos within a reasonable period of time to have his claims heard.[35] The tribunal further held that Georgia had breached the ECT by reason of its continuing failure to pay prompt, adequate, and effective compensation, as required by the terms of Article 13(1) of the ECT.[36] The tribunal determined that it was unnecessary to decide whether the failure to pay compensation itself rendered the expropriation unlawful because of its finding that Georgia had violated the due process criterion which thereby rendered the expropriation unlawful.[37]

b. Requisition

4.14 Requisition of property can constitute an expropriation although it would be very unusual to come across this form of expropriation in investment treaty claims given the specific nature of the measures. In the past, some of the most important international cases concerning expropriation (or allegations thereof) have involved measures of requisition.

4.15 In *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, the International Court of Justice (ICJ) considered a claim involving requisition of the ELSI factory and its assets.[38] The allegation was that, if not an overt expropriation, the taking might be regarded as a disguised expropriation of the shareholders' interests in ELSI. The Court held that there was no need on the facts of the case to resolve this question. This case is further considered in Chapter 2 (Test for Expropriation).

[32] Ibid, para. 387.
[33] Ibid, para. 392.
[34] Ibid, para. 393.
[35] Ibid, para. 396.
[36] Ibid, para. 408.
[37] Ibid, para. 389.
[38] *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, ICJ Judgment of 20 July 1989.

4.16 Another well-known case is the *Norwegian Shipowners' Claim*.[39] In this case, the Permanent Court of Arbitration found that contract rights had been expropriated by the United States' government. During the First World War, there was a serious shortage of ships both in Europe and the United States. Norwegian subjects, amongst others, directed their attention to the possibilities of shipbuilding in the United States. From July 1915 onwards, various contracts were placed by Norwegian subjects with shipyards in the United States. On 6 April 1917, the United States declared war against Germany. Thereafter, on 3 and 4 August 1917, the United States Shipping Board Emergency Fleet Corporation sent a general order of requisition by telegram to almost all the shipyards of the United States. The order contained in the letter of 3 August expressly requisitioned not only the ships and the material, but also the contracts, the plans, detailed specifications and payments made, and it even commandeered the yards (depriving them of their right to accept any further contracts). On 6 October 1917, the Chairman of the Shipping Board confirmed by letter that the Board had concluded that it was its duty to retain for urgent military purposes, all vessels being built in the United States for foreign account, title to which was commandeered by the United States on 3 August, and that decision included necessarily the vessels building for Norwegian account. The letter also stated that it was the Board's intention 'to compensate the owners of commandeered vessels, be they American, Allied or Neutral, to the full measure required by the generous principles of American Public Law'.

4.17 The tribunal held that the Norwegian ships were requisitioned on 6 October 1917.[40] It considered that whatever the intentions may have been 'the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be constructed.' The tribunal opined that 'in fact the claimants were fully and forever deprived of their property and that this amounted to a requisitioning by the exercise of the power of eminent domain within the meaning of American municipal law.'[41]

4.18 It was common ground between the parties, that, in the absence of any treaty, the Norwegian owners of the contracts were protected by the Fifth Amendment of the Constitution of the United States against any expropriation not necessary for public use, and that they were entitled to 'just compensation' for expropriation.[42] It was also common ground that 'just compensation' should be liberally awarded, and that it should be based upon the net value of the property taken. The tribunal determined that it was somewhat difficult to fix the real market value of some of these shipbuilding contracts and that the value must be assessed *ex aequo et bono*.[43] The tribunal further opined that 'as this is a case of expropriation', interest should be paid.[44]

4.19 Many investment treaties include a separate provision dealing with the requisition of an investment in specific circumstances, for example, war, armed conflict, civil strife, national emergency, and revolution. These provisions generally deal with compensation for losses although in some treaties compensation is linked to expropriation. For example, Article 5 of

[39] *Norwegian Shipowners' Claims*, Award of 13 October 1922, Report of International Arbitral Awards, Vol. 1, pp. 307–46.
[40] Ibid, p. 329.
[41] Ibid, p. 325.
[42] Ibid, p. 334.
[43] Ibid, p. 339.
[44] Ibid, p. 341.

the US Model BIT (2012) provides that any compensation for losses suffered by foreign investments owing to armed conflict or civil strife resulting, inter alia, 'from requisitioning of the covered investment or part thereof by the latter's forces or authorities' shall be 'prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation]'.

c. Nationalization

4.20 Although most investment treaties refer to 'expropriation *or* nationalisation', nationalization is commonly understood to be a form of expropriation. Garcia-Amador, the Special Rapporteur to the United Nations on State Responsibility, described nationalization as a type of expropriation, pointing out that, although there are differences between nationalization and expropriation pure and simple, many of the characteristic features of nationalization are found in expropriation:

> This type or form of expropriation is commonly referred to as 'nationalization'. In contrast to personal acts of expropriation, nationalization measures reflect changes brought about in the State's socio-economic structure (land reforms, socialization of industry or of some of its sectors, exclusion of private capital from certain branches of the national economy); or, looked at from another angle, nationalization measures constitute the instruments through which those changes in the former liberal economy are introduced. Although measures of this category are sometimes prescribed in the State's constitution, as a general rule they are adopted, and are always applied, pursuant to special procedures for carrying the nationalization into effect. There are also other differences, including some fairly marked ones, between nationalization and expropriation pure and simple, but any attempt to point them out would show that many of the characteristic features of the former can also be found, and in fact, often are found, in the latter.[45]

4.21 The Iran–US Tribunal also considered nationalization to be a form of expropriation,[46] as have investment treaty tribunals. In *Guaracachi America, Inc. and Rurelec Plc v. Bolivia*,[47] the claimants contended that the nationalization of their 50 per cent shareholding in a Bolivian company engaged in the energy sector, Empresa Eléctrica Guaracachi SA (EGSA), constituted an unlawful expropriation as, inter alia, no compensation was paid and due process had not been followed.[48] The nationalisation occurred on 1 May 2010 when President Evo Morales' issued Supreme Decree No. 0493 resulting in the transfer of Guaracachi America's shares in EGSA to the Bolivian National Electricity Company. On the other hand, Bolivia argued that the nationalization was lawful and that, with an equity interest of zero dollars held by the claimants in EGSA as of the nationalization date, it had no duty to compensate given that the BITs did not provide for payment of compensation in the event of nationalization of assets with no value. Bolivia did not deny that compensation should be paid following a nationalization but argued that this should only be in an amount equivalent to the fair market value of the investment and nothing more.[49]

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[45] Document A/CN.4/119, *Fourth Report on State Responsibility* by Mr F.V. Garcia-Amador, Special Rapporteur, Extract from the Yearbook of the International Law Commission, 1959, Vol. II, para. 48.

[46] *Amoco International Finance Corp. v. Islamic Republic of Iran*, Award No. 310-56-3, 10 Iran–US CTR 121, Award of 14 July 1987.

[47] *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17.

[48] Ibid, para. 281.

[49] Ibid, para. 290.

4.22 The tribunal found that the measures constituted an unlawful expropriation in that Bolivia had expropriated the investment without providing 'just and adequate compensation' as required by the expropriation provision in the UK–Bolivia BIT signed on 24 May 1988. The tribunal concluded that, had the valuation of the assets been zero, as contended by Bolivia, then no compensation would be due and the expropriation would have been legal. It found however that EGSA had in fact a positive value and Bolivia had acted wilfully and intentionally to obtain an expert valuation setting forth a negative value for EGSA.[50] The tribunal awarded compensation of just under USD 29 million increased by annually compounded interest at 5.6 per cent from 1 May 2010 until the date of full payment under the award.[51]

d. Confiscation

4.23 There is some confusion as to whether another type of taking, confiscation, can be classified as expropriation, thereby entitling the foreign investor to compensation under investment treaties. Confiscation has been described as 'the seizure and appropriation of property as a punishment for breach of the law, whether municipal or international'.[52] In a letter sent on 21 July 1938 to the Secretary of State to the Mexican Ambassador, Castillo Najera, in response to the continuing expropriation by the Mexican government of agrarian properties owned by American citizens without compensation, Cordell Hull, on behalf of the government of the United States, expressed the view that 'the taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future.'[53]

4.24 Investment treaties do not normally expressly refer to confiscation. One exception is the Iran–Greece BIT signed on 13 March 2000 which provides: 'Investments of investors of either Contracting Party shall not be nationalised, *confiscated*, expropriated or subjected to any other measure having equivalent effect except ...'. Investment treaty tribunals have nevertheless considered confiscations as expropriatory and compensable, although much depends on the facts of the case and the real purpose of the measure.

4.25 In *Mr. Franz Sedelmayer v. Russia*,[54] a German citizen brought a claim against the Russian Federation under the German–Russia BIT signed on 13 June 1989 which provides at Article 4: 'Dispossession measures, including nationalization or other measures having similar consequences may be applied in the territory of one Contracting Party to investments of investors of the other Contracting Party only in cases where these dispossession measures are carried out for reasons of public necessity, in accordance with the procedure established under the legislation of that Contracting Party and with the payment of compensation. Such measures must not be discriminatory in nature.'

4.26 In August 1991, the Police Department in Leningrad, Russia, (the GUVD), and the 'Sedelmayer Group of Companies' signed a Shareholder's Agreement establishing a joint

[50] Ibid, paras 438 and 441.
[51] Ibid, Chapter XII(g).
[52] *Osborn's Legal Dictionary*, 10th Edition.
[53] Letter dated 21 July 1938 from Cordell Hull to the Mexican Ambassador, Castillo Najera, Foreign Relations of the United States, Diplomatic papers, 1939, the American Republics, Vol. V.
[54] *Mr. Franz Sedelmayer v. Russian Federation*, Award, SCC Case No. 106/1998, IIC 106 (1998), 7 July 1998, Sweden; Stockholm Chamber of Commerce (SCC).

stock company, KOC. The goals of the company were to develop, install, produce, and repair police service equipment; to provide transportation and protection services for foreign and soviet citizens; and to import–export operations related to the production of electronic and other appliances. In November 1991, premises were transferred by GUVD for use by KOC in fulfillment of the Shareholder's Agreement. Thereafter, a Federal Property Fund was established to take over all the assets that other governmental agencies had contributed to joint ventures. The Deputy Chairman of the Property Fund ordered the chief of GUVD to transfer its shares in KOC to the fund. The activities of the Property Fund were later transferred to another governmental body, the Property Committee of the City of St Petersburg, the KUGI. Despite several efforts by the KUGI to have GUVD's share in KOC transferred, GUVD did not transfer the asset. In February 1992, the State Commercial Court issued a ruling in which the State registration of KOC was declared null and void due to alleged faults carried out in the capital contribution of KOC. In December 1994, the President of the Russian Federation, Boris Yeltsin, issued a Directive ordering the transfer of the premises to the Procurement Department of the President. Following instructions which were based on the Directive, GUVD transferred the premises to the Procurement Department. In September 1995, a court issued a ruling for the arrest and sealing up of buildings and structures at the premises. The premises were finally seized in January 1996.

4.27 The claimant alleged that its property had been confiscated as a result of the Directive and that this amounted to an unlawful expropriation in breach of the BIT. The Russian Federation denied this and relied on the court rulings declaring the framework of the KOC illegal and the fact that federal property had been returned to the Russian State by order provided for under Russian legislation.[55]

4.28 The tribunal expressed the view that it was possible for confiscatory measures to be regarded as expropriation under the treaty, but much depends on the real purpose of the measure. It concluded that the purpose behind the measures taken by the Russian authorities appeared to be to take hold of the premises used by the KOC[56] and that, in accordance with the expropriation protection in the treaty, an investor is entitled to compensation even if the expropriation measures are carried out for a public purpose in accordance with the relevant legislation. The tribunal explained that the situation would have been different if the alleged investment had been made in breach of Russian law as the investment would not be covered by the treaty and, consequently, the claimant would not be entitled under the treaty to compensation for confiscated investments.[57]

4.29 Taking each category comprising the investment in turn, the tribunal considered whether the confiscation could be considered as a compensable expropriation under the BIT. The first category of investment was the in-kind contribution of chattels to KOC's capital, including goods seized by the Russian authorities from the premises. The tribunal rejected Russia's objection that there had been an infringement of the regulations in Russian law concerning the time for payment of charter capital in the joint stock companies[58] and held that there was an expropriation and that compensation should be paid.[59]

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[55] Ibid, paras 261–2.
[56] Ibid, para. 279.
[57] Ibid, paras 283 and 284.
[58] Ibid, para. 354.
[59] Ibid, para. 366.

4.30 The second category of investment were vehicles and law enforcement equipment which allegedly had been confiscated or had lost their value due to the expropriation. Russia argued that the claimant had been repeatedly brought to administrative responsibility for violating custom regulations whilst carrying out his commercial activities.[60] The tribunal reiterated its finding that the purpose of the measures taken by the Russian authorities was to take hold of the premises and nothing indicated that the measures taken aimed at confiscating any movable assets from KOC including vehicles, at least primarily.[61] The tribunal held that, although it was impossible to express an opinion on the question as to whether the confiscation of the vehicles was well-founded or not, what mattered in this context was that the confiscation was decided by the customs authorities and that the decision had appeared to be taken independently of the decision to seal the premises. The tribunal therefore concluded that the confiscation of the vehicles could not be regarded as an expropriation under the treaty.[62]

4.31 The third category of investment related to the claimant's loss of investment made in the premises that is, reconstruction works and loss of the right to use the premises. The tribunal held that these investments had been expropriated and that it had not been shown that the liquidation of KOC was due to any fault committed by the claimant. Consequently, the liquidation order did not affect the claimant's right for compensation.[63]

4.32 Similarly, the tribunal in *EDF (Services) Ltd v. Romania*[64] considered the motive of the confiscation in determining whether the measures constituted an expropriation under the BIT. In this case, EDF brought a claim under the Bailiwick of Jersey–Romania BIT signed on 14 June 2005 alleging, inter alia, creeping expropriation of its investment. EDF's investment in Romania consisted of its participation in two joint venture companies, ASRO and SKY, with entities owned by the Romanian government.[65] On 5 September 2002, Romania passed Government Emergency Ordinance No. 104 (GEO 104), regulating duty-free business within airports. As a result, ASRO's duty-free licences were revoked. GEO 104 led to the closure of ASRO's duty-free operations at Constanta and Timisoara airports and the discontinuance of its duty-free operation at the Otopeni airport.[66] Following investigation of ASRO's activities, a fine was imposed and a sequestration of assets ordered by the Financial Guard on 26 November 2002. ASRO was declared bankrupt on 9 September 2004.[67]

4.33 Between May 1997 and November 2002, SKY provided in-flight duty free services on board the aircraft of its shareholder, Compania de Transportationuri Aeriene Romane Tarom's (TAROM), Romania's national airline company. Following the entry into force of GEO 104, SKY and TAROM obtained new duty-free licences. On 25 November 2002, TAROM terminated SKY's services agreement, refused to grant SKY further access to its aircraft, and took over for itself the in-flight duty-free business. On 1 July 2005, a

60 Ibid, para. 380.
61 Ibid, para. 385.
62 Ibid, paras 389 and 390.
63 Ibid, para. 437.
64 *EDF (Services) Ltd v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009.
65 Ibid, para. 46.
66 Ibid, para. 57.
67 Ibid, para. 59.

Bucharest tribunal granted TAROM's petition to withdraw from SKY and EDF then become its sole shareholder.[68]

4.34 The tribunal considered that the only possible takings were the sanctions of the Financial Guard, for which there was a judicial recourse, and GEO 104, which, in its view, was a non-compensable police power measure. It decided that the measures in question, taken in their aggregate effect, did not constitute a creeping expropriation, and moreover, there was no evidence of a coordinated pattern adopted by the State for their implementation.[69]

4.35 The tribunal determined that the confiscation sanction was within the legal power of the Financial Guard and it had been applied in good faith.[70] It found that the investi gation was part of the Financial Guard's duty as a public body entrusted with the power to assess and punish contraventions. The investigation was commenced on receipt of an anonymous letter signed by employees of the claimant, maintaining that unlawful activities were being carried out by various EDF-related companies. In the course of its investigation, the Financial Guard discovered that ASRO's legal existence had expired as of 27 January 2002. The resulting sanctions, particularly the confiscation of ASRO's revenues earned after that date, were issued pursuant to the applicable law.[71]

4.36 Subsequent to the confiscation, ASRO undertook various procedural steps before the Romanian courts to obtain the reimbursement of the revenues confiscated by the Financial Guard. The tribunal noted that due process was assured to the claimant by Romania and that the maintenance of the sanction applied by the Financial Guard to ASRO was due to ASRO's failure to comply with procedural requirements. These requirements, which were known or should have been known to the claimant and ASRO, were, in the tribunal's view, in keeping with normal procedural rules. The tribunal concluded that 'unless a breach of the BIT is otherwise found, which the Tribunal has excluded, the BIT is not an appropriate instrument to provide the investor with a means to enforce rights available to it under the applicable legal system but that it failed to duly and timely invoke.'[72]

2. Indirect expropriation

4.37 In contrast to direct expropriation, indirect expropriation involves 'the total or near-total deprivation of an investment without a formal transfer of title or outright seizure'.[73] Higgins defines indirect takings as 'the deprivation of property rights through acts of the State other than outright takings, whether in the form of nationalisation, expropriation, confiscation, requisition or sequestration' and argues that where physical property has been concerned, the issue has been fairly clear: interferences which *significantly deprive* the owner of the use of his property amount to a taking of that property.[74] Schreurer similarly submits that the decisive element in an indirect expropriation is the substantial loss of control or economic

[68] Ibid, para. 63.
[69] Ibid, para. 308.
[70] Ibid, para. 311.
[71] Ibid, para. 281.
[72] Ibid, para. 313.
[73] UNCTAD Report *Taking of Property*, 2000, p. 4, available at http://www.unctad.org.
[74] Higgins, *The Taking of Property by the State: Recent Developments International Law*, Académie de droit international. Recueil des Cours, 1982, III, tome 176, The Hauge, M. Nijhoff, 1983, pp. 267 and 324.

value of a foreign investment without a physical taking.[75] Paulsson and Douglas endorse a case-by-case development of the concept.[76]

4.38 Various terms are used to describe indirect expropriation. As the UNCTAD Report, *Expropriation, A Sequel*, observes: 'the terminology is not fully uniform, and one can encounter references to de facto, creeping, constructive, disguised, consequential, regulatory or virtual expropriation. All of these are equivalents or subcategories of indirect expropriation.'[77]

4.39 Increasingly, common forms of indirect expropriation are creeping expropriation (Chapter 6), regulatory expropriation (Chapter 7), contractual expropriation (Chapter 8), and judicial expropriation (Chapter 9). Regulatory, contractual, and judicial expropriations may also constitute a creeping expropriation where they are part of a series of acts and omissions which, in their totality, amount to an expropriation.

(1) Creeping expropriation:
UNCTAD defines creeping expropriation as 'the slow and incremental encroachment of 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.'[78] The Commentary to Section 712 of the Restatement of the Law (Third) of Foreign Relations of the United States (the United States' Third Restatement) similarly defines creeping expropriation as 'actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages'. Reisman and Sloane define the concept as 'in the paradigmatic case, an expropriation accomplished by a cumulative series of regulatory acts or omissions over a prolonged period of time, no one of which can necessarily be identified as the decisive event that deprived the foreign national of the value of its investment'.[79] Fortier and Drymer explain that creeping expropriation involves 'processes which are not acts *per se*, singular and direct in consequence, but a process which, notwithstanding that it may be aimed at other entirely legitimate regulatory objectives and does not involve a single instance of an outright taking, nonetheless has the effect, often degree-by-degree, of depriving the owner of his fundamental right'.[80]

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[75] Schreuer, Chapter 3, Rapport: The Concept of Expropriation under the ECT and other Investment Protection Treaties, *Investment Arbitration and the Energy Charter Treaty*, edited by Clarisse Ribeiro, JurisNet, 2006, citing inter alia Brownlie 5th Edition, 1998, Higgins 1982, and Reisman and Sloane 2003 at 113, 121 as authority for this proposition (paras 12 and 33 and footnotes 15 and 53).

[76] Paulsson and Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, Arbitrating Foreign Investment Disputes, Kluwer Law International, 2004, pp. 145–58.

[77] UNCTAD, *Expropriation*, A Sequel, p. 11 at n. 16, citing Weston, *Constructive Takings under International Law: A Modest Foray into the Problem of Creeping Expropriation*, 16 Virginia Journal of International Law, 1976, pp. 105–06 and Stern, In Search of the Frontiers of Indirect Expropriation, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* edited by AW Rovine, Martinus Nijhoff, 2007, pp. 38–9.

[78] UNCTAD Report, *Taking of Property*, 2000, pp. 11–12.

[79] Reisman and Sloane, *Indirect Expropriation and its Valuation in the BIT Generation* 2004, Yale Faculty Scholarship Series, Paper 1002, p. 128

[80] Fortier and Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, Caveat Investor*, 19 ICSID Review—Foreign Investment Law Journal, Volume, 2004, p. 294

(2) Regulatory expropriation:
UNCTAD defines regulatory takings as takings of property that fall within the police powers of a State, or otherwise arise from State measures like those pertaining to the regulation of the environment, health, morals, culture, or economy of a host country.[81] Some tribunals have held that bona fide regulatory measures will not constitute compensable expropriation even where an investment has been destroyed. Other tribunals have held that no matter how laudable a regulatory measure is, if it constitutes an expropriation then the State has a responsibility under international law to compensate the foreign investor. A number of factors come into play when distinguishing between the two. To constitute bona fide regulation, the measure must be in the public interest and the measure must not be discriminatory. The impact of the measure is a crucial distinguishing factor. Some tribunals have also considered the legitimate expectations of the investor and the proportionality of the measure with the public purpose objective.

(3) Contractual expropriation:
Contractual expropriations are takings by the State of a foreign investor's contractual rights that entail the international responsibility of the State. Contractual expropriations are different to normal contractual disputes in that the State steps outside of its role as a contract party and acts in its sovereign capacity in expropriating the investment. There must, as with other forms of indirect expropriation, be a substantial deprivation of the investment.

(4) Judicial expropriation:
Whereas most cases of expropriation result from action by the executive or legislative arm of the State, a decision by the judicial arm of the State which deprives the investor of its investment may also amount to an expropriation. It is characteristic of judicial expropriation that the court proceedings are usually instigated by a private party for his own benefit, and not that of the State.[82]

3. Efforts at codification of customary international law

García-Amador defined the act of 'affecting' property in very broad terms to include direct and indirect acts as well as partial and temporary deprivation: **4.40**

> The act of 'affecting' as understood in its etymological and, to some extent also, juridical sense—it includes every measure which consists of or directly or indirectly results in the total or partial deprivation of private patrimonial rights, either temporarily or permanently.[83]

[81] UNCTAD Report, *Taking of Property*, 2000, p. 12.

[82] *Rumeli Telekom AS & Telsim Mobil Telekomikasyon Hizmetleri AS v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, paras 702–4 citing *Oil Field of Texas Inc v The Government of the Islamic Republic of Iran*, Award of 8 October 1986, Journal of World Trade, Vol. 21(2), 1 April 1987, 'It is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court'.

[83] Garcia-Amador, para. 40 at n. 45.

4.41 Similarly, efforts at codification of expropriation under customary international law point to the distinction between direct and indirect expropriation and to concepts such as creeping expropriation, partial expropriation, and temporary interference:

(1) The 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (The Harvard Draft Convention), Article 10(3) refers to direct and indirect expropriation, as well as to temporary interference:

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

(2) The 1967 OECD Draft Convention on the Protection of Foreign Property, Article 3 'Taking of Property' provides that 'no Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions [on legality] are complied with'. The Notes and Commentary to Article 3 explain that indirect expropriation may include measures that purport to be temporary and creeping expropriation:

> 3(a) ... In the case of direct expropriation ... the law of the property rights concerned is the avowed object of the measure. By using the phrase 'to deprive ... directly or indirectly' in the text of the Article it is, however, intended to bring within its compass any measures taken with the intent of wrongfully depriving the national concerned of the substance of his rights and resulting in such loss (e.g. prohibiting the national to sell his property or forcing him to do so at a fraction of the fair market price).
>
> (b) ... interference may amount to an indirect expropriation. Whether it does will depend on its extent and duration. *Though it may purport to be temporary, there comes a stage at which there is no immediate prospect that the owner will be able to resume the enjoyment of his property.* Thus in particular Article 3 is meant to cover 'creeping expropriation' ... Under it, measures otherwise lawful are applied in such a way as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation. As instances may be quoted as excessive or arbitrary taxation, prohibition of dividend distribution coupled with compulsory loan; impositions of administrators; prohibition of dismissal of staff; refusal to access to raw materials or essential export or import licenses.
>
> (c) The taking of property within the meaning of the Article must result in a loss of title or substance (emphasis added).

(3) Comment (g) to Section 712 of the 1987 United States' Third Restatement, Explanatory Note, points to the possibility of partial expropriation:

> Subsection (1) [relating to responsibility for injury from improper takings] 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 (emphasis added).

4. Arbitral practice—defining the concept of expropriation

4.42 Investment treaty tribunals have long recognized the distinction between direct and indirect expropriation. In *Metalclad Corp. v. Mexico*,[84] a NAFTA tribunal held that Mexico had indirectly expropriated the claimant's investment in a hazardous waste landfill in that the Municipalities' denial of a construction permit without any basis and subsequent administrative and judicial actions effectively and unlawfully prevented the claimant's operation of the landfill. The tribunal further held that an ecological decree issued by the Governor of the Mexican State of San Luis Potosi and covering an area of 188,758 hectares including the landfill site, created therein an ecological preserve, with the effect of barring forever the operation of the landfill.[85] The tribunal interpreted the meaning of 'measures tantamount to expropriation' under Article 1110 in broad terms to include not only direct expropriation but also indirect expropriation with the *effect* of depriving the investor, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of property:

> Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference 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.[86]

4.43 This definition of expropriation, whilst since adopted by many tribunals, has been criticized by others as too wide. In a challenge to the arbitral award that went before the Supreme Court of British Columbia, the presiding judge, Mr. Justice Tyscoe, considered that 'the tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110' which was in addition to 'the more conventional notion of expropriation involving a taking of property'. This definition was, in Justice Tyscoe's opinion, sufficiently broad to include an otherwise legitimate re-zoning of property by a municipality or other zoning authority.[87]

4.44 In *Chemtura Corp. v. Canada*,[88] the tribunal observed that the award in *Metalclad v. Mexico* had given rise to some controversy as to the degree of the required deprivation.[89] The tribunal noted that, although the award was not set aside by the Supreme Court of British Columbia, on the issue of the definition of expropriation Justice Tysoe had described the tribunal's characterization of expropriation as 'extremely broad'.[90] The tribunal did not consider it necessary to settle the legal controversy to decide the case before it.[91] Instead, it considered that the determination as to whether there has been a 'substantial deprivation' was a fact-sensitive exercise to be conducted in the light of the circumstances of each case and observed that one important feature of fact-sensitive assessments is that they cannot be conducted on the basis of rigid binary rules.

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[84] *Metalclad Corp. v. United Mexican States*, Case No. ARB(AF)/97/1, Award, dispatched 30 August 2000.
[85] Ibid, paras 106 and 109.
[86] Ibid, para. 103.
[87] *United Mexican States v. Metalclad Corporation*, Decision of 2 May 2001, 2001 BCSC 664, para. 99.
[88] *Chemtura Corp. v. Canada*, Ad Hoc Tribunal (UNCITRAL), Award, IIC 451 (2010), 2 August 2010.
[89] Ibid, para. 248.
[90] Ibid, citing *United Mexican States v. Metalclad Corporation*, 2001 BCSC 664.
[91] Ibid, para. 249.

4.45 In *Técnicas Medioambientales Tecmed SA v. Mexico*,[92] the tribunal considered that it is generally understood that the terms 'equivalent to' and 'tantamount to' found in treaties refer to indirect expropriation. The tribunal also considered that a distinction should be drawn between creeping expropriation and de facto expropriation, although they are both usually considered forms of indirect expropriation:

> Generally, it is understood that the term '... equivalent to expropriation ...' or 'tantamount to expropriation' included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called 'indirect expropriation' or 'creeping expropriation', as well as to the above-mentioned de facto expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect. 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 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.[93]

4.46 The majority of investment treaty arbitrations concern claims of indirect expropriation, either stand alone, or in addition, or as an alternative to, claims of direct expropriation. Chapters 6 to 9 deal with arbitral practice in respect to different types of indirect expropriation such as creeping, regulatory, contractual, and judicial expropriation.

C. Lawful Expropriation and Illegal, Wrongful, or Unlawful Expropriation

4.47 A central feature of the concept of expropriation is that expropriation is lawful so long as certain conditions are met. Investment treaty tribunals normally determine first, whether an expropriation has occurred, and then consider whether it is lawful or unlawful with reference to the treaty conditions of legality.[94] As the tribunal in *Fireman's Fund Insurance Company v. Mexico* observed, the conditions for lawful expropriation do not bear on the question as to whether an expropriation has occurred—to start by an inquiry as to whether the conditions in the treaty for avoiding liability in the event of an expropriation have been fulfilled would be 'to put the cart before the horse'.[95] The conditions of legality for expropriation—public interest, non-discrimination, due process, and compensation—are considered below in respect to customary international law and the treaty conditions of legality.

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[92] *Técnicas Medioambientales Tecmed SA v. Mexico*, ARB(AF)/00/2, Award, 10 ICSID Rep 130, (2004) 43 ILM 133, IIC 247 (2003), 29 May 2003.

[93] Ibid, para. 114.

[94] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, para. 442.

[95] *Fireman's Fund Insurance Company v. Mexico*, ARB(AF)/02/1, Award of 17 July 2006, para. 174.

1. Conditions of legality under customary international law

4.48 An established principle in customary international law, as reflected in modern-day investment treaties, is that expropriation is intrinsically lawful so long as certain conditions are met. This principle was recognized by the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case.[96]

4.49 On 1 July 1922, the Polish Court of Huta Krolewska rendered a decision to the effect that the registration of the Oberschlesische, a German company, as owner of a nitrate factory in Upper Silesia was to be cancelled and that the previously existing situation was to be restored and the right of ownership in the property to be registered in the name of the Polish Treasury. This decision was immediately carried out. Two days later, the Polish government took over the management of the factory by way of a ministerial decree delegating a new manager with full powers to take charge of the factory. The Polish government subsequently entered the factory in the list of property transferred to it under the Treaty of Versailles.[97] The government of the German Reich submitted the dispute concerning its interests to the PCIJ and contended that Poland's actions violated the Geneva Convention, in particular, the provision on expropriation.

4.50 The PCIJ held that the factory had been unlawfully expropriated by Poland. In Judgement No. 7 of 25 May 1926, the Court opined that 'expropriation is only lawful in the cases and under the conditions provided for in Article 7 and the following articles; apart from these cases, or if these conditions are absent, expropriation is unlawful'.[98] The Court further opined that 'expropriation for reasons of public utility, judicial liquidation, and similar measures were not affected by the Convention'.[99] In Judgment No. 13 of 13 September 1928, the Court reiterated the distinction between lawful and unlawful expropriation, opining that the seizure of the property was not an expropriation which could subsequently be rendered lawful by the payment of fair compensation; rather, 'it was a seizure of property, rights, and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention'.[100] This has been interpreted by some to mean that compensation is not a legality requirement of expropriation under customary international law.

4.51 Thirty years later, Garcia-Amador, the Special Rapporteur to the United Nations on State Responsibility, noted that the right of expropriation is recognized in international law and traditionally has been regarded as a discretionary power inherent in the sovereignty of the State and that, other than in exceptional circumstances, an expropriation, pure and simple, will constitute a lawful act of the State:

> The right of 'expropriation', even in its widest sense, is recognized in international law, irrespective of the patrimonial rights involved or of the nationality of the person in whom they are vested. This international recognition has been confirmed on innumerable occasions in diplomatic practice and in the decisions of courts and arbitral commissions, and, more

[96] *Case Concerning Certain German Interests in Polish Upper Silesia (The Merits)*, Judgment No. 7, 25 May 1926.

[97] Ibid, pp. 21 and 22.

[98] Ibid, p. 21.

[99] Ibid, p. 22.

[100] *Case Concerning The Factory At Chorzów (Claim For Indemnity) (The Merits)*, Judgment No. 13, 13 September 1928, p. 47.

recently, in the declarations of international organizations and conferences. Traditionally this right has been regarded as a discretionary power inherent in the sovereignty and jurisdiction which the State exercises over all persons and things in its territory, or in the so-called right of 'self-preservation', which allows it, inter alia, to further the welfare and economic progress of its population .... In fact, save in the exceptional circumstances ... , an act of expropriation, pure and simple, constitutes a lawful act of the State and, consequently, does not per se give rise to any international responsibility whatever.... such responsibility can only exist and be imputable if the expropriation or other measure takes place in conditions or circumstances inconsistent with the international standards which govern the State's exercise of the right or, in other words, contrary to the rules which protect the acquired rights of aliens against 'arbitrary' acts or omissions on the part of the State.[101]

4.52 UNCTAD observes that the international debate on expropriation for most of the twentieth century focused on the conditions under which an expropriation could be considered lawful but today it appears to be recognized that the basic principles in customary international law are that foreign-owned property may not be expropriated, or subject to a measure tantamount to expropriation, unless four conditions of legality are met—public purpose, non-discrimination, due process, and compensation.[102] However, this view is not universally shared. For example, Reinisch, writing on the 'Legality of Expropriations', comments:

> As opposed to the uncertain state of the customary international law on the conditions under which a State may lawfully expropriate the property of foreigners, treaty-based investment law contains fairly clear rules on the legality requirements of expropriation. These largely correspond to the 'Western' views demanding a public purpose, non-discrimination as well as compensation often among the lines of the *Hull* formula demanding 'prompt, adequate and effective' compensation.[103]

4.53 In particular, and despite the long history of expropriation, some commentators consider that it is not yet settled whether due process and compensation are conditions of legality for an expropriation under customary international law. On the other hand, others argue that investment treaties (including their expropriation provisions) now represent customary international law[104] or play a role in its formation.

2. Treaty conditions of legality

4.54 International investment treaties, including BITs, recognize that expropriation is lawful and condition its legality on certain requirements. These are cumulative, and treaties typically include the following four conditions:[105]

(a) that the expropriation must be in the public interest;
(b) it must not be discriminatory;

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[101] Garcia-Amador, paras 41 and 42 at n. 45.

[102] UNCTAD Report, *The Investor-State Dispute Settlement and Impact on Investment Rulemaking*, 2007, p. 56.

[103] Reinisch, Legality of Expropriation, *Standards of Investment Protection*, Oxford University Press, 2008, p. 176.

[104] Schwebel, The Influence of Bilateral Investment Treaties on Customary International Law, *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 98 (31 March–3 April 2004), p. 27.

[105] *See* for example, Cyprus–Hungary BIT signed on 24 May 1989, Article 4; Egypt–Finland BIT signed on 5 May 1980, Article 3; Ireland–Czech Republic BIT signed on 28 June 1996, Article 5; Kyrgyzstan–Indonesia BIT signed on 18 July 1995, Article II; Argentina–Thailand BIT signed on 5 February 2002, Article 6(1); Greece–Azerbaijan BIT signed on 23 March 2006, Article 5; Saudi Arabia–Malaysia BIT signed on 25 October 2000, Article 5; Spain–Syrian Republic BIT signed on 6 September 2003, Article 5.

(c) due process must be followed;
(d) compensation is payable.

For example, Article 14 of the ASEAN Comprehensive Agreement provides:

> A Member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation ('expropriation'), except:
>
> (a) for a public purpose;
>
> (b) in a non-discriminatory manner;
>
> (c) on payment of prompt, adequate, and effective compensation; and
>
> (d) in accordance with due process of law.

Article 13 of the ECT similarly provides:

> Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subject to a measure having effect equivalent to nationalisation or expropriation (hereafter referred to as 'Expropriation') except where such Expropriation is:
>
> (a) for a purpose which is in the public interest;
>
> (b) not discriminatory;
>
> (c) carried out under due process of law; and
>
> (d) accompanied by the payment of prompt, adequate and effective compensation.

Article 1110(1) of NAFTA also provides:

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

The Organisation of Islamic Cooperation Investment Agreement[106] includes reference to all four conditions of legality at its Article 10, and qualifies the compensation requirement with reference to the laws of the host State:

> It will, however, be permissible to:
>
> Expropriate the investment in the public interest in accordance with the law, without discrimination and on prompt payment of adequate and effective compensation to the investor in accordance with the laws of the host state regulating such compensation, provided that the investor shall have the right to contest the measure of expropriation in the competent court of the host state.

4.55 Many BITs include all four conditions of legality—(a)(b)(c)(d), although there are exceptions. For example, the UK–Argentina BIT (11 December 1990), the Egypt–Belarus BIT (20 March 1997), and the Uganda–France BIT (3 January 2003) do not include (c) as a

[106] The Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organisation of the Islamic Conference (the Organization of Islamic Cooperation Investment Agreement) signed on 5 June 1981.

condition. The Syria–Germany BIT (2 August 1977) does not include (b). The German–Haiti BIT (21 July 1976), the UK–Peoples Republic of Benin BIT (27 November 1987), the Great Britain–Haiti BIT (18 March 1985), and the Pakistan–Korea BIT (15 April 1990) do not include either (b) or (c) as conditions. Moreover, Article IV of paragraph 2 of the Treaty of Amity, applied by the US–Iran Tribunal—the case law of which is sometimes referred to in investment treaty cases—includes only (a) and (d).

4.56 At the turn of the millennium, UNCTAD observed that the development of a fourth requirement, due process, is an emerging trend in international investment agreements.[107] It further noted that 'while BIT provisions do mention due process requirements, they usually seem to allude to the requirement only after a taking so that there could be a review of whether proper compensation standards were used in assessing the compensation. They do not face the issue of whether or not a foreign investor should be given an opportunity to show the regulatory authority the reason why measures proposed by it should not be taken against the investor. Indeed, this is a matter of the internal public law of the host State.'[108]

4.57 Nowadays, the due process requirement is commonly found in BITs. Unusually, the NAFTA specifies at its Article 1110(c) that an expropriation must be in accordance with due process of law *and Article 1105(1)*—that is, the minimum standard of treatment in accordance with international law, including fair and equitable treatment (a standard of protection interpreted to include due process) and full protection and security.[109]

4.58 Although rare, some BITs also contain additional conditions of legality to (a)(b)(c)(d). For example, the UK–Columbia BIT (17 March 2010) references good faith. The US–Egypt BIT (11 March 1986) provides that an expropriation must not violate any specific contractual engagement. The US–Georgia BIT (7 March 1994) and the US–Congo BIT (12 February 1990) include that expropriation must be in accordance with the fair and equitable and non-discrimination provisions in the respective treaties. The Japan–Cambodia BIT (14 June 2007) provides that expropriation must be in accordance with the fair and equitable, full protection and security, and umbrella clause provisions of the treaty. The Turkey–Oman BIT (4 February 2007) provides that expropriation must be in accordance with the non-discrimination, national treatment, and most-favoured nation treatment provisions of the treaty.

3. The conditions: public interest, non-discrimination, due process, compensation

a. Public interest

4.59 The requirement that an expropriation must be in the public interest to be lawful is a well-established principle of customary international law. The notion of arbitrariness has been emphasized when examining measures taken in the public interest in that the measures taken by the State must not be arbitrary. The 'essential' or 'genuine' purpose of the measure is also pivotal in the analysis. Garcia-Amador opined that 'It is accordingly sufficient to

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[107] UNCTAD Report, *Taking of Property*, 2000, UNCTAD/ITE/IIT/15, Executive Summary.

[108] Ibid, p. 32.

[109] See *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award of 17 July 2006 para. 208; and *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Award of 16 March 2017, para. 417.

require that all States should comply with the condition or requirement which is common to all; namely that the power to expropriate should be exercised only when expropriation is necessary and is justified by genuine public purpose or reason; if this raison d'etre is plainly absent, the measure of expropriation is "arbitrary" and therefore involve the international responsibility of the State'.[110]

4.60 Attempts at codification of expropriation under customary international law recognize the public interest condition of legality. Article 10(1) of Harvard Draft Convention states that a taking is wrongful if it is not for a public purpose:

> The taking, under the authority of the State, of any property of an alien, or of the use thereof, is wrongful:
>
> (a) if it is not for a public purpose clearly recognized as such by law of general application in effect at the time of the taking; or
> (b) if it is in violation of a treaty.

4.61 The United States' Third Restatement, Section 712, provides that a State is responsible under international law for injury resulting from, inter alia, a taking by the State of the property of a national of another State that is not for a public purpose. The Restatement notes at its comment (e) that the public purpose requirement is reiterated in most formulations of international law.

4.62 Bernhardt's *Encyclopedia of International Law* caveats the right of a State to expropriate alien property for the public good with the proviso that it must not be for the sole purpose of increasing the State's resources:

> As to the admissibility of an expropriation, it has never been questioned that a State has in principle the right to expropriate alien property for the public good. Expropriatory measures must be designed to transfer the property to the State, or for the public good to an owner capable of using the property in a more beneficial manner. It would not be appropriate to use the power of expropriation for the sole purpose of increasing the State's resources.[111]

4.63 Commentators agree that, to be lawful, an expropriation must be in the public interest. For example, Reinisch notes that the need of a purpose or public interest in order to legitimate an expropriation has long been considered part of customary international law and observes that the practice of international tribunals and courts demonstrate that 'in spite of a broad deference to expropriating States, they are nonetheless willing to assess whether such public purpose has been genuinely pursued'.[112]

4.64 The concept of public interest is broad, and courts and tribunals are reluctant to second-guess the public policy justification of the State. The UNCTAD Report, *Taking of Property*, observes, 'usually, a host country's determination of what is in its public interest is accepted'.[113] The United States' Third Restatement, Section 712, comment (e) similarly observes:

> That limitation [the taking for public purpose], however, has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and

[110] Garcia-Amador, para. 59 at n. 45.
[111] Bernhardt's *Encyclopedia of International Law*, 1st Edition, p. 322.
[112] Reinisch, Legality of Expropriations, *Standards of Investment Protection*, Oxford University Press, 2008, pp. 178 and 186.
[113] UNCTAD Report, *Taking of Property*, 2000, p. 13.

not subject to effective reexamination by other States. Presumably, a seizure by a dictator or oligarchy for private use could be challenged under this rule.

4.65 In *Amoco International Finance Corp. v. Iran*,[114] the tribunal considered whether the expropriation of the claimant's investment in a joint venture company, Khemco, for the purpose of building and operating a plant for the production and marketing of sulphur, natural gas liquids, and liquified petroleum gas was lawful. The tribunal considered this with reference to Article IV(2) of the Treaty of Amity.[115] The Treaty of Amity stipulates that property shall not be taken except for a public purpose, nor without the prompt payment of 'just compensation'. The tribunal opined that the expropriation would only be lawful if the conditions in the treaty were actually met.[116]

4.66 The tribunal found that the claimant's rights and interests under the joint venture agreement, including its shares in Khemco, had been lawfully expropriated by Iran.[117] The tribunal accepted that the expropriation was for a public purpose, namely the nationalization of the oil industry in Iran initiated by the 1951 Nationalisation Act, with a view to implementing one of the main economic and political objectives of the new Islamic government.[118] The tribunal noted that 'a precise definition of the "public purpose" for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested. It is clear that, as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that States, in practice, are granted extensive discretion'.[119]

4.67 That said, the tribunal emphasized that there must be a genuine public policy justification, which would not be the case if the purpose of the expropriation was to avoid contractual obligations or if it was only for financial gain. The tribunal further observed that, in cases of nationalization, the public policy justification of obtaining a greater share, or the totality, of the revenues from the natural resource, for the development of the country, has not generally been denounced as unlawful and illegitimate.[120]

4.68 In *Goetz and ors v. Burundi*, the tribunal opined that, in the absence of an error of fact or law or of an abuse of power or of a clear misunderstanding of the issue, it was not the tribunal's role to substitute its own judgment for the discretion of the government of Burundi of what are imperatives of public need.[121]

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[114] *Amoco International Finance Corp. v. Islamic Republic of Iran*, Award of 14 July 1987 at n. 46.

[115] Article IV(2) reads: 'Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.'

[116] *Amoco International Finance Corp. v. Islamic Republic of Iran*, Award of 14 July 1987, para. 104 at n. 46.

[117] Ibid, paras 128 and 182.

[118] Ibid, para.146.

[119] Ibid, para. 145.

[120] Ibid.

[121] *Goetz and ors v. Republic of Burundi*, ICSID Case No. ARB/95/3, Decision on Liability of 2 September 1998, para. 126.

4.69 In *Rusoro Mining Ltd v. Venezuela*,[122] the claimant alleged that its investment in gold mining in Venezuela had been unlawfully expropriated. On 17 August 2011, President Chávez publicly announced the immediate nationalization of the gold mining industry in Venezuela. Shortly after, on 16 September 2011, Venezuela adopted the Nationalization Decree. All mining rights held by Rusoro through its subsidiaries were automatically extinguished by law as of 15 March 2012. After Rusoro's formal withdrawal from the mining areas on 31 March 2012, all of its mining rights and other assets located in Venezuela were taken over by the Bolivarian Republic.[123]

4.70 The tribunal held that Venezuela had complied with the public policy requirement in the BIT, opining that States enjoy extensive discretion in establishing their public policy and that it is not the role of investment tribunals to second-guess the appropriateness of the political or economic model adopted by the legitimate organs of a sovereign State. The tribunal held that the Nationalization Decree clearly stated its purpose, and such purpose was a legitimate aim of economic policy. On its face, the Decree therefore complied with the public purpose requirement.[124] However, the tribunal held that the expropriation was in violation of other treaty conditions of legality by Venezuela's failure to pay 'prompt, adequate and effective compensation'.[125] The tribunal awarded Rusoro the sum of USD 966,500,000 as compensation for the expropriation of its investment, plus interest compounded annually from 16 September 2011 until actual payment.[126]

4.71 Although investment treaty tribunals continue to show deference to States in the determination of what is in their public interest, they increasingly examine the measures and take a robust stance where there is a clear absence of a public policy justification or the genuine purpose of the expropriatory measure is not for the public interest.

4.72 In *Siag and Vecchi v. Egypt*,[127] the tribunal rejected Egypt's public policy justification for the direct expropriation of the claimant's parcel of oceanfront land on the Gulf of Aqaba on the Red Sea from Egypt. In *ADC Affiliate Ltd and ors v. Hungary*,[128] the tribunal rejected Hungary's public policy justification for the expropriation of the claimant's investment in and related to the Budapest-Ferihegy International Airport. In *Siemens AG v. Argentina*,[129] the tribunal questioned Argentina's public policy justification for measures taken in relation to the claimant's investment in a project for the implementation of an immigration control, personal identification, and electoral information system. In *Yukos Universal Ltd v. Russia*,[130] the tribunal opined that whether the destruction of Russia's leading oil company and largest taxpayer was in the public interest was 'profoundly questionable'. In

[122] *Rusoro Mining Ltd v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, IIC 850 (2016), dispatched 22 August 2016.

[123] Ibid, paras 373 and 377.

[124] Ibid, para. 385.

[125] Ibid, para. 410.

[126] Ibid, para. 904.

[127] *Siag and Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award, IIC 374 (2009), 11 May 2009, dispatched 1 June 2009.

[128] *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006.

[129] *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Award and Separate Opinion, IIC 227 (2007), 6 February 2007.

[130] *Yukos Universal Ltd v. Russian Federation*, PCA Case No. AA 227, Final Award, IIC 652 (2014), ICGJ 481 (PCA 2014), 18 July 2014, Permanent Court of Arbitration (PCA).

Belokon v. Kyrgyzstan,[131] the tribunal concluded that the expropriation of Manas Bank by Kyrgyzstan was unlawful and that the expropriation had not been for a public purpose.

4.73 In *Vestey Group Ltd v. Venezuela*,[132] the tribunal introduced a 'reasonable nexus' test to determine whether the measure had a reasonable nexus with the declared public purpose or, in other words, was at least capable of furthering that purpose. In this case, the claimant alleged unlawful expropriation of its cattle farming business by Venezuela in violation of the UK–Venezuela BIT signed on 15 March 1995. In 1999, Venezuela adopted a new constitution mandating a land reform and the elimination of large idle estates. To implement the land reform, Venezuela passed the Land Law on 13 November 2001. The Land Law authorized the State to recover illegally occupied idle estates for public utility purposes and social use. After failed negotiations, in 2011 Venezuela ordered the recovery of all the remaining farms operated by the claimant and took control over its movable and immovable property located on the farms.[133] The BIT provided that expropriations and measures having equivalent effect must be 'in public purpose related to the internal needs of the Party, on a non-discriminatory basis and against prompt, adequate and effective compensation'. The tribunal held, like others before it, that the treaty criteria for legality were cumulative.[134]

4.74 The tribunal found that the measures taken by Venezuela violated the public purpose criteria. Firstly, the tribunal assessed whether there existed a public purpose. In doing so, it concurred with Venezuela that for purposes of this assessment States deserve broad deference.[135] The tribunal deferred in this regard to Venezuela's policy determination that the purpose of the measures was 'to ensure the availability and timely access to food by its citizens, as part of its national plan to ensure food self-sufficiency'.[136] This finding did not however end the inquiry. The tribunal also assessed whether the impugned expropriatory measure was 'for' the public purpose as the expropriation provision in the BIT required. The tribunal introduced a 'reasonable nexus' test, questioning whether the measure had a reasonable nexus with the declared public purpose:

> In doing so, it must consider all the relevant circumstances, including the government's post-expropriation conduct. While the objective is not to review the effectiveness of the measures, the government's failure to advance a declared purpose may serve as evidence that the measure was not taken in furtherance of such purpose. Thus, the idea is to determine whether the measure had a reasonable nexus with the declared public purpose or in other words, was at least capable of furthering that purpose.[137]

4.75 The tribunal concluded that there was no obvious nexus between Venezuela's declared purpose to achieve wider public access to food and the expropriation of the farm. Firstly, the farm in fact shared the burden of meeting the alimentary needs of the population. A productive private farming enterprise selling the entirety of its beef output on the domestic

[131] *Belokon v. Kyrgyzstan*, Ad Hoc Tribunal (UNCITRAL), Award, IIC 760 (2014), 24 October 2014.
[132] *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, dispatched 15 April 2016.
[133] Ibid, paras 48 and 49.
[134] Ibid, para. 250.
[135] Ibid, para. 294.
[136] Ibid, para. 296.
[137] Ibid, para. 296.

market at regulated prices contributed to the implementation of the State's access to food policy. Further, nothing on record suggested that the farm's output had increased after the expropriation or that the population gained wider or cheaper access to the beef produced by the farm.[138] Secondly, the tribunal rejected the justification advanced by Venezuela that the takeover of the farm was necessary to guarantee wider public access to its genetically superior cattle. On the contrary, the facts showed that the claimant regularly sold its purebred cattle and semen of high genetic quality to local producers whereas, under the government's control, the farm sold purebred cattle at higher than regulated prices. Moreover, even if this was the aim, measures lighter than expropriation were available.[139] Thirdly, it rejected Venezuela's argument that the aim of the measure to facilitate public access to food warranted the redistribution to the people of the large uncultivated land plots in private hands (latifundios). This justification did not apply given the farm was a productive enterprise.[140] Although the tribunal did not find an obvious nexus with the public interest, it dispensed with a definitive ruling on this requirement given its other findings that Venezuela had failed to accord due process or provide compensation for the expropriation.

4.76 The 'reasonable nexus' text is not mentioned in the UK–Venezuela BIT, although it is found in a few BITs.[141] Despite this, the tribunal in *Vestey* gave definition to the test in that, whilst giving broad deference to a State's stated public policy objectives, it also questioned whether the expropriatory measures had a close enough connection to the policy objectives and took into account all the relevant circumstances, including the government's post-expropriation conduct. This inquiry will undoubtedly curb a State's ability to justify expropriatory conduct by reference to public policy but it has yet to be seen whether the test will be more widely adopted by tribunals.

4.77 The public policy objective of the State can also play an important role in regulatory expropriations. The question as to when measures taken by a host State constitute, on the one hand, a valid exercise of the State's police powers to regulate or, on the other hand, a compensable expropriation, continues to cause controversy in investment treaty law. In these circumstances, tribunals closely examine the State's public policy justification and some tribunals have adopted a proportionality test between the impact of the measures and the public policy objective. Chapter 7 (Regulatory Expropriation) considers arbitral practice in this regard.

b. Non-discrimination

4.78 The non-discrimination requirement is relevant to the concept of expropriation in two respects. Firstly, it is a condition of legality for expropriation in most investment treaties and in customary international law.[142] Secondly, to distinguish

[138] Ibid, para. 297.
[139] Ibid, para. 298.
[140] Ibid, para. 299.
[141] For example, the Senegal–India BIT, signed on 3 July 2008, Annex 5.
[142] 'Discriminatory action taken against a foreign investor gives rise to a venerable claim under customary international law. In investment treaties, this claim is based on a negative prohibition against discriminatory treatment of the foreign investor or a positive undertaking to provide national treatment (treatment the same as that provided to the host country's citizens) or most favoured nation treatment, which is that treatment promised to similarly-situated citizens of other countries.' Bishop, Crawford, and Reisman, *Foreign Investment Disputes*, 2nd Edition, Wolters Kluwer, 2014, para. 1.09.

non-compensable bona fide regulation from expropriation. [143] This is further considered in Chapter 7.

4.79 Maniruzzaman submits that the requirement that expropriation be non-discriminatory is an accepted principle of customary international law and entails two elements: firstly, the measures directed against a particular party must be for reasons unrelated to the substance of the matter, for example, the company's nationality. Secondly, discrimination entails like persons being treated in an equivalent manner.[144] Efforts at codification of customary international law emphasize discrimination on the basis of nationality. The United States' Third Restatement comments:

> [f]ormulations of the rules on expropriation generally include a prohibition of discrimination, implying that a program of taking that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law.

Furthermore:

> Discrimination implies unreasonable distinction. Takings that invidiously single out property of persons of a particular nationality would be unreasonable; classifications, even if based on nationality, that are rationally related to the state's security or economic policies might not be unreasonable.[145]

4.80 The 2000 UNCTAD Report, *Taking of Property*, observed that, traditionally, the non-discrimination requirement related particularly to the singling out of aliens on the basis of nationality or ethnicity, but as regulatory takings become more prominent, there has been a progressive change to the scope of the requirement, for example, any action that is without legitimate justification is now considered contrary to the non-discriminatory requirement, even absent any singling-out on the basis of nationality:

> Progressively however, as the issue of regulatory takings becomes prominent, any taking that is pursuant to discriminatory or arbitrary action, or any action that is without legitimate justification, is considered to be contrary to the non-discrimination requirement, even absent any singling-out on the basis of nationality. This includes prohibition of discrimination with regard to and payment of compensation requirements. Moreover, the non-discrimination requirement demands that governmental measures, procedures and practices be non-discriminatory even in the treatment of members of the same group of aliens.[146]

4.81 A decade on, the UNCTAD Report, *Expropriation: A Sequel*, focuses solely on whether the measure is discriminatory based on the investor's nationality. UNCTAD concludes that 'an expropriation which targets a foreign investor is not discriminatory *per se*: the expropriation must be based on, linked to, or taken for reasons of, the investor's nationality'.

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[143] Reinisch, *Standards of Investment Protection*, Oxford University Press, 2008, p. 186, comments, 'The non-discrimination requirement is a standard both in customary international law and in most treaty provisions addressing the legality of expropriation. The precise content of this non-discrimination requirement, however, remains unclear.'

[144] Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8(1) Journal of Transnational Law and Policy, 1998, pp. 57–77, p. 59. Reinisch also submits (citing Maniruzzaman) that, 'The non-discrimination requirement is a standard element both in customary international law and in most treaty provisions addressing the legality of expropriations.' Reinisch, Legality of Expropriation, *Standards of Investment Protection*, Oxford University Press, 2008, p. 186.

[145] United States' Third Restatement, Section 712, Comment f.

[146] UNCTAD Report, *Taking of Property*, 2000, p. 13.

The Report cites *GAMI Investments v. Mexico* where the tribunal held that the takings were not discriminatory and 'GAMI [the foreign investor] had failed to demonstrate that the measure it invokes resulted from or have any connection with GAMI's participation in GAM [the local company].' The Report also cites *ADC v. Hungary* where the tribunal held that the treatment received by foreign investors as a whole was discriminatory, finding, 'in order for a discrimination to exist, particularly in the expropriation scenario, there must be different treatments to different parties'. A third case cited by the Report is *Eureko v. Poland* where the tribunal found that frustration of the right to acquire further shares constituted an expropriation and was discriminatory in nature for reason that the State had mistreated the claimant based on its foreign nationality.[147]

4.82 In *GAMI Investments v. Mexico*,[148] the finding of non-discrimination (cited by UNCTAD) was in relation to Article 1102(2) of the NAFTA on national treatment. Other tribunals have also relied on tests for discrimination adopted in the context of other treaty standards to determine whether expropriatory measures are discriminatory. In the case of *GAMI*, only some sugar mills in the country were expropriated and some of these belonged to Mexican corporations which had no foreign shareholders. The tribunal consequently dismissed the claimant's argument that mills belonging to GAM, its Mexican subsidiary, were expropriated simply because it had a US minority shareholder.[149] The tribunal was also unpersuaded that GAM's circumstances were demonstrably so 'like' those of non-expropriated mill owners that it was wrong to treat GAM differently. Mexico had decided that nearly half of the mills in the country should be expropriated in the public interest. The tribunal was of the view that the measure was plausibly connected with a legitimate goal (ensuring that the sugar industry was in the hands of solvent enterprises) and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.[150]

4.83 In *Eureko BV v. Poland*,[151] the tribunal held that Poland's failure to conduct an IPO of PZU, a Polish insurance company in which the Dutch investor held shares, was clearly discriminatory. The measures had been proclaimed by successive Ministers of the State Treasury as being pursued in order to keep PZU under majority Polish control and to exclude foreign control such as the claimant.[152]

4.84 Investment treaty case law has emphasized that the determination of discrimination is fact specific and depends on the circumstances of the case. Treatment will be discriminatory if, in a like situation, a comparator is treated differently without justification. In *Parkerings-Compagniet AS v. Lithuania*,[153] the tribunal rejected the claimant's claim that the termination by Lithuania of an agreement entered into between it and the Vilnius Municipality to create, maintain, and enforce a public parking system and to operate the street parking and ten multi-storey car parks, constituted an unlawful expropriation on the basis that the

[147] UNCTAD Report, *Expropriation: A Sequel*, 2012, pp. 34–36.

[148] *GAMI Investments, Inc. v. Mexico*, Ad Hoc Tribunal (UNCITRAL), Final Award, IIC 109 (2004), 15 November 2004.

[149] Ibid, para. 112.

[150] Ibid, para. 114.

[151] *Eureko BV v. Poland*, Ad Hoc Tribunal (UNCITRAL), Partial Award and Dissenting Opinion, IIC 98 (2005), 19 August 2005.

[152] Ibid, para. 242.

[153] *Parkerings-Compagniet AS v. Republic of Lithuania*, Award of 11 September 2007 at n. 94.

expropriation claim was a contractual, not treaty claim. The tribunal considered the issue of discrimination in the context of another alleged treaty breach (most-favoured-nation treatment), and, in doing so, considered the concept of discrimination under general international law. The tribunal opined that discrimination is to be ascertained by looking at the circumstances of the individual case and involves either issues of law or fact. The tribunal further opined that to violate international law, discrimination must be unreasonable or lacking proportionality:

> Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State: at least, Article IV of the Treaty [MFN] does not include such requirements. However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context.[154]

4.85 In *Quiborax SA and Non Metallic Minerals SA v. Bolivia*,[155] the tribunal held that Bolivia unlawfully expropriated the claimants' investment in mining concessions and that there had been discrimination without justification in Bolivian law for the differential treatment. The tribunal found that there was compelling evidence on record of discriminatory intent showing, in particular, that measures taken targeted the claimant's local subsidiary company because of the Chilean nationality of its main shareholder. The tribunal applied the test for discrimination in *Saluka Investments BV (the Netherlands) v. the Czech Republic* (albeit in *Saluka* the test was adopted in the context of the fair and equitable treatment standard): State conduct is discriminatory, if: (i) similar cases are (ii) treated differently (iii) and without reasonable justification. As to the third element, the tribunal agreed with the tribunal in *Parkerings* that there are situations that may justify differential treatment, and this was a matter to be assessed under the specific circumstances of each case.[156]

4.86 On the facts, the tribunal found that the claimant's local subsidiary company and other mining companies operating in the Río Grande Delta were audited and fined for alleged errors in export declarations and additionally one lost its environmental licence at the same time but that the claimant's subsidiary was the only company that lost its concession. The tribunal concluded that the claimant's subsidiary had received different treatment to other companies in like circumstances.[157]

4.87 In *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. Argentina*,[158] the tribunal found that Argentina had unlawfully expropriated the claimants' investment

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[154] Ibid, para. 368.

[155] *Quiborax SA and Non Metallic Minerals SA v. Bolivia*, ICSID Case No. ARB/06/2, Award, IIC 739 (2015), dispatched 16 September 2015.

[156] Ibid, para. 247 citing at footnotes *272 and 274 Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 313 and *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, para. 368.

[157] Ibid, para. 247.

[158] *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award of 21 July 2017.

in two airlines but dismissed the claimants' contention that the expropriation was unlawful for reason also that Argentina had discriminated against them in providing subsidies to competitors but not to their airlines. The tribunal considered that, in order to make out this element of their claim, the claimants must demonstrate that Argentina expropriated their investment in a discriminatory manner and that this requires 'differential treatment of the Claimants' investment from other similar investments in like circumstances'.[159]

4.88 The tribunal held that the claimants had failed to establish that individual government members' statements about the alleged goal of 're-Argentinizing' the airlines led to discriminatory treatment that was unfair or inequitable—they had not demonstrated that any of the government members alleged to have demanded the re-Argentinization of the airlines were involved in or had any influence on Argentina's decision to expropriate. The tribunal further held that the claimants had failed to prove that their investment was expropriated because it was owned by foreigners[160] and they had not provided evidence of other similar investors in like circumstances whose investments were not expropriated. The tribunal found instead that the evidence indicated that the claimants' investment was in fact expropriated because its continued operation in Argentina would allow the government to fulfil the public interest of connectivity.[161]

4.89 In *Total SA v. Argentina*,[162] the tribunal dismissed the claimant's claim for indirect expropriation of its investment in the power generation sector in Argentina. Although the tribunal's consideration of discrimination under international law was in the context of the national treatment standard, it has subsequently been referred to by tribunals when considering discrimination in the context of the legality of expropriation. The tribunal considered that to determine whether treatment is discriminatory it is necessary to identify a comparator in a 'like situation' or 'similarly-situated' and that the basis of likeness will vary depending on the legal context in which the notion has to be applied:

> In order to determine whether treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation. In economic matters the criterion of 'like situation' or 'similarly-situated' is widely followed because it requires the existence of some competitive relation between those situations compared that should not be distorted by the State's intervention against the protected foreigner.[163] This is inherent in the very definition of the term 'discrimination' under general international law that:
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> > 'Mere differences of treatment do not necessarily constitute discrimination ... discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are

[159] Ibid, para. 1019.
[160] Ibid, para. 1020.
[161] Ibid, para. 1021.
[162] *Total SA v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, IIC 484 (2010), 21 December 2010, dispatched 27 December 2010.
[163] The tribunal noted in a corresponding footnote: 'This is but an application of the fundamental, traditional principle that a finding of discrimination (i.e., of an inferior treatment applied in respect of a relevant regulation) presupposes a comparison between persons, things or activities that are "eiusdem generis" (of the same species), See International Law Commission, Draft Articles on Most-Favoured-Nation Clauses with Commentaries, Y.B. ILC 1978, Vol. II(2), 8–72. There is no reason why this precondition should not apply equally in investment protection as in trade matters, where the requirement of "likeness" is spelled out as to products in Article I.1 and II.2 of GATT and in Article II.1 and XVII of GATS as to services. (that include direct investments in the service sectors under Article I.2 (c) GATS).'

treated in the same way.' (R. Jennings, A. Watts (eds.), Oppenheim's International Law, 9th ed. (Longman, 1992), Vol. I, p. 378).

The elements that are at the basis of likeness vary depending on the legal context in which the notion has to be applied and the specific circumstances of any individual case.[164]

4.90 In *Olin Holdings Ltd v. Libya*,[165] the tribunal held that the expropriation of the claimant's investment in a dairy and juice factory in Libya was discriminatory as well as without due process or prompt or effective compensation and therefore in violation of the expropriation provision of the Cyprus–Libya BIT signed on 30 June 2004. The measures complained of included the issuance of an Expropriation Order on 19 October 2006 which expropriated a parcel of land along the Tripoli Airport Road, including Olin's factory. In 2008 the Libyan authorities accepted to expressly exempt two of Olin's competitors from any destruction or relocation: Al-Aseel Juice Plant, a privately owned Libyan company, as well as the State-owned OKBA Dairy Factory.

4.91 In finding that the expropriation was discriminatory, the tribunal referred to its earlier findings of discrimination in the context of the national treatment standard.[166] In its analysis of national treatment, the tribunal referred to the passage set out above from *Total*. The tribunal summed up the findings of *Total* as: 'Accordingly, if the Claimant can prove that it was treated less favourably than a person similarly situated, then there would be discriminatory treatment unless the Respondent can prove that such treatment was justified.'[167] The tribunal framed the test as follows:

(1) Has the claimant proved that Olin, OKBA and Al-Aseel are similarly situated?
(2) Has the claimant proved that Libya treated Olin less favourably than OKBA and Al-Aseel?
(3) If the answer to these two questions is yes, has the Respondent proved that the difference of treatment is justified?[168]

4.92 The tribunal answered the first question in the affirmative. All three companies operated in the same business sector, namely the dairy and juice market in Libya, and all three companies were also closely situated on the map of Tripoli, in the same industrial zone. The fact that the factories operated in the same business sector was, in the tribunal's view, an appropriate comparator, reinforced by the existence of a similar location. The tribunal also answered the second question in the affirmative. The tribunal found that Olin had not received a formal and official expropriation exemption unlike the two national competitors. The tribunal considered that such an exemption would have given Olin the assurance that the land on which its factory was erected would not be expropriated, nor would its building risk destruction. The tribunal concluded that these, and other measures, meant that Olin was operating in less favourable circumstances. The tribunal concluded that Libya had failed to prove that the treatment was justified[169] and awarded Olin EUR 20 million as compensation for its losses.

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164 *Total SA v. Argentina*, para. 210 at n. 162.
165 *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Award of 25 May 2018.
166 Ibid, para. 174.
167 Ibid, para. 203 citing in a corresponding footnote Newcombe and Paradell, Law and Practice of Investment Treaties—Standards of Treatment 162, Wolters Kluwer, 2009.
168 Ibid, para. 204.
169 Ibid, paras 205–17.

In *Belokon v. Kyrgyzstan*,[170] the tribunal opined that, for a determination that actions are discriminatory in the sense of the BIT it would mean a comprehensive discrimination susceptible to destroying an entire investment, as opposed to incidental discriminatory acts.[171] **4.93**

Discriminatory conduct in cases of nationalization does not include differential treatment of foreign investors if the nationalization is carried out by general criteria and it so happens that, as a consequence, foreign investors are treated differently. Foigel argued that nationalization directed against both nationals and foreigners must be illegal if, in similar situations, the interests of foreigners are given a lower degree of protection than others of the nationals of the country concerned but there is no unlawful discrimination where, according to municipal law, property is not protected against acts of nationalization and the State carries out an act of nationalization by general criteria, if in actual fact the nationalization measures only affect foreigners.[172] **4.94**

In *Amoco International Finance Corp. v. Iran*,[173] the tribunal rejected the claimant's contention that the nationalization of its interest in a joint venture in the oil sector in Iran was discriminatory. The claimant relied on the fact that, in another of the Iranian National Petroleum Company's joint ventures, the Japanese share of a consortium was not expropriated whilst, in contrast, all American interested in petrochemical joint ventures with NPC were expropriated. Iran contended that, as the Single Article Act Concerning the Nationalisation of the Oil Industry in Iran applied to the entire industry, irrespective of nationality, it could not be discriminatory. The tribunal declined to find that the expropriation was discriminatory on the basis that peculiarities discussed by the parties could explain why the Japanese company was treated differently and that reasons specific to the non-expropriated enterprise, or to the expropriated one, or to both, may justify such a difference of treatment.[174] **4.95**

In *Rusoro Mining Ltd v. Venezuela*,[175] the tribunal found that Venezuelan and foreign investors in the gold sector were equally affected by the Nationalization Decree and, whilst it was true that Venezuela's State-owned companies were not negatively affected by the Nationalization Decree, this was a necessary consequence of the nationalization of a productive sector in which privately owned and State-owned companies coexist. The tribunal opined that, in situations like this where privately owned enterprises are expropriated while State-enterprises remain unaffected, this difference of treatment cannot be considered to amount to discrimination. **4.96**

c. Due process

Notwithstanding that the ICJ has held that 'willful disregard of due process' in the context of taking will be arbitrary,[176] there are differing views as to whether due process is a settled condition of legality of expropriation under customary international law. Moreover, the scope of the due process requirement is not entirely clear. **4.97**

[170] *Belokon v. Kyrgyzstan*, Award of 24 October 2014 at n. 131.

[171] Ibid, para. 213.

[172] Foigel, *Nationalisation, A Study in the Protection of Alien Property in International Law*, London Sevens, 1957, pp. 46–7.

[173] *Amoco International Finance Corp. v. Islamic Republic of Iran*, Award of 14 July 1987 at n. 46.

[174] Ibid, para. 142.

[175] *Rusoro Mining Ltd v. Venezuela*, Award, dispatched 22 August 2016 at n. 122.

[176] In the *Elettronica Sicula SPA (ELSI)*, Judgment of 20 July 1989, ICJ Rep. 1989, p. 15, the ICJ considered whether an act of requisition was arbitrary and defined arbitrariness as a 'willful disregard of due process, an act which shocks, or at least surprises, a sense of juridical propriety ...' (para. 124).

4.98 The requirement of due process is cited by some commentators in addition to (a)(b)(d) as a condition for lawful expropriation[177] and *Oppenheim's International Law* identifies, as the most clearly established condition of lawful expropriation, that the expropriation must not be arbitrary and must be based on the application of duly adopted laws.[178]

4.99 The OECD includes due process as a requirement of legality for the taking of property in the Draft Convention on the Protection of Foreign Property, concluding that, in general, the term implies that when a property is taken, the measures must be free from arbitrariness:

> The Notion of Due Process of Law. (a) In essence, the contents of the notion of due process of law make it akin to the requirements of the 'Rule of Law', an Anglo-Saxon notion, or the 'Rechtsstaat' as understood in continental law. Used in an international agreement the content of this notion is not exhausted by a reference to the national law of the Parties concerned. The 'due process of law' of each of them must correspond to the principles of international law; (b) In view of the variety of national rules that give expression to the notion, its precise definition in terms of international law is difficult. On analysis—this term—which is used in some US Bilateral Investment Treaties—implies that whenever a State seizes property, the measures taken must be free from arbitrariness. Safeguards existing in its Constitution or other laws or established by judicial precedent must be fully observed; administrative or judicial machinery used or available must correspond at least to the minimum standard required by international law. Thus the term contains both the substantive and procedural elements; (c) ... (d) This analysis shows that, used in the context of an international agreement, the notion of 'due process of law' means that the national of a Party may be deprived of his property by measures taken by another Party only subject to the safeguards and conditions provided for by national law and the principles of international law.[179]

4.100 The 1998 OECD Draft Multilateral Agreement on Investment includes due process alongside public interest, non-discrimination, and compensation as requirements of legality for expropriation and further explains at Article 2.6:

> Due process of law includes in particular the right of an investor of a Contracting Party which claims to be affected by expropriation by another Contracting Party to prompt review of its case, including, the valuation and payment of compensation in accordance with the provision of this Article by a judicial authority or other competent or independent authority of the latter Contracting Party.

4.101 In contrast, Reinisch submits that general conclusions on the 'due process' requirement must remain tentative and considers that, as opposed to the public purpose and the non-discrimination pre-requisite, the due process requirement seems to be less certainly

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[177] Paulsson and Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, Arbitrating Foreign Investment Disputes, Kluwer Law International, 2004, pp. 145–58; Fortier and Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, Caveat Investor*, 19 ICSID Review, Foreign Investment Law Journal, 2004; Schreuer, Chapter 3, Rapport: The Concept of Expropriation under the ECT and other Investment Protection Treaties, *Investment Arbitration and the Energy Charter Treaty*, edited by Clarisse Ribeiro, JurisNet, 2006; Sheppard, Chapter 3, Comments on the Rapport: The Distinction between Lawful and Unlawful Expropriation, *Investment Arbitration and The Energy Charter Treaty*, edited by Clarisse Ribeiro, JurisNet, 2006—endorses Schreuer's view; Reinisch, *Standards of Investment Protection*, Oxford University Press, 2008, p. 191; Schill, *The Multilateralisation of International Investment Law*, Cambridge University Press, 2009, p. 15.

[178] *Oppenheim's International Law*, edited by Jennings and Watts, 9th Edition, p. 920.

[179] The Notes and Comments to Article 3 of The OECD Draft Convention on the Protection of Foreign Property, 1967. Article 3(1) reads: 'No party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with: (1) the measures are taken in the public interest and under due process of law ....'

established in customary international law. Reinisch notes however that the due process requirement is very widely used in investment treaties and that the limited case law suggests that a fair procedure offering the possibility of judicial review is crucial.[180]

4.102 Some efforts at codification of customary international law and some commentators identify as customary principles for lawful expropriation (a)(b)(d), without reference to (c)—due process.[181] For example, Rubins and Kinsella summarize customary international law on expropriation as follows:

> Under customary international law, a State is sovereign within its territory and is at liberty to take control of alien property. This sovereignty, however, exists within the framework of international law, which requires that the taking be nondiscriminatory and carried out for a public purpose and obliges the State to pay compensation in the full amount of the value of the property taken.[182]

The authors submit that the state of customary international law is reflected in Section 712 of the United States' Third Restatement which provides that expropriation is unlawful if it is not for a public purpose or is discriminatory or is not accompanied by the provision of just compensation.[183]

4.103 Similarly, Dolzer and Schreuer cite (a)(b)(d) and explain that given due process is an expression of the minimum standard under customary international law and of the requirement of fair and equitable treatment it is not yet certain whether due process adds, in the context of expropriation, an independent condition of legality:

> It is today generally accepted that the legality of a measure of expropriation is conditioned on three (or four) requirements. These requirements are contained in most treaties. They are also seen to be part of customary international law. These requirements must be fulfilled cumulatively:
>
> i. The measure must serve a public purpose ...
>
> ii. The measure must not be arbitrary and discriminatory within the generally accepted meaning of the terms.
>
> iii. Some treaties explicitly require that the procedure of expropriation must follow principles of due process. Due process is an expression of the minimum standard under customary international law and of the requirement of fair and equitable treatment. Therefore, it is not clear whether such a clause, in the context of the rule on expropriation, adds an independent requirement for the legality of the expropriation.

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[180] Reinisch, *Standards of Investment Protection*, Oxford University Press, 2008, p. 193.

[181] *See* the 1987 American Law Institute Restatement of the Law (Third) of the United States, Section 712; UNCTAD Report, *Taking of Property*, 2000 (Executive Summary, p. 1); Fachiri, *Expropriation and International Law*, 6 British Yearbook of International Law, 1925, 159, 169–70, pp. 160, 169, 171); Opinion of Lord McNair QC, *The Seizure of Property and Enterprises in Indonesia*, VI Netherlands International Law Review, 1959, p. 243; Domke, *Foreign Nationalisation—Some Aspects of Contemporary International Law*, 55 American Journal of International Law, 1961, pp. 590, 600, 604; Higgins, *The Taking of Property by the State: Recent Developments International Law*, 176 Recueil des Cours, 1983, Vol. III, 259, 268, p. 291; Dugan, Wallace, Rubins, and Sabahi, Investor-State Arbitration, Chapter XVI, Expropriation, 2008, p. 437, submit, 'the current state of customary law of expropriation is arguably reflected in the 1987 Restatement (Third) of Foreign Relations Law' and 'accordingly, states may expropriate property of aliens provided that they do so in a nondiscriminatory way, for a public purpose, and most importantly on payment of full compensation.'

[182] Rubins and Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide*, Oceana Publications, 2005, pp. 174–5.

[183] Ibid.

iv. The expropriation measure must be accompanied by prompt, adequate, and effective compensation. Adequate compensation is generally understood today to be equivalent to the market value of the expropriated investment. [184]

4.104 The position under customary international law becomes less significant where the investment treaty includes due process as a requirement of legality. Many modern-day investment treaties include due process as a condition of legality, and some as a requirement for the review of compensation. In *ADC Affiliate Ltd and ors v. Hungary*,[185] the tribunal defined due process as demanding an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions:

> Due process of law, in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that 'the actions are taken under due process of law' rings hollow. And that is exactly what the Tribunal finds in the present case.[186]

4.105 Other tribunals have also found that due process may be denied both substantively and procedurally.[187] In *Rusoro Mining Ltd v. Venezuela*,[188] the tribunal held that the treaty condition of due process requirement would be satisfied in relation to measures taken to nationalize the gold mining industry in Venezuela if two conditions were met: (i) that the decision to nationalize was properly adopted, and that (ii) the expropriated investor had an opportunity to challenge the decision before an independent and impartial body.[189] In accepting that due process had been satisfied, the tribunal rejected the claimant's argument that any attempt to obtain justice locally would have been futile given that judicial recourses were nevertheless available.[190]

4.106 In *Venezuela Holdings BV and ors v. Venezuela*,[191] the tribunal determined that the expropriation of the claimants' investments in two oil projects was the result of laws enacted by the National Assembly and of decisions taken by the President of the Republic of Venezuela, the purpose of which was to create new mixed companies in which the State would own more than 50 per cent of the shares. Negotiations with the oil companies were foreseen

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[184] Dolzer and Schreuer, Chapter 6, Expropriation, *Principles of International Investment Law*, 2nd Edition, Oxford University Press, 2012, pp. 99–100.

[185] *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. Republic of Hungary*, Award of 2 October 2006 at n. 128.

[186] Ibid, para. 435. The ECT/ICSID Tribunal in *Ionannis Kardassopoulos and Ron Fuchs v. the Republic of Georgia*, Award of 3 March 2010, para. 396, approved the reasoning of the tribunal in ADC.

[187] *Siag and Vecchi v. Egypt*, Award of 11 May 2009, at n. 127, para. 440; *Ioannis Kardassopoulos v. Georgia*, Award of 28 February 2010, para. 395 at n. 24; *Vestey Group Ltd v. Venezuela*, ICSID Case No. ARB/06/4, Award, IIC 988 (2016), 15 April 2016, paras 305–6.

[188] *Rusoro Mining Ltd v. Venezuela*, Award, dispatched 22nd August 2016 at n. 122.

[189] Ibid, para. 389.

[190] Ibid, para. 392.

[191] *Venezuela Holdings BV and ors v. Venezuela*, ICSID Case No. ARB/07/27, Award, IIC 656 (2014), dispatched 9 October 2014.

to that effect for a period of four months, and nationalization contemplated only in case of failure of those negotiations.[192] The tribunal considered that this process enabled the participating companies to weigh their interests and make a decision during a reasonable period of time and was therefore compatible with the due process requirement in the expropriation provision of the Netherlands–Venezuela BIT signed on 22 December 1991.[193]

4.107 In *Vestey Group Ltd v. Venezuela*,[194] the tribunal held that the due process criteria for legality of the expropriation in the UK–Venezuela BIT had not been met. The Land Law introduced by the Venezuela government in November 2001 to recover land provided for a procedure for the recovery, without compensation, of illegally occupied State-owned land by private persons and no compensation was due under the Land Law for improvements made to the land. The tribunal held that, by introducing and applying the Land Law to the claimant's cattle farm business and thereby derogating from the procedural guarantees of Venezuela's Expropriation Law (which were detailed), Venezuela had deprived the claimant not only of the opportunity to have the valuation of its investment reviewed by an independent authority, but also of the right to be compensated altogether. The tribunal concluded that the regime provided for by the Land Law failed to satisfy the due process requirements of the BIT. The tribunal further held that Venezuela had failed to comply with the procedural regime of the Land Law itself, as rudimentary as it was.[195] In addition, the tribunal found that Venezuela had failed to comply with the due process and compensation requirements of legality for expropriation in the BIT. The tribunal awarded the claimant compensation of just over USD 98 million plus interest.[196]

d. Compensation

4.108 **i. Does non-payment of compensation render an expropriation unlawful?** The requirement for a State to pay compensation for expropriation of a foreign investment is a settled principal under customary international law. However, there remains some controversy as to whether the failure to pay compensation renders an expropriation illegal. This is important because of the distinction between lawful and unlawful expropriation and the legal consequences in respect to remedies.

4.109 Marboe places the debate in historical context explaining that, for a long time, expropriation has been considered lawful only if accompanied by the payment of compensation. For example, in 1933 the tribunal in *De Sabla* held that it was 'axiomatic that acts of government in depriving an alien for his property without compensation impose international responsibility' and the 1938 the United States' Secretary of State, Cordell Hull's, note to the ambassador of Mexico states that 'the legality of an expropriation is in fact dependent on the payment of compensation'. Marboe explains that this understanding was then challenged after the Second World War by the increasing number of communist states as well as newly independent states, culminating in General Assembly Resolutions in the 1970s which qualified the importance of compensation for lawful expropriation.[197]

[192] Ibid, para. 297.
[193] Ibid.
[194] *Vestey Group Ltd v. Venezuela*, Award, dispatched 15 April 2016 at n. 132.
[195] Ibid, paras 305–6.
[196] Ibid, para. 472.
[197] Marboe, *Calculation of Compensation and Damages in International Investment Law*, 2nd Edition, Oxford University Press, 2017, paras 2.32 and 3.33.

4.110 Ripinsky and Williams point out that the compensation requirement is different in that there is an obligation to pay compensation in cases of both lawful and unlawful expropriation and that this has led some commentators to hold the view that the non-payment of compensation does not render an expropriation unlawful.[198] That said, they submit that compensation cannot be the same for lawful and unlawful expropriation[199] and that the non-payment of any compensation for an unreasonable length of time cannot be seen as lawful behaviour because this 'would undermine the whole regime of international law on expropriation'.[200] Such takings, in their view, should be treated as unlawful. Moreover, the requirement of good faith is a relevant factor in determining whether the compensation requirement has been met:

> It appears also that the requirement of good faith should be given an important role in deciding on the lawfulness of expropriation. If, on the facts of a particular case, a tribunal establishes that a State has made good faith efforts to comply with an obligation to pay compensation, it should not be held to be in violation of the compensation requirement. For example, a good faith offering of, or provision for, compensation (even if not in a sufficient amount, as long as not manifestly unreasonable) should render the expropriation lawful. However, a general provision for payment of compensation for expropriated property in the domestic law of the host State would not qualify as recognition of a duty to pay compensation in the required sense, as such recognition would need to be expressed in relation to a specific expropriatory act. Moreover, a State must take actual steps for payment of compensation within a reasonable time; a mere formal provision for payment would not be sufficient.[201]

Similarly, Reinisch views the non-payment of compensation as a legality requirement:

> When compensation is not paid, or at least offered, and/or other legality requirements are not met, an expropriation becomes illegal and State responsibility is triggered. The State committing an international wrong has to pay damages in order to put the victim of the unlawful act in a position he or she would have been in had the act not been committed. In the case of an illegal taking of property, the primary remedy would thus be restitution kind. Only where restitution is impossible are monetary alternatives in the form of payments for 'financially assessable damage' considered.[202]

4.111 Marboe agrees. She argues that if a State does not pay any compensation and does not even provide for a procedure for the payment of compensation, it violates its treaty obligations[203] and commits an internationally wrongful act. Marboe further submits that, by their very nature, indirect expropriations often have to be considered unlawful 'as it will be hard to imagine an indirect expropriation being accompanied by the payment of compensation and similarly,

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198 Ripinsky and Williams, *Damages in Investment Law*, BIICL, 2015, p. 67.

199 Ibid, p. 65.

200 Ibid, p. 68; Cf Sir John Fischer Williams, *International Law and the Property of Aliens*, 9 British Yearbook of International Law, 1928, 1, argues that, apart from any special terms imposed by concession or treaty, it is not an accepted doctrine of international law that if a State expropriates the property of an alien without the payment of full/adequate compensation it commits an international wrong, even if the measure applies indiscriminately to nationals and aliens (pp. 1–2); Brownlie submits that expropriation for certain public purposes, e.g., exercise of police power and defence measures in wartime, is lawful, even if no compensation is payable, Brownlie, *Principles of Public International Law*, 6th Edition, Oxford University Press, p. 512.

201 Ibid, pp. 68–9.

202 Reinisch, *Standards of Investment Protection*, Oxford University Press, 2008, pp. 199–200.

203 Marboe, *Calculation of Compensation and Damages in International Investment Law*, 2nd Edition, Oxford University Press, 2017, para. 3.55.

it will be difficult to identify a proper legal procedure to challenge the State measures before a court in accordance with the principle of due process of law'.[204]

4.112 The main authority which respondent States rely on in investment treaty arbitrations to support the contention that the failure to pay compensation does not render an expropriation unlawful is the *Chorzów Factory* case. As already mentioned, in this case, the PCIJ opined that the action of Poland was 'not an expropriation to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention'.[205] In a Dissenting Opinion in the ICJ *Case Concerning Elettronica Sicula SpA (ELSI)*, Judge Schwebel also opined, 'The Court is doubtless correct in holding that the Mayor's failure to pay compensation for the requisition compounded its unlawfulness.'

4.113 However, *Chorzów Factory* and other legal authorities relied on by respondent States, such as *Amoco v. Iran*, *SPP v. Egypt*, and *Santa Elena v. Costa Rica*, were all very early cases and were not decided with reference to modern-day investment treaties. Given this, and the fact that *Chorzów Factory* pre-dates the NAFTA, the ECT, and the recent proliferation of BITs which provide that for an expropriation to be lawful it must be: (a) in the public interest, (b) non-discriminatory, (c) in accordance with due process, *and* (d) accompanied by compensation, this begs the question whether the old regime has been surpassed by the new? The answer is not clear. Whilst many tribunals have viewed the payment of compensation as a condition of legality,[206] others have not.[207]

4.114 In *Amoco International Finance Corp. v. Iran*,[208] the Iran–US tribunal found that Amoco's rights and interests under the Khemco Agreement, and its shares in Khemco, a joint venture company, 'were lawfully expropriated by Iran'[209] rejecting the claimant's argument that the expropriation was wrongful 'because no compensation had been paid for this taking'.[210]

4.115 Iran argued that the Single Article Act provided that compensation would be paid and that the Special Commission was empowered to determine its amount. It insisted that the claimant never availed itself of the opportunity provided by the Single Article Act and

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[204] Ibid, para. 3.60.

[205] *Case Concerning the Factory at Chorzów, (Claim for Indemnity) (The Merits)*, 13 September 1928, p. 46.

[206] For example: *Wena Hotels Ltd v. Arab Republic of Egypt*, Award of 8 December 2000, para. 101; *Rumeli Telekom AS & Telsim Mobil Telekomikasyon Hizmetleri AS v. Republic of Kazakhstan*, Award of 29 July 2008, para. 706; *Siag and Vecchi v. Egypt*, Award of 11 May 2009, paras 434–5; *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. The Republic of Hungary*, Award of 2 October 2006, para. 444; *Siemens AG v. Argentina, Award and Separate Opinion* of 6 February 2007, para. 273; *Quiborax SA and Non Metallic Minerals SA v. Bolivia*, Award, dispatched 16 September 2015, para. 255; *Tenaris SA and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Venezuela*, Award of 29 January 2016, para. 481.

[207] *Amoco International Finance Corp. v. Islamic Republic of Iran*, Award of 14 July 1987, para. 138; *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992, para. 183; *Compañía del Desarrollo de Santa Elena SA v. Costa Rica*, Final Award of 17 February 2000, para. 68; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, CA, et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award of 13 March 2015, para. 241.

[208] *Amoco International Finance Corp. v. Islamic Republic of Iran*, Award of 14 July 1987 at n. 46.

[209] Ibid, para. 182.

[210] Ibid, para. 133.

never applied for compensation, while other companies of various nationalities, including American companies had, and in such cases, compensation payments were made. Iran further argued that the claimant could not take the position that there was no due process because the expropriated companies were free to produce all documents they wanted in support of their demands and could be heard by the commission dealing with compensation. Lastly, Iran argued that it was not reasonable for the claimant to contend that the compensation was not 'adequate', since neither the claimant or Amoco sought compensation and the other companies considered the compensation to be adequate and accepted it.[211]

4.116 The tribunal emphasized that the wording of the Treaty of Amity not only provides that property of nationals and companies of either Party 'shall not be taken ... without the prompt payment of just compensation' but adds, more precisely, in the following sentence that 'adequate provision shall have been made at or prior to the time of taking *for the determination and payment thereof*'. The tribunal concluded that it suffices to note that the treaty does not require that the amount of the compensation should be determined at or prior to the time of the taking; rather, it only provides that 'adequate' provision be made in this regard.

4.117 The tribunal considered that to be 'adequate' the provisions for the determination and payment of compensation must provide the owner of the expropriated assets sufficient guarantee that the compensation will be actually determined and paid in conformity with the requisites of international law, that is, in the present case, that 'just compensation' will be promptly paid. In the tribunal's view, this did not necessarily imply that a judicial procedure should be set up to this effect because, as a matter of fact, procedures are seldom provided for in the practice of States and, more usually, compensation is decided by administrative authorities, very often without formal negotiation with the interested parties but in many cases, in implementation of principles defined in statutes or by constitutional laws, with a possible recourse to ordinary judicial remedies.[212]

4.118 The tribunal concluded that adequate provision had been made for the payment of compensation. Although the Single Article Act did not fix any standard for compensation to be paid, it empowered a Special Commission to determine the compensation. In practice, the Special Commission instituted negotiations with the parties to the nullified contracts in order to arrive at settlement agreements. In case of failure in the negotiations, the companies were entitled to have recourse to the settlement procedures in the contracts, usually international arbitration. In view of these facts, the tribunal deemed that 'the provisions of the Single Article Act for compensation were neither in violation of the treaty or customary international law'.[213]

4.119 In a Concurring Opinion,[214] Judge Brower disagreed with the tribunal's findings, 'I thus would have ruled the expropriation of the Claimant's interest in the Khemco Agreement to have been unlawful.' Judge Brower failed to see how the compensation requirement in the Treaty of Amity was in any way satisfied by the Single Article Act and opined that 'the

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211 Ibid, para. 134.
212 Ibid, para. 137.
213 Ibid, para. 138.
214 Concurring Opinion of Judge Brower, *Amoco International Finance Corp. v. Islamic Republic of Iran*, Award of 14 July 1987 at n. 46.

stated possibility of settlement of claims arising out of agreements treated as nullities is a far cry from the decree provision, establishing a "Compensation Committee" to determine "fair compensation", that apparently was upheld, albeit sub silentio, by the tribunal in the AMINOIL case as satisfying the demands of customary international law.'[215]

4.120 In *Southern Pacific Properties (Middle East) Ltd v. Egypt*,[216] the Egyptian government did not pay compensation for the cancelling of a project to develop tourist complexes at the pyramids area in Cairo and at Ras El Hekma on the Mediterranean. The tribunal nevertheless held that Egypt had lawfully expropriated the claimant's investment.[217] The case was decided with reference to Egypt's Investment Law No. 43 and international law.[218] The tribunal found that the cancellation of a project by the Egyptian government was compensable notwithstanding that the right which had been exercised for a public purpose, namely the preservation and protection of antiquities, was an 'unquestionable attribute of sovereignty' and constituted 'a lawful exercise of the right of eminent domain'.[219] The tribunal awarded the claimant compensation in the sum of USD 27,661,000 plus post-award interest.[220]

4.121 In *Compania del Desarollo de Santa Elena v. Costa Rica*,[221] a dispute decided under Costa Rican law and international law,[222] the tribunal recognized that 'there rests upon the expropriating State a duty, in both Costa Rican and international law, to pay compensation in respect of even a lawful expropriation'.[223] The tribunal observed that the vocabulary describing the amount of compensation properly payable in respect of a lawful taking has varied considerably from time to time and comprises such words as 'full', 'adequate', 'appropriate', 'fair', and 'reasonable' and sometimes the descriptive adjective is elaborated by the additional mention of 'market value'.[224]

4.122 In *Tidewater Inc. v. Venezuela*,[225] the tribunal found that Venezuela had expropriated the claimants' investment in its Venezuelan subsidiary, SEMARCA, by the seizure of SEMARCA's vessels which provided maritime support services to the oil industry in Venezuela. The seizure of the vessels ended SEMARCA's operations in Venezuela. The

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[215] Ibid, para. 7.

[216] *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992.

[217] Ibid, para. 183 ('Thus, the claimants are seeking "compensation" for a lawful expropriation and not "reparation" for an injury caused by an illegal act such as breach of contract.')

[218] Ibid, paras 78 and 80 ('Both Parties agree that Law No. 43 is applicable to their dispute .... Finally, even accepting the Respondent's view that the Parties have implicitly agreed to apply Egyptian law, such an agreement cannot entirely exclude the direct application of international law in certain situations. The law of the ARE, like all municipal legal systems, is not complete or exhaustive and where a lactone occurs with cannot be said to the agreement as to the application of a law, which, ex hypothesis, does not exist. In such case, it must be said that there is "absence of agreement" and, consequently, the second sentence of Article 42(1) would come into play.')

[219] Ibid, paras 158–9.

[220] Ibid, para. 257.

[221] *Compañía Del Desarrollo De Santa Elena, SA*, Case No. ARB/96/1, Final Award of 17 February 2000.

[222] Ibid, para. 64.

[223] Ibid, para. 68. The tribunal further held 'International law permits the Government of Costa Rica to expropriate foreign-owned property within its territory for a public purpose and against the prompt payment of adequate and effective compensation. This is not in dispute between the parties ...' (para. 71).

[224] Ibid, para. 69.

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

tribunal held that the expropriation was lawful, since it lacked only compensation.[226] The tribunal considered an expropriation only lacking fair compensation as a 'provisionally lawful expropriation':

> The Tribunal concludes that a distinction has to be made between a lawful expropriation and an unlawful expropriation. An expropriation only wanting fair compensation has to be considered as a provisionally lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation.[227]

In the tribunal's view, the essential difference between lawful and unlawful expropriation was that compensation for a lawful expropriation is fair compensation represented by the value of the undertaking at the moment of dispossession whereas reparation in case of unlawful expropriation is restitution in kind or its monetary equivalent.[228]

4.123 The tribunal further considered that, if almost every decision finding expropriation would also find unlawful expropriation, almost every tribunal would then set aside the 'fair market value at the time of expropriation' standard for compensation for expropriation and this would make a detailed and elaborate element of the expropriation provision in modern BITs, including the provisions of the BIT in the case at hand, effectively nugatory.[229]

4.124 Other tribunals have found that the compensation requirement has not been met but without then determining whether this rendered the expropriation illegal. In *Tradex Hellas SA v. Albania*,[230] a case decided under Albanian Law No. 7764 of 2 November 1993 on Foreign Investments which includes four conditions of legality for expropriation—that it be in accordance with public policy, non-discriminatory, in due process, and 'upon payment of prompt, adequate and effective compensation'[231]—the tribunal observed that 'though it is beyond doubt that in a case of expropriation compensation has to be paid, it seems less clear both in the discussion by the parties and in legal writings on the subject what is the legal significance of this requirement—is an expropriation illegal if no compensation is paid? Or is compensation always due, even if the expropriation is legal?'[232] The tribunal left the question open because, in any event, it was deciding the dispute under Albanian Law No. 7764 which provided that compensation had to be paid for expropriation fulfilling the criteria mentioned in the law.[233]

4.125 In *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*,[234] the claimant argued that the respondent State had not met the standard of 'prompt, adequate and effective compensation' under Article 13(1) of the ECT. The respondent countered, relying on the reasoning of the US–Iran Claims Tribunal in *Amoco*, that failure to satisfy this criterion does not in itself render an expropriation unlawful. The tribunal held that it was unnecessary for it to decide whether the respondent's argument was valid since its conduct also failed to meet another criterion set out in Article 13(1) of the ECT, namely the requirement that any

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226 Ibid, para. 146.
227 Ibid, para. 141.
228 Ibid, para. 142.
229 Ibid, para. 138.
230 *Tradex Hellas SA v. Albania*, ICSID Case No. ARB/94/2, Award of 29 April 1999.
231 Ibid, paras 95 and 96.
232 Ibid, para. 98.
233 Ibid.
234 *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, Award of 3 March 2010 at n. 24.

expropriation be carried out in accordance with due process of law, which the respondent conceded, would, in any event, render the expropriation unlawful.[235]

It follows that, for the time being, there appears to exist a hierarchy of norms in the case law amongst the conditions of lawful expropriation—even if in legal argument. But from the standpoint of a foreign investor, the requirement to pay compensation is arguably one of the more important criteria, if not equally important. Moreover, if it is accepted (as some commentators argue) that BITs now represent customary international law, then, given they include compensation alongside the other conditions of legality, it would follow that there can be no hierarchy. **4.126**

ii. Does an offer to pay compensation satisfy the compensation requirement? Another issue that arises in investment treaty arbitration is whether an offer to pay compensation satisfies the compensation requirement for legality of an expropriation. Tribunals have considered it does, subject to various conditions such as that the negotiations are in good faith, the offer is compatible with the treaty standard of compensation, and the offer is made at the time of the taking. The cases each turned on their own facts. **4.127**

In *Mondev International Ltd v. United States*,[236] the tribunal dismissed the claimant's claims in their entirety relating to a commercial real estate development project in the City of Boston. The tribunal considered that whilst it is true that the obligation to compensate as a condition for a lawful expropriation under NAFTA Article 1110 does not require that the award of compensation should occur at exactly the same time as the taking, for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognized by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation. Further, a 'taking' of property, not acknowledged as such by the government concerned and not accompanied by any offer of compensation, is not rendered conditionally lawful by the contingency that the aggrieved party may sue in the local courts for conversion or for breach of contract.[237] The tribunal opined that the word 'on' in Article 1110 requiring that the nationalization or expropriation be 'on payment of compensation in accordance with paragraphs 2 through 6', should be interpreted to require that the payment must be clearly offered, or be available as compensation for taking through a readily available procedure at the time of the taking—which did not happen.[238] **4.128**

In *Venezuela Holdings BV and ors v. Venezuela*,[239] the dispute concerned the claimants interests in two extra-heavy oil projects located in the region in Venezuela known as the Orinoco Oil Belt and an offshore project for the extraction of oil. The parties agreed that the claimants' investment was expropriated on 27 June 2007 in implementation of Decree 5200.[240] Decree 5200, issued by President Chávez four months earlier ordered, inter alia, that the associations located in the Orinoco Oil Belt be 'migrated' into new mixed companies under **4.129**

[235] Ibid, paras 389 and 390.
[236] *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002.
[237] Ibid, para. 71.
[238] Ibid, para. 72.
[239] *Venezuela Holdings BV and ors v. Venezuela*, Award, dispatched 9 October 2014 at n. 191.
[240] Ibid, para. 288.

the 2001 Organic Law of Hydrocarbons in which a Venezuelan State-owned oil entity, or one of its subsidiaries, would hold at least a 60 per cent participation interest.[241] The claimants submitted that the expropriation was unlawful because Venezuela had failed to meet at least three of the conditions for lawfulness in the Netherlands–Venezuela BIT signed on 22 December 1991 including that the expropriation was not against any compensation, let alone 'just compensation' as required by the BIT.[242] Venezuela contested this. The tribunal held that the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful—'an offer of compensation may have been made to the investor, and in such a case, the legality of the expropriation will depend on that offer. In order to decide whether an expropriation is lawful or not in the absence of payment of compensation, a tribunal must consider the facts of the case'.[243]

4.130 It was undisputed that negotiations took place and that Venezuela made proposals during the negotiations, however, the tribunal had been presented with limited information concerning the negotiations. The then President of one of the claimants, Mobil Oil Cerro Negro, testified that there had been several meetings with the Ministry of Energy regarding compensation but that there was an understanding that the content of the discussions was confidential. The respondent denied there was any confidentiality obligation and even released the claimants from that commitment should one exist; but, despite this, the claimants did not seek to file contemporaneous correspondence to support their position.[244] Instead, the claimants relied largely on press reports and public statements to substantiate their position including on a statement made then then Minister of Energy in the National Assembly stating that the government would only pay book value for the extra-heavy oil assets in the Orinoco Oil Belt. The tribunal held that the press reports and public statements did not constitute evidence of what exactly happened during the discussions.[245]

4.131 The tribunal determined that it was the claimant's burden to prove their allegations concerning the position taken by Venezuela during the discussions on compensation. The tribunal found that it seemed likely that there were discussions at the time on the method of valuation of the expropriated interests, on the relevance of the cap provisions referred to by Venezuela, and on the exact amount of the compensation payable to the claimants. The tribunal concluded that the evidence submitted did not demonstrate that the proposals made by Venezuela were incompatible with the requirement of 'just' compensation of the expropriation provision in the BIT and that, accordingly, the claimants had not established the unlawfulness of the expropriation on that ground.[246] In light of this finding, the tribunal rejected the claimant's claim that the expropriation was unlawful and decided therefore that compensation should be calculated in conformity with the requirements of the BIT.[247]

4.132 In *ConocoPhillips Petrozuata BV and ors v. Venezuela*,[248] the tribunal considered whether, during negotiations about compensation, Venezuela had negotiated in good faith by

[241] Ibid, para. 108.
[242] Ibid, para. 290.
[243] Ibid, para. 301.
[244] Ibid, para. 304.
[245] Ibid, para. 303.
[246] Ibid, para. 305.
[247] Ibid, para. 306.
[248] *ConocoPhillips Petrozuata BV and ors v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, IIC 605 (2013), 3 September 2013.

reference to the compensation provision at Article 6(c) of the Netherlands–Venezuela BIT which provided for the payment of 'just compensation' representing the market value of the investment immediately before the expropriation.[249] Article 6(c) did not mention negotiations or a requirement to negotiate in good faith, however, the tribunal considered that it is commonly accepted that parties must engage in good faith negotiations to fix the compensation in terms of the standard set, in this case the terms in the BIT, if a payment satisfactory to the investor is not proposed at the outset.[250] The tribunal found that Venezuela had made an offer for compensation on the basis of book value less depreciation and not the 'market value' of the expropriated assets in the claimant's oil projects.

4.133 The claimants alleged that the respondent had failed to pay compensation or negotiate in good faith on the basis of the 'fair market value' of the expropriated asset. The negotiations about compensation took place from 2006 through to the taking of the asset in June 2007, and beyond.[251] The tribunal observed that there was limited documentation, which may be explained by a confidentiality agreement referred to in the proceedings, but not documented or given any precision.[252] Both parties relied on witness testimony as well as documentary evidence which consisted of the respondent's non-binding term sheets, the respondent's draft contracts, the claimants' 'trigger letters' for international arbitration, and correspondence.

4.134 The tribunal noted that the respondent did not reply to the 'trigger letters'. The tribunal also considered significant the written account in three letters sent by the claimants of meetings on 29 and 31 January 2007 with their precise questions about the basis for valuation. In the tribunal's view, the letters made it clear that the claimants rejected a valuation based on book value and that this would not adequately compensate it. The tribunal recalled that the Venezuelan authorities, which had received the 'trigger letters' just twelve days earlier, had not replied or challenged the account of the meetings in the letters, and, in particular, had not rejected the position attributed to them that any compensation would not be based on fair market value.[253] The claimants further contended that a verbal offer made on 29 March 2007 represented no more than 5 per cent of the real value of their investments and was, therefore, totally inadequate.[254] Following that, and other meetings, ConocoPhillips wrote on 12 April 2007 to the Minister, Vice-Minister, and the national oil company official, in respect of each project. The letters recorded the claimants account of the meeting of 29 March 2007 that is, that two verbal compensation proposals had been made based on book value less depreciation for its interests in the Petrozuata Project and that the government of Venezuela would not compensate the claimants for the fair market value of its interests in the project. The government failed also to reply to the letters.[255] On the basis of the evidence before it, the tribunal concluded that Venezuela had not, at the time, negotiated in good faith by reference to the standard of 'market value' set out in the BIT.[256]

[249] Ibid, para. 361.
[250] Ibid, para. 362.
[251] Ibid, para. 363.
[252] Ibid, para. 364.
[253] Ibid, para. 393.
[254] Ibid, para. 390.
[255] Ibid, para. 391.
[256] Ibid, para. 394.

4.135 The tribunal drew the same conclusion in respect to the later phase of negotiations notin that offers made by the claimants were made without prejudice to its existing legal right in continuance of its good faith efforts to reach an amicable solution with Venezuela an that the claimants reserved their rights to change the terms of the proposal and their right under, inter alia, the BIT and the Investment Law.[257] The tribunal also considered publi statements by the Venezuelan Minister of Hydrocarbon about the negotiations, includin one referring to General Assembly Resolution 1803 (XVII) of 1962 and the fact tha Venezuela should, of course, indemnify the book value of the nationalized assets.[258] Th tribunal concluded that Venezuela had breached its obligation to negotiate in good faitl for compensation for the taking of the ConocoPhillips assets in the three projects on th basis of market value as required by Article 6(c) of the BIT, and that, consequently, the ex propriation was illegal and the date of the valuation was the date of the Award.[259]

4.136 In *Vestey Group Ltd v. Venezuela*,[260] the tribunal rejected Venezuela's submission that its offer for a purchase price during the sale and purchase negotiations of the expropriated farm must be considered as an offer of compensation for expropriation purposes. The tribunal was of the view that the offer to pay a price to buy a company could not be assimilated to an offer to compensate for expropriation under the BIT which provides that expropriation be against, 'against prompt, adequate and effective compensation'.[261] Firstly, the offer was made one year prior. Secondly, throughout the sales negotiations, the government offered to pay a purchase price without ever making reference to an expropriation. In that respect, the tribunal found that the case differed to other cases invoked by Venezuela including *Mobil* and *ConocoPhilips:*

> The present facts differ from the circumstances of Mobil and ConocoPhilips which the Respondent invokes. In Mobil, there was evidence of 'discussions [that] took place in 2007 between the Parties on the compensation that was due to the Claimants on the account of the expropriation.' The representative of Mobil Oil Cerro Negro himself testified during the proceedings that the claimant 'had several meetings with the Ministry of Energy regarding compensation for government's taking of [their] interests in ... joint ventures.' Similarly, the term sheets proposed by the government in ConocoPhillips 'clearly showed that Venezuela intended to take the existing interests of ConocoPhillips in those Projects ....' In contrast, here PDVSA Agrícola and later the MOA expressed an interest to purchase Vestey's shares in Agroflora. The offers relied upon by the Respondent make no reference whatsoever to expropriation or recovery.[262]

4.137 In *Rusoro Mining Ltd v. Venezuela*,[263] the tribunal held that Venezuela had failed to satisfy the compensation requirement of legality in the Canada–Venezuela BIT signed on 1 July

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[257] Ibid, para. 397.

[258] Ibid, para. 399.

[259] Ibid, para. 401. At para. 362 the tribunal had commented on the requirement to negotiate compensation in good faith, 'The requirements for prompt payment and for interest recognise, in accordance with the general understanding of such standard provisions, that payment is not required at the precise moment of expropriation. But it is also commonly accepted that the Parties must engage in good faith negotiations to fix the compensation in terms of the standard set, in this case, in the BIT, if a payment satisfactory to the investor is not proposed at the outset.'

[260] *Vestey Group Ltd v. Venezuela*, Award, dispatched 15 April 2016 at n. 132.

[261] Ibid, paras 311–12.

[262] Ibid, para. 313.

[263] *Rusoro Mining Ltd v. Venezuela*, Award, dispatched 22 August 2016 at n. 122.

1996 when it expropriated the claimant's investment in gold mining in Venezuela. The tribunal endorsed the view of the tribunal in *Venezuela Holdings BV and ors v. Venezuela* that the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful—an offer of compensation may have been made to the investor and, in such case, the legality of the expropriation will depend on the terms of that offer.[264] The tribunal added that the legality of an expropriation where the State has taken the investment but has failed to make any compensation payment depends on whether a good faith offer for a reasonable amount of compensation was made.[265]

4.138 The tribunal found that, although Venezuela had made an offer of compensation to the claimant, the offer was insufficient and the minimum amount offered was never paid or deposited.[266] The Nationalization Decree had provided for the payment of compensation to investors in the gold sector, but established a cap. Venezuela had submitted an offer for an amount which was significantly below the cap established by the Decree. The tribunal rejected the reason given by Venezuela for this reduction—the alleged illegality of Rusoro's investment[267]—and held that the expropriation was unlawful.

D. Arbitral Practice—Some Examples

4.139 In deciding whether an expropriation is lawful or unlawful, investment treaty tribunals consider whether the State has breached the treaty conditions of legality. The treaty conditions are cumulative. The awards set out below consider the treaty conditions of legality in some detail and, importantly, illustrate that the question as to whether the conditions of legality for expropriation have been satisfied very much depends on the facts and circumstances of the case.

4.140 In *Siag and Vecchi v. Egypt*,[268] the claimants purchased a large parcel of oceanfront land on the Gulf of Aqaba on the Red Sea from Egypt for the purpose of developing a tourist resort. They alleged that, through a series of acts and omissions commencing in 1995, Egypt expropriated their investment. They brought a claim against Egypt under the Italy–Egypt BIT signed on 2 March 1989. The tribunal held that the investment had been directly expropriated commencing with Resolution No. 83 of 26 May 1996 which formally transferred ownership of the land in Taba from Siag Touristic (and hence the claimants) to the Egyptian government.[269] The tribunal further held that the qualifying conditions of lawful expropriation in the BIT were cumulative.

4.141 Unusually, the treaty specified five conditions for lawfulness: (i) that the expropriation be in the public purpose; (ii) against adequate and fair compensation; (iii) according to legal procedures; (iv) on condition that such measures are taken on a non-discriminatory basis; and (vi) in due process of law. The tribunal concluded that Egypt had failed to meet the five conditions and, consequently, the expropriation was unlawful.[270]

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[264] Ibid, para. 401 citing *Exxon Mobil* at 301.
[265] Ibid, para. 407.
[266] Ibid, para. 410.
[267] Ibid, para. 408.
[268] *Siag and Vecchi v. Egypt*, Award, 11 May 2009, dispatch 1 June 2009 at n. 127.
[269] Ibid, para. 427.
[270] Ibid, para. 443.

4.142 Firstly, the tribunal rejected Egypt's argument that the Al Sharq Gas Company, which had ownership of the land in Taba, used the land to construct a major pipeline to transport gas to Jordan therefore evidencing a public purpose for the expropriation. The tribunal noted that Al Sharq was not constituted until 2000 which was after the expropriation, and that Resolution No. 83 expropriating the investment referred to the failure of Siag to honour its contractual commitments on time and not to any public purpose. The tribunal did not accept that because an investment was eventually put to public use, the expropriation of that investment must necessarily be said to have been 'for' a public purpose.[271]

4.143 Secondly, the tribunal rejected Egypt's argument that the Explanatory Memorandum to Prime Ministerial Decree No. 799 explicitly stated that adequate compensation would be paid to the claimants and that the issue of compensation was currently before the Egyptian courts and would be resolved. The tribunal held that the claimant had not received prompt, adequate, and fair compensation, noting that the claimants had not been paid compensation for at least twelve years.[272]

4.144 Thirdly, the tribunal held that there had been a failure of due process of law and accepted that due process may be denied both substantively and procedurally.[273] The tribunal noted that Resolution No. 83 was passed some seven months before the completion deadline and concluded that the claimants were not afforded due process by Egypt's early cancellation. This constituted a substantive denial of due process.[274] In addition, Resolution No. 83 had been passed without prior notice to the claimants. The tribunal found that this constituted a procedural denial of due process.[275]

4.145 In *ADC Affiliate Ltd and ors v. Hungary*,[276] the claimant brought a claim against Hungary for unlawful expropriation of its investment in and related to the Budapest-Ferihegy International Airport under the Hungary–Cyprus BIT which entered into force on 24 May 1989. The tribunal held that Hungary had expropriated the claimant's investment and, in doing so, had breached all four treaty conditions of legality.[277]

4.146 In 1994, the claimant, ADC, successfully won a tender and was awarded contracts by the Air Traffic and Airport Administration (ATAA) to: (a) renovate Terminal 2/A, (b) construct Terminal 2/B, and (c) participate in the operation of Terminals 2/A and 2/B. The claimant completed the renovation of Terminal 2/A and the construction of terminal 2/B which was opened to the public in December 1998. In 1999, the Ministry of Transport prepared a Proposal for the Government's Air Transportation Strategy, which requested that plans be drawn up to transform the ATAA.[278] The Hungarian government developed a national aviation strategy, embracing the entire aviation sector, of which part of its programme was to align with and implement EU law within the aviation sector in preparation for accession to the EU.[279]

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[271] Ibid, paras 431–2.
[272] Ibid, paras 434–5.
[273] Ibid, para. 440.
[274] Ibid, para. 441.
[275] Ibid, para. 442.
[276] *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. The Republic of Hungary*, Award of 2 October 2006 at n. 128.
[277] Ibid, para. 476.
[278] Ibid, para. 172.
[279] Ibid, para. 179.

Thereafter, in December 2001, the government enacted an Amending Act to the Air Traffic Act and issued a Decree, the consequence of which being that the project company was no longer able to operate the terminals and to collect the associated revenues.[280] The claimants contended that the respondent State's issuance of the Decree and the following taking-over of all activities of the project company in the airport by BAA constituted an expropriation of their investments in Hungary.

4.147 The tribunal held that it was the clearest possible case of expropriation:

> There can be no doubt whatsoever that the legislation passed by the Hungarian Parliament and the Decree had the effect of causing the rights of the Project Company to disappear and/or become worthless. The Claimants lost whatever rights they had in the Project and their legitimate expectations were thereby thwarted. This is not a contractual claim against other parties to the Project Agreements. An act of State brought about the end of this investment and, particularly absent compensation, the BIT has been breached. It is common ground that no compensation was offered in respect of this taking. Further, the Tribunal is satisfied that no case has been made out that the taking was in the public interest. The subsequent privatization of the airport involving BAA and netting Hungary US$ 2.26 billion renders any public interest argument unsustainable. In the opinion of the Tribunal, this is the clearest possible case of expropriation.[281]

4.148 The tribunal could see no public interest being served by Hungary's actions depriving the claimants of their investment in the airport project. With the lack of any substantiating facts and legal reasoning, the tribunal rejected Hungary's repeated attempts to persuade it that the Amending Act, the Decree, and the actions taken in reliance thereon, were necessary and important for the harmonization of the Hungarian government's transport strategy, laws, and regulations with EU law. In the tribunal's opinion, 'public interest' requires a *genuine* public interest—which was, in this case, lacking:

> A treaty requirement for 'public interest' requires some genuine interest of the public. If mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.[282]

The tribunal noted that the subsequent privatization of the airport involving BAA and netting Hungary USD 2.26 billion rendered any public interest argument unsustainable.[283]

4.149 The tribunal also held that the expropriation was not under due process of law as required by the BIT. It agreed with the claimants that due process of law in the expropriation context demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it.[284] The tribunal found that, firstly, there was no legal procedure available to the claimants. Secondly, that Hungary had failed to establish a connection between the 'need to transform the ATAA' and the deprivation of the claimants' investments'. Thirdly, the tribunal rejected Hungary's argument that Hungarian law provided methods for the claimants to review the expropriation. Fourthly, it rejected Hungary's argument that the claimants still

[280] Ibid, para. 189.
[281] Ibid, para. 304.
[282] Ibid, para. 432.
[283] Ibid, para. 304.
[284] Ibid, paras 435.

retained their contractual rights for dispute resolution on the basis that the dispute was non-contractual in nature.[285]

4.150 In addition to relying on the failure of due process for making out its expropriation claim, the claimants further contended that the lack of due process amounted to a denial of justice, which in turn, constituted a breach of the fair and equitable treatment requirement. The tribunal linked its finding of lack of due process in the expropriation context to a finding of breach of the fair and equitable and full protection and security treaty standards:

> The expropriation of the Claimants' interest constituted a depriving measure under Article 4 of the BIT and was unlawful as: ... (b) it did not comply with due process, in particular, the Claimants were denied of 'fair and equitable treatment' specified in Article 3(1) of the BIT and the Respondent failed to provide 'full security and protection' to the Claimants' investment under Article 3(2) of the BIT...[286]

4.151 The tribunal further held that Hungary's actions were discriminatory, dismissing Hungary's argument that, as the only foreign parties involved in the operation of the airport, the claimants were not in a position to raise any claims of being treated discriminately:[287]

> It is correct for the Respondent to point out that in order for a discrimination to exist, particularly in an expropriation scenario, there must be different treatments to different parties. However and unfortunately, the Respondent misses the point because the comparison of different treatments is made here between that received by the Respondent-appointed operator and that received by foreign investors as a whole.[288]

Finally, the tribunal found that it was abundantly clear that just compensation had not been paid to the claimants for the expropriation of their investment.[289]

4.152 In *Siemens AG v. Argentina*,[290] the German–Argentina BIT signed on 9 April 1991 required that any expropriation be for a public purpose and with compensation. The tribunal held that Argentina had unlawfully expropriated the claimant's contractual rights relating to a project for the implementation of an immigration control, personal identification, and electoral information system. The tribunal found that there was no evidence of a public purpose in the measures taken prior to the issuance of Decree 669/01 which terminated the contract. Rather, the termination was an exercise of public authority to reduce the costs to Argentina of the contract, which had recently awarded through public competitive bidding, and part of a change of policy by a new Administration eager to distance itself from its predecessor. On the other hand, the public purpose of the 2000 Emergency Law, which empowered the President to renegotiate public sector contracts, was to face the dire fiscal situation of the government and this was a legitimate concern of Argentina. In this regard, the tribunal deferred to Argentina in the determination of its public interest.

4.153 The tribunal stated that even though it would be satisfied in finding that an expropriation had occurred based only on Decree 669/01 and that the public purpose pursued by this Decree in the context of Argentina's fiscal crisis and the 2000 Emergency Law would be

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[285] Ibid, paras 435–439.
[286] Ibid, para. 476.
[287] Ibid, para. 441.
[288] Ibid, para. 442.
[289] Ibid, para. 444.
[290] *Siemens AG v. Argentina*, Award and Separate Opinion of 6 February 2007 at n. 129.

sufficient to meet the public purpose requirement of expropriation under the treaty, it could not ignore the context in which Decree 669/01 was issued, nor separate this Decree from the other measures taken by Argentina in respect of the investment that culminated in its issuance. The tribunal concluded that the Decree was a convenient device to continue a process which had started more than a year earlier long before the onset of the fiscal crisis. From this perspective, while the public purpose of the 2000 Emergency Law was evident, its application through Decree 669/01 to the specific case of the claimant's investment and the public purpose was questionable. The tribunal did not definitively decide the issue because, in any case, compensation had never been paid and on grounds which the tribunal found were lacking in justification. For this reason, the tribunal held that the expropriation was unlawful.[291]

4.154 In *Yukos Universal Ltd v. Russian Federation*,[292] the tribunal held that the Russian Federation had violated Article 13 of the ECT and at least two of its conditions for legality—due process and the payment of compensation. On the public policy requirement, the tribunal considered that whether the destruction of Russia's leading oil company and largest taxpayer was in the public interest was 'profoundly questionable'. The tribunal noted that it was in the interest of the largest State-owned oil company, Rosneft, which took over the principal assets of Yukos virtually cost-free, but this was not the same as saying that it was in the public interest of the economy, polity, and population of the Russian Federation.[293]

4.155 On the non-discrimination requirement, the tribunal noted that the treatment of Yukos and the appropriation of its assets by Rosneft, when compared to the treatment of other Russian oil companies that also took advantage of investments in low-tax jurisdictions, may well have been discriminatory, but did not decide the issue given that it was inconclusively argued between the parties. On the due process requirement, the tribunal determined that, whilst Yukos was subjected to processes of law, the effective expropriation of Yukos was not carried out under due process of law. The harsh treatment accorded to Messrs Khodorkovsky, the principal shareholder and CEO of Yukos, and Lebedev, the Director of another of the claimants, remotely jailed and caged in court, the mistreatment of counsel of Yukos, the difficulties counsel encountered in reading the record and conferring with Messrs Khodorkovsky and Lebedev, and the very pace of the legal proceedings did not comport with the due process of law. Rather, the conduct of the Russian courts, including sentencing on 'creative theories' indicated that the courts, 'bent to the will of Russian executive authorities to bankrupt Yukos, assign its assets to a State controlled company, and incarcerate a man who gave signs of becoming a political competitor'.[294] On the treaty requirement to pay compensation, the tribunal held that the effective expropriation of Yukos had not been accompanied by the payment of 'prompt, adequate and effective compensation', or, in point of fact, any compensation whatsoever.[295]

[291] Ibid, para. 273.

[292] *Yukos Universal Ltd v. Russian Federation*, PCA Case No. AA 227, Final Award, IIC 652 (2014), ICGJ 481 (PCA 2014), 18 July 2014, PCA.

[293] Ibid, para. 1581.

[294] Ibid, paras 1582–3.

[295] Ibid, para. 1584.

4.156 In *Belokon v. Kyrgyzstan*,[296] the tribunal concluded that the expropriation of Manas Bank by Kyrgyzstan failed to satisfy the legality conditions in the Latvia–Kyrgyz Republic BIT signed on 22 May 2008. Firstly, the tribunal found that the expropriation had not been for a public purpose. Whilst the initial imposition of the temporary administration regime in 2010 may have been undertaken for a public purpose, the administration of the temporary regime did not appear to have been pursued with that goal. The continued administration of Manas Bank appeared to have been undertaken because of suspicions of wrongdoing on account of a connection between the claimant and the Bakiev regime. The tribunal further noted that the administration of Manas Bank permitted the return of funds to State coffers despite contractual obligations to keep deposits with Manas Bank and, in addition, the administration allowed the expropriation of assets secured by Manas Bank and prevented Manas Bank from taking legal actions to claim compensation for the expropriation of these secured assets. The tribunal concluded that, on the whole, the actions of the Kyrgyz Republic did not appear to have been taken in the interests of the public but rather to promote the narrower interests of the government in obtaining by seizure of Manas Bank what could not otherwise be achieved under the law.[297] Moreover, the Krygyz Republic had failed to compensate the claimant for the loss of his property.[298]

4.157 The tribunal did not find sufficient evidence to uphold the claimant's argument that the expropriation was discriminatory and noted that the actions were taken not just against Manas Bank but also against other banks in the Kyrgyz Republic, although it may be that the actions against the particular banks were related, perhaps because they all are suspected of having connections with the Bakiev regime. The tribunal opined that for a determination that the actions were discriminatory in the sense of the BIT, this would mean a comprehensive discrimination susceptible to destroying an entire investment, as opposed to incidental discriminatory acts.[299]

4.158 In *Quiborax SA and Non Metallic Minerals SA v. Bolivia*,[300] the tribunal held that Bolivia had expropriated the claimants' investment in mining concessions by revoking the concessions by decree and substantially depriving Quiborax of the value of its 50.995 per cent shareholding in its subsidiary, Non-Metallic Minerals SA (NMM), a Bolivian mining company operating in the Rio Grande delta in Bolivia.

4.159 The tribunal concluded that the expropriations were not in accordance with the conditions of legality set out in the Bolivia–Chile BIT signed on 22 September 1994. On the first condition of legality, that measures are adopted for the public or national interest and in accordance with the law, the tribunal opined that a finding that the measure was not a legitimate exercise of Bolivia's police powers would not necessarily prevent the possibility that the motive for which the measure was issued was in the public or national interest.[301] The tribunal deferred to Bolivia's sovereign right to determine what was in the national and public interest and accepted that Bolivia may have had a legitimate interest in protecting the Gran Salar de Uyuni Fiscal Reserve. However, the tribunal did not accept that the

296 *Belokon v. Kyrgyzstan*, Award of 24 October 2014 at n. 131.
297 Ibid, paras 211–12.
298 Ibid, para. 215.
299 Ibid, para. 213.
300 *Quiborax SA and Non Metallic Minerals SA v. Bolivia*, Award, dispatched 16 September 2015 at n. 155.
301 Ibid, para. 243.

revocation of the concessions was carried out in accordance with Bolivian law, hence, even if the expropriation was in the national or public interest, it was not carried out in accordance with the law and therefore the expropriation was unlawful.[302]

4.160 On the second condition of legality, non-discrimination, the tribunal held that there had been discrimination and that there was no justification in Bolivian law for the differential treatment. This is set out in more detail in Section 3(b) (non-discrimination). On the third condition of legality, that the measures be accompanied by provision for the payment of immediate, sufficient, and effective compensation, the tribunal found that it was undisputed that Bolivia neither paid nor offered compensation to NMM for the revocation of its mining concessions, therefore Bolivia had also failed to meet this requirement.[303]

4.161 In *Tenaris SA and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Venezuela*,[304] the claimant alleged that its investment in Matesi Materiales Siderúrgicos SA (Matesi), a company which produced high quality hot briquetted iron, a component used in the production of steel, had been indirectly expropriated, the prejudicial effects of which were compounded by Venezuela's attempt to reduce the compensation which otherwise ought to have been payable.[305]

4.162 The claimant brought its claims under the Portugal–Venezuela BIT signed on 17 June 1994 and the Belgium–Luxembourg–Venezuela treaty signed on 17 March 1998. The tribunal found that the process by which Matesi was nationalized was initiated by President Chavez on 10 April 2008, when he announced that Venezuela's steel industry was to be taken back and put at the service of the country. That announcement, and the subsequent ratification of the decision by the National Assembly, was followed on 30 April 2008 by the publication of Decree No. 6,058, the 'Nationalisation Decree'. Pursuant to its terms, SIDOR and its subsidiary and affiliated companies, of which Matesi was one, were to be transformed into State corporations. There then followed Decrees 6,796 (July 2009) and 8,280 (June 2011), which addressed the nationalization and expropriation of Matesi itself.[306]

4.163 The tribunal held that the investment had been unlawfully expropriated and that the simple failure on the part of Venezuela to pay compensation was sufficient to render the expropriation unlawful as a matter of Venezuelan law.[307] The tribunal noted that Article 115 of the Venezuelan Constitution required expropriation to be carried out pursuant to a final and conclusive judgment and with timely payment of just compensation. Article 2 of the Expropriation Law likewise contemplated expropriation by way of final judgment and timely payment of fair compensation. Further still, Article 11 of the Investment Law required that the expropriation of investments, or measures having a similar effect, may only be carried out after the applicable legal procedures have been followed and upon payment of prompt, just, and adequate compensation.[308]

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[302] Ibid, para. 245.
[303] Ibid, para. 255.
[304] *Tenaris SA and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Venezuela*, ICSID Case No. ARB/11/26, Award, IIC 764 (2016), dispatched 29 January 2016.
[305] Ibid, para. 453.
[306] Ibid, para. 452.
[307] Ibid, para. 481 citing, in a corresponding footnote, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012.
[308] Ibid, para. 481.

4.164 The tribunal further observed that Venezuela had put in place a 'tailor made' expropriation process which it itself failed to follow[309] and concluded that the failure of Venezuela to observe the requirements of its own nationalization legislation was sufficient to constitute a breach of the expropriation provision in the Portuguese treaty, which has an explicit renvoi to Venezuelan domestic law through the language: 'in accordance with the legislation in force'. The tribunal was also satisfied that Venezuela had breached the due process requirement in the Luxembourg treaty to the extent that its conduct was not: 'in accordance with legal procedures'. Moreover, Venezuela had acted in breach of both treaties in effecting an expropriation without 'provisions for the payment of adequate and effective compensation'.[310]

4.165 In *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. Argentina*,[311] the claimants asserted that the Argentine Republic had expropriated their shares in two Argentine airlines and their subsidiaries by unlawfully re-nationalizing and taking other measures. They argued that the expropriation was a creeping expropriation in violation of the conditions of legality in the Spain–Argentina BIT signed on 26 December 1990. The tribunal found that the Argentine Republic had indirectly expropriated the airlines by taking over the day-to-day management before it passed Law 26,466, purporting to directly expropriate the shares.[312] The tribunal further held that the expropriation was unlawful in that it was not in accordance with the law and the Argentine Republic had failed to pay adequate compensation but rejected the claimants' contentions that it was not in the public interest and was discriminatory.

4.166 The claimants argued that the expropriation was not in the public interest because, inter alia, the Argentine Republic's alleged desire stated in Law No. 26,466 for the expropriation of shares in the airlines was 'to guarantee continuity and safety in the provision of the public service of commercial air transportation, the protection of the workers' jobs and the preservation of the assets of the airlines', and that this ran against its own actions, including increasing airfares, challenging the airlines' financial statements, and failing to grant promised tax benefits and subsidies—with the consequence of putting the airlines into a difficult situation in 2008.[313] On the other hand, the Argentine Republic argued that it was forced to take control of an airline that was totally abandoned, which, in turn, implied a risk for the country's connectivity.[314] Moreover, regular air transportation is a public service and it had a very clear public interest in ensuring the connectivity of the country.[315]

4.167 The tribunal considered the stated and demonstrated need for connectivity in Argentina to be a genuine public interest which overrode purely individual or private interests. It found that, although ultimately inadequate in the execution of measures, the Argentine Republic recognized the need to provide for higher airfares and other assistance for airlines facing higher costs in order to maintain the industry as a whole and also to ensure that lesser trafficked

309 Ibid, para. 492.
310 Ibid, paras 494–7.
311 *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. The Argentine Republic*, Award of 21 July 2017 at n. 158.
312 Ibid, para. 1009.
313 Ibid, para. 972.
314 Ibid, para. 979.
315 Ibid, para. 978.

routes continued to have service despite their commercial unattractiveness. The government also provided bail-out funds in 2008 to keep the airlines in operation, which the tribunal held lent support to the conclusion that the airlines provided an important public service and that the government had an interest in their continued operation. In this context, the tribunal was of the view that the Argentine Republic's decision to expropriate the airlines' shares and to continue operating the airlines, were steps taken in the bona fide public interest to preserve connectivity.[316] The tribunal also rejected the claimant's argument that the expropriation was discriminatory for the reasons set out in the Section 3(b) (non-discrimination).

4.168 But the tribunal went on to find that the Argentine Republic had failed to satisfy the requirement of due process. It noted that the parties agreed that the 'law' in issue for this branch of the test under the BIT was Argentine law and the requirements of due process. The tribunal opined that 'an expropriation that is carried out in accordance with the local law will satisfy this branch of the test but may still be unlawful at international law if the other conditions for lawful expropriation have not been met'.[317]

4.169 The tribunal found that the formal expropriation, as commenced by Law 26,466, and the process that followed, appeared to have been in accordance with Argentine law. The expropriation process provided Interinvest, the claimants' subsidiary company, with a legal procedure that granted it a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. Further, the evidence demonstrated that Interinvest was afforded the opportunity to claim its rights before the Argentine courts and to have its claims heard. In fact, Interinvest chose to seek a suspension of those proceedings to provide time for settlement negotiations to continue.[318] The tribunal rejected the claimants' argument that the local process, which allegedly did not provide for independent valuation, was in violation of due process. While the compensation tribunal was a government-appointed body and therefore not 'independent' of the government, the evidence indicated that the valuation process allowed an affected party to challenge the tribunal's valuations and submit its own evidence of value.[319] Finding that the direct expropriation was in accordance with due process of law, the tribunal concluded it unnecessary to consider whether the alleged creeping expropriation violated due process, given its findings that the claimants had failed to make out their claim of creeping expropriation.[320]

4.170 The tribunal turned next to determining whether the indirect expropriation by the Argentine Republic in taking over the day-to-day management before it passed Law 26,466 purporting to directly expropriate the shares was in accordance with due process of law. The tribunal found that the Argentine Republic's breach of the fair and equitable treatment (FET) obligation also meant that the indirect expropriation of the investment was not in accordance with the law—in particular, the Argentine Republic's lack of transparency in agreeing to the July 2008 Agreement (by which Interinvest agreed to sell all its shares to the government for a price to be determined pursuant to a defined mechanism), the passing of Law 26,412 in September 2008 which resulted in the tribunal applying a valuation

[316] Ibid, para. 984.
[317] Ibid, para. 1001.
[318] Ibid, para. 1002.
[319] Ibid, para. 1004.
[320] Ibid, para. 1006.

methodology that was inconsistent with that agreed to in the July 2008 Agreement, and the government's arbitrary decision to expropriate the investment rather than proceed to a third-party valuation as agreed.[321]

4.171 On the requirement to pay compensation for expropriation, the claimant argued that the Argentine Republic had failed to pay appropriate compensation 'without undue delay and in freely convertible currency' as required by the BIT. The Argentine Republic argued, on the other hand, that under international law there are circumstances in which expropriation may be lawful even when the amount of compensation to be paid is zero. Further, in the circumstances of the case, it was appropriate for the claimants not to receive any compensation for their shares in the airlines because appropriate compensation must reflect the market value of the expropriated asset. The Argentine Republic relied on *Biwater Gauff v. Tanzania* for the proposition that a company may have negative shareholders' equity at the time of expropriation and in those cases, the appropriate compensation is zero.[322]

4.172 The tribunal agreed with the Argentine Republic that there are circumstances in which no compensation can be adequate compensation for an expropriation. For example, this may be the case when an investment is loss-making and no longer a going concern. In these circumstances, the State can demonstrate that the investor did not suffer a financial loss as a result of the taking. But, the tribunal found that this was not the case here.[323] The tribunal concluded that, had the Argentine Republic not breached the July 2008 Agreement and had the discounted cash flow analysis described in that Agreement been conducted by a third independent valuator as agreed, the resulting valuation would have represented adequate compensation for the taking pursuant to the treaty. Instead, in refusing to complete that valuation and proceeding to a formal expropriation on a different valuation methodology, the Argentine Republic had failed to provide adequate compensation for the taking of the investment.[324]

[321] Ibid, para. 1100.
[322] Ibid, para. 1028.
[323] Ibid, para. 1036.
[324] Ibid, para. 1039.

5

THE TEST FOR EXPROPRIATION. THE MAIN FACTORS

5.01 The test for expropriation is still evolving and, to a large extent, shapes the concept of expropriation. Although it is relatively straightforward for an investment treaty tribunal to identify a direct expropriation, it can be more difficult to determine whether there has been an indirect expropriation. The test is multi-faceted, and the emphasis can turn solely on the adverse effects of the measure on the investment (the sole-effects doctrine) or, in addition, factors such as the intent of the host State and purpose of the measure, whether there has been discrimination, and concepts such as legitimate expectations and proportionality. Depending on the facts of the case, the tribunal may also consider issues such as whether temporary measures can constitute expropriation, whether an expropriation can be partial or must be whole, and whether omissions as well as actions can amount to expropriation. The test requires a case-by-case, fact-based inquiry, given not only the evolving nature of the concept but also the (even slight) differences between investment treaties, the increasing complexity of investments, and ever new factual matrixes. This chapter explores the main factors in the test for expropriation, although different forms of indirect expropriation have slightly nuanced tests. For this reason, subsequent chapters consider creeping expropriation (Chapter 6), regulatory expropriation (Chapter 7), contractual expropriation (Chapter 8), and judicial expropriation (Chapter 9).

5.02 The vast majority of investment treaties do not include guidance as to what constitutes indirect expropriation although it is becoming more common to find clarifications in newer or renegotiated bilateral investment treaties (BITs) as governments attempt to protect their regulatory policy space. For example, the Senegal–India BIT signed on 3 July 2008 sets out factors for determining indirect expropriation including the economic impact of the measures, discrimination, interference with the investor's legitimate expectations, and the character and intent of the measures. The BIT clarifies that, except in rare cases, non-discriminatory regulatory actions will not usually constitute expropriation:[1]

[1] Senegal–Italy BIT, signed on 3 July 2008, Annex 5, which is stated as being an integral part of the treaty.

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

(i) the economic impact of the measure or a series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that expropriation or nationalization, has occurred; (ii) the extent to which the measures are discriminatory either in scope or in application with respect to a Party or an investor or an enterprise; (iii) the extent to which the measures or series of measures interfere with distinct, reasonable, investment-backed expectations; (iv) the character and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention to expropriate.

Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives including health, safety and the environment concerns do not constitute expropriation or nationalization.

5.03 Similarly, the UK–Columbia BIT signed on 17 March 2010,[2] identifies factors for determining an indirect expropriation including the scope of the measures and the investor's 'reasonable and distinguishable' expectations. The BIT also states that regulatory measures which are non-discriminatory, taken in good faith, not arbitrary, and which are not disproportionate in light of their purpose, shall not constitute indirect expropriation:

For the purposes of this Agreement, it is understood that:

(a) indirect expropriation results from a measure or series of measures of a Contracting Party having an equivalent effect to direct expropriation without formal transfer of title or outright seizure;

(b) the determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact-based inquiry into various factors including, but not limited to, the scope of the measure or series of measures and their interference with the reasonable and distinguishable expectations concerning the investment;

(c) non-discriminatory measures that the Contracting Parties take for reasons of public purpose or social interest (which shall have a meaning compatible with that of 'public purpose') including for reasons of public health, safety, and environmental protection, which are taken in good faith, which are not arbitrary, and which are not disproportionate in light of their purpose, shall not constitute indirect expropriation.

5.04 Many Canadian BITs identify factors to consider in determining whether measures constitute indirect expropriation; for example, the Canada–Czech Republic BIT signed on 6 May 2009,[3] the Canada–China BIT signed on 9 September 2012,[4] the Canada–Tanzania BIT signed on 17 May 2013,[5] and the Canada–Cote d'Ivoire BIT signed on 30 November 2014[6] include: the economic impact of the measures, the extent to which it is interfered with the distinct, reasonable, investment-backed expectations of the investor, and the

[2] Article VI(2).
[3] Annex A.
[4] Annex B(10).
[5] Article 10.
[6] Annexes B(10).

character of the measures. The BITs also state that regulatory measures will not, except in rare circumstances, constitute expropriation:[7]

> The determination of whether a measure or series of measures of a Contracting Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Contracting Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (b) the extent to which the measure or series of measures interferes with distinct, reasonable, investment-backed expectations; and (c) the character of the measure or series of measures.
>
> Except in rare circumstances, such as if a measure or series of measures is so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a nondiscriminatory measure or series of measures of a Contracting Party that is designed and applied to protect the legitimate public objectives for the well-being of citizens, such as health, safety and the environment, does not constitute indirect expropriation.

A. The Impact of the Measure

1. Substantial deprivation

5.05 Definitions of expropriation generally emphasize that it involves a substantial deprivation of rights. Brownlie describes expropriation as a deprivation by the State of a right of property or by permanent transfer of the power of management and control:

> [Expropriation is] the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control. The deprivation may be followed by transfer to the territorial state or to third parties ... If compensation is not provided, or the taking is regarded as unlawful, then the taking is sometimes described as confiscation. Expropriation of one or more major national resources as part of a general program of social and economic reform is now generally referred to as nationalization or socialization.[8]

Higgins submits that interferences which significantly deprive the owner of the use of his property amount to a taking of that property and that the test is whether there is loss of effective control over the use and dispossession of property.[9]

5.06 Coe and Rubins observe that the language chosen to express the triggering degree of deprivation is unsettled and includes: 'radical,' 'fundamental', 'in significant part', 'substantial', or 'serious' but the sense often conveyed is that the interference must approach 'total impairment'. They also note that multiple elements are considered by tribunals in determining whether there has been an expropriation, however two elements seem to be 'first among equals' in determining liability: the interference must be sufficiently lasting (the 'permanence' requirement) and its effect must be sufficiently substantial.[10]

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[7] See also Canada–Burkina Faso BIT, signed on 30 November 2014, Annex 1.

[8] Brownlie, *Principles of Public International Law*, 6th Edition, Oxford University Press, p. 509.

[9] Higgins, *The Taking of Property by the State: Recent Developments International Law*, Académie de droit international. Recueil des Cours, 1982, III, tome 176, M. Nijhoff, 1983, pp. 324 and 351.

[10] Coe and Rubins, Chapter 17, Regulatory Expropriation and the Techmed Case: Context and Contributions, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, edited by Todd Weiler, Cameron May, 2005, pp. 620–621.

5.07 The International Court of Justice (ICJ) has opined that there must be a 'significant deprivation' of interests in order for measures to amount to an expropriation. The case of *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*,[11] concerned a dispute that arose from the requisition on 1 April 1968 by the government of Italy of the plant and related assets of Elettronica Sicula SpA (ELSI), an Italian company 100 per cent owned by two US corporations, Raytheon and Machlett Laboratories. The requisition order was for a period of six months. Less than a month later ELSI filed for bankruptcy.

5.08 The United States claimed that the government of Italy requisitioned ELSI's plant and related assets in order to prevent the orderly liquidation of ELSI and to facilitate the acquisition of ELSI's assets by Italy's commercial conglomerate, Istituto per la Ricostruzione Indusiriale (IRI), consequently forcing ELSI into bankruptcy. The United States argued that the requisition was the beginning of a process that led to the acquisition of the bulk of the assets of ELSI for far less than market value, in breach of Article V, paragraph 2, of the Treaty of Friendship, Commerce and Navigation between the United States and Italy (FCN) which provided that property shall not be taken without due process of law and without the prompt payment of just and effective compensation.[12] Thus, what was alleged by the claimant was that, if not an overt expropriation, the taking might be regarded as a disguised expropriation.[13]

5.09 The Court held that the question as to whether there had been a disguised expropriation or a 'taking' amounting ultimately to expropriation did not have to be resolved because it was not possible to say that the ultimate result was the consequence of acts or omissions of the Italian authorities and, at the same time to ignore the most important factor, namely ELSI's financial situation and the consequent decision of its shareholders to close the plant and to put an end to its activities. The Court noted that the Italian municipal courts had considered that ELSI, if not already insolvent in Italian law before the requisition, was in so precarious a state that bankruptcy was inevitable.

5.10 The Court further held that, in any event, the requisition, independently of the motives which allegedly inspired it, being by its terms for a limited period and liable to be overturned by administrative appeal, could not amount to a taking unless it constituted a 'significant deprivation' of Raytheon and Machlett's interest in ELSI's plant, as might have been the case if ELSI remained solvent, the requisition had been extended, and the hearing of administrative appeal delayed. In the Court's opinion, the bankruptcy of ELSI transformed the situation less than a month after the requisition, and the requisition could therefore only be regarded as significant for this purpose if it caused or triggered the bankruptcy.[14]

5.11 In a Dissenting Opinion, albeit in the context of Article III of the FCN (the right to control and manage), Judge Schwebel opined that it was unpersuasive for the Court to say, in effect, that ELSI would have gone into bankruptcy later if not sooner, and accordingly that the requisition did not matter. In Schwebel's view, at the time the requisition took place, it did matter—it did have the economic effects, or some of the economic effects, and it deprived Raytheon and Machlett of their right to control and manage and hence liquidate

[11] *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, ICJ Rep., Judgment of 20 July 1989.
[12] Ibid, para. 114.
[13] Ibid, para. 116
[14] Ibid, para. 119.

ELSI.[15] If this same reasoning had been applied by the Court when considering whether there had been a 'significant deprivation' of Raytheon and Machlett's interests then the findings would arguably have been different.

5.12 Investment treaty tribunals have also emphasized that for a finding of expropriation there must be at least a substantial deprivation of the investment and have adopted a variety of tests including 'deprivation', 'substantial deprivation', 'radical deprivation', 'destruction', and 'neutralisation' of the use, control, benefit, enjoyment, or value of the investment.[16] In this respect, two cases of the Iran–US Tribunal are often relied on by parties in investment treaty arbitrations. The test applied by these tribunals was deprivation of the 'effective use, control and benefits' (*Starrett Housing*) and deprivation of 'fundamental rights of ownership and it appears that this deprivation is not merely ephemeral' (*Tippetts*).

5.13 In *Starett Housing Corp. v. Islamic Republic of Iran*,[17] the claimants, a US parent company and its subsidiary corporations engaged in construction and development projects in Iran, alleged that the Iranian government had unlawfully expropriated their investment in a project to construct a large-scale residential community comprising 6,000 apartment units northwest of Tehran. The basic project agreement was assigned by the claimants to an Iranian subsidiary, Shah Goli, in which it held an 80 per cent shareholding. The claimants contended that by September 1978 the project was 75 per cent complete but thereafter construction came to a halt when employees were forced to leave Iran following the Iranian revolution, although the claimants maintained a few executives in Iran to be immediately available in the event conditions improved. On 14 July 1979, the Iranian Revolutionary Council adopted a Bill for Appointing Temporary Managers, pursuant to

[15] Dissenting Opinion of Judge Schwebel, p. 108.

[16] In *Enkev Beheer BV v. Republic of Poland*, the tribunal considered that, 'the accumulated mass of international legal materials comprising both arbitral decisions and doctrinal writings, describe for indirect expropriation, taking or deprivation, consistently albeit in different terms, the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or their virtual annihilation and effective neutralization.' PCA Case No. 2013-01, First Partial Award of 29 April 2014, para. 344. *See also CME Czech Republic BV v. Czech Republic*, UNCITRAL, Partial Award and Separate Opinion of 13 September 2001, para. 604; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, IIC 65 (2005), 25 April 2005, dispatched 12 May 2005, paras 262 and 263; *Técnicas Medioambientales Tecmed SA v. Mexico*, ARB(AF)/00/2, Award, 10 ICSID Rep. 130, (2004) 43 ILM 133, IIC 247 (2003), 29 May 2003, para. 116; *Suez and ors v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, IIC 442 (2010), 30 July 2010, para. 123; *Total SA v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, IIC 484 (2010), 21 December 2010, para. 195; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011, para. 299; *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/02, Final Award, IIC 578 (2012), dispatched 31 October 2012, para. 523; *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, IIC 568 (2012), 14 December 2012, para. 402; *Perenco Ecuador Ltd v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, IIC 657 (2014), dispatched 12 September 2014, paras 673 and 674; *Belokon v. Kyrgyzstan*, Ad Hoc Tribunal (UNCITRAL), Award, IIC 760 (2014), 24 October 2014, para. 206; *Al-Warraq v. Indonesia*, Ad Hoc Tribunal (UNCITRAL), Final Award, IIC 718 (2014), 15 December 2014, para. 524; *Quiborax SA and Non Metallic Minerals SA v. Bolivia*, ICSID Case No. ARB/06/2, Award, IIC 739 (2015), dispatched 16 September 2015, para. 238; *Ryan and ors v. Poland*, ICSID Case No. ARB(AF)/11/3, Award, IIC 842 (2015), dispatched 24 November 2015, para. 495; *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Final Award of 21 January 2016, paras 450–1.

[17] *Starrett Housing Corp. v. Islamic Republic of Iran*, Award No. ITL 32-24-1, 4 Iran-US CTR 122, Interlocutory Award of 19 December 1983.

which the Ministry of Housing appointed a temporary manager of Shah Goli to direct all further activities in connection with the project on behalf of the government.

5.14 The claimants sought USD 112 million for unlawful expropriation of their project and other acts in breach of international obligations by the government of Iran with respect to their property rights. The tribunal opined that international law recognizes that 'measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner'. The tribunal found that the appointment of a temporary manager meant that the claimants could no longer exercise their rights to manage Shah Goli and, consequently, they were deprived of their possibilities of effective use and control of it. The tribunal rejected Iran's contention that Starrett had been requested to resume the project and could have appointed managers from a country other than the United States. It found instead that the completion of the project was dependent on a large number of American construction supervisors and subcontractors whom it would have been necessary to replace and that the right to freely select managers, supervisors, and contractors was an essential element of the right to manage the project. The tribunal concluded that there could be little doubt that, by at least the end of January 1980, the claimants had been deprived of the 'effective use, control and benefits' of their property rights in the project and that Iran had interfered with the property rights 'to an extent that rendered these rights so useless that they must be deemed to have been taken'.

5.15 In *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*,[18] the claimant, an engineering and architectural consulting partnership in the United States (TAMS), and AFFA, an Iranian engineering firm, equally owned TAMS-AFFA, an Iranian entity created for the sole purpose of performing engineering and architectural services on the Tehran International Airport (TIA) project. This was based on a contract concluded in 1975 between TAMS-AFFA and the Iranian Civil Aviation Authority (CAO). TAMS brought a claim before the Iran–US Tribunal claiming the value of its 55 per cent interest in TAMS-AFFA which it alleged had been unlawfully expropriated by the government of Iran.[19]

5.16 As a consequence of the Iranian revolution, work on the TIA project stopped almost completely in the two-month period between December 1978 and January 1979. Prior to further discussions between TAMS-AFFA and the CAO concerning the future of the TIA project, on 24 July 1979 the Plan and Budget Organization of the government of Iran appointed a temporary manager for AFFA. The new manager assumed the right to sign cheques on TAMS-AFFA's accounts by himself and to make personnel and other decisions without consulting TAMS. Some of these violations of the partnership agreement were rectified in the following months; however, the crisis in relations between the United States and Iran that developed in November 1979 reversed this trend. The last remaining TAMS representative with signatory authority apparently left the country in December 1979. TAMS wrote and telexed TAMS-AFFA on several occasions in January and February 1980 concerning further work on the TIA project but received no response. After December

[18] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, 6 Iran–US CTR, Award of 29 June 1984, p. 219 et seq.

[19] Ibid, p. 220.

1979, TAMS-AFFA ceased all communication with TAMS. Although TAMS-AFFA continued to function, it was managed by government-appointed successors to the original government-appointed manager.[20]

5.17 The tribunal held that the claimant had been subjected to 'measures affecting property rights' in violation of the Treaty of Amity by being deprived of its property interests in TAMS-AFFA since at least 1 March 1980 by acts and omissions of the government of Iran. The tribunal opined that a taking can be indirect by means of interference by a State in the 'use or enjoyment of its benefits' and that this conclusion is warranted whenever the owner is deprived of 'fundamental rights of ownership and that the deprivation is not merely ephemeral'. The tribunal further opined that the effect of the measures and the reality of their impact is more important than the intent of the government or the form of the measures:

> A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. 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.[21]

5.18 The tribunals in *Starett* and *Tippetts* focused on the impact of the measures on the investment. When the impact of the measure on an investment is applied as the sole criterion to determine whether there has been an indirect expropriation, this is known as the 'sole effects doctrine'. This doctrine has frequently been applied by investment treaty tribunals.[22]

5.19 In *Tecnicas Medioambientales Tecmed SA v. Mexico*,[23] the tribunal held that a resolution of the Mexican authorities rejecting the application for a renewal of the authorization of an operating licence for a landfill of hazardous industrial waste, and requesting that the investor's company submit a programme for closure of the landfill, was expropriatory.[24] In reaching its decision, the tribunal asked itself whether the investor, 'was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto ... 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.'[25] In support of this, the tribunal cited the European Court of Human Rights in the case of *Matos e Silva, Lda and ors*

[20] Ibid, pp. 224–5.

[21] Ibid, pp. 225–6.

[22] See, e.g., *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award of 12 April 2002, para. 107; *Telenor Mobile Communications AS v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, paras 47(3), 63, and 65; *Parkerings-Compagniet AS v. Republic of Lithuania*, Award of 11 September 2007, para. 455.

[23] *Tecnicas Medioambientales Tecmed, SA v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003.

[24] Ibid, para. 151.

[25] Ibid, para. 115. In support of this test, the tribunal cited the award in *Pope Talbot Inc. v. Government of Canada*, 102–4, pp. 36–8, and the Restatement of the Law (Third) Restatement of the Foreign Relations Law of the United States, § 712, pp. 200–1, notes 6–7, pp. 211–12 (1987).

v. Portugal, Judgement of 16 September 1996, 85, p. 18—'[whether] the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed'[26] and *Tippetts*.[27]

5.20 In *Metalclad Corp. v. Mexico*,[28] the tribunal found that Mexico had unlawfully expropriated the claimant's investment in a hazardous waste landfill site through the Municipality's denial of a construction permit without any basis. The tribunal defined expropriation in broad terms to include measures with 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:

> Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference 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.[29]

This definition of indirect expropriation has been adopted by many other investment treaty tribunals—both NAFTA and others.[30]

a. The Pope & Talbot list of measures

5.21 In *Pope & Talbot Inc. v. Canada*,[31] a subsidiary of a US investor owned and operated three softwood lumber mills in the southern interior of British Columbia, Canada. In the years leading up to 1996, the investment company exported about 90 per cent of its softwood lumber to the United States. On 29 May 1996, Canada and the United States entered into the Softwood Lumber Agreement (SLA), retroactive to 1 April 1996 and lasting for five years. The SLA established a limit on the free export of softwood lumber first manufactured in the provinces of British Columbia, Alberta, Ontario, and Quebec into the United States.[32] The US investor claimed that its investment had been indirectly expropriated by way of creeping expropriation. It pointed to 1 April 1996 as the initial date of expropriation and suggested that each time Canada reduced the investment's allocation of fee free quota, a further expropriation occurred.[33]

5.22 The tribunal applied the test of 'substantial deprivation'[34] and concluded that the regulatory measures had not constituted an interference with the investment's business activities

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[26] Ibid, para. 115 et seq.

[27] *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, Award of 29 May 2003, para. 133 at n. 23.

[28] *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000.

[29] Ibid, para. 103.

[30] See, e.g., *Técnicas Medioambientales Tecmed, SA v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 113 and footnote 125. This ICSID claim was raised under the Spain–Mexico BIT which entered into force on 18 18 December 1996; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, para. 438. This ICSID claim was raised under the Lithuania–Norway BIT signed on16 June 1992.

[31] *Pope & Talbot Inc. v. Canada*, Ad Hoc Tribunal (UNCITRAL), Interim Award, IIC 192 (2000), 26 June 2000.

[32] Ibid, paras 6 and 28.

[33] Ibid, para. 81.

[34] Ibid, para. 102, Indeed, at the hearing, the Investor's Counsel conceded, correctly, that under international law, expropriation requires a 'substantial deprivation'.

substantial enough to be characterized as an expropriation under international law.[35] This, the tribunal found, was supported by the following facts:

> The Investor's (and the Investment's) Operation Controller testified at the hearing that the Investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the Investment have been detained by virtue of the Regime. Canada does not supervise the work of the officers or employees of the Investment, does not take any of the proceeds of company sales (apart from taxation), does not interfere with management or shareholder's activities, does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions ousting the Investor from full ownership and control of the Investment.[36]

5.23 The sole 'taking' that the investor had identified was interference with the investment's ability to carry on its business of exporting softwood lumber to the United States yet the tribunal noted that the investor continued to export substantial quantities of softwood lumber and to earn substantial profits on these sales.[37] The tribunal concluded that, even if, for purposes of the analysis, it accepted the allegations concerning diminished profits, the degree of interference did not rise to the level of an expropriation, creeping or otherwise, rather: 'the test is whether the interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner'.[38]

5.24 In determining the degree of the interference, many tribunals have adopted the list of measures identified by the tribunal in *Pope & Talbot*.[39] In *Tidewater et al. v. Venezuela*, the tribunal considered the measures in *Pope & Talbot* 'useful', summing them up as follows—whether:

(a) the investment has been nationalized or the measure is confiscatory;
(b) the investor remains in control of the investment and directs its day-to-day operations, or whether the State has taken over such management and control;
(c) the State now supervises the work of employees of the investment; and,
(d) the State takes the proceeds of the company's sales.[40]

5.25 In *Enron Corp. and Ponderosa Assets LP v. Argentina*,[41] the claimants brought a claim concerning tax assessments allegedly imposed by some Argentinean provinces in respect to a gas transportation company in which the claimants participated. The claimants invoked the provisions of the US–Argentine Republic BIT signed on 14 November 1991. The

[35] Ibid, para. 96.
[36] Ibid, para. 100.
[37] Ibid, para. 101.
[38] Ibid, para. 102 citing the definition of the standard in the Draft Convention on the International Responsibility of States for Injuries to Aliens, Article 10(3) as requiring interference that would 'justify an inference that the owner * * * will not be able to use, enjoy, or dispose of the property . . . ' and the Restatement, §712 comment (g) which speaks of 'action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property.'
[39] See, e.g., *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, IIC 65 (2005), 25 April 2005, dispatched 12 May 2005, para. 263.
[40] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, CA, et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award of 13 March 2015, para. 105.
[41] *Enron Corporation and Ponderosa Assets LP v. Argentina*, ICSID Case No. ARB/01/3, Award, IIC 292 (2007), 15 May 2007, dispatched 22 May 2007.

tribunal considered the list of measures adopted by the tribunal in *Pope & Talbot* as 'representative of the legal standard required to make a finding of indirect expropriation'.[42] It dismissed the claim on the facts, finding that nothing of the sort had happened in the case of the claimants' companies or any of the related companies, so much so that the claimants' interests in these companies had been freely sold and included in complex transactions, some involving foreign companies too.[43]

5.26 In *Sempra Energy International v. Argentina*,[44] the tribunal also considered the list of measures identified by the tribunal in *Pope & Talbot* as 'representative of the legal standard required to make a determination on an alleged indirect expropriation'. The tribunal considered that the list could be expanded significantly in the light of the findings of many other tribunals but that the measures would still have to meet the standard of having, as a result, a substantial deprivation of rights.[45] The tribunal further considered that a finding of indirect expropriation requires more than adverse effects: 'it would require that the investor no longer be in control of its business operation, or that the value of the business has been virtually annihilated.' The tribunal held that this was not the case here.[46]

5.27 In *PSEG Global Inc. and Konya Ilgin Elektrik Üretim VE Ticaret Ltd Şrketi v. Turkey*,[47] a case concerning the adoption by Turkey of several legislative acts that resulted in changes to the contractual terms relating to the development of an electrical power plant, the tribunal applied the test of deprivation of control adopted in *Pope & Talbot*.[48] On the facts, the tribunal held that, although the measures affected the claimant's legitimate expectations, they did not constitute an expropriation as they did not result in a taking of the property, which remains 'the essence of expropriation'.[49]

b. The nature of substantial deprivation revisited

5.28 Recent investment treaty jurisprudence has revisited the very fundamental issue of the nature of substantial deprivation and, in particular, whether there can be a substantial deprivation of an investment in the absence of economic loss.

5.29 In *Telenor Mobile Communications AS v. Hungary*,[50] the tribunal opined that there must be a substantial economic deprivation for a finding of expropriation. The investor, Telenor, brought a claim under the Hungary–Norway BIT signed on 8 April 1991 concerning a concession agreement for the provision of public mobile radiotelephone services made between the Hungarian Minister of Transport, Communications and Water Management, and the claimant's wholly owned subsidiary, Pannon GSM Telecommunications RT

[42] Ibid, para. 245 citing *Pope & Talbot Inc. v. Canada*, NAFTA (UNCITRAL) Arbitration Proceeding, Interim Award of 26 June 2000, para. 100.

[43] Ibid, para. 246.

[44] *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, IIC 304 (2007), 18 September 2007, dispatched 28 September 2007.

[45] Ibid, para. 284.

[46] Ibid, para. 285.

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

[48] Ibid, para. 278.

[49] Ibid, para. 279.

[50] *Telenor Mobile Communications AS v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006.

(Pannon).[51] Telenor claimed that its investment had been expropriated, or part thereof, without compensation, in breach of the BIT's expropriation provision.[52]

5.30 The concession agreement was entered into following a tender process which was part of Hungary's reorganization of its State-controlled telecommunications system in the early 1990s. At the time there was only one fixed-line operator and the concession agreement imposed on Pannon various fixed fees. Thereafter, the regime changed with the introduction of the concept of universal telephone services, a minimum set of telecommunication services to be available to the public at a reasonable cost. The Hungarian government left universal service provisions in the hands of the fixed-line operators until December 2001 or, in some cases, until May or November 2002, and in 2001 set up a public fund (the ETTA) to fund the unrecovered costs incurred by the universal service providers. Pannon and other mobile operators were required to contribute to the fund for the years 2002 and 2003[53] even though they were not providers of the universal services. The claimant contended that these measures constituted an indirect expropriation of its investment. The tribunal held that for there to be an expropriation, 'the conduct complained of must be such as to have a major adverse impact on the economic value of the investment'[54] and that the interference must be substantial and deprive the investor of the 'economic value, use, or enjoyment' of the investment:

> There has been a substantial volume of case law, both under the Washington Convention and in general public international law, as to the magnitude of the interference with the investor's property or economic rights necessary to constitute expropriation. Though different tribunals have formulated the test in different ways, they are all agreed that the interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use, or enjoyment of the investment.[55]

5.31 In considering whether the measures taken by the respondent constituted an expropriation, the tribunal opined that the determinate factors were the intensity and duration of the economic deprivation suffered by the investor as a result of the measures.[56] The tribunal held that the effect of the measures complained of fell far short of the 'substantial economic deprivation' of its investment required to constitute expropriation. The tribunal found that, beyond the compulsory collection of the 2002 and 2003 ETTA levies from Pannon's bank account, none of Pannon's assets had been seized. Pannon's management had been left in the hands of its board without governmental interference. The concession agreement remained in full force and Pannon had not been denied access to its assets, revenues, or any of its other resources. Moreover, Pannon proclaimed itself highly profitable in its annual reports and its net income and asset value had increased steadily year on year. The tribunal compared the alleged interference with the list of measures set out by the tribunal in *Pope & Talbot* which it had rejected amounted to expropriation, and concluded that, except for the ETTA levies, exactly the same was true of the acts of Hungary in relation to Telenor.[57]

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[51] Ibid, para. 16.
[52] Ibid, para. 17(1).
[53] Ibid, paras 22 and 23.
[54] Ibid, para. 64.
[55] Ibid, para. 65.
[56] Ibid, para. 70 citing Christoph Schreuer, *The Concept of Expropriation under the ECT and other Investment Protection Treaties*, 2 Transnational Dispute Management, November 2005, para. 82.
[57] Ibid, para. 79.

5.32 Similarly, in *Bayuindir Insaat Turizm Ticaret Ce Sanayi AS v. Pakistan*,[58] the tribunal emphasized the economic impact of the measures when analysing the claimant's claim of expropriation of its contractual rights concerning a contract entered into with the Pakistan National Highway Authority for the construction of a six-lane motorway and ancillary works known as the 'Pakistan Islamabad-Peshawar Motorway'. Firstly, the tribunal identified that the assets comprising the investment had an economic value, stating, 'such rights have an economic value and can potentially be expropriated.'[59] Secondly, the tribunal considered that it must review whether Pakistan had interfered with the claimant's contractual rights to such an extent to amount to 'a deprivation of the economic substance of such rights'.[60] Thirdly, the tribunal considered that the critical element for a finding of expropriation was 'the economic effect of the measure rather than the intent underlying it'.[61] The tribunal held that, absent proof otherwise, there could be no deprivation of the economic substance of the claimant's contractual rights as the scope of such rights was limited by the counterparty's own rights under the contract.[62] The tribunal rejected the expropriation claim.

5.33 In *Glamis Gold Ltd v. United States*,[63] the tribunal also considered economic deprivation to be the decisive factor. The tribunal considered whether the claimant's investment 'had been so radically deprived of its economic value' so as to constitute an expropriation, and in doing so, assessed the economic impact of the measures complained of on the value of the project. The claimant, although still in formal possession of its federally granted mining right, claimed that the value of that right was so diminished by governmental action that it had been expropriated. The tribunal rejected the claim and held, in light of the significantly positive valuation on the claimant's project, that the first factor in any expropriation analysis had not been met i.e. 'the complained of measures did not cause a sufficient economic impact' to effect an expropriation.[64]

5.34 More recently, applying the tests in *Telenor* (the impact on the economic value of the investment) and *Tecmed* (the measure must constitute a deprivation of the economic use and enjoyment of the investment), the tribunal in *Spyridon Roussalis v. Romania* held that to qualify as an indirect expropriation, the measure must constitute a deprivation of the economic use and enjoyment of the investment.[65]

5.35 On the other hand, some tribunals have considered that economic loss is not an essential ingredient of substantial deprivation. The Iran–US tribunal considered that other factors can constitute substantial deprivation, for example, 'an interference by the State in the use of that property or with the enjoyment of its benefits' (*Tippetts*)[66] and an interference by the State with property rights 'to such an extent that these rights are rendered so useless

[58] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of 27 August 2009.

[59] Ibid, para. 457.

[60] Ibid, para. 458.

[61] Ibid, para. 459.

[62] Ibid, para. 460.

[63] *Glamis Gold Ltd v. United States*, UNCITRAL, Award of 14 May 2009.

[64] Ibid, para. 536.

[65] *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, para. 328.

[66] *Tippetts, Abbett, Mccarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, The Government of The Islamic Republic of Iran, and ors*, Award of 29 June 1984 at n. 18.

that they must be deemed to have been expropriated' (*Starrett Housing*).[67] Recently, investment treaty tribunals have revisited the issue once more.

5.36 In *Biwater Gauff (Tanzania) Ltd v. Tanzania*,[68] the tribunal upheld the investor's claim that its contractual rights to operate and manage a water sewage system had been expropriated on a cumulative basis by: the public announcement terminating the lease contract by the government, a subsequent political rally, withdrawal of the VAT certificate, and finally, the seizure of the investor's assets and deportation of its management.[69] On the facts, the majority tribunal found that the losses and damages claimed had already, by the time of the expropriation, been separately caused.[70] In reaching a finding of expropriation, the tribunal adopted the 'substantial interference' test, whilst, at the same time, expressed the view that the absence of economic loss or damage is primarily a matter of causation and quantum rather than a necessary ingredient in the cause of action of expropriation:

> Equally, whilst accepting that effects of a certain severity must be shown to qualify an act as expropriatory, there is nothing to require that such effects be economic in nature. A distinction must be drawn between (a) interference with rights and (b) economic loss. A substantial interference with rights may well occur without actually causing any economic damage which can be quantified in terms of due compensation. In other words, the fact that the effect of conduct must be considered in deciding whether an indirect expropriation has occurred, does not necessarily import an economic test.
>
> In the Arbitral Tribunal's view, the absence of economic loss or damage is primarily a matter of causation and quantum—rather than a necessary ingredient in the cause of action of expropriation itself.... In such circumstances, there may still be scope for a non-compensatory remedy for the expropriation (e.g. injunctive, declaratory or restitutionary relief) (emphasis as original).[71]

5.37 In support of this position, the tribunal referred to Article 2, paragraph 9 of the International Law Commission's Articles on State Responsibility (the ILC Articles) which states that:

> It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular 'damage' to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure.[72]

The tribunal further noted that the BIT did not include 'economic damage' as a requirement for expropriation and did not consider that it must, or should, be imported.[73]

5.38 Born, the dissenting arbitrator, disagreed with the majority tribunal's finding that there was no loss for reason that, by the time the expropriation occurred, the damage had

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[67] *Starrett Housing Corp. v. The Government of the Islamic Republic of Iran*, Award of 19 December 1983 at n. 17.

[68] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 18 July 2008.

[69] Ibid, para. 519.

[70] Ibid, paras 485.

[71] Ibid, paras 464–5.

[72] Ibid, para. 466.

[73] Ibid, para. 467.

been separately caused. In his view, the majority tribunal's analysis confused, on the one hand, issues of causation, and on the other hand, quantification. Instead, Born held that the wrongful seizure by Tanzania of the investor's business, premises, and assets, had caused it injury. Nevertheless, Born concurred with the majority tribunal's finding that the claimant had failed to demonstrate compensable and quantifiable monetary damages or loss: although Tanzania wrongfully took the claimant's investment, thereby causing it injury, the monetary value of the commercial injury was zero as the evidence showed that the claimant was persistently losing money under the lease contract, and without a fundamental renegotiation of the lease contract and its economic terms, it would continue to lose money.[74]

5.39 In *El Paso Energy International Company v. Argentina*,[75] the tribunal expressed the view that a necessary condition for a finding of expropriation is that there must be neutralization of the use of the investment, and 'that *at least one* of the essential components of the property rights must have disappeared'. On the meaning of 'one of the essential components', the tribunal recognized that the overwhelming majority of investment cases stand for the proposition that an expropriation usually implies a 'removal of the ability of an owner to make use of its economic rights', whilst also noting that it is generally accepted that the decisive element in an indirect expropriation is the 'loss of control' of a foreign investment. Applying the test of the *CMS* tribunal: 'the essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized'—the tribunal decided that, on the facts, there was no expropriation.[76] The tribunal emphasized in conclusion that there must be a substantial deprivation of the use of the investment:

> In conclusion, the Tribunal, consistently with mainstream case-law, finds that for an expropriation to exist, the investor should be substantially deprived not only of the benefits, but also of the use of his investment. A mere loss of value, which is not the result of an interference with the control or use of the investment, is not an indirect expropriation.[77]

5.40 In *Deutsche Bank AG v. Sri Lanka*,[78] whilst accepting that effects of a certain severity must be shown to qualify an act as expropriatory, the tribunal opined that there is nothing to require that such effects be economic in nature, especially in the absence of treaty language to this effect:

> A distinction must be drawn between (a) interference with rights and (b) economic loss. A substantial interference with rights may well occur without actually causing any economic damage which can be quantified in terms of due compensation. In other words, the fact that the effect of conduct must be considered in deciding whether an indirect expropriation has occurred, does not necessarily import an economic test. The Tribunal also notes that in this case, the Treaty does not include 'economic damage' as a requirement for expropriation nor does the Tribunal consider that there is any basis for importing such a standard.[79]

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[74] Ibid, paras 16 and 18–22.

[75] *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, IIC 519 (2011), Award of 27 October 2011, dispatched 31 October 2011.

[76] Ibid, paras 245–8.

[77] Ibid, para. 256.

[78] *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/02, Final Award, IIC 578 (2012), dispatched 31 October 2012.

[79] Ibid, para. 504.

In the tribunal's view, the absence of economic loss or damage was not a necessary prerequisite in the cause of action of expropriation itself but rather a matter in the first place of causation and quantum.[80]

In *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. Argentina*,[81] the tribunal agreed with the respondent that 'there are circumstances in which no compensation can be adequate compensation for an expropriation. This may be the case when an investment is loss-making and no longer a going concern'. In these circumstances, the State can demonstrate that the investor did not suffer a financial loss as a result of the taking.[82] This would suggest that the tribunal did not consider economic deprivation as an essential ingredient of expropriation. **5.41**

2. Permanent deprivation

Expropriation requires a permanent deprivation. This deprivation can be caused by measures which, although temporary, have the effect on the investment of a permanent deprivation. Some attempts at codification of customary international law (as set out in Chapter 4, The Concept of Expropriation) refer to 'temporary interference'. Investment treaties do not normally refer to temporary interference or deprivation although there are exceptions. The Italy–Bosnia BIT signed on 19 May 2000 includes the following provision on expropriation, which reads in part: **5.42**

> **Article 5**
>
> **Nationalisation or Expropriation**
>
> 1. The investments to which this Agreement relates shall not be subject to any discriminatory measure which might limit the right of ownership, possession, control or enjoyment of the investments, permanently or temporarily, unless where specifically provided by current, national or local, legislation and/or regulations and orders handed down by Courts or Tribunals having jurisdiction.[83]
> 2. It will be considered as nationalisation or expropriation of an investor of one of the Contracting Parties, a measure or nationalisation or expropriation of goods or rights belonging to a company controlled by the investor, as well as subtracting from the company financial resources or other assets, creating obstacles to the activities or otherwise substantially prejudice the value of the same.

Given expropriation is essentially the destruction of an investment, the most logical interpretation of the term 'temporary' would seem to be that it refers not to the expropriation itself (otherwise this would suggest that the expropriation itself will not last), but to the deprivation of the investment, which, in the case of temporary interference or deprivation, can have a more lasting and permanent effect even though the measure purports to be temporary. This interpretation is consistent with investment treaty practice.

Tribunals have long recognized that temporary measures are capable of amounting to an expropriation. This depends on the circumstances of the case and the effect of the **5.43**

[80] Ibid, para. 505.

[81] *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award of 21 July 2017.

[82] Ibid, para. 1036.

[83] Italy–Bosnia BIT, Article 5(1).

measures—even if the measures are temporary, they can nonetheless have the effect of a lasting and substantial deprivation of the investment.

5.44 The Iran–US tribunal considered the appointment of temporary managers was one of the factors constituting expropriatory acts in several cases: *Tippetts, Starrett Housing, Phelps Dodge*, and *Saghi*. In *Phillips Petroleum Company v. Iran*, the tribunal opined that, in cases of creeping expropriation, the taking will not necessarily be found to have occurred at the first or the last event, but rather when the interference has deprived the claimant of fundamental ownership, the deprivation is not merely 'ephemeral', or when it becomes an 'irreversible deprivation'. The tribunal noted that where the appointment of temporary managers by Iran ripened into a taking of title at a later date, the Tribunal has previously held that the earlier date should be used when 'there is no reasonable prospect of return of control'.[84]

5.45 In *Middle East Cement Shipping v. Egypt*,[85] the claimant brought a claim under the Egypt–Greece BIT signed on 16 July 1993 alleging the *de facto* revocation of its licence to import and store cement in bulk in floating silos in the free zones on the Badr quay close to El-Adabia port in Suez and to pack and dispatch.[86] The revocation of the licence was by ministerial decree, which Egypt argued affected the licence only for four months until the end of September 1989 when the licence would have, in any case, come to its contractual end.[87] The tribunal noted Egypt's concession that, at least for a period of four months, the claimant was deprived by the decree of rights it had been granted under the licence. The tribunal held that, as a matter of fact, the investor was deprived by such measures of parts of the value of his investment, and, therefore, the taking amounted to an expropriation within the meaning of the BIT.[88]

5.46 In *Fireman's Fund Insurance Company v. Mexico*,[89] the tribunal considered the elements of expropriation and noted that, in the ten cases decided by other NAFTA tribunals, the definition varied. Considering these cases and customary international law in general, the tribunal concluded that one of the elements of expropriation is that 'the taking must be permanent, and not ephemeral or temporary'.[90]

5.47 In *Wena Hotels Ltd v. Egypt*,[91] a dispute arose out of long-term agreements of twenty-one and twenty-five years entered into between the claimant and the Egyptian Hotel Company (EHC) in 1989 and 1990 to lease and develop two hotels located in Luxor and Cairo. In May 1990, the claimant filed an arbitration in Cairo against EHC over disputes concerning the Luxor Hotel Agreement. Thereafter, in April 1991, the hotels were seized by the government and the claimant was evicted. From the beginning of April 1991 to

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[84] *Phillips Petroleum Company Iran v. Iran*, Award No. 425-39-2, 21 Iran–US CTR 79, Award of 29 June 1989, para. 101.

[85] *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award of 12 April 2002.

[86] Ibid, para. 98.

[87] Ibid, para. 103.

[88] Ibid, para. 107.

[89] *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award of 17 July 2006.

[90] Ibid, para. 176(D).

[91] *Wena Hotels Ltd v. Egypt*, ICSID Case No. ARB/98/4, Award, (2004) 6 ICSID Rep. 89, (2002) 41 ILM 896, IIC 273 (2000), 8 December 2000.

February 1992, the Nile Hotel remained under the control of EHC. The Luxor Hotel remained under EHC's control until 21 April 1992.[92] Just two days before the Nile Hotel was returned to the claimant, on 23 February 1992, the Ministry of Tourism withdrew its operating licence because of fire safety violations and the hotel was closed down.[93] The EHC removed and auctioned much of the hotel's fixtures and furniture and the claimant did not operate the hotel again.[94] On 16 January 1992, the Chief Prosecutor of Egypt ruled that the seizure of the Nile Hotel was illegal and that the claimant was entitled to repossess the hotel.[95] On 21 April 1992, the Chief Prosecutor ruled that EHC's seizure of the Luxor Hotel was also illegal and ordered that the hotel be returned to the claimant. On 28 April 1992, the claimant re-entered the Luxor Hotel but the Ministry of Tourism denied the claimant a permanent operating licence; instead, it granted a series of temporary licences because of alleged defects in the drainage system and the fire safety system.[96]

5.48 The claimant filed an investment treaty claim against Egypt under the UK–Egypt BIT signed on 11 June 1995, alleging, inter alia, expropriation of its investment. The tribunal held that, despite having returned the hotels, Egypt had deprived the claimant of its fundamental rights of ownership by allowing the EHC forcibly to seize the hotels, to possess them illegally for nearly a year, and to return the hotels stripped of much of their furniture and fixtures. The tribunal rejected Egypt's argument that this was no more than ephemeral interference and, citing *Tippets*, held that Egypt's actions constituted a taking:

> Putting aside various other improper actions, allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the hotels for nearly a year is more than an ephemeral interference 'in the use of that property or with the enjoyment of its benefits.'[97]

5.49 In *SD Myers v. Canada*,[98] when examining the export ban on PCB waste and the closure of the Canadian border for approximately sixteen months, the tribunal recognized the possibility that, in some contexts and circumstances, a temporary deprivation could amount to an expropriation:

> 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 may be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary.[99]

On the facts, the tribunal rejected the claimant's claim of indirect expropriation given that the closure of the border was only temporary and had postponed the claimant's venture

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[92] Ibid, para. 53.
[93] Ibid, para. 55.
[94] Ibid, para. 56.
[95] Ibid, para. 54.
[96] Ibid, para. 58.
[97] Ibid, para. 99 citing *Tippets*, at 225. In footnote 242 the tribunal added: 'Such a deprivation easily qualifies as an expropriation within the meaning of Article 3(a) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 Amer. J. Int'l L. 545 (1961) ('A taking of property' includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference. ('as quoted in G.C. Christie "What Constitutes a Taking of Property Under International Law," 38 Brit. Y.B. Int'l L. 308, 330 (1962).')
[98] *SD Myers v. Canada*, UNCITRAL, First Partial Award of 13 November 2000, paras 287–8.
[99] Ibid, para. 283.

into the Canadian market for approximately eighteen months. The tribunal heard testimony that the delay had the effect of eliminating the claimant's competitive advantage but held that, although this may have significance in assessing the compensation to be awarded in relation to Canada's violations of other treaty protections, it did not support the proposition that the measure should be characterized as an expropriation.[100] The tribunal concluded that the measures were designed to, and did, curb SDMI's initiative, but only for a time. Canada realized no benefit from the measure and the evidence did not support a transfer of property or benefit directly to others. Instead, an opportunity was delayed.[101]

5.50 In *Tecnicas Medioambientales Tecmed SA v. Mexico*,[102] the tribunal considered that the deprivation must be permanent (and not temporary) to amount to expropriation:

> Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary.[103]
>
> Therefore, it is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent.[104]

5.51 In *Azurix Corp. v. Argentina*,[105] the tribunal rejected the claimant's claim for expropriation of its investment in a utility distributing drinking water and treating and disposing of sewerage water in the Argentine Province of Buenos Aires.[106] In considering whether the measures amounted to an expropriation, the tribunal addressed the parties' competing views, in the context of creeping expropriation, on the time needed for a set of measures to have an expropriatory effect. The claimant argued that there was no set duration for a period of time to be classified as being more than 'ephemeral' in international law and that it had been permanently deprived of its investment.[107] On the other hand, Argentina argued that the expropriatory effect should have lasted until it consolidated and could be considered to have a permanent effect, and that the set time to lapse is not defined by international law as an algorithm, but requires the passing of a reasonable time.[108]

5.52 The tribunal considered that there is no specific time set under international law for measures constituting creeping expropriation to produce that effect; rather, it depends on the specific circumstances of the case. The tribunal noted that 'arbital tribunals have considered that a measure was not "ephemeral" where the property was out of the control of the investor for a year (*Wena*) or an export licence was suspended for four months (*Middle East Cement*), or that the measure was ephemeral if it lasted for three months (*SD Myers*)'. The tribunal further noted that these cases involved a single measure but when considering multiple measures, it would depend on the duration of their cumulative effect. The tribunal concluded that 'unfortunately, there is no mathematical formula to reach a

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[100] Ibid, para. 284.
[101] Ibid, para. 287.
[102] *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, Award of 29 May 2003, para. 133 at n. 23.
[103] Ibid, para. 116.
[104] Ibid, para. 166, citing Iran–US Tribunal case law (*Tippetts* and *Phelps Dodge Corp.*) para. 116
[105] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006.
[106] Ibid, para. 322
[107] Ibid, para. 285.
[108] Ibid, para. 295.

mechanical result. How much time is needed must be judged by the specific circumstances of each case. As expressed by the tribunal in *Generation Ukraine*: "The outcome is judgement, i.e. the product of discernment, and not the printout of a computer program" '.[109]

5.53 In *LG&E v. Argentina*,[110] when considering the test for expropriation, the tribunal opined that one must consider the duration of the measure as it relates to the degree of interference with the investor's ownership rights. The tribunal further considered that, 'generally, the expropriation must be permanent, that is to say, it cannot have a temporary nature, unless the investment's successful development depends on the realization of certain activities at specific moments that may not endure variations'.[111]

5.54 In *Biwater Gauff (Tanzania) Ltd v. Tanzania*,[112] the tribunal opined that, in general terms, a substantial deprivation of rights for at least a meaningful period of time is required.[113] In *Plama Consortium Ltd (Cyprus) v. Bulgaria*, the tribunal considered that 'the decisive elements in the evaluation of Respondent's conduct in this case are therefore the assessment of ... (ii) the irreversibility and performance of the contested measures (i.e. *not ephemeral or temporary*) ...'.[114]

5.55 In *Achmea BV v. Slovakia*,[115] the claimant complained that various legislative measures introduced after a change in government in July 2006 constituted a systematic reversal of the 2004 liberalization of the Slovak health insurance market that had prompted it to invest in the sector. According to the claimant, these actions effectively destroyed the value of its investment and constituted an indirect expropriation under the Netherlands–Czech and Slovak Federal Republic BIT signed on 29 April 1991.[116] Despite finding that the removal through legislative reforms of the right to generate profits coupled with a ban on the transfer of the portfolio effectively deprived the claimant of access to the commercial value of its investment, that the investment could neither be maintained so as to generate profits nor be sold, and that there was no way in which the claimant could recover the commercial value of its investment,[117] the tribunal held that the measures did not constitute an expropriation. The tribunal viewed the 'deprivation' as temporary in that the ban on profits was later reversed by the Constitutional Court and declared unconstitutional[118] but considered that a ban on profits, if maintained, would have constituted a deprivation under the expropriation provision of the BIT.[119] The tribunal remarked that, had it decided the case before the decision of the Constitutional Court, it is likely that it would have found that there was a 'permanent' deprivation that could amount to an expropriation in violation of the BIT and that 'the question is, therefore, whether such a temporary deprivation should

[109] Ibid, para. 313.
[110] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc.v. Argentine Republic*, Decision on Liability of 3 October 2006.
[111] Ibid, para. 193.
[112] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, Award 24 July 2008 at n. 68.
[113] Ibid, para. 463.
[114] *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, para. 193.
[115] *Achmea BV v. Slovakia*, PCA Case No. 2008-13, Final Award, IIC 649 (2014), 7 December 2012, Permanent Court of Arbitration (PCA).
[116] Ibid, para. 7.
[117] Ibid, para. 279.
[118] Ibid, para. 290.
[119] Ibid, para. 288.

be treated differently now that the Constitutional Court has given its decision'. It decided that the facts must be taken as they exist at the time of the hearing.[120]

5.56 In *Inmaris Perestroika Sailing Maritime Services GmbH and ors v. Ukraine*,[121] the claimants and a State-owned education institution of Ukraine entered into a service contract for the use of a training ship owned by the institution to train cadets for Ukraine's national fishery fleet. The claimants also used the ship to market tours and events. The claimants contended that an instruction from the Ministry of Ukraine preventing the ship from leaving territorial waters, and the Ministry's refusal to allow the ship to leave throughout the course of the following year, constituted an expropriation of its contractual rights to use the ship in breach of the expropriation provision in the German–Ukraine BIT signed on 15 February 1993. Ukraine argued that any deprivation was merely temporary because the travel ban at issue was lifted after a year. The tribunal held that the act deprived the claimants of access to, and control over, the essential asset for its investment i.e. the ship, and thus their contractual rights.[122]

5.57 The tribunal found that the damage to the claimant's investment had by that time been done: an entire sailing season had been cancelled and the claimants' business had suffered substantial harm such as they could not be expected to resume operations as if nothing had happened. Indeed, two of the claimants were, at that stage, in insolvency proceedings and, even if those entities had remained solvent, it was not reasonable to assume that customers would be willing to work with them in light of the events.[123] The tribunal concluded that, at a minimum, the travel ban amounted to an indirect expropriation in that it destroyed the value of the claimants' contractual rights and the diminution in value was, for all intents and purposes, permanent.[124]

5.58 In *Olin Holdings Ltd v. Libya*,[125] the claimant commenced an International Chamber of Commerce (ICC) arbitration under the Cyprus–Libya BIT signed on 30 June 2004, against Libya alleging, inter alia, that its investment in a dairy and juice factory in Libya had been unlawfully expropriated. Between 2003 and 2006, Olin was issued an investment licence by the Ministry of Economy, leased land for its factory, was granted a building permit from the Tripoli People's Committee, was issued a new investment licence adding production of juices to the scope of its investment, and by the end of 2006, had competed the construction of its factory and was ready to start production. Then, in November 2006 Olin received an eviction order from the Tripoli's People's Committee issued pursuant to an Expropriation Order of the General People's Committee which expropriated a parcel of land along the Tripoli Airport Road, including Olin's factory, to establish a housing project. Within days, the Libyan army had destroyed several buildings around Olin's factory and expelled thousands of occupants. In May 2007, the plot of Olin's factory was formally transferred to the government. In August 2010, and notwithstanding an earlier court order of the Tripoli Court of Appeal cancelling the Expropriation Order on the grounds that it

[120] Ibid, para. 291.

[121] *Inmaris Perestroika Sailing Maritime Services GmbH and ors v. Ukraine*, ICSID Case No. ARB/08/8, Award of 1 March 2012.

[122] Ibid, para. 300.

[123] Ibid, para. 301.

[124] Ibid, para. 302.

[125] *Olin Holdings Limited v. State of Libya*, ICC, Final Award of 25 May 2018.

was unlawful under Libyan law, the General Authority for Public Property instructed Olin to evacuate the site. In June 2011, the Libyan authorities transferred the property title of the plot back to the lessor. In October 2015, Olin ceased all operations at its factory, even though its operation licence had been renewed.[126]

5.59 The tribunal expressed the view that, in assessing the overall impact of the Expropriation Order on Olin's investment, State measures, even if temporary, can have an effect equivalent to expropriation if their length and impact on the investment are sufficiently important. The tribunal found that measures taken by Libya considerably impaired Olin's investment between November 2006 and June 2011, which, in its view, was a significant period of time for a business that had just started its operations. Moreover, the measures coincided with Olin accumulating a negative cash flow.[127] The tribunal concluded that the Expropriation Order, combined with the events that followed, severely impaired Olin's use and enjoyment of its investment[128] and constituted an indirect expropriation.[129] The tribunal considered that these measures, over a four-year period, had caused uncertainty to Olin on the question as to whether its factory was going to be demolished and relocated resulting in an abandonment of new investments in Olin's business and stoppages in production and postponements of marketing campaigns, the fundamental inability of Olin to plan and manage its business, the loss of 'first mover' advantage in the market, and strained relations with stakeholders.[130]

B. Expropriation or Commercial Risk

5.60 Investment treaty tribunals have held that investment treaties are not insurance policies for risky investments. In determining whether measures constitute expropriation, tribunals have distinguished cases of expropriation from failed business ventures that have suffered losses as a result of normal commercial risk. This is consistent with rulings of the ICJ which have recognized that no enterprise can escape from the chances and hazards resulting from general economic conditions.

5.61 The *Oscar Chinn Case*[131] concerned a claim made by the government of the United Kingdom against Belgium before the ICJ in respect to loss and damage alleged to have been sustained by Mr. Oscar Chinn, a British subject, who had established a river transport and ship building business in the Congo, which was, at that time, a Belgian colony. In 1930 and 1931, a global economic crisis severely impacted trade in the Congo. In June 1931, the Belgium Minister for the Colonies introduced measures to reduce transport rates for the transport and handling of native products intended for export and to reimburse any losses incurred provided the accounts as a whole showed a deficit. A Belgian company, Unatra, was entitled to benefit from these measures but they did not extend to other fluvial transport enterprises, including Mr. Chinn's enterprise. The government of the United Kingdom alleged that the measures constituted a breach of the Convention

[126] Ibid, paras 79–128.
[127] Ibid, para. 165.
[128] Ibid, para. 161.
[129] Ibid, para. 167.
[130] Ibid, para. 439.
[131] *Oscar Chinn Case*, Series A/B/63, Judgment of 12 December 1934.

7

REGULATORY EXPROPRIATION

A. Overview

7.01 Regulatory measures come in a variety of forms and relate to all aspects of economy and society. Everyday examples include taxation, the environment and public health, energy, import and export restrictions, currency controls, financial markets, anti-competitive practices, construction, transport, broadcasting, and telecommunications. Regulatory measures can be enacted in many ways including by legislation, decree, and the issuance (and revocation) of regulations, permits, and licences. Investment treaty claims very often concern the impact of regulatory measures on foreign investments.

7.02 Over six decades ago, Garcia-Amador observed that the fundamental lawfulness of this class of measures in an international context, regardless of their nature or scope, has seldom been disputed. He opined that the possibility of a State incurring international responsibility for regulatory measures including taxation, charges on property, import and export restrictions, and control of exchange rates and currency, can only arise if the measure is discriminatory or personal and arbitrary.[1] More recently, UNCTAD re-affirmed the position that, according to the doctrine of police powers, certain acts of States are not subject to compensation under the international law of expropriation and that police powers must be understood as encompassing a State's full regulatory dimension. UNCTAD added that, although there is no universally accepted definition, in a narrow sense, this doctrine covers State acts such as: (a) forfeiture or a fine to punish or suppress crime; (b) seizure of property by way of taxation; (c) legislation restricting the use of property, including planning, environment, safety, health and the concomitant restrictions to property rights; and (d) defence against external threats, destruction of property of neutrals as a consequence of military

[1] Document A/CN.4/119, *Fourth Report on State Responsibility* by Mr FV Garcia-Amador, Special Rapporteur, Extract from the Yearbook of the International Law Commission, 1959, Vol. II, para. 44.

operations and the taking of enemy property as part payment of reparation for the consequences of an illegal war.[2]

7.03 Efforts to codify the position under customary international law recognize that some takings are not considered wrongful (and are therefore not compensable) so long as certain conditions are met, in particular that the taking is non-discriminatory. Article 10(5) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (the Harvard Draft Convention) identifies categories of non-compensable takings such as those resulting from taxation, changes in currency valuation, and actions taken in the public interest:

> An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided ...

It adds that four conditions must be met for takings to be considered lawful:

(a) it is not a clear and discriminatory violation of the law of the State concerned;
(b) it is not the result of a violation of any provision of Articles 6 to 8 [denial of access to a tribunal or administrative authority; denial of a fair hearing; adverse decisions and judgements] of this Convention;
(c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and
(d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

7.04 Paragraph 712 comment (g) of the Restatement of the Law (Third) of Foreign Relations of the United States (the United States' Third Restatement) similarly takes the position that certain takings, including bona fide general taxation and regulation, are non-compensable so long as the measures taken are not discriminatory and are not designed the frustrate the investment:

> A State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police powers of States, if it is not discriminatory, and is not designed to cause the alien to abandon the property to the State or sell it at a distress price.

7.05 Two very fundamental questions arise:

(a) in what circumstances, if any, do takings of foreign investments as a result of regulatory measures constitute expropriation? and
(b) in circumstances where takings constitute expropriation, is the host State liable to compensate the foreign investor?

[2] UNCTAD Report, *Expropriation, A Sequel*, 2012, p. 79. See also *Black's Law Dictionary Online*, 2nd Edition, definition of 'police powers': ('The powers granted by the constitution to the State in order to govern, establish, adopt as well as enforce laws that are designed for the protection as well as preservation of the public health. The government also gets the right to make use of private property for public usage.')

There is no single test to determine when takings as a consequence of regulatory measures constitute expropriation; instead, arbitral tribunals make a case-by-case, fact-specific, determination and adopt a variety of criteria, one of the decisive ones being (as with other types of indirect expropriation) the impact of the measures on the investment. In investment treaty cases where takings are considered expropriatory, then the international responsibility of a State is triggered and the host State is liable to compensate the foreign investor.

7.06 In an attempt to overcome uncertainty and to ringfence regulatory policy space some modern-day bilateral investment treaties (BITs) expressly refer to the police powers doctrine and clarify the circumstances in which regulatory measures will not constitute indirect expropriation under the treaty. For example, many Canadian BITs state that, except in rare circumstances, non-discriminatory measures designed and applied to protect the legitimate public objectives for the well-being of citizens such as health, safety, and the environment, will not constitute indirect expropriation. The treaties clarify that the severity of the measure is considered the decisive factor—if, in light of its purpose, a measure cannot be reasonably viewed as having been adopted and applied in good faith, then it will constitute an expropriation.

7.07 However, even taking the above definition, the difficulty remains in identifying the rare circumstances. It can be difficult for tribunals to determine when regulatory interference crosses the line to compensatory expropriation. Rubins and Kinsella submit that this is because customary international law also recognizes the need of States to engage in regulation in the normal exercise of police powers and to advance the welfare and safety of their populations.[3]

7.08 The OECD has identified, in broad terms, the following criteria adopted by tribunals to determine whether regulatory measures constitute indirect (and compensable) expropriation:

(a) the degree of interference with the property right;
(b) the character of the governmental measures i.e. its purpose and context; and
(c) the interference of the measure with reasonable and investment-backed expectations.[4]

7.09 A decade ago, UNCTAD observed that the critical question as to the elements establishing a taking in international law remains unsettled and that most arbitral tribunals agree this determination has to be made on a case-by-case basis. The Report identifies key elements repeatedly referred to by arbitral tribunals in the preceding decade to determine whether a taking was compensable. These include:

(a) the permanence of the interference with the property;
(b) the substantiality of such interference;

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[3] Rubins and Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide*, Oceana Publications, 2005, pp. 182–3.

[4] OECD Report, *Indirect Expropriation and the Right to Regulate in International Investment Law*, 2004, p. 10. On (c) Dugan, Wallace, Rubins, and Sabahi, Chapter XVI, Expropriation, *Investor-State Arbitration*, Oxford University Press, 2009, p. 465, point out that a tribunal is more likely to find that a government measure is an expropriation if the measure contradicts express or even implied representations that the government has made to the investor. One example cited is *EnCana Corp. v. The Republic of Ecuador* whereby the tribunal stated at para. 183 of the award, 'In the absence of specific commitment from the host State, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage, during the period of the investment.'

(c) the existence of investment-backed expectations; and, more recently
(d) the proportionality between the public policy objective and the impact on the property rights of the investor.[5]

7.10 In a more recent report, UNCTAD adds that when assessing if a regulatory measure is expropriatory in nature, it is necessary to undertake a broad examination of its nature, purpose, and character, with the critical issue being to determine whether the measure is part of the normal or common regulatory activity of the State or whether it possesses attributes that turn it into an expropriation.[6] The list of attributes is wide and includes the lack of genuine public purpose, of due process, of proportionality, and of fair and equitable treatment; discrimination; abuse of rights; and direct benefit to the State. The Report concludes that no one indicator should be treated as decisive, instead a global assessment is required.[7]

7.11 Fortier and Drymer submit that determining when a regulation 'goes too far' is 'the nub of the issue' and propose that the appropriate test may be 'I know it when I see it'. They observe that, although a long line of authorities has held that States are not liable to pay compensation; when, in the normal exercise of their police powers States adopt, in a non-discriminatory manner, bona fide regulations that are aimed at the general welfare, international law has yet to identify in a comprehensive and definitive fashion which regulations are 'commonly accepted' as within the police power of States and are thus non-compensable.[8]

7.12 The authors identify three different approaches adopted by arbitral tribunals to distinguish between non-compensable regulation and a taking: (a) the 'sole effect' test, i.e. the effect of the measure on the investment. There are two distinct 'effects': the level of interference on the investment (nature, degree, and duration of the interference) and the extent to which the measure may undermine the investor's reasonable and legitimate expectations represented by the investment; (b) the 'purpose' of the measure; and (c) a combination of both the 'sole effects' and 'purpose' tests.[9]

7.13 Schreuer identifies two criteria that lend themselves to establishing the threshold between simple regulation and regulatory expropriation: the 'qualitative' test which looks at the severity of the measure's effect on the investment, and the 'motive or purpose' of the measure test. Schreuer notes that the 'motive or purpose' of the measures test has not found general acceptance and points instead to the 'sole effects doctrine', which denies the relevance of an intention to expropriate. This approach, Schreuer submits, is prevalent in international practice. From an analysis of arbitral awards, Schreuer concludes that the decisive standard is the effect of the measures on the investor's property, but that this is not to say that the existence of a legitimate public purpose is irrelevant—an absence of a legitimate public purpose 'would inject an element of illegality that

[5] UNCTAD Report, *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, 2007, p. 57.
[6] UNCTAD Report, *Expropriation: A Sequel*, 2012, p. 92.
[7] Ibid, p. 94
[8] Fortier and Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, Caveat Investor*, 19 ICSID Review—Foreign Investment Law Journal, 2004, pp. 298–99
[9] Ibid, pp. 300–9

would lead to an award of damages conceptually different from and possibly higher than compensation'.[10]

7.14 Paulsson and Douglas submit that a guiding principle, albeit with reference to a non-exclusive test, in determining whether a taking constitutes a non-compensable regulation or an indirect expropriation is whether, based on the investment treaty cases under review, the prohibition against indirect expropriation protects the legitimate expectations of the investor based on specific undertakings or representations by the host State upon which the investor has reasonably relied.[11]

7.15 Paulsson also argues that, alone, the North American Free Trade Agreement (NAFTA) award *Methanex Corp. v. United States*[12] goes a long way towards justifying the conclusion that investment arbitrations are not putting at risk the right to regulate. In this case, a Canadian investor brought a claim against the United States under NAFTA alleging that the State of California destroyed a profitable business by banning the use of a certain fuel additive. The position taken by the United States was that the ban was a legitimate exercise of its regulatory powers. As a principle finding of fact, the tribunal found that the ban was motivated by the 'honest belief, held in good faith and on reasonable scientific grounds, that MTBE [the controversial additive] contaminated groundwater and was difficult and expensive to clean up'.[13] The tribunal concluded that the ban was a lawful regulation and not an expropriation: it was made for a public purpose, was non-discriminatory, and was accomplished by due process.[14]

7.16 On the ability to predict whether a proposed regulation will lead to compensation for those affected, Paulsson concludes, '[i]n a phrase, perfect predictability is an illusion'. But, this,

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[10] Schreuer, Part 1 – Rapport, The Concept of Expropriation under the ECT and Other Investment Protection Treaties, Chapter 3, *Investment Arbitration and The Energy Charter Treaty*, edited by Clarisse Ribeiro, JurisNet, 2006, p. 144–58. Yannaca-Small, Chapter 3, Part 2—Comments on the Rapport: Indirect Expropriation and the Right of the Governments to Regulate Criteria and Articulate the Difference, *Investment Arbitration and the Energy Charter Treaty*, 2006, identifies the following three criteria in distinguishing non-compensable regulation from expropriation: (a) the quantative test that looks at the severity of the measures effects on the investment; (b) the 'purpose and context'; and (c) whether the governmental measure affects the investor's reasonable expectations (pp. 160–3); Mostafa, *The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law*, 15 Australian International Law Journal, 2008, submits that two main doctrines have emerged when considering whether a governmental measure constitutes an indirect expropriation: the sole-effects doctrine (which requires that reference be made only to the effect of the measure on the property) and the police powers doctrine (which posits that the purpose, context, and nature of the measure may all be relevant to the question). Mostafa concludes, 'Currently, neither doctrine has consistently gained favour over the other in investment protection case law. This has led to a high degree of uncertainly for both investors and host States when disputes arise regarding regulations implemented by the host State that detract from investor's property rights. The uncertainly is compounded by the fact that the police powers doctrine itself is of unclear scope ...' (p. 268); Coe and Rubins, Chapter 17, Regulatory Expropriation and the Tecmed Case: Context and Contributions, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, edited by Todd Weiler, Cameron May, 2005, identify two approaches adopted by tribunals in distinguishing a non-compensable regulation from a taking: (a) flexible, fact-dependent tests often deployed in an effort to access 'reasonableness' and (b) the substantiality of impact i.e. the degree of interference (pp. 634–7).

[11] Paulsson and Douglas, Indirect Expropriation in Investment Treaty Arbitrations, Arbitrating Foreign Investment Disputes, Kluwer Law International, 2004, p. 157.

[12] *Methanex Corp. v. The United States of America*, UNCITRAL, Final Award on Jurisdiction and the Merits of 3 August 2005.

[13] Ibid, Part III, Chapter A, para. 102.

[14] Ibid, Part IV, Chapter D, para. 15.

he submits, does not mean that there can be no predictability at all: the grounds on which a property owner adversely affected by regulation may be entitled to compensation are becoming clearer. These are: (a) where the government has violated reasonable investment-backed expectations or specific commitments made to the investor; (b) where the relevant regulation is not legitimate and bona fide; and (c) where the regulatory acts are not consistent with due process.[15]

7.17 In addition, Yannaca-Small identifies the proportionality of the measure as a relevant factor. She submits that there seems to have been a convergence in recent years in the ways tribunals have distinguished legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation. Yannaca-Small notes that, in broad terms, tribunals have identified and have had recourse to the following criteria which look very similar to the ones laid out by the new generation of investment agreements: (i) the degree of interference with the property right, including the duration of the regulation; (ii) the character of governmental measures, that is, the purpose and the context of the governmental measure; (iii) the proportionality between the public policy objective pursued by a measure and the impact of such measure on the property of the investor; and (iv) the interference of the measure with reasonable and investment-backed expectations. Yannaca-Small observes that these criteria are often deeply intertwined with one another in tribunals' analyses, such that, in certain instances, separating them from one another may impose somewhat artificial distinctions. Similarly, depending on the facts at play in a given arbitration, many tribunals consider only a few, or even a single one of these criteria and pay only glancing, if any, attention to the others. She concludes that, nonetheless, they each represent a separate concern that may inform a tribunal's determination as to whether indirect expropriation has occurred.[16]

B. Types of Regulatory Measures

7.18 Investment treaty tribunals have considered various types of regulatory measures in cases of alleged indirect expropriation, including:

(1) Taxation—*Marvin Feldman v. Mexico*;[17] *Nykomb Synergetics Technology Holding AB v. Latvia*;[18] *EnCana Corp. v. Ecuador*;[19] *Paushok and ors v. Mongolia*;[20] *Burlington Resources Inc. v. Ecuador*;[21]

[15] Paulsson, *Indirect Expropriation: Is the Right to Regulate at Risk?* This paper was delivered at a Symposium co-organized by ICSID, OECD, and UNCTAD on Making the Most of International Investment Agreements: A Common Agenda in Paris on 12 December 2005.

[16] Yannaca-Small, Indirect Expropriation and the Right to Regulate: Has the Line Been Drawn? Part IV Guide to Key Substantive Issues, in *Arbitration Under International Investment Agreements: A Guide to Key Issues*, 2nd Edition, OUP, 2018, para. 22.49.

[17] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award and Dissenting Opinion, (2003) 18 ICSID Rev-FILJ 488, IIC 157 (2002), (2005) 7 ICSID Rep 341, (2003) 42 ILM 625, dispatched 16 December 2002.

[18] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, Award, IIC 182 (2003), 16 December 2003, Arbitration Institute (SCC Institute).

[19] *EnCana Corp. v. The Republic of Ecuador*, LCIA Case No. UN3481, Award and Partial Dissenting Opinion, IIC 91 (2006), 3 February 2006, London Court of International Arbitration.

[20] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Award on Jurisdiction and Liability, Ad Hoc Tribunal (UNCITRAL), IIC 490 (2011), 28 April 2011.

[21] *Burlington Resources Inc. v. The Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, IIC 568 (2012), 14th December 2012, dispatched 14 December 2012.

El Paso Energy International Company v. Argentina;[22] *Quasar de Valores SICA SA and ors v. Russia*;[23] *Perenco Ecuador Ltd v. The Republic of Ecuador*;[24] *Ryan and ors v. Poland*.[25]

(2) Import and export regulations—*Pope & Talbot Inc. v. Canada*[26] concerning regulations on soft lumber wood; *SD Myers Inc. v. Canada*[27] concerning the export of soft lumber wood; *Grand River Enterprises Six Nations Ltd and ors v. United States*[28] concerning regulations on the export of tobacco products.

(3) Environmental and health regulations—*Compañía del Desarrollo de Santa Elena SA v. Costa Rica*[29] concerning compensation for the lawful expropriation of land for environmental purposes; *Tecmed SA v. Mexico*[30] concerning measures taken in relation to a landfill for hazardous industrial waste; *Methanex Corp. v. United States*[31] concerning a ban on the sale and use of a gasoline additive; *Chemtura Corp. v. Canada*[32] concerning the regulation of a form of pesticide on the market; *Philip Morris Brands Sàrl and ors v. Uruguay*[33] concerning regulations relating to the tobacco industry.

(4) Currency control and tariff regulation—*LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentina*;[34] *National Grid Public Limited Company v. Argentina*;[35] *Suez and ors v. Argentina*;[36] *Total SA v. Argentina*.[37]

(5) The energy sector and tariff regulation—*Blusun SA, Jean-Pierre Lecorcier and Michael Stein v. Italy*;[38] *Charanne and Construction Investments v. Spain*;[39] *Eiser Infrastructure Ltd*

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[22] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, IIC 519 (2011), 27 October 2011, dispatched 31 October 2011.

[23] *Quasar de Valores SICA SA and ors v. The Russian Federation*, SCC Case No. 24/2007, Award, IIC 557 (2012), 20 July 2012, Stockholm; Chamber of Commerce (SCC); Arbitration Institute (SCC Institute).

[24] *Perenco Ecuador Ltd v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, IIC 657 (2014), dispatched 12 September 2014.

[25] *Ryan, Schooner Capital LLC, Atlantic Investment Partners LLC v. The Republic of Poland*, Award, ICSID Case No. ARB(AF)/11/3, IIC 842 (2015), despatched 24 November 2015, World *Bank*; International Centre for Settlement of Investment Disputes (ICSID).

[26] *Pope & Talbot Inc. v. The Government of Canada*, Ad Hoc Tribunal (UNCITRAL), Interim Award, IIC 192 (2000), 26 June 2000.

[27] *SD Myers Inc. v. The Government of Canada*, Partial Award on the Merits, 13 November 2000, para. 283.

[28] *Grand River Enterprises Six Nations Ltd and ors v. The United States of America*, ICSID Case No. ARB/10/5, Award, IIC 481 (2011), dispatched 12 January 2011.

[29] *Compañía del Desarrollo de Santa Elena SA v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, IIC 73 (2000), dispatched 17 February 2000.

[30] *Técnicas Medioambientales Tecmed SA v. The United Mexican States*, ARB(AF)/00/2, Award, 10 ICSID Rep. 130, (2004) 43 ILM 133, IIC 247 (2003), 29 May 2003.

[31] *Methanex Corp. v. The United States of America*, Final Award on Jurisdiction and Merits at n. 12.

[32] *Chemtura Corp. v. The Government of Canada*, Ad Hoc Tribunal (UNCITRAL), Award, IIC 451 (2010), 2nd August 2010.

[33] *Philip Morris Brands Sàrl and ors v. Uruguay*, ICSID Case No. ARB/10/7, Award, IIC 844 (2016), 28 June 2016, dispatched 8 July 2016.

[34] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006.

[35] *National Grid Plc v. The Argentine Republic*, Ad Hoc Tribunal (UNCITRAL), Award, Case 1:09-cv-00248-RBW, IIC 361 (2008), 3 November 2008.

[36] *Suez and ors v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, IIC 442 (2010), 30 July 2010.

[37] *Total SA v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, IIC 484 (2010), 21 December 2010, dispatched 27 December 2010.

[38] *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award of 27 December 2016.

[39] *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Final Award of 21 January 2016.

and Energía Solar Luxembourg Sàrl v. Spain;[40] *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain*.[41]

(6) Telecommunications and tariff regulation—*Telenor Mobile Communications AS v. Hungary*.[42]

(7) Financial industry regulation—*Fireman's Fund Insurance Company v. Mexico*;[43] *Deutsche Bank AG v. Sri Lanka*;[44] *Saluka Investments BV v. Czech Republic*;[45] *Renee Rose Levy De Levi v. Peru*;[46] *Valeri Belokon v. Kyrgyz Republic*.[47]

(8) Air transport industry regulation—*ADC Affiliate Ltd and ADC & ADMC Management Ltd v. Hungary*.[48]

(9) Broadcasting regulation—*CME Czech Republic v. Czech Republic*.[49]

C. Bona Fide Regulation in the Police Powers of the State

7.19 Investment treaty tribunals are split on the issue as to whether bona fide non-discriminatory regulation can be characterized as expropriation. On the one hand, tribunals have held that bona fide regulation exercised in the police powers of the State does not constitute expropriation so long as certain criteria are met, one of the main ones being that the measure must be non-discriminatory. Other criteria applied by tribunals include that the measure must be for a public purpose, in accordance with due process, proportional, and must not violate specific commitments made to the investor. On the other hand, tribunals have found that regulatory measures, even though bona fide and non-discriminatory, have amounted to a compensable expropriation.

7.20 In *Sedco, Inc. v. National Iranian Oil Co.*, the Iran–US Tribunal observed that it is '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 powers of states'.[50]

[40] *Eiser Infrastructure Ltd and Energía Solar Luxembourg Sà rl v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award of 4 May 2017.

[41] *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award of 15 February 2018.

[42] *Telenor Mobile Communications AS v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006.

[43] *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award of 17 July 2006.

[44] *Deutsche Bank AG v. The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Final Award, IIC 578 (2012), dispatched 31 October 2012.

[45] *Saluka Investments BV v. The Czech Republic*, Partial Award, IIC 210 (2006), 17 March 2006, PCA.

[46] *Renee Rose Levy De Levi v. The Republic of Peru*, ICSID Case No. ARB/10/17, Award, IIC 728 (2014), dispatched 26 February 2014.

[47] *Valeri Belokon v. The Kyrgyz Republic*, Ad Hoc Tribunal (UNCITRAL), Award, IIC 760 (2014), 24 October 2014.

[48] *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006.

[49] *CME Czech Republic v. The Czech Republic*, Ad Hoc Tribunal (UNCITRAL), Partial Award and Separate Opinion, IIC 61 (2001), (2002) 9 ICSID Rep 121, (2002) 14(3) World Trade and Arb. Matl 109, 13 September 2001.

[50] *Sedco, Inc v. National Iranian Oil Co.*, Award No. ITL 55-129-3, Award of 24 October 1985, para. 275.

7.21 In *Methanex Corp. v. United States*,[51] the tribunal held that an otherwise non-discriminatory regulation for the public purpose and enacted with due process would not be expropriatory unless specific commitments were violated.[52] As already seen, the tribunal concluded that from the standpoint of international law, a California ban on the sale and use of the gasoline additive 'MTBE' (methyl tertiary-butyl ether) was a lawful regulation and not an expropriation.[53] This case is considered further below in respect to legitimate expectations.

7.22 In *Saluka Investments BV v. Czech Republic*,[54] the claimant brought a claim under the Netherlands–Czech Republic BIT signed on 24 April 1991 alleging, inter alia, that it had been deprived of the value of its shares in Ipbinvestiční a Poštovní Banka (IPB) by the Czech Republic's intervention which culminated in the forced administration of the bank by the Czech National Bank (CNB).

7.23 The tribunal acknowledged that the expropriation provision in the treaty was drafted very broadly and did not include an exception for the exercise of regulatory power but found that, in using the concept of deprivation, it imported into the treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order.[55] The tribunal opined that 'it is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt, in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.'[56]

7.24 The tribunal considered that the Harvard Draft Convention's four exceptions to the categories of non-compensable takings 'do not, in any way, weaken the principle that takings or deprivations are non-compensable'; rather, 'they merely remind the legislator or, indeed, the adjudicator, that the so-called "police power exception" is not absolute'.[57] The tribunal also recalled that the United States' Third Restatement includes bona fide regulations and 'other action of the kind that is commonly accepted as within the police power of State' in the list of permissible—that is, non-compensable—regulatory actions.[58]

7.25 The tribunal opined that general regulation falling within the police powers of the State will not constitute expropriation:

> In the opinion of the Tribunal, 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.[59]

However, the tribunal also observed that international law has yet to draw a bright and easily distinguishable line between non-compensable regulation on the one hand and, on the other, unlawful and compensable expropriation:

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[51] *Methanex Corp. v. The United States of America*, Final Award on Jurisdiction and Merits at n. 12.
[52] Ibid, Part IV, Chapter D, para. 7.
[53] Ibid, Part IV, Chapter D, para. 15.
[54] *Saluka Investments BV v. The Czech Republic*, Partial Award at n. 45.
[55] Ibid, para. 254.
[56] Ibid, para. 255.
[57] Ibid, para. 258.
[58] Ibid, para. 260.
[59] Ibid, para. 262.

> That being said, 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.[60]

When faced with the question of when, how, and at what point, an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation, the tribunal expressed the view that international tribunals must consider the circumstances in which the question arises.[61]

7.26 The tribunal concluded that, although the claimant had been deprived of its investment in IPB as a result of the imposition of the forced administration of the bank by the CNB on 16 June 2000, this was a lawful and permissible regulatory action by the Czech Republic aimed at the general welfare of the State, and did not fall within the ambit of any of the exceptions to the permissibility of regulatory action which are recognized by customary international law.[62] The tribunal took the view that CNB was justified under Czech law in imposing the forced administration of IPB and appointing an administrator to exercise the administration. The tribunal further found that the Czech State in the person of its banking regulator, the CNB, had the responsibility to take the decision on 16 June 2000 and enjoyed a margin of discretion in the exercise of that responsibility.[63]

7.27 In *Chemtura Corp. v. Canada*,[64] the claimant brought an UNCITRAL arbitration alleging that Canada had breached NAFTA Article 1110. It argued that the Canadian Pest Management Regulatory Agency's (PMRA) suspension of Crompton Canada's lindane product registrations were measures tantamount to expropriation.[65] Lindane is a pesticide that was first registered on the Canadian market in 1938. As a result of the risks associated with the use of lindane, many steps had been taken to restrict the use of lindane on an international level in the last decades. The dispute concerned measures taken by Canada which the claimant argued constituted an expropriation of its investment including the PMRA's decision to phase out lindane use in general. The claimant argued that the measures were not taken for a public purpose as the PMRA had no new, pertinent, or reasonable scientific rationale. Rather, the measures were in fact triggered by trade considerations and related pressure from the United States. The claimant further argued that the expropriation of the its lindane products business in Canada violated due process and was in breach of NAFTA Article 1105(1). Finally, the claimant contended that Canada's failure to pay compensation for the taking was also a violation of its international obligations.[66]

7.28 The tribunal applied the three-step approach adopted by other NAFTA tribunals: (i) whether there was an investment capable of being expropriated, (ii) whether that investment had, in fact, been expropriated, and (iii) whether the conditions set in Article

[60] Ibid, para. 263.
[61] Ibid, para. 264.
[62] Ibid, paras 267 and 275.
[63] Ibid, paras 271 and 272.
[64] *Chemtura Corp. v. The Government of Canada*, Award of 2 August 2010 at n. 32.
[65] Ibid, para. 251.
[66] Ibid.

1110(1)(a)–(d) of NAFTA had been satisfied.[67] In determining whether the investment had been expropriated, the tribunal applied the 'substantial deprivation' test.[68] The tribunal held that the criteria in *Pope & Talbot* —set out in Chapter 5 of this book—must guide its enquiries in determining whether the effects of the measures challenged were to 'substantially' deprive the investor of the benefit the investment; however, this was a matter of degree and not one of specific conditions.[69] On the facts, the tribunal found that the interferences of the respondent with the claimant's investment could not be deemed substantial in that the sales from lindane products were a relatively small part of the overall sales of Chemtura Canada at all relevant times.[70] This conclusion was also supported by the fact that Chemtura Canada remained operational and its yearly sales, although reduced in 2002, continued an ascending trend between 2003 and 2007 reaching levels comparable to those of 1997 to 1999. Lastly, the tribunal noted that there was no allegation that the respondent interfered with Chemtura Canada's management, daily operations, or the payment of dividends; in other words, the claimant remained at all relevant times in control of its investment.[71]

7.29 Irrespective of the existence of a contractual deprivation, the tribunal considered that, in any event, the measures challenged by the claimant constituted a valid exercise of the respondent's police powers, finding: the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. The tribunal opined that a measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, did not constitute an expropriation.[72]

7.30 In *Renee Rose Levy De Levi v. Peru*,[73] the tribunal rejected a claim of indirect expropriation under the Peru–France BIT signed on 6 October 1993 on the grounds that the acts complained of were legitimate regulatory acts of the State. In doing so, the tribunal agreed with the statement of another arbitral tribunal, '... in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation'.[74]

7.31 The claimant had contended that Peru arbitrarily and illegally subjected Banco Nuevo Mundo (BNM), the shareholders of which were initially the father of the claimant, Mr. David Levy Pesso, and then the claimant herself, to a process of intervention, followed by its dissolution and liquidation.[75] The claimant alleged the existence of a 'creeping expropriation' from the Superintendency of Banking, Insurance, and Pension Fund Administration's (SBS) extended visit in August 2000 until the declaration of BNM's dissolution. The tribunal found however that SBS's visit was not long, it was not made in bad faith nor

[67] Ibid, para. 257.
[68] Ibid, para. 249.
[69] Ibid, para. 247.
[70] Ibid, para. 263.
[71] Ibid, para. 264.
[72] Ibid, para. 266.
[73] *Renee Rose Levy De Levi v. The Republic of Peru*, Award dispatched 26 February 2014 at n. 46.
[74] Ibid, para. 475 citing *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 139.
[75] Ibid, para. 2.

under coercion, threats, or harassment against the investor or the investment, and that the claimant had not proved that it was the cause of the speculation or rumours about BNM's precarious financial situation.[76]

7.32 The tribunal further found that SBS had intervened in BNM pursuant to the laws in force including when, following receipt of the PwC audit report, it had ordered the dissolution and liquidation of the bank. The tribunal considered that these were legitimate acts of 'police power' characteristic of bank officials because, according to Article 2 of the Banking Law, the main purpose of the Law was '... to provide for the competitive, solid and reliable operation of the financial and insurance systems, so as to contribute to national development'.[77] As opposed to an expropriation, the tribunal found that what had happened was repeated non-compliance with the banking regulations by BNM, which had taken risks in times of a considerable liquidity crisis that affected it, causing it to fail to perform its obligations and to close its offices. The tribunal concluded that these acts made SBS's intervention and BNM's subsequent dissolution and liquidation inevitable. It noted that, as other arbitral tribunals have repeatedly pointed out, no investment treaty is an insurance or guarantee of investment success, especially when the investor makes bad business decisions.[78]

7.33 In *Quiborax SA and Non Metallic Minerals SA v. Bolivia*,[79] the tribunal considered whether the revocation by decree and ex-post annulment of the claimants' mining concessions constituted an expropriation. The tribunal agreed with Bolivia that if the revocation decree was a legitimate exercise of its sovereign right to sanction violations of the law in its territory, it would not qualify as a compensable taking as international law has generally understood that regulatory activity exercised under the so-called 'police powers' of the State is not compensable.[80] The tribunal considered that this was especially true in cases of rights of exploitation (such as licences or concessions) that depend on the fulfilment of certain requirements by the foreign investor and that if a State cancels a licence or a concession because the investor has not fulfilled the necessary legal requirements to maintain that licence or concession or has breached the relevant laws and regulations that are sanctioned by the loss of those rights, such cancellation cannot be considered to be a taking by the State.[81]

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[76] Ibid, para. 445.

[77] Ibid, para. 476.

[78] Ibid, para. 478 citing *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award of 13 November 2000, para. 64; *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, para. 178; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction of 17 July 2003, para. 29; *Eudoro Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award of 26 July 2000, para. 73.

[79] *Quiborax SA and Non Metallic Minerals SA v. Bolivia*, ICSID Case No. ARB/06/2, Award, IIC 739 (2015), dispatched 16 September 2015.

[80] Ibid, para. 202 citing comment (g) to para. 712 of the American Law Institute's Restatement (Third) of the Foreign Relations Law and the Reporters' Note 6 to para. 712 of the Restatement which adds:

> It is often necessary to determine, in the light of all the circumstances, whether an action by a state constitutes a taking and requires compensation under international law, or is a police power regulation or tax that does not give rise to an obligation to compensate, even though a foreign national suffers loss as a consequence.

The tribunal also found support for this approach in *Tecmed v. The United Mexican States*, Award of 29 May 2003, para. 119 and *CME Czech Republic BV v. The Czech Republic*, UNCITRAL, Partial Award of 13 September 2001, para. 603.

[81] Ibid, para. 206 citing at footnote 230 *Genin v. Estonia*, Award of 25 June 2001, paras 348–73 (holding that the cancellation of a banking licence resulting from the legitimate exercise of the State's regulatory and supervisory functions cannot be regarded as a breach of the relevant treaty or international law); *Swisslion*

The tribunal held that the decree was in fact a taking as it found no justification in Bolivian law,[82] and moreover, the revocation of the concessions did not comply with minimum standards of due process, whether under international law or Bolivian law.[83]

7.34 The tribunal considered that for an indirect expropriation to exist it is generally accepted that the State measure must have the effect of substantially depriving the investor of the economic value of its investment,[84] and, in addition, the deprivation must be permanent and must not be justified by the police powers doctrine.[85] The tribunal held that the claimant's investment had been indirectly expropriated: the revocation of the concessions had the effect of substantially depriving Quiborax of the value of its investment in Bolivia, i.e., of its shares in NMM and, in the absence of the concessions, which were NMM's raison d'être, the claimants' investment in NMM was virtually worthless.[86]

7.35 In *Philip Morris Brands Sàrl and ors v. Uruguay*,[87] the investor brought a claim against Uruguay under the Swiss Confederation–Oriental Republic of Uruguay BIT which entered into force on 22 April 1991. Philip Morris claimed that, through several tobacco control measures regulating the tobacco industry, Uruguay had violated the BIT in its treatment of the trademarks associated with cigarette brands in which Philip Morris had invested. These measures included the government's adoption of a single presentation requirement precluding tobacco manufacturers from marketing more than one variant of cigarette per brand family (the 'Single Presentation Requirement' or 'SPR') and the increase in the size of graphic health warnings appearing on cigarette packages (the '80/80 Regulation').[88]

7.36 The tribunal opined that, in order for a State's action in the exercise of regulatory powers not to constitute indirect expropriation, the action must comply with certain conditions and among those most commonly mentioned are that the action must be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory, and must be proportionate. In its view, the SPR and the 80/80 Regulation satisfied these conditions.[89] The tribunal found that the measures were introduced as part of a larger scheme of tobacco control and concluded that the measures were a valid exercise by Uruguay of its police powers for the protection of public health and did not constitute an expropriation of the claimants' investment.[90]

DOO Skopje v. The Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16, Award of 6 July 2012, paras 312–14 (holding that a court's confirmation that a contract had been legitimately terminated due to non-compliance by the investor was not an expropriation: 'The internationally lawful termination of a contract between a State entity and an investor cannot be equated to an expropriation of contractual rights simply because the investor's rights have been terminated …').

[82] Ibid, para. 214.

[83] Ibid, para. 221.

[84] Ibid, para. 238 citing at footnotes 263 and 264 *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award of 26 June 2000, para. 102; *Occidental Exploration and Production Company v. The Republic of Ecuador (Occidental v. Ecuador I)*, LCIA Case No. UN3467, Award of 1 July 2004, para. 89.

[85] Ibid, para. 238 citing at footnote 265 *Burlington v. The Republic of Ecuador*, Decision on Liability, paras 471–73.

[86] Ibid, para. 239.

[87] *Philip Morris Brands Sàrl and ors v. Uruguay*, Award, dispatched to the parties on 8 July 2016 at n. 33.

[88] Ibid, para. 9.

[89] Ibid, para. 305.

[90] Ibid, paras 306 and 307.

In arriving at this conclusion, the tribunal accepted Uruguay's contention that the expropriation provision of the BIT must be interpreted in accordance with Article 31(3)(e) of the Vienna Convention requiring that treaty provisions be interpreted in the light of '[a]ny relevant rules of international law applicable to the relations between the parties', a reference 'which includes ... customary international law'. It then considered the rules of customary international law with respect to the doctrine of police powers of the State, noting that protecting public health has long been recognized as an essential manifestation of the State's police power.[91] The tribunal referred to Article 10(5) of the Harvard Draft Convention and paragraph 712 comment(g) of the United States' Third Restatement. The tribunal further noted that, according to the OECD, '[i]t is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police power of the State, compensation is not required.'[92] **7.37**

Turning to the treatment of the police powers doctrine by arbitral tribunals, the tribunal observed that after the turn of the millennium a consistent trend emerged in arbitral decisions whereby tribunals developed the scope, content, and conditions of the police powers doctrine. They considered that whether a measure may be characterized as expropriatory depends on the nature and purpose of the State's action: **7.38**

> The principle that the State's reasonable bona fide exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that the measures taken for that purpose should not be considered as expropriatory did not find immediate recognition in investment treaty decisions. But a consistent trend in favour of differentiating the exercise of police powers from indirect expropriation emerged after 2000. During this latter period, a range of investment decisions have contributed to develop the scope, content and conditions of the State's police powers doctrine, anchoring it in international law. According to a principle recognized by these decisions, whether a measure may be characterized as expropriatory depends on the nature and purpose of the State's action. Some decisions have relied on the jurisprudence of the European Court of Human Rights, based on Article 1 of Protocol 1 of the Convention.[93]

The tribunal pointed to decisions of several arbitral tribunals which affirm the police power doctrine: *Tecmed v. Mexico*, *Saluka v. Czech Republic*, *Methanex v. United States*, and *Chemtura v. Canada*. [94]

In its view, the provisions contained in some more recent BITs clarifying that, except in rare circumstances, non-discriminatory regulatory actions taken in the public interest do not constitute indirect expropriation, whether or not introduced *ex abundanti cautela*, reflected the position under general international law.[95] **7.39**

On the other hand, investment treaty tribunals have opined that regulatory measures, even though bona fide, non-discriminatory, and in the exercise of a State's power to regulate, are **7.40**

[91] Ibid, para. 291.

[92] Ibid, para. 294 citing OECD, 'Indirect Expropriation' and the 'Right to Regulate', International Investment Law, OECD Working Papers on International Investment, 2004/4 (September 2004).

[93] Ibid, para. 295 citing *Tecmed*, para. 122; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/2, Award of 14 July 2006, para. 311; *EDF (Services) Ltd v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009, para. 293.

[94] Ibid, paras 296–99.

[95] Ibid, para. 301.

capable of constituting expropriation. In drawing a line between the two, tribunals have placed emphasis on the State's treaty obligations.

7.41 In *Southern Pacific Properties (Middle East) Ltd v. Egypt*,[96] the tribunal held that the cancellation of a project to develop tourist complexes at the pyramids area near Cairo and at Ras El Hekma on the Mediterranean coast by the Egyptian government was compensable notwithstanding that the right had been exercised for a public purpose, namely the preservation and protection of antiquities, was an 'unquestionable attribute of sovereignty' and constituted 'a lawful exercise of the right of eminent domain'. The tribunal considered that the rules of Egyptian law and international law governing the exercise of the right of eminent domain impose an obligation to indemnify parties whose legitimate rights have been affected by such exercise.[97] It awarded the claimant just over USD 27 million in compensation.

7.42 In *Compañía del Desarrollo de Santa Elena SA v. Costa Rica*,[98] the tribunal opined that where property is expropriated, even for environmental purposes, whether domestic or international, the State's obligation to pay compensation remains. This case is often relied on by foreign investors in investment treaty claims.

7.43 The claimant, CDSE, was formed primarily for the purpose of purchasing a property known as 'Santa Elena' located in Costa Rica's Guanacaste Province. Its terrain consisted of over thirty kilometres of pacific coastline as well as numerous rivers, springs, valleys, forests, and mountains. In addition, the property was home to a variety of flora and fauna indigenous to the region. The claimant purchased the property with the intention of developing large portions of the property as a tourist resort and residential community. On 5 May 1978, Costa Rica issued an expropriation decree for Santa Elena for conservationist objectives.[99] The claimant did not object to the expropriation but contested the price Costa Rica proposed to pay in compensation. In approaching the question of compensation, the tribunal bore in mind two considerations. Firstly, international law permits the government of Costa Rica to expropriate foreign-owned property within its territory for a public purpose and against prompt payment of adequate and effective compensation. Secondly, while an expropriation or taking for environmental reasons may be classified as a taking for public purpose, and thus, legitimate, this fact does not affect either the nature or the measure of the compensation to be paid for the taking, and the international source of the obligation to protect the environment makes no difference.[100] The tribunal opined that environmental regulatory measures, no matter how laudable and beneficial to society, can amount to a compensable expropriation:

> 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

[96] *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992.

[97] Ibid, paras 158 and 159.

[98] *Compañía del Desarrollo de Santa Elena SA v. Costa Rica*, Final Award dispatched 17 February 2000 at n. 29.

[99] Ibid, paras 15–18.

[100] Ibid, para. 71.

environmental purposes, whether domestic or international, the State's obligation to pay compensation remains.[101]

7.44 In *Tecmed SA v. Mexico*,[102] the tribunal considered that 'the principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable. Another undisputed principle is that within the framework or from the viewpoint of the domestic laws of the State, it is only in accordance with domestic laws and before the courts of the State that the determination of whether the exercise of such power is legitimate may take place. And such determination includes that of the limits which, if infringed, would give rise to the obligation to compensate an owner for the violation of its property rights'. That said, the tribunal viewed its perspective differently: its function being to examine whether the measures complained of violated the BIT in light of its provisions and international law. The tribunal opined, after reading the expropriation provision in the BIT and interpreting its terms according to the ordinary meaning to be given to them (Article 31(1) of the Vienna Convention), that there is 'no principle stating that regulatory administrative actions were per se excluded from the scope of the 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'.[103] This case is more fully considered in the Section to follow (Proportionality and human rights case law).

7.45 In *ADC Affiliate Ltd and ors v. Hungary*,[104] the claimant contended that Hungary's issuance of a decree and the following takeover of all activities of the project company in the Budapest-Ferihegy International Airport by Budapest Airport Rt, a legal successor to the government's Air Traffic and Airport Administration, constituted an expropriation of its investment.[105] Hungary denied it had expropriated the claimant's investment and contended that the actions amending the transport legislation and the enactment of the ministerial decree were important elements of the harmonization of the government's transport strategy, laws, and regulations with European Union law in preparation of Hungary's accession to the European Union in May 2004.[106] The tribunal rejected this argument and held that Hungary had unlawfully expropriated the claimants' investment.

7.46 The tribunal did not accept Hungary's contention that the actions taken against the claimants were merely an exercise of its rights under international law to regulate its domestic economic and legal affairs. The tribunal opined that the exercise of the right to regulate by a State is not unlimited and must have boundaries, such as those contained in investment treaties:

> It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants,

[101] Ibid, para. 72.
[102] *Técnicas Medioambientales Tecmed SA v. The United Mexican States*, Award of 29 May 2003 at n. 30.
[103] Ibid, paras 119–21 (citing *Santa Elena*).
[104] *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. The Republic of Hungary*, Award of 2 October 2006 at n. 48.
[105] Ibid, para. 218.
[106] Ibid, para. 329.

> the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.[107]

The tribunal also rejected Hungary's argument that when investing in a host State, a foreign investor assumes the 'risk' associated with the State's regulatory regime. In the tribunal's view, it was one thing to say that an investor shall conduct its business in compliance with the host State's domestic laws and regulations, but quite another to imply that the investor must be ready to accept whatever the host State decides to do to it.[108]

D. The Test for Regulatory Expropriation

7.47 The determination of regulatory expropriation in investment treaty arbitration is case-by-case and fact specific. Although the test for regulatory expropriation is becoming clearer it varies between cases and depends on the particular circumstances of the case and the factors considered important by the tribunal, as well as whether factors are applied alone or in combination and the emphasis placed on the different factors.

7.48 In *Fireman's Fund v. Mexico*,[109] on the basis of ten NAFTA cases and customary international law in general, the tribunal concluded that to distinguish between a compensable expropriation and a non-compensable regulation by a host State, the following factors (usually in combination) may be taken into account: (a) whether the measure is within the recognized police powers of the host State; (b) the (public) purpose and effect of the measure; (c) whether the measure is discriminatory; (d) the proportionality between the means employed and the aim sought to be realized; a(e) the bona fide nature of the measure.[110]

7.49 From a wider review of investment treaty law, including ICSID (BITs), NAFTA, the Energy Charter Treaty (ECT), and UNCITRAL cases, it is evident that some of these factors play a greater role than others. Most tribunals consider the impact of the measures on the investment to be a decisive factor although some tribunals have also placed importance on the intent and purpose of the measure. Other tribunals (although it seems relatively few compared to the large number of cases) have considered additional factors such as the legitimate expectations of the investor and the proportionality of the measure to the public interest. There is no steadfast rule or pattern.

7.50 The following factors have been applied by investment treaty tribunals. The combination of factors varies from case to case as does the emphasis placed on different factors. Substantial deprivation is always considered a factor, either alone, or in combination with other factors.

(1) Non-discrimination.
(2) The degree of interference or impact on the investment.

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[107] Ibid, para. 423.
[108] Ibid, para. 424.
[109] *Fireman's Fund Insurance Company v. The United Mexican States*, Award of 17 July 2006 at n. 43.
[110] Ibid, para. 176(j).

(3) The intent of the government and the purpose of the measure.
(4) The reasonableness of the measure.
(5) The legitimate expectations of the investor.
(6) The proportionality between the impact of the measure and the public policy objective.

1. Non-discrimination

7.51 Non-discriminatory regulation falling within the police powers of the State will not normally constitute expropriation.[111] In *El Paso Energy International Company v. Argentina*,[112] the tribunal opined that, in principle, general non-discriminatory regulatory measures adopted in accordance with the rules of good faith and due process do not entail a duty of compensation:

> In sum, a general regulation is a lawful act rather than an expropriation if it is non-discriminatory, made for a public purpose and taken in conformity with due process. In other words, in principle, general non-discriminatory regulatory measures, adopted in accordance with the rules of good faith and due process, do not entail a duty of compensation.[113]

2. Impact of the measure

7.52 For regulatory measures to amount to expropriation, as with other types of indirect expropriation, there must be a substantial deprivation of the investment. Investment treaty tribunals have applied the test of substantial deprivation either as the main factor in determining whether measures amount to an indirect expropriation or in combination with other factors. Sometimes tribunals apply the list of measures in *Pope & Talbot*[114] to determine if there has been a substantial deprivation. These measures are considered in Chapter 5 (The Test for Expropriation).

(1) In *Tecmed SA v. Mexico*,[115] the tribunal adopted the test of 'radical deprivation' and emphasized the degree of deprivation as a distinguishing factor.[116]
(2) In *Nykomb Synergetics Technology Holding AB v. Latvia*,[117] the tribunal opined that the decisive factor must primarily be the degree of possession taking or control over the enterprise.[118]
(3) In *CMS Gas Transmission Company v. Argentina*,[119] the tribunal considered the essential question to be whether the enjoyment of the property had been effectively neutralized[120] and noted that the standard applied by a number of tribunals was that of substantial deprivation.[121]

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[111] Ibid, para. 206. See also Article 10(5) of the Harvard Draft Convention and para. 712 comment (g) of the United States' Third Restatement.
[112] *El Paso Energy International Company v. The Argentine Republic*, Award of 27 October 2011 at n. 22.
[113] Ibid, para. 240.
[114] *Pope & Talbot Inc. v. The Government of Canada*, Ad Hoc Tribunal (UNCITRAL), Interim Award, IIC 192 (2000), 26 June 2000, para. 100.
[115] *Técnicas Medioambientales Tecmed SA v. The United Mexican States*, Award of 29 May 2003 at n. 30.
[116] Ibid, para. 116.
[117] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, Award of 16 December 2003 at n. 18.
[118] Ibid, paras 120–1.
[119] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, IIC 65 (2005), 25 April 2005, dispatched 12 May 2005.
[120] Ibid, para. 262.
[121] Ibid, para. 263.