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V Praze dne 15.04.2011

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Iveta Štefánková

"The upsurge of investment arbitration in the last 10 years or so has made a strong impact on the substantive standards provided by investment treaties. Traditionally, the most important standard was expropriation."[1]

The standard of expropriation raises a delicate balancing issue between the often incompatible interests of the state and the foreign investor and tries to accommodate these conflicting interests in a satisfactory manner. Admittedly, the right of the state to expropriate is generally accepted in international law. "This international recognition has been confirmed on innumerable occasions in diplomatic practise and in the decisions of courts and arbitral commissions, and, more recently, in the declarations of international organizations and conferences."[2] Thus the state discretionary power to expropriate as the manifestation of the sovereignty collides with the respect for property rights of the foreigners.

International expropriation law

"International law does not prescribe in an imperative manner the particular form which a measure of expropriation must assume."[3] Actually, the expropriation may occur in many ways and under different names. "The primary distinction in customary international law is between: (i) direct form of expropriation in which the state openly and deliberately seizes property, and/or transfer title to private property to itself or a state-mandated third party; and (ii) indirect form of expropriation in which a government measure, although not on its face effecting a transfer of property, results in the foreign investor being deprived of its property or its benefits."[4] The multilateral (MIT) and bilateral (BIT) investment treaties append a few more formulations. Article 1110(1) of the North American Free Trade Agreement contains the following provision:

> "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except:
>
> (a) For a public purpose;
> (b) On a non-discriminatory basis;

[1] Schreuer, Christopher. Introduction: Interrelationship of Standards. In Reinisch, August. Standards of Investment Protection. New York: Oxford University Press, 2008, p. 1
[2] UN Doc. A/CN.4/Ser.A/1959/Add.1, Yearbook of the Internationl Law Commission Vomule II 1959
[3] Friedman, S. Expropriation in International Law. London: Stevens and Sons Limited, 1953, p. 136
[4] Newcombe, A, Pradell, L. Law and practise of investment treaties: standards of treatment. The Netherlands: Kluwer Law International, 2009, p.323

(c) In accordance with due process of law and Article 1105(1); an

(d) On payment of compensation in accordance with paragraphs 2 through 6."[5]

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

> "Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'Expropriation') except where such Expropriation is:
>
> (a) For a purpose which is in the public interest;
>
> (b) Not discriminatory;
>
> (c) Carried out under due process of law; and
>
> (d) Accompanied by the payment of prompt, adequate and effective compensation."[6]

As you can see the international expropriation law gives us an ample wording but no precise definitions. "In the absence of firm guidance, arbitral tribunals have fashioned a variety of tests for assessing whether States are liable for expropriation, which can create both opportunities and uncertainties for parties in circumstances where expropriation arguably has occurred."[7] In order to construe expropriation, references to some codifications of the standards and also major human rights conventions have been made. In this case the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, specifically the Article 10 titled Taking and Deprivation of Use or Enjoyment of Property, states:

> "A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, and disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference."[8]

Article 3 of the 1967 OECD Draft Convention on the Protection of Foreign Property took the similar view by granting "the protection against wrongful interference with its [property] use

[5] North American Free Trade Agreement [online]. Available at http://www.sice.oas.org/trade/nafta/chap-111.asp#A1110 (visited 13.4.2011)
[6] Energy Charter Treaty [online]. Available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf (visited 13.4.2011)
[7] McLachlan, Campbell, Shore, Laurence, Weiniger, Matthew. International Investment Arbitration Substantive Principles. New York: Oxford University Press, 2007, p. 267
[8] Professor Sohn, Louis B. a Baxter, R. R. Responsibility of States for Injuries to the Economic Interests of Aliens. American Journal of International Law, Vol. 55, 1961, p. 545-584

by unreasonable or discriminatory measures"[9], which "may amount to indirect deprivation depending on its extent and duration"[10].

> "... 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 excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusal of access to raw materials or of essential export or import licences."[11]

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

> "A state is responsible under international law for injury resulting from:
>
> (1) a taking by the state of the property of a national of another state that:
>
> (a) is not for a public purpose, or
> (b) is discriminatory, or
> (c) is not accompanied by provisions for just compensation;
>
> ...
>
> (3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of national of another state."[12]

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

> "Conduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all benefit of his interest in property, constitutes a taking of the property ... even though the state does not deprive him of his entire legal interest in the property."[13]

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

[9] OECD Draft Convention on the Protection of Foreign Property [online] Available at http://www.oecd.org/dataoecd/35/4/39286571.pdf (visited 13.4.2011)
[10] Ibid 9.
[11] Ibid 9.
[12] Supra Note 4., p. 330
[13] Amador, F. V. García and Sohn, Louis B. Recent codification of the law of State Responsibility for injuries to aliens. BRILL, 1974, p. 394

regulation, forfeiture from crime, or other action of the kind that is commonly considered as within the police powers of states.[14]

Organisation for Economic Co-operation and Development entered the river of international investment law again in May 1995 when it launched the negotiations with the purpose to provide a broad multilateral framework for international investment. Later on the negotiations were discontinued inter alia because of the opposition from developing countries and therefore the Multilateral Agreement on Investment (MAI) couldn't reach a successive completion. "But the MAI would have contained provisions similar to those in BITs and, in certain areas, furthered investment liberalization."[15]

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

> "A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation") except:
>
> (a) For a purpose which is in the public interest,
>
> (b) On a non-discriminatory basis,
>
> (c) In accordance with due process of law, and
>
> (d) Accompanied by payment of prompt, adequate and effective compensation in accordance with Articles 2.2 to 2.5 below. "[16]

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

> "Articles - - on General Treatment, and - - Expropriation and Compensation, are intended to incorporate into the MAI existing international legal norms. The reference in Article IV.2.1 to expropriation and nationalisation and "measures tantamount to expropriation or nationalisation" reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and

[14] Dolzer, Rudolf. Indirect Expropriations: New Developments?. Environmental Law Journal, Vol. 11, 2003, p. 63-93

[15] Newcombe, Andrew Paul. Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory And Whe Should Compensation Be Paid? Toronto: Faculty of Law University of Toronto, 1999, p. 68. LLM Thesis

[16] Draft MAI Negotiating Text [online] Available at http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf (visited 13.4.2011)

other normal activity in the public interest undertaken by governments. Nor would such normal and non-discriminatory government activity contravene the standards in Article - - .1 (General Treatment)"[17]

The taxation interpretative note adds that the imposition of taxes does not generally constitute expropriation but admits this possibility unless a taxation measure finds itself within the bounds of internationally recognised tax policies and practices.

International Human Rights instruments, as I will discuss later in this work, represent fruitful source for international expropriation law. The codification of the relevant principles for the purposes of the convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention on Human Rights") laid down in Protocol No. 1, was based on three broad principles:[18]

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[19]

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

"Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

No one shall be deprived of his property except of just compensation, for reason of public utility or social interest, and in the cases and according to the form established by law."[20]

Various arbitral tribunals' decisions contributed to the treatise on expropriation, from which I would emphasize *Metalclad* award decided under NAFTA provisions. "Remarkably, the *Metalclad* award laid down its definition without reference to any previous decision or

[17] Ibid 16.
[18] Dolzer, Rudolf. Indirect Expropriations: New Developments?. Environmental Law Journal, Vol. 11, 2003, p. 63-93
[19] European Convention on Human Rights [online] Available at http://www.hri.org/docs/ECHR50.html#P1 (visited 13.4.2011)
[20] American Convention on Human Rights [online] Available at http://www.hrcr.org/docs/American_Convention/oashr5.html (visited 13.4.2011)

codificatory norm, focusing strongly and exclusively on the effect of the governmental measure on the alien owner."[21] Based on this ICSID award:

> "... expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[22]

All these mentioned statements of prominent institutions or Human Rights conventions including the evolving case law may serve as a starting point in the discussion of whether or not an expropriation has occurred. For this purpose, cases governed by customary international law as well as by MITs and BIT receive the same amount of attention.

Turning to the case law, it can be said that two schools of thought relating to this question have emerged. "One line of argument, which shall hereinafter be called the "sole effect doctrine", principally restricts itself to focusing solely on the particular effect that a given measure has on the legal position of investor. A second approach finds it inappropriate to stop the analysis there, tending instead to consider the wider context of a given case."[23] "One that favours the interests of foreign investors – the "sole effect" doctrine – and another that favours the right of the state to regulate – the "police powers" doctrine, as Veijo Heiskanen calls it."[24]

The 'Sole Effect Doctrine'

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

[21] Supra Note 18.
[22] Metalclad Corporation v. The United Mexican States, (NAFTA), Award, 30 August 2000, Available at http://ita.law.uvic.ca/documents/MetacladAward-English.pdf (visited 13.4.2011)
[23] Dolzer, Rudolf and Bloch, Felix. Indirect Expropriation: Conceptual Realignments?, International Law Forum, Vol. 3, August 2003, p. 155-165
[24] Brunetti, Maurizio. Indirect Expropriation in International Law/E'expropriation indirecte en droit international, International Law Forum/Du Droit International, Vol. 3, August 2003, p. 151

Newcombe, who refers to this doctrine as to the orthodox approach, the Sole Effect Doctrine is considered the dominant conception in international law.[25] Also having regard to the reasoning and decision we may trace the evidence of this approach in international tribunals' awards.

"Several cases decided by arbitral tribunals in the past two decades have explicitly focused on the effect on the owner as the dominant or exclusive criterion which delineates the line between a taking and a regulation."[26] The most cited in this context are *Tippetts, Biloune* and *Metalclad* cases.

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

> "**the motivation for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case.** What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune's interest in MDCL, unless Respondents can establish by persuasive evidence sufficient justification of these events." [27]

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

[25] Newcombe, Andrew. The Boundaries of Regulatory Expropriation in International Law. ICSID Review – Foreign Investment Law Journal, Vol. 20, 2005, p. 1-55
[26] Supra Note 18.
[27] Biloune and Marine Drive Complex Ltd v Ghana Investment Centre and the Government of Ghana, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR (1989), 184-185 (emphasis added)

by the Iranian Government. The Tribunal concluded that the expropriation took place and held that:

> "A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.
>
> While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government [...] such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. **The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact. "**[28]

"The third explicit and unequivocal pronouncement in favour of the "sole effect doctrine" followed in the *Metalclad* decision rendered in 2000."[29] In this case the U.S. company purchased the Mexican enterprise together with its permits in order to construct hazardous waste transfer station and landfill site. The Mexican local authority, however, issued an order to stop the work on the ground that the municipal permit was necessary. The Tribunal found that:

> "... expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[30]

"Additionally, substantial case law based upon BIT ... has evolved which also focuses upon the requirement of substantial and significant deprivation of the owner's rights in order to regard a certain measure as expropriation."[31]

According to the Sole Effect doctrine the key requirement for indirect expropriation is substantial deprivation. But so far the international law seems to fail to define exactly the intensity of interference that constitutes expropriation. As a result expropriation standard

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[28] Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran, The Government of the Islamic Republic of Iran found in Dolzer, Rudolf. Indirect Expropriations: New Developments?. Environmental Law Journal, Vol. 11, 2003, p. 63-93(emphasis added)
[29] Supra Note 18.
[30] Metalclad Corporation v. The United Mexican States, (NAFTA), Award, 30 August 2000 [online] Available at http://ita.law.uvic.ca/documents/MetacladAward-English.pdf (visited 14.4.2011)
[31] Hoffmann, Anne K. Indirect Expropriation. In Reinisch, August. Standards of Investment Protection. New York: Oxford University Press, 2008, p. 157

adherent to international investment protection may under some circumstances contravene the state's "right to regulate and exercise the public order function, their sovereign powers"[32]. As a matter of fact the states often intervene with the property rights while exercising their regulation power[33] "to protect essential public interests from certain types of harm"[34]. "While various forms of regulation may have an adverse economic impact on investment and its uses, adverse impact is not per se expropriatory because it does not result in a substantial deprivation of investment rights."[35] Thus, the international expropriation law is forced "to draw the line between legitimate non-compensable national regulation aimed at protecting the environment, or 'human, animal or plant life or health' on one hand and regulation which is 'tantamount' to expropriation and requiring compensation, on the other"[36]. Concretely, the Tribunals in *Tecmed* and *Feldman* dealt with this kind of predicament. The *Tecmed* award contains as follows:

> "The principle that the State's exercise of its sovereign powers within the framework of its police powers may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.
>
> ... regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, ..."[37]

"The tribunal in *Feldman* pointed to a number of regulatory interferences that had been regarded as expropriations."[38] Nevertheless, the Tribunal noted that:

> "... the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting of withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning

[32] Ibid 31.
[33] Supra Note 25.
„The exercise of such powers may not be grossly unfair, unjust, idiosyncratic or discriminatory. It mus involve a minimum standard of due process."
[34] Supra Nozte 25.
[35] Supra Note 25.
[36] Waelde, T. and Kolo, A. Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law. International and Comparative Law Quarterly, Vol. 50, No. 4, October 2001, p. 811-848
[37] Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, (Spain/Mexico BIT), Award, 19 May 2003, Available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186 (visited 14.4.2011)
[38] Kriebaum , Ursula. Regulatory Taking: Balancing the Interests of the Investor and the State. The Journal of World Investment and Trade, Vol. 8, No. 5, October 2007, p. 717-744

> restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this."[39]

Subsequently, the international law is positive about the fact that not every state's regulatory measure with negative effect on the investor's side is an expropriation requiring compensation. Then, we might consent with Newcombe's opinion that under the "orthodox approach" an expropriation occurs when a foreign investor is deprived of the use, benefit, management or enjoyment of all or substantially all of its investment, except where deprivation results from a *bona fide* and *legitimate* use of state police powers. He considers this approach quite broad and that it offers little guidance on when regulation "goes too far".[40]

Besides the Sole Effect Doctrine, there is also the Police Power doctrine recognised as an actual approach of the present jurisprudence.

The 'Police Powers Doctrine'

"Under the classic police powers doctrine, if the regulatory measure at issue is taken for a legitimate public purpose and is not discriminatory, the measure is lawful under international law and does not give rise to right to compensation."[41] This point of view was shared, for example, by the tribunal which rendered the *Methanex* award which held that:

> "But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the ten putative foreign investor contemplating investment that the government would refrain from such regulation."[42]

Based on this approach there seems to be no room left for investment protection. For the reason, emphasized by Ursula Kriebaum, that any non-discriminatory measure, taken in the

[39] Marvin Feldman v. Mexico, (NAFTA), Award, 16 December 2002, Available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC587_En&caseId=C175 (visited 8.4.2011)
[40] Supra Note 25.
[41] Heiskanen, Veijo. The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation. International Law FORUM du droit international, Vol. 5, No. 3, Augist 2003, p. 176-187
[42] Methanex Corporation v. United States of America, (NAFTA), Partial Award, [online] Available at http://www.state.gov/documents/organization/51052.pdf (visited 14.4.2011)

public interest that interferes with property rights will no longer be an expropriation regardless of its consequences.[43]

"Tribunals applying a moderate "police powers" doctrine rely primarily on the effect of the interference, but they will also consider factors like the purpose of the measure or the existence of legitimate expectations when deciding whether an expropriation has occurred."[44] The first award where the relation between the effect and the purpose of the measure was designed was the *Tecmed* award in which the tribunal related to the judgments rendered by European Court of Human Rights and applied the proportionality test[45].

> "After establishing that regulatory actions and measured will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality."[46]

Unlike the Tribunal's application of proportionality test which main purpose was to establish whether the expropriation has occurred or not, the Human Right's proportionality test is used to outweigh the State's interest to interfere with the property protection interest.[47] "In effect, the European Court of Human Rights examines a reasonable balance between the demands of the general interest of the community and the private interests of the alleged victim of the deprivation, or whether the measure in fact imposes an unreasonable or excessive burden upon the individual."[48]

Conversely, the ECHR's conception of the standard of compensation basically corresponds with the international one. "One possible difference could be that the Court in theory accepts

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[43] Supra Note 38.
[44] Supra Note 38.
[45] Christoffersen, Jonas. Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights. BRILL, 2009, p. 69-70

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

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

[46] Supra Note 37.
[47] Surpa Note 38.
[48] Mountfield, Helen. Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights. Environmental Law Journal, Vol. 11, 2003, p. 136-147

that there could be no compensation in exceptional circumstances[49], whereas the international standard does not expressly include this point."[50]

Generally speaking, the notion of regulatory expropriations remains uncanny as neither the ECHR nor US regulatory expropriations jurisprudence using a proportionality test cannot discern circumstances under which the substantial deprivation may be justified. "This approach is ... explicitly mandating tribunals to consider three factors in the expropriation analysis: (i) the character of the government action; (ii) the economic impact of the government action; and (iii) distinct, reasonable investment-backed expectations."[51]

The Character of the Government Action

"Governments may only rely on police power regulation as a rationale for non-compensation in certain circumstances."[52] Public interest, public purpose or public benefit doesn't represent the justifiable postulate as it is only considered as a requirement for lawful expropriation. The doctrine refers here to pre-eminent-public interests or bona fide interests. "The most widely accepted of which are as follows: under treaty provisions; as a legitimate exercise of police power, including measures of defence against external threats; confiscation as a penalty for crimes; seizure by way of taxation or other fiscal measures; loss caused indirectly by health and planning legislation and the concomitant restrictions on the use of property; the destruction of property of neutrals as a consequence of military operations, and the taking of enemy property as part payment of reparation for the consequences of an illegal war."[53]

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

> "It is 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."[54]

To underline the vague character of this concept of interests I would like to focus on the protection of environment which provides conditions not only for human existence. *Santa*

[49] However, the ECHR does not mention any examples of those specific circumstances.
[50] Fabri, Hélène Ruiz. The Approach Taken by the European Court of Human Rights to the Assessment of rhe Compensation for „Regulatory Expropriations" of the Property of Foreign Investors. Environmental Law Journal, Vol. 11, 2003, p. 148-173
[51] Supra Note 25.
[52] Supra Note 25
[53] Brownlie, Ian. Principles of Public International Law. 6th edition Oxford: University Press, 2003, p.511-512
[54] Saluka Investment BV (The Netherlands) v Czech Republic, (UNICITRAL), Partial Award, 2006, para 255 and 275 [online] Available at http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf (visited 14.4.2011)

Elena tribunal, as a matter of fact, didn't regard this interest as a justification for non-compensation and held that:

> "Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensations remains."[55]

Simultaneously, Santiago Montt takes the view that preeminent public interests should remain 'rarities'.[56]

The Economic Impact of the Government Action

Regulatory economic impact on the allegedly expropriated investment must reach the character of substantial deprivation in accordance with international law. As representative examples may serve the contracts or concessions in the situations when the state annuls, cancels or revokes this binding instruments providing the state "does so in accordance with the conditions established in the same agreement or in the applicable rules of domestic law."[57] Similarly, Newcombe takes the view that the state responsibility does not arise for every permit, licence or concession cancellation.[58] The compensation would be required on condition that the provisions in contract or concession would coverage the required international minimum standards.

In *Azinian* case, as a result of the cancellation of the concession contract the claimant was seeking recovery of the loss of the value of the concession as an on-going enterprise. The Tribunal stated as follows:

> "It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints.
>
> NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides."[59]

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[55] Compañía del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica, ICSID Award, 17 February 2000, para77 [online] Available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC539_En&caseId=C152 (visited 14.4.2011)
[56] Montt, Santiago. State Liability in Investment Treaty Arbitration. Hart Publishing, 2009, p. 275
[57] Ibid 56.
[58] Supra Note 25.
[59] Azinian v. United Mexican States, (NAFTA), Award of International Centre for the Settlement of Investment Disputes, International Law Reports, Vol. 121, p. 19

In *Saluka* case, the Dutch-based subsidiary of Nomura, Saluka had purchased a stake in a newly privatized Czech bank, Investicni a Postovni Banka (IPB), which later faced insolvency and was placed under forced administration by the CNB [Czech National Bank]. Saluka argued that IPB was deprived of financial assistance which the Czech Republic provided to competitors. The Tribunal confirmed the investment deprivation as a result of this imposition of forced administration of the bank. Subsequently, the Tribunal reviewed the circumstances which led to this approach of the Czech National Bank concluding that the measure was justified:

> "As will be seen, the CNB's decision is fully motivated. Having reviewed the totality of the evidence which CNB invoked in support of its decision, the Tribunal is of the view that the CNB was justified, under Czech law, in imposing the forced administration of IPB and appointing an administrator to exercise the forced administration.
>
> The CNB's decision is, in the opinion of the Tribunal, a lawful and permissible regulatory action by the Czech Republic aimed at the general welfare of the State, and does not fall within the ambit of any exemptions to the permissibility of regulatory action which are recognised by customary international law."[60]

Lastly, "the international minimum standard for regulatory expropriation must balance the need for stability and fairness with state regulatory autonomy, sustainable development and respect for domestic policy choices."[61] In addition, the view of Ursula Kriebaum emphasizes the choice of the least invasive measure capable of achieving the regulatory purpose.[62]

Distinct, Reasonable investment-backed expectations

The relationship between the investor and the host state is noted for the mutual conflicting interests that are primarily based on the risk allocation. Investors typically have need for stability, transparency, security and predictability concerning the investment practice whilst states concentrate on the broad exercise of regulatory power. "The regulatory regime affecting investment, however, must adapt to changes in society."[63] "In this respect, it can hardly be doubted that modern international jurisprudence accords more weight to environmental concerns than was the case fifty years ago."[64]

[60] Saluka Supra Note 54, para 271 and 275
[61] Supra Note 15.
[62] Supra Note 38.
[63] Supra Note 25.
[64] Supra Note 18.

In case of foreign investors emerges markedly the different level of protection between nationals and aliens. The *Tecmed* award highlighted one of the aspects redeeming this situation stating that:

> "On the basis of a number of legal and practical factors, it should be also considered that the foreign investor has a reduced or nil participation in the taking of the decision that affect it, partly because the investors are not entitled to exercise political rights reserved to the nationals of the State, such as voting for the authorities that will issue the decisions that affect such investors."[65]

"In addition to a lack of voice, investors may not be able to "exit" as a risk mitigation strategy, especially where investment is immobile or costs are sunk."[66] This kind of investment is highly susceptible to creeping or indirect expropriation through regulatory measures of the state.

The quandary of the legitimate expectations doctrine lies in its circular nature. On one side there is a rational, legitimate expectation and on the other occurs overriding public interest protecting eminent object.

These three factors are the expression of customary international law. They provide clarification and wide elaboration but we still cannot claim they can solve "hard cases". The task remains unaccomplished: identification of justifiable circumstances for non-compensation.

[65] Supra Note 37., para 122
[66] Supra Note 25.

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