8

EXPROPRIATION

A. **Introduction—the Classical Claim and its Modern Elasticity** 8.01
B. **Towards More Precise Definitions of Expropriation** 8.03
The lack of international uniformity, but discernible substantive principles 8.07
Multilateral investment treaties 8.08
NAFTA 8.08
Draft Multilateral Agreement on Investment 8.22
ASEAN Comprehensive Investment Agreement 8.23
Trans-Pacific Partnership Agreement (TPPA) 8.24
ICSID Convention 8.30
Bilateral investment treaties 8.31
Expropriation in the light of international law standards 8.58
The relationship of municipal and international law in expropriation claims 8.64
C. **Direct and Indirect Expropriation** 8.67
Direct expropriation 8.68
Indirect expropriation 8.70
Events not constituting indirect expropriation: effect of omissions and consent 8.71
The different forms of indirect expropriation 8.75
Creeping expropriation 8.76
Measures 'tantamount to' or 'equivalent to' expropriation 8.79
Actions of State courts 8.83
The many forms of indirect expropriation 8.87
A significant interference 8.89
D. **The Case-by-Case Approach of Tribunals** 8.94
Criteria considered by international tribunals 8.95
Expropriation is only lawful if certain conditions are met 8.95
Degree of interference required 8.100
A temporary interference 8.107
Partial interference 8.113
Objective impact or subjective intention? 8.118
Degree of expectation of the investor 8.121
Date of expropriation 8.123
Governmental measures that may constitute expropriation 8.125
Organs of the State 8.125
The character of State conduct under scrutiny 8.128
Regulatory activity 8.139
Where contractual rights constitute assets capable of expropriation 8.149
E. **Conclusion** 8.156

A. Introduction—The Classical Claim and its Modern Elasticity

8.01 At the heart of foreign investors' claims against States prior to the 1950s was the claim of nationalisation or expropriation. The classical situation was a State's blatant seizure of the investor's assets while the State implemented a general programme of economic reform,[1] or the State's highly visible acts in depriving the investor of its assets, without compensation. A small minority of investors might have had a concession contract with the host State, governed by international law, which incorporated its own contractual protections against expropriation, and allowed for international arbitration.[2] Otherwise, the investor in search

[1] Brownlie 621: 'Expropriation of one or more major national resources as part of a general programme of social and economic reform is generally referred to as nationalization.' Accordingly, nationalisation is now understood to be a particular type of expropriation.

[2] See, for example, *Texaco Overseas Petroleum Co v Libya* (Award) (1979) 53 ILR 389 (Ad Hoc, 1977, Dupuy); *Libyan American Oil Co [LIAMCO] v Libya* (1982) 62 ILR 140 (Ad Hoc, 1977, Mahmassani); *British*

of compensation or redress was usually left with the options of (a) seeking to persuade its home State to intervene through diplomatic protection (perhaps leading to international arbitration), or (b) pursuing remedies in the municipal courts of the State that had seized the assets. Neither option was particularly attractive to the aggrieved investor.

8.02 With the proliferation of investment treaties providing for direct access to international arbitral tribunals by foreign investors, and the more sophisticated efforts at domestic regulatory control undertaken by States in recent years, the classical claim has expanded. The treaty framers may have thought that they were codifying customary international law, but treaty claims on expropriation—and arbitral tribunals' interpretation of treaty provisions—have arguably overtaken customary international law and have become the focal point of the development of the international law of expropriation. Moreover, an *indirect* deprivation of a foreign investor's asset (which itself might take a variety of forms), possibly through a series of actions over time, rather than a militia storming a factory, has come to characterise modern expropriation claims. International law has thus recognised an elasticity in the nature and range of expropriatory acts, and assessing this elasticity—for example, how far does it extend?[3]—has become a central issue in international investment arbitration.

B. Towards More Precise Definitions of Expropriation

8.03 The core concept of expropriation is reasonably clear: it is a governmental taking of property for which compensation is required. Actions 'short of direct possession of the assets may also fall within the category' of expropriation.[4] Expropriation is therefore lawful, but the compensation requirement 'makes the legality conditional'.[5] However, it is difficult to define with precision the situations covered by the concept. The definitions of expropriation appearing in investment treaties are of such a generality that they provide little guidance to parties or arbitral tribunals confronted by concrete cases.[6] It should be noted, as discussed further below, that modern treaties are defining expropriation with ever greater precision (though still often at a level of generality that makes it hard to determine, in specific cases, what is and is not expropriation). 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. As argued in the conclusion, the tests developed to determine expropriation by

Petroleum v Libya (1979) 53 ILR 297 (Ad Hoc, 1973/1974, Lagergren); *Kuwait v Aminoil* (1984) 66 ILR 518 (Ad Hoc, 1982, Reuter P, Hamed Sultan & Fitzmaurice).

[3] An early useful statement of this modern elasticity may be found *Valentine Petroleum & Chemical Corp v US Agency for International Development* (Award) 44 ILR 79 (1967, de Vries, Rogers & Sebes). The Tribunal quotes the definition of expropriatory action in the AID Contract of Guaranty, and comments that it is broad enough to include both 'constructive taking' or 'creeping expropriation', and notes that the former also comprises 'interference with the use or enjoyment of property' pursuant to the guidance provided by the American Law Institute, *Restatement (Third) Foreign Relations of the United States* (1987) vol 1, 1987, especially s 192.

[4] Shaw 603.

[5] Brownlie 622–4. There are some widely recognised exceptions to the 'compensation rule', eg under particular treaty provisions, as a legitimate exercise of police power, or confiscation as a penalty for crimes.

[6] It has been said of NAFTA art 1110(1) that its 'language is of such generality as to be difficult to apply in specific cases'. *Feldman v Mexico* (Award) ICSID Case No ARB(AF)/99/1, 7 ICSID Rep 318 (2002, Kerameus P, Gantz & Covarrubias Bravo (dissenting)) para 98. Covarrubias Bravo filed a Dissenting Opinion on the issue of national treatment and discrimination.

arbitral tribunals have become increasingly detailed and specific. International law should not necessarily be viewed as less certain or variable than national law, which has had the advantage of a lengthy period of development within a narrower jurisprudential framework. As Higgins observed in the early 1980s, the 'reality is that most municipal law systems have themselves developed doctrines on the taking of property that are at best incoherent'.[7]

8.04 For example, in analysing three decades of US Supreme Court judgments in expropriation cases, a scholar referred to the 'crazy-quilt pattern of Supreme Court doctrine' on expropriation.[8] It has further been noted that although the 'process of describing general criteria to guide resolution of regulatory taking claims, begun in *Penn Central*,[9] has reduced to some extent the ad hoc character of takings law', it is 'nonetheless true that not all cases fit neatly into the categories delimited to date, and that still other cases that might be so categorised are explained in different terms by the Court'.[10] If the US position on certain significant aspects of domestic expropriation, especially as regards the issue of regulatory or 'indirect' takings, has not crystallised into a clear formulation, it is not surprising that arbitral tribunals comprising members from many different legal backgrounds and interpreting international law have not developed a coherent doctrine of expropriation, especially as regards indirect expropriation.

8.05 Analysis of the tests fashioned by arbitral tribunals as a whole, and their application in specific cases to date, would not necessarily lead to the conclusion, at this stage of the development of the international law of expropriation, that arbitral tribunals have favoured investors at the expense of States. However, international law has undoubtedly evolved towards expanding claimants' opportunities to articulate an expropriation cause of action. This evolution can be said to reflect, in part, the increasing complexity of investment forms and methods and the concomitant sophistication of States' efforts to regulate their economic environment (while welcoming investment). It cannot be said (with persuasive evidentiary support) that there is an international law determination to lower the bar for claimants to succeed in claims of expropriation. Dolzer has commented that a teleological approach to treaty interpretation might involve multilateral and bilateral investment treaties being 'interpreted *in favorem* investor, stressing and expanding his rights so as to promote the flow of foreign investment', though such an approach would need to address 'the arguments that investment treaties are meant to benefit both investor and host state and that they are based on the recognition of the rights and obligations of both the host state and the investor'.[11]

8.06 Accordingly, an assessment of the substantive principles of the law of expropriation in the investment treaty context may usefully be undertaken by focusing more pragmatically on the ad hoc character of this growing body of law. Such an assessment also underscores the

---

[7] R Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) 176 *Recueil des Cours* 259, 268.

[8] A Dunham, '*Griggs v Allegheny County* in Perspective: Thirty Years of Supreme Court Expropriation Law' [1962] S Ct Rev 63.

[9] *Penn Central Transportation Co v City of New York* (1978) 438 US 104 (Burger CJ (dissenting), Rehnquist & Stevens JJ).

[10] JH Killian and GA Costello (eds), *The Constitution of the United States of America: Analysis and Interpretation (Annotations of Cases Decided by the Supreme Court of the United States to June 29, 1992)* (1996) 1393. The editors add, at 1394, that the Court 'emphasizes that the taking of one "strand" or "stick" in the "bundle" of property rights does not necessarily constitute a taking as long as the property as a whole retains economic viability, but some strands are more important than others' [footnote omitted].

[11] R Dolzer, 'Indirect Expropriations: New Developments?' (2002) 11 NYU Environmental Law Journal 64, 73–4.

importance of knowing the writings and awards on expropriation previously produced by the individual members of the arbitral tribunal that has been constituted to resolve the investment dispute in a particular case.[12]

The lack of international uniformity, but discernible substantive principles

8.07 The difficulty of determining with precision the meaning of expropriation in international law because of the generality of language in international materials such as multilateral and bilateral investment treaties and the broad doctrinal statements that have appeared in many cases[13] is reinforced by the fact that the expropriation provisions in treaties, though often similar, sometimes contain distinctions in wording. That said, governments are becoming increasingly sensitive to exposure to liability through investor–State dispute settlement provisions. Some States have responded by withdrawing from BITs and MITs altogether.[14] More commonly, though, modern BITs and MITs are defining expropriation with increasing precision so as to limit the scope of States' liability for illegal expropriation.[15] Distinctions between the definitions of expropriation in different treaties have provoked discussion as to whether, on the one hand, a substantive difference in meaning should be recognised or, on the other hand, an emphasis on small variations in language (English language) is a misguided approach to the understanding of international law. In either event, it is nonetheless important to identify the textual definitions that have appeared in materials of major influence as well as the formulations developed by various international arbitral tribunals. In view of the vast array of sources that one might consult, it may be useful, in determining the substantive principles of expropriation law, to begin with the definitions that have appeared in the major multilateral investment treaties and to consider how certain tribunals have interpreted these definitions, before addressing the provisions on expropriation in various bilateral investment treaties.

Multilateral investment treaties

8.08 NAFTA Article 1110(1) of the North American Free Trade Agreement (NAFTA)[16] 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[17] tantamount to nationalization or expropriation of such an investment ('expropriation'), except:
> (a) for a public purpose;
> (b) on a non-discriminatory basis;

[12] ibid 77 (US and European approaches to expropriation claims 'may not fully coincide').

[13] ibid 76.

[14] Indonesia announced in 2014 that it would terminate more than 60 bilateral investment treaties. Additionally, several States, including Bolivia, Ecuador, and Venezuela withdrew from the ICSID Convention in 2007, 2009 and 2012 respectively. See B Bland and S Donnan, 'Indonesia to Terminate more than 60 Bilateral Investment Treaties' *Financial Times* (26 March 2014) <http://on.ft.com/1UTpk7L>.

[15] See eg Trans-Pacific Partnership Agreement (TPPA) discussed at para 8.24.

[16] North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) 107 Stat 2057, CTS 1994 No 2 (NAFTA) (Appendix 1 below) art 1110(1).

[17] The term 'measure' is defined in NAFTA art 201 to include 'any law, regulation, procedure, requirement or practice'.

(c) in accordance with due process of law and art 1105(1);[18] and
(d) on payment of compensation in accordance with paragraphs 2 through 6.

8.09 Additional sections of art 1110 are also relevant to various international arbitral decisions:

[Article 1110(7)]

This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).

[Article 1110(8)]

For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

8.10 It is clear in NAFTA that 'expropriation' is explained by reference to the verbs 'expropriate' and 'nationalize', though no indication is given as to the meaning of these words.[19] Inclusion of both terms at least suggests a broad range of actions to be proscribed, as does the express inclusion of the words 'directly or indirectly' and the additional provision 'or take a measure tantamount'. However, there is no specific guidance in the instrument as to what constitutes 'direct' as opposed to 'indirect' expropriation, and how a 'measure tantamount to nationalization' differs from direct or indirect nationalisation.

8.11 An influential arbitral Tribunal's interpretation of this language has supplied some guidance on these points. The award in *Waste Management II*[20] comments on the text of art 1110 as follows:

> It may be noted that Article 1110(1) distinguishes between direct or indirect expropriation on the one hand and measures tantamount to an expropriation on the other. An indirect expropriation is still the taking of property. By contrast, where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant ... Evidently the phrase 'take measures tantamount to nationalization or expropriation of such investment' in Article 1110(1) was intended to add to the meaning of the prohibition, over and above the reference to indirect expropriation. Indeed there is some indication that it was intended to have a broad meaning, otherwise it is difficult to see why Article 1110(8) was necessary. As a matter of international law a 'non-discriminatory measure of general application' in relation to a debt security or loan which imposed costs on the debtor

---

[18] ibid art 1105(1) states that treatment accorded to investors must be in accordance with international law, including fair and equitable treatment and full protection and security.

[19] A commonly understood distinction between the two terms is that nationalisation consists of taking private assets into State ownership, and suggests large-scale takings, whereas expropriation would seem to have a broader scope in the sense that it does not necessarily imply that ownership has been taken by the State, but instead that a deprivation has occurred because of an action taken by the State. See also Higgins, 'The Taking of Property by the State' 376, fn 2 (expropriation 'may affect an entire industry or individuals. Nationalization by contrast entails large-scale takings by virtue of a legislative or executive act for the purpose of transferring the interests into public-sector use').

[20] *Waste Management Inc v Mexico* (Award) ICSID Case No ARB(AF)/00/3, 11 ICSID Rep 361, IIC 270 (NAFTA/ICSID (AF), 2004, Crawford P, Civiletti & Magallón Gómez) ('*Waste Management II*').

causing it to default would not be considered expropriatory or even potentially so. It is true that paragraph (8) is stated to be 'for greater certainty', but if it was necessary even for certainty's sake to deal with such a case this suggests that the drafters entertained a broad view of what might be 'tantamount to expropriation'.[21]

8.12 The breadth afforded by the language of art 1110 led another influential arbitral tribunal, in *Metalclad*,[22] to find 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 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.*[23]

8.13 This determination by the *Metalclad* arbitral Tribunal is not without controversy. Indeed, upon judicial review in the Supreme Court of British Columbia, Tysoe J characterised the *Metalclad* Tribunal's definition of expropriation under art 1110 as 'extremely broad' (though this definition was not a reviewable issue).[24] There is at least some uncertainty as to whether the *Metalclad* definition of expropriation, under either NAFTA or general principles of international law, is too broad to be reliable, though the text of art 1110 would appear to subject sovereign conduct to a broad scope of claims of expropriatory action.

8.14 Another point of uncertainty in art 1110(1) of NAFTA is whether the four conditions mentioned under points (a) to (d)[25] should be taken into consideration in determining whether to find expropriation, and if so, how. In *Feldman v Mexico*,[26] the arbitral Tribunal, which was troubled by NAFTA's lack of a precise definition of expropriation, held that 'the conditions (other than the requirement for compensation) are not of major importance in determining expropriation'. It explained that:

> In the Tribunal's view, the essential determination is whether the actions of the ... government constitute an expropriation or nationalization, or are valid governmental activity. If there is no expropriatory action, factors a–d are of limited relevance, except to the extent that they have helped to differentiate between governmental acts that are expropriation and those that are not, or are parallel to violations of NAFTA Articles 1102 and 1105. If there is a finding of expropriation, compensation is required, even if the taking is for a public purpose, non-discriminatory and in accordance with due process of law and Article 1105(1).[27]

8.15 Although the analysis supplied by the *Feldman* Tribunal offers this clarification, the task of identifying 'expropriatory action' remains problematic: as the Tribunal observes, this assessment must be made 'based on the facts of specific cases'.[28] Moreover, there may be circumstances where it is important to determine whether the expropriatory action is 'valid governmental activity' that has not been compensated, since expropriation is not necessarily

---

[21] ibid paras 143–4.

[22] *Metalclad Corp v Mexico* (Award) ICSID Case No ARB(AF)/97/1, 5 ICSID Rep 209, IIC 161 (NAFTA, 2000, Lauterpacht P, Civiletti & Siqueiros).

[23] ibid para 103 [emphasis added].

[24] sub nom *Mexico v Metalclad Corp* [2001] BCSC 664, ICSID Case No ARB(AF)/97/1, 5 ICSID Rep 236, IIC 162 (S Ct BC). Tysoe J observed at para 99 that the Tribunal's definition 'is sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority'.

[25] See para 8.08 above.

[26] *Feldman v Mexico* (Award).

[27] ibid para 98.

[28] ibid para 102.

invalid governmental activity, but instead activity that must be accompanied by compensation. To be sure, in cases involving investment treaties, the issue is a practical matter whether there has been an expropriation, and if so, whether the compensation (if any) for such expropriation has been 'prompt, adequate and effective'. However, Brownlie has commented that the level of compensation for expropriation that is unlawful per se (for example not for a purpose in the public interest) would include direct and consequential loss, whereas expropriation that would have been lawful if accompanied by compensation may lead to payment for direct losses only.[29]

8.16 The *Feldman* Tribunal also deemed the scope of 'indirect expropriation' and 'tantamount to expropriation' to be 'functionally equivalent'.[30] This is contrary to the analysis given by the *Waste Management II* Tribunal, which discerned an important distinction between these two concepts (ie an indirect expropriation still being a taking of property whereas a 'measure tantamount' need not involve a taking to make 'formal distinctions of ownership irrelevant'). This apparent discord between two distinguished Tribunals' interpretations of the language and concepts in art 1110 underscores the difficulties in assessing the contours of the modern claim of expropriation.

8.17 **Energy Charter Treaty** The uncertainty accompanying the meaning of expropriation is also raised when another definition in another recent multilateral investment treaty is considered. Article 13(1) of the Energy Charter Treaty (ECT) 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:
> (1) for a purpose which is in the public interest;
> (2) not discriminatory;
> (3) carried out under due process of law; and
> (4) accompanied by the payment of prompt, adequate and effective compensation.[31]

8.18 This wording differs from that of art 1110(1) of NAFTA, most notably in that the ECT does not expressly refer to 'direct' or 'indirect' expropriation. Further, the ECT uses the language of measures 'having effect equivalent' to expropriation, instead of 'tantamount to' expropriation. However, art 13(1) of the ECT has the same structure as art 1110(1) of NAFTA—a general definition followed by four conditions—and the underlying principles would appear to be similar.

8.19 Nonetheless, on the basis of language alone, the NAFTA definition of expropriation might be regarded as having a broader scope than the ECT definition, in view of the express inclusion of indirect expropriation in the former.[32] There is also the possible difference between

[29] Brownlie (6th edn, 2003) notes that the Iran–US Claims Tribunal has considered the remedial significance of this distinction in types of expropriation (at 625).

[30] *Feldman v Mexico* para 100.

[31] Energy Charter Treaty (signed 17 December 1994, entered into force 30 September 1999) 2080 UNTS 100 (ECT) (Appendix 2 below).

[32] *Pope & Talbot Inc v Canada* (Interim Award) 7 ICSID Rep 69, IIC 192 (NAFTA/UNCITRAL, 2000, Dervaird P, Belman & Greenberg) paras 83–5; *SD Myers Inc v Canada* (First Partial Award on the Merits) 8 ICSID Rep 4, IIC 249 (NAFTA/UNCITRAL, 2000, Hunter P, Chiasson & Schwartz (partial dissent)) (Separate Opinion by Schwartz, concurring with the Partial Award of the Tribunal except with respect to

'tantamount' and 'equivalent'. The differences in wording might permit the argument that a finding of expropriation by a NAFTA arbitral tribunal is not necessarily a suitable international law precedent for a tribunal applying the ECT standard. However, the *Pope & Talbot* and *SD Myers* Tribunals (interpreting art 1110 of NAFTA) effectively concluded that the words 'tantamount to expropriation' meant equivalent to expropriation, and embraced the concept of 'creeping' expropriation rather than expanding the internationally accepted scope of the term expropriation. Moreover, it could be argued that as a matter of international law, 'expropriation' has come to comprise direct and indirect expropriation, and the NAFTA definition merely identifies with greater specificity of language the international law norm, which in any event is included in the 'narrower' ECT definition by the addition of the phrase on measures 'equivalent' to expropriation.

8.20 The *Nykomb Synergetics* Tribunal, in deciding an expropriation claim under the ECT, determined that: ' "Regulatory takings" may under the circumstances amount to expropriation or the equivalent of an expropriation.'[33] The Tribunal also commented that the 'decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise that the disputed measures entail'. The Tribunal assumed that 'expropriation' comprised the notion of 'indirect' or 'creeping' expropriation in the sense of a regulatory taking, though it found that the claimant failed to prove a regulatory taking. The Tribunal also appeared to make its determination while accepting the respondent's apparent concession that the issue was whether there was an expropriation 'even in the wider sense developed under recent international treaty law'.[34]

8.21 Along these lines, focusing on the absence of the word 'indirectly' or parsing any linguistic difference between 'equivalent' and 'tantamount' would be unhelpful. The discussion below of arbitral awards indicates the various approaches that have been taken regarding the international law norm of 'expropriation' in resolving investor–State disputes, and the significance to be placed on the particular wording of expropriation provisions in multilateral (and bilateral) investment treaties.

8.22 **Draft Multilateral Agreement on Investment** The provisions on expropriation in other multilateral investment instruments provide limited assistance either in framing guidance for international arbitral tribunals on the scope of the concept or in indicating whether the differences in wording between, for example, the expropriation provisions in the NAFTA and ECT treaties, should be accorded any significance. The draft Multilateral Agreement on Investment (MAI), negotiated under the aegis of the Organization for Economic Co-operation and Development (OECD),[35] contains a provision on expropriation that is similar to that of art 1110(1) of NAFTA in that it expressly refers to direct and indirect

performance requirements) paras 142–3; see also *Feldman v Mexico* paras 100–1. *Pope & Talbot v Canada* at fn 87, notes the suggestion of Dolzer and Stevens that treaty provisions that define 'measures tantamount to expropriation' to include 'impairment ... of economic value' may 'represent the broadest scope of indirect expropriation'; however, the Tribunal stated that 'the authors' analysis does not change the basic concept at work in the treaties, NAFTA included: measures are covered only if they achieve the same results as expropriation'.

[33] *Nykomb Synergetics Technology Holding AB v Latvia* (Award) SCC Case No 118/2001, IIC 182 (2003, Haug C, Gernandt & Schütze) para 4.3.1. See the discussion at 8.75 below, on the forms of 'indirect' expropriation.

[34] ibid.

[35] OECD, 'The MAI Negotiating Text' (12 December 2005) <www.oecd.org/dataoecd/46/40/1895712.pdf>.

expropriation, but the MAI uses the word 'equivalent' instead of 'tantamount'. The version consolidated when the negotiations were discontinued in April 1998 reads as follows:

> 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.

8.23 **ASEAN Comprehensive Investment Agreement** The Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement[36] contains a provision that is closer to art 13(1) of the ECT in that it does not refer to direct or indirect expropriation and uses the word 'equivalent' instead of 'tantamount'. Article 14 reads: 'A Member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (in the article referred to as 'expropriation'), except: for public purpose; in a non-discriminatory manner; on payment of prompt, adequate, and effective compensation; and in accordance with due process of law.'

8.24 **Trans-Pacific Partnership Agreement (TPPA)** Article 9.8 of the TPPA[37] provides that no party 'shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except: (a) for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate and effective compensation [defined elsewhere in the TPPA]; and in accordance with due process of law.'[38] Footnote 17 to this provision provides that the term 'public purpose' is as defined in customary international law, though notes that domestic law may express the same concept using different terms, such as 'public necessity', 'public interest' or 'public use'.

8.25 Annex 9-B sets out the parties' 'shared understanding' of the meaning of expropriation. Annex 9-B(1) states that an 'action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.'

8.26 Further, Annex 9-B(3) provides a definition of indirect expropriation, which is 'an action or series of actions by a Party [that] has an effect equivalent to direct expropriation without formal transfer of title or outright seizure'. Annex 9-B(3)(a) also states that the determination of whether an action or series of actions constitutes indirect expropriation requires 'a case-by-case, fact-based inquiry.' In conducting such an inquiry, Annex 9-B(3)(a)(i)-(iii) sets out an non-exhaustive list of relevant factors, including:

(1) The economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment standing alone does not establish that an indirect expropriation has occurred;
(2) The extent to which the government action interferes with distinct, reasonable investment-backed expectations. Whether an investor's investment-backed expectations

[36] ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 29 March 2012) (ACIA) (Appendix 3 below).
[37] TPPA (signed 4 February 2016, not yet in force) (Appendix 11 below).
[38] Citations omitted.

are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.[39]

(3) The character of the government action.

8.27 Annex 9-B(3)(b) expressly carves out States' right to regulate in the public interest. The provision states: 'Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.' Footnote 37 to this provision clarifies that 'regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological patents), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.'

8.28 Additionally, the TPPA preserves States' right to regulate in a number of specific areas:

(1) *Environment/health*: Article 9.15 preserves a party's right to make regulations it considers appropriate to 'ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives'.
(2) *Temporary safeguard measures*: Under art 29.3, TPPA States preserve the right to take temporary safeguard measures in exceptional circumstances (such as a financial crisis). However, these measures must be temporary and must be phased out progressively over an 18-month period (unless exceptional circumstances apply).
(3) *Tobacco*: Under art 29.5, TPPA States also preserve the right to deny an investor protected rights with respect to claims challenging a tobacco control measure.
(4) *Cultural protection*: Under art 29.8, TPPA States also preserve the right to establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.
(5) *Public debt*: Annex 9-G also has specific provisions relating to public debt.

8.29 The text of the TPPA shows careful crafting of investors' rights, with particular sensitivity towards protecting States' sovereign right to regulate in the public interest and to take temporary safeguard measures in exceptional circumstances. Certain provisions of the TPPA are clearly a response to events that have caused the so-called backlash against investment arbitration, borne out of States' fears of exposure to excessive liability under broadly phrased investment protection standards. Such events include the arbitration brought by Philip Morris Asia against Australia alleging that Australia's plain-packaging laws on cigarettes constituted a breach of Philip Morris Asia's investor-protection rights under a free trade agreement between Australia and Hong Kong.[40] Even though the Tribunal found it lacked jurisdiction to hear the case, there was nevertheless public concern that a State should have to pay compensation to a foreign investor for regulations made to protect

[39] TPPA, Annex 9-B, fn 36.

[40] See Australian Government Attorney-General's Department, 'Tobacco Plain Packaging—Investor–State Arbitration' <www.ag.gov.au/tobaccoplainpackaging>.

public health.[41] The temporary safeguard measures provision was likely a response to the extensive liability that Argentina faced as a result of emergency measures it took in response to a financial crisis.[42]

8.30 **ICSID Convention** Finally, for the reasons given in earlier chapters, it should be remembered that the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States[43] (the ICSID Convention), which entered into force on 14 October 1966, does *not* refer to expropriation. The ICSID Convention was intended to provide a framework for investors seeking compensation from States for a wide range of grievances, and not simply or mainly expropriation cases. Jurisdiction over investment disputes under the ICSID Convention is defined by reference to the notion of investment under art 25.

8.31 **Bilateral investment treaties** The imprecision of the definition of expropriation in most multilateral investment treaties is reinforced by the more than 2,500 bilateral investment treaties (BITs) that have been signed and ratified. It is standard for modern BITs to contain an expropriation provision, but such provisions usually do not provide any more guidance to the parties (and arbitrators) than the multilateral instruments discussed above. A review of several States' BITs over a number of years (for example those of the United States, United Kingdom, Germany, the Netherlands, Singapore, and the Czech Republic) reveals a range of 'boilerplate' expropriation sections that manifest the differences in diction already seen in the multilateral instruments. A fluctuation in terminology over time defies easy identification of any trends.

8.32 Perhaps the only safe conclusion that can be drawn from such a review is that States generally seek to incorporate in their BITs the 'customary international law standards for expropriation'.[44] Thus, States have frequently relied on the language and standards commonly thought to express the international law of expropriation that have appeared in widely cited twentieth century materials. For example, the 1938 'Hull formula' (attributed to US Secretary of State Cordell Hull, in a note to the Mexican Government) stated that 'under every rule of law and equity, no government is entitled to expropriate private property for whatever purpose without provision for prompt, adequate and effective payment therefor'.[45] The 1961 Harvard Draft Convention on the International Responsibility of States for Injuries

---

[41] See D Hurst, 'Australia Wins International Legal Battle with Philip Morris over Plain Packaging' The *Guardian* (17 December 2015) <www.theguardian.com/australia-news/2015/dec/18/australia-wins-international-legal-battle-with-philip-morris-over-plain-packaging>.

[42] See *CMS Gas Transmission Co v Argentina* (Award) ICSID Case No ARB/01/8, 14 ICSID Rep 158, IIC 65 (2005, Orrego Vicuña P, Lalonde & Rezek); *LG&E Energy Corp v Argentina* (Decision on Liability) ICSID Case No ARB/02/1, IIC 152 (2006, Maekelt P, Rezek & van den Berg); *Enron Corp Ponderosa Assets LP v Argentina* (Award) ICSID Case No ARB/01/3, IIC 292 (2007, Orrego Vicuña P, van den Berg & Yves-Tschanz); *Sempra Energy International v Argentina* (Award) ICSID Case No ARB/02/16, IIC 304 (2007, Orrego Vicuña P, Lalonde & Morelli Rico); *Continental Casualty Co v Argentina* (Award) ICSID Case No ARB/03/9, IIC 336 (2008, Sacerdoti P, Nader & Veeder); and *Total SA v Argentina* (Decision on Liability) ICSID Case No ARB/04/1, IIC 484 (2010, Sacerdoti P, Álvarez & Herrera Marcano).

[43] Convention on the Settlement of Investment Disputes between States and Nationals of other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 ('ICSID Convention') (Chap 2, Appendix 12 below).

[44] An example of this is expressed in the Message accompanying the US–Bolivia BIT: 'Article III incorporates into the Treaty customary international law standards for expropriation.' Treaty concerning the Encouragement and Reciprocal Protection of Investment (US–Bolivia) (signed 17 April 1998, entered into force 6 June 2001) Senate Treaty Doc 106-25.

[45] Official Documents: Mexico-United States (1938) 32 AJIL Supp 181; (1942) 3 Hackworth Digest of International Law 655.

to Aliens provided the following wording: 'any such unreasonable interference with the use enjoyment or disposal of property as to justify an inference that the owner thereof will not b able to use, enjoy or dispose of the property within a reasonable period of time after the incep tion of such interference'.[46] Article 3 of the 1967 OECD Draft Convention on the Protectio of Foreign Property has also served as an important source: '[N]o Party shall take any measure depriving, directly or indirectly, of his property a national of another party'.[47] The first mod ern BIT, that between Germany and Pakistan (1959), discussed below, also provided an earl framework from which other States could draw.

8.33 The problem remains that these 'customary international law standards' are not themselves stable or precise set of widely accepted points of law that provide adequate predictive aid to inves tors and States, as the discussion below of arbitral tribunal awards would suggest. Nonetheles in a dispute proceeding under a BIT, one must commence any analysis of the expropriatio standard by scrutinizing the language of the BIT itself.

8.34 **United States** Many recent BITs that the United States has entered into contain a provisio such as the following, which closely resembles the provision considered above in art 1110(1 of NAFTA:

> Neither party shall expropriate or nationalize a covered investment under this treaty either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and general principles of treatment provided for in Article II, paragraph 3 [i.e. fair and equitable treatment; full protection and security; treatment no less favorable than that required by international law; no impairment by unreasonable and discriminatory measures].[48]

8.35 As described in the Letters of Submittal regarding these BITs from the US Department of Sta to the US President, such provisions incorporate the 'customary international law standar for expropriation' and describe the obligations of the Parties with respect to expropriation an nationalisation of a covered investment. These obligations apply to both direct expropriatio and indirect expropriation through measures 'tantamount to expropriation or nationalizatio and thus apply to 'creeping expropriations'—a series of measures that effectively amounts to a expropriation of a covered investment without taking title. These BITs are stated as being base on the '1994 US prototype BIT'.

8.36 Slightly earlier US BITs contain almost identical wording in their expropriation section For example, the US–Ukraine BIT,[49] based on the 1994 US prototype BIT, reads as follow

[46] Revised Harvard Draft (1961) 55 AJIL 545, 553 art 10(3)(a).

[47] OECD, *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OE on the Draft Convention* (1967); see also H Abs and H Shawcross, 'Draft Convention on Investments Abro (1960) 9 J Pub L 115, 116.

[48] See, for example, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, wi Annex and Protocol (US–Jordan) (signed 2 July 1997, entered into force 13 June 2003) Senate Treaty D 106-25; Treaty Concerning the Encouragement and Reciprocal Protection of Investment, with Annex a Protocol (US–Bahrain) (signed 29 September 1999, entered into force 31 May 2001) Senate Treaty Doc 10 25; US–Bolivia BIT, art III of which includes detailed provisions regarding the computation and payment prompt, adequate, and effective compensation.

[49] Treaty Concerning the Encouragement and Reciprocal Protection of Investment with Annex, a Related Exchange Letters (US-Ukraine) (signed 4 March 1994, entered into force 16 November 1996) Sena Treaty Doc 103-37. The US–Argentina expropriation provision is virtually identical, but there is no comme

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except: for public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2).

8.37 The US–Ukraine BIT Letter of Submittal makes the same comment as noted above that this section incorporates into the Treaty the international law standards for expropriation and compensation, and that investors are also protected from 'creeping expropriations'. There is an interesting adumbration, however, on the consequences of 'creeping expropriations', which are stated to be those 'that result in a *substantial* deprivation of the benefit of an investment without taking of the title to the investment'.[50] 'Substantial deprivation of the benefit' is, as we have seen, later termed 'effectively expropriate' in Letters of Submittal describing 'creeping expropriations'. It is nonetheless significant that at least the US understanding (in this BIT) is that a claim that fails to demonstrate a substantial deprivation will not succeed.

8.38 US BITs signed in the 1980s are of particular interest because, even though their expropriation provisions vary between elaborate and terse wording, the accompanying Letters of Submittal emphasise the intention to define expropriation broadly and flexibly. In this sense, the expropriation sections of later BITs may be considered, along the curve of development of customary international law standards, to encompass such breadth and flexibility without having to continue to identify these characteristics expressly or through examples or explanations. Thus, the US–Egypt BIT[51] contains the following elaborate expropriation provision in which several instances of 'indirect' expropriation are set out:

> No investment or any part of an investment of a national or a company of either Party shall be expropriated or nationalized by the other Party or a political or administrative subdivision thereof or subjected to any other measure, direct or indirect (including, for example, the levying of taxation, the compulsory sale of all or part of such an investment, or impairment or deprivation of management, control or economic value of such an investment by the national or company concerned), if the effect of such other measure, or a series of such other measures, would be tantamount to expropriation or nationalization (all expropriations, all nationalizations and all such other measures hereinafter referred to as 'expropriation') unless the expropriation
> (a) is done for a public purpose;
> (b) is accomplished under due process of law;
> (c) is not discriminatory;
> (d) is accompanied by prompt and adequate compensation, freely realizable; and

on expropriation in the Letter of Submittal from the US Department of State to the US President: Treaty Concerning the Reciprocal Encouragement and Protection of Investments, with Protocol (signed 14 November 1991, entered into force 20 October 1994) Senate Treaty Doc 103-02.

[50] Similarly, the Treaty of Reciprocal Encouragement and Protection of Investments (US–Armenia) (signed 23 September 1992, entered into force 29 March 1996) Senate Treaty Doc 103-11 [emphasis added].

[51] Treaty Concerning the Reciprocal Encouragement and Protection of Investments (US–Egypt) (signed 11 March 1986 (modified), entered into force 27 June 1992) Senate Treaty Doc 99-24, art III (1).

(e) does not violate any specific provision on contractual [engagement] [stability or expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriation].[52]

8.39 The Letter of Submittal for the US–Egypt BIT comments that 'international law standar shall apply to the expropriation of investments and to the payment of compensation f expropriation'. It further notes that 'the meaning of "expropriation" as used in the model BI [and incorporated in the US/Egypt BIT] is broad and flexible; it includes any measure whi is "tantamount to expropriation or nationalization" '.

8.40 The US–Morocco BIT[53] was 'negotiated from a streamlined model text',[54] but was al intended to convey the broad scope of expropriation. The very brevity and simplici of language in the US–Morocco BIT may well be regarded as effective in achieving th goal: 'Nationalization or expropriation measures, *or any other public measure having the sa effect or nature*, which might be taken by either Party against investments of nationals companies of the other Party, shall be neither discriminatory nor taken for reasons oth than a public purpose. Any such measures shall only be taken under legal procedures whi afford due process of law'.[55] The Letter of Submittal for this BIT indicates that the langua covers an indirect as well as direct 'taking'. Further commentary in the Letter of Submit states that 'the BIT's definition of expropriation is broad and flexible; essentially any measu regardless of form, which has the effect of depriving an investor of his management, cont or economic value in a project may constitute an expropriation requiring compensati equal to the fair market value'.[56] The emphasis on breadth and flexibility is noteworthy, a in this Letter of Submittal the requirement for expropriation is thought to entail (at le from the US perspective) *deprivation* of management, control, or economic value, but n *substantial* deprivation, which is the US perspective concerning the later US–Ukraine B discussed above. It can be a far different enterprise to plead and prove *deprivation* as oppos to *substantial* deprivation.

8.41 However, it is difficult to assess whether an international arbitral tribunal would actually a lower barrier to recovery for the investor claimant based on the notion that the investor h only to show some deprivation, as opposed to a substantial deprivation (indeed, the abse of the word substantial might suggest that a complete deprivation is actually required, that the barrier would be higher, not lower, than substantial deprivation). Is the custom international law standard mere deprivation? This is unlikely, at present. However, the t

[52] Sub-para (e), it should be noted, constitutes a condition that is not expressly stated in many more rec BITs entered into by the US. The provision was modified in the course of various protocols; the two variants indicated by the square brackets.

[53] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, with Protocol (U Morocco) (signed 22 July 1985, entered into force 29 May 1991) Senate Treaty Doc 99-18, art III.

[54] Letter of Submittal; US–Morocco BIT

[55] US–Morocco BIT [emphasis added]. Art III continues: '... when such measures are taken, each Pa shall pay promptly just and effective compensation to the nationals or companies of the other Party'.

[56] Letter of Submittal. See also Treaty Concerning the Reciprocal Encouragement and Protection Investment, with Protocol (US– Democratic Republic of Congo(Kinshasa)) (signed 3 August 1984, ente into force 28 July 1989), containing a similar explanation in the Letter of Submittal, though the expropriat provision in the BIT uses different language: 'No investment or any part of an investment of a national company of either Party shall be expropriated or nationalized by the other Party or subjected to any measu direct or indirect, tantamount to expropriation, unless ...' This language is similar to that used in more rec US BITs, as discussed above.

and the parties' intentions in entering into a treaty could of course displace the customary international law standard in the case of a dispute arising out of that particular treaty. The key point here is the potential flexibility and concomitant uncertainty of the expropriatory action claim.[57]

8.42 In 2012 the US Government published an update of its 2004 model BIT.[58] The 2012 BIT made no changes to the substantive investment law protections. When the 2004 model US BIT was introduced, it contained a number of provisions that expressly sought to 'incorporate many of the principles from existing US BITs',[59] but also reflects an acceptance, in relation to expropriation (and with certain qualifications as to 'minimum standard of treatment'), of 'customary international law' understood as the law 'that results from a general and consistent practice of States that they follow from a sense of legal obligation'.[60] Like the 2004 model BIT, the expropriation provision of the 2012 model BIT[61] is stated to apply only to interference with 'a tangible or intangible property right or property interest in an investment', and contains a description of 'indirect expropriation' that acknowledges the need for a 'case-by-case, fact-based inquiry'.[62] Such inquiry would take into account, inter alia, the understanding that an adverse effect on the 'economic value of an investment' does not of itself establish expropriation; the interference is to be weighed against 'distinct, reasonable investment-backed expectations'; the 'character of the government action' must be taken into account; and a government's 'non-discriminatory regulatory actions' designed to protect 'legitimate public welfare objectives' do not, '[e]xcept in rare circumstances', 'constitute indirect expropriations'.[63] At the very least, then, the 2012 US model BIT serves as a useful guide to a State's approach to the incorporation of customary international law developments relating to expropriation claims in a BIT while seeking to place limits on the more expansive interpretations of expropriation that have appeared in recent investment treaty arbitral awards.

8.43 A brief review of expropriation provisions in other States' BITs, negotiated at different points in time, as set out below, provides additional perspectives on the points considered in relation to the US BITs.

---

[57] The fair market value compensation requirement is also noteworthy in this Letter of Submittal and should be compared to the arguably lesser recovery amount set out in the first modern BIT, the 1959 Germany–Pakistan BIT (discussed at 8.46 below).

[58] 2012 US model BIT (Appendix 6 below).

[59] The Office of the United States Trade Representative provides the following background: 'The new model [2004] contains provisions developed by the Administration to address the investment negotiating objectives of the Bipartisan Trade Promotion Authority Act of 2002, which incorporated many of the principles from existing U.S. BITs. The model is substantively similar to the investment chapters of the free trade agreements the United States has concluded since the 2002 Act. USTR and the State Department consulted their respective advisory committees and relevant congressional committees in the development of the new model. The United States last updated its model BIT in 1994.' Office of the United States Trade Representative, 'US Model Bilateral Investment Treaty' <https://ustr.gov/archive/Trade_Sectors/Investment/Model_BIT/Section_Index.html> accessed 1 September 2016.

[60] 2012 US model BIT (Appendix 6 below) Annex A.

[61] ibid art 6(1): 'Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ('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 and Article 5 [Minimum Standard of Treatment] (1) through (3)' (omitting the compensation section; discussed in the following chapter).

[62] 2012 US model BIT (Appendix 6 below) Annex B(2) and (4)(a).

[63] 2012 US model BIT (Appendix 6 below) Annex B(4).

8.44 **United Kingdom** A recent example of a BIT concluded by the United Kingdom is that entered into with Sierra Leone in 2000.[64] Its expropriation provision reads as follows:

> Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as expropriation) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation.

8.45 Unlike the US BITs discussed in this chapter, the UK BITs maintain a consistent use of language over time. From the outset, in the early 1970s, in developing the draft Agreement for the Promotion and Protection of Investments, UK governments sought to capture but not to 'go beyond what was thought to reflect' customary international law standards.[65] Indeed, the BIT concluded with Egypt in 1975[66] employs language in its expropriation provision that is identical to the above 2000 BIT with Sierra Leone, and there are few notable variations in this clause in examples surveyed in the intervening period or subsequently.[67] The UK BITs notably rely on the phrase 'measures having effect equivalent to nationalisation and expropriation' to capture forms of 'indirect' expropriation. However, the UK BITs offer no guidance as to the scope of 'indirect' expropriation, whether through examples or further elaboration. Further, there is no indication as to whether deprivations must be complete or substantial or something less than substantial.

8.46 **Germany** The German practice is of particular interest, as Germany signed the first modern BIT—with Pakistan in 1959.[68] This contained the following expropriation provision:

> Nationals or companies of either Party shall not be subjected to expropriation of their investments in the territory of the other Party except for public benefit against compensation, which shall represent the equivalent of the investments affected.[69]

8.47 Two further examples show the subsequent evolution of the standard. Thus, the Germany–Jamaica BIT, 1992 states:

> Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to

---

[64] Agreement for the Promotion and Protection of Investments (UK–Sierra Leone) (signed 13 January 2000, entered into force 20 November 2001) 2186 UNTS 4, UKTS 17 (2002) art 5.

[65] E Denza and S Brooks, 'Investment Protection Treaties: United Kingdom Experience' (1987) 36 ICLQ 908, 911–12; UK model BIT (Appendix 4 below) art 5.

[66] Agreement for the Promotion and Protection of Investments (UK–Egypt) (signed 11 June 1975, entered into force 24 February 1976) 1032 UNTS 31, UKTS 97 (1976) art 5.

[67] See, for example, Agreement for the Promotion and Reciprocal Protection of Investments (UK–Ukraine) (10 February 1993) 1728 UNTS 201, UKTS 24 (1993) art 6. See also the same definition in, for instance, the Agreement for the Promotion and Protection of Investments (UK–India) (signed 14 March 1994, entered into force 6 January 1995) 1870 UNTS 213, UKTS 27 (1995) art 5; Agreement for the Promotion and Protection of Investments (UK–Philippines) (signed 3 December 1980, entered into force 2 January 1981) 1218 UNTS 61, UKTS 7 (1981) art 5; Agreement for the Promotion and Protection of Investments (UK–Bolivia) (signed 24 May 1988, entered into force 16 February 1990) 1640 UNTS 3, UKTS 34 (1990) art 5; Agreement for the Promotion and Protection of Investments (UK–Vietnam) (1 August 2002) 2224 UNTS 430, UKTS 6 (2003) art 5; Agreement for the Promotion and Protection of Investments (UK–Kenya) (13 September 1999) UKTS 8 (2000) art 5.

[68] Vertrag zwischen der Bundesrepublik Deutschland und Pakistan zur Förderung und zum Schutz von Kapitalanlagen ('Treaty for the Promotion and Protection of Investments, with Protocol and exchange notes') (Germany–Pakistan) (signed 25 November 1959, entered into force 28 April 1962) 457 UNTS 23; 1961 BGBl II 793.

[69] ibid art 3(2).

expropriation or nationalization, hereinafter referred to as 'comparable measure', in the territory of the other Contracting Party except for the public benefit and against compensation.[70]

8.48 The Germany–Bosnia and Herzegovina BIT, 2001 has the formula:

> Investments by investors of either Contracting State shall not be directly or indirectly expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State except for the public benefit and against compensation.[71]

8.49 It is noteworthy that the 2001 Germany–Bosnia and Herzegovina BIT effectively replicates the language in art 1110(1) of NAFTA, whereas the 1992 BIT did not include the words 'directly or indirectly'. But of greater interest is the comparison provided by the first modern BIT on record, that of Germany-Pakistan, signed in 1959. In the straightforward language of the expropriation provision of this earliest BIT, there is no term used other than 'expropriation', and nothing that would hint at the breadth or flexibility that the additional terms which are now so familiar in investment instruments—that is, 'directly or indirectly', 'tantamount', 'equivalent'—would suggest. The Germany-Pakistan BIT, at least as conveyed by the stark solitariness of the word 'expropriation' (not even accompanied by the word 'nationalization'), points to an earlier stage of evolution of the customary international law standard that States have sought to incorporate in their BITs. 'Creeping' expropriation arguably was not part of the customary international law standard at the time that the Germany–Pakistan BIT was signed.

8.50 A complex cause-and-effect process may be discerned here: as the international law principle of expropriation came to be applied in broader and more flexible ways, a set of terms characterising the widening scope came into common usage, and such terms were, to a varying extent, deemed to be needed to reflect this scope. However, arguably, now that 'expropriation' has come to comprise this broad scope, it would be difficult to argue that the word 'expropriation' used at this time and *unaccompanied* by any of these terms somehow harkens back to the earlier, narrower definition. Thus, if the Germany–Pakistan BIT expropriation provision were to appear in a BIT signed in 2006, an international arbitral tribunal might nonetheless find that the parties expected the tribunal to apply the principle broadly and flexibly. An express disavowal of indirect or creeping expropriation would probably be required in order to recapture the 1959 standard. Moreover, the compensation term 'equivalent of investments affected', which in 1959 may have suggested a recovery that did not include lost profits and arguably was intended to be lower than 'fair market value', may have evolved into something broader if applied today.[72]

8.51 **The Netherlands** An example of the recent Dutch practice is the Netherlands–Bosnia and Herzegovina BIT, 1998:

> Neither Contracting Party shall take any measures depriving nationals of the other Contracting Party of their investments or any measures having effect equivalent to nationalisation or expropriation unless the following conditions are complied with:

[70] Vertrag über die gegenseitige Förderung und den Schutz von Kapitalanlagen ('Treaty concerning the Reciprocal Encouragement and Protection of Investments') (Germany–Jamaica) (signed 24 September 1992, entered into force 29 May 1996) 1996 BGBl II 58 art 4(2).

[71] Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen ('Treaty concerning the Encouragement and Reciprocal Protection of Investments') (Germany–Bosnia and Herzegovina) (signed 18 October 2001, 11 November 2007) 2004 BGBl II 314 art 4(2).

[72] The issue of compensation is fully discussed in Chapter 9 below.

(1) the measures are taken in the public interest and under due process of law;
(2) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;
(3) the measures are taken against just compensation.[73]

8.52 This example is of interest because of its use of the word 'depriving' as a synonym for expropriation, with the additional protection of 'any measures having effect equivalent to nationalisation or expropriation'. 'Depriving' does not appear in earlier Netherlands BITs.[74] However, neither formulation indicates whether a '*substantial* deprivation' is covered.

8.53 **Australia** An example of an Australian BIT is that of 2001, between Australia and Egypt:[75]

> Neither Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') the investments of investors of the other Party unless the following conditions are complied with:
>
> (1) the expropriation is in the public interest which is related to the internal needs of that Party and under due process of law;
> (2) the expropriation is non-discriminatory; and
> (3) the expropriation is accompanied by the payment of prompt, adequate and effective compensation.

8.54 There is a readily apparent consistency in the Australian practice as well as the Singaporean and Czech Republic BITs set out below, in which the term 'measures having effect equivalent to' is used in order for the parties to have the opportunity to rely on a flexible definition of expropriation and the prevailing customary international law standard, such as it may be.

8.55 **Singapore** The formula adopted in the Singapore–Mongolia BIT, 1995 is:[76]

> Neither Contracting Party shall take any measure of expropriation, nationalization or other measures having effect equivalent to nationalization or expropriation (herein after referred to as 'expropriation') against the investment of nationals or companies of the other Contracting Party unless the measures are taken for any purpose authorised by law, on a non-discretionary basis, in accordance with its laws and against compensation which shall be effectively realisable and shall be made without unreasonable delay.

8.56 **Czech Republic** A final example is taken from a treaty between two States that were both formerly part of the Eastern bloc. The Czech Republic–Moldova BIT, 1999 provides:[77]

> Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (herein

---

[73] Agreement on Encouragement and Reciprocal Protection of. Investments (Netherlands–Bosnia and Herzegovina) (signed 13 May 1998, entered into force 1 January 2002) 2233 UNTS 152, Tractatenblad 1998, 172 art 6.

[74] See, for example, Agreement on Encouragement and Reciprocal Protection of Investments (Netherlands–Venezuela) (signed 22 October 1991, entered into force 1 November 1993) 1788 UNTS 45, Tractatenblad 1993, 154 art 6.

[75] Agreement on the Promotion and Protection of Investments (Australia–Egypt) (5 September 2002) 2008 UNTS 348, ATS 2002 19. This is substantially unchanged from a decade earlier. See, for example, Agreement on the Reciprocal Promotion and Protection of Investments (Australia-Vietnam) (11 September 1991) 1661 UNTS 225, ATS 1991 36.

[76] Agreement on the Promotion and Protection of Investments (Singapore–Mongolia) (signed on 24 July 1994, entered into force 14 January 1996). See also Agreement on the Promotion and Protection of Investments (Singapore–Vietnam) (signed 29 October 1992).

[77] Agreement for the Promotion and Reciprocal Protection of Investments (Czech Republic–Moldova) (signed 12 May 1999, entered into force 21 June 2000) 128/2000 Sb art 5.

referred to as 'expropriation') in the territory of the other Contracting Party except where for a public purpose. The expropriation shall be carried out under due process of law, on a non-discriminatory basis and shall be accompanied by provisions for the payment of prompt, adequate and effective compensation.

8.57 This brief overview of certain BIT provisions shows fluctuations of language over a fairly narrow range, and a marked reluctance on the part of contracting States to address particulars. It is not possible to conclude that the differences in language are necessarily attributable to considerations specific to the contracting parties. Nor do they demonstrate deep doctrinal differences between States as to the extent of protection to be provided. In short, while expropriation—direct or indirect—is one of the main concerns of private investors, the increasing number of BITs has done little to assist in the determination of the actual conditions that prescribe what acts of a State would constitute expropriation under international law.[78] The frustrating generality of language commented upon by the *Feldman* Tribunal in relation to the definition of expropriation in NAFTA could be echoed by an arbitral tribunal hearing an expropriation claim under virtually any BIT. However, there is clearly an accepted trend towards finding States potentially responsible for a broader scope of expropriatory action, while maintaining that the deprivation alleged must be very substantial, though not necessarily complete. Decisions of international arbitral tribunals are therefore crucial in clarifying and refining the nature of modern expropriation claims, and these decisions are considered more fully below.

Expropriation in the light of international law standards

8.58 In the absence of a precise definition of expropriation in investment treaties, it is usual practice for international tribunals to construe expropriation in the light of 'the whole body of state practice, treaties and judicial interpretations of that term in international law cases'.[79] Despite the generality of this reference to the sources of international law,[80] in practice tribunals have placed particular reliance on the judicial interpretations of the term in other arbitral awards, and on some codifications of the standards. They have also referred on occasion to the jurisprudence on property rights in major human rights conventions.

8.59 Judicial interpretations comprise, in particular, the awards rendered under art 1110 of NAFTA,[81] ICSID awards, awards of other tribunals under BIT dispute provisions, decisions of other arbitral tribunals and national courts, and the decisions of the Iran–US Claims Tribunal.[82] The Iran–US Claims Tribunal has produced a rich source of jurisprudence on expropriation, and pertinent awards will be referred to in the course of this chapter. However, its jurisdiction is not limited to expropriation but also comprises 'other measures affecting

---

[78] N Gallagher and L Shore, 'Bilateral Investment Treaties' (2004) Int Arb LR 49, 51.
[79] *SD Myers Inc v Canada* (First Partial Award on the Merits) para 280.
[80] Statute of the International Court of Justice, art 38. On the approach to interpretation of treaty provisions see generally 3.128 *et seq* above.
[81] Under NAFTA art 1120(1), investors may submit their claim to arbitration under the ICSID Convention, the ICSID Additional Facility Rules, or an ad hoc arbitration under the UNCITRAL Arbitration Rules (Appendix 1 below).
[82] Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) 19 January 1981, art II.

property rights'. Iran–US Claims Tribunal decisions should therefore be used with particular care.[83]

8.60 A particularly influential codification, often used by international tribunals in relation to the meaning of expropriation, is the Restatement (Third) of the Foreign Relations Law of the United States,[84] in particular the definitions of indirect and creeping expropriation in section 712 (discussed below). For example, the *Pope & Talbot v Canada* and *Saluka* Tribunals expressly relied on the Restatement (Third).[85] It should also be remembered that the expropriation provisions in the Restatement (Third), drawn in part from the 1961 Harvard Draft Convention prepared by Sohn and Baxter, have by no means won universal acceptance; challenges have come, in particular from capital-importing States (especially in relation to the compensation provisions).[86]

8.61 Some human rights conventions also contain provisions relating to the protection of property, which are occasionally referred to by international tribunals when considering the concept of expropriation. Article 21 of the American Convention on Human Rights[87] and art 17.2 of the Universal Declaration of Human Rights of 1948[88] are examples of provisions relating to protection of property. The former reads as follows: 'Rights to Property 1. 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. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.' The latter (art 17(2)) states that 'No one should be arbitrarily deprived of his property'.

8.62 Article 1 of the First Protocol to the European Convention on Human Rights[89] should also be noted in this context:

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

[83] This point was reiterated by the Tribunal in *Pope & Talbot Inc v Canada* (Interim Award) para 104: 'References to the decisions of the Iran-US Claims Tribunal [should not] ignore the fact that that tribunal's mandate expressly extends beyond expropriation to include "other measures affecting property rights".'

[84] American Law Institute, *Restatement of the Law, Third, Foreign Relations of the United States* (1987) Vol 1, 1987, especially s 712 ('*Restatement (Third)*)'.

[85] *Pope & Talbot* (Interim Award) paras 99–102. This decision also relies on the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), reprinted in LB Sohn and RR Baxter, 'Responsibility of States for Injuries to the Economic Interest of Aliens' (1961) 55 AJIL 545, 576. The Tribunal in *Saluka* also relied on the 1967 OECD Draft Convention on the Protection of Foreign Property: *Saluka Investments BV v Czech Republic* (Partial Award) PCA Case No 2001–04, 15 ICSID Rep 274, IIC 210 (UNCITRAL, 2006, Watts P, Behrens & Fortier).

[86] *Restatement (Third)*, s 712, Reporters' Notes (Note 1—'Status of international law on expropriation').

[87] American Convention on Human Rights 'Pact of San Jose, Costa Rica' (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

[88] Universal Declaration of Human Rights (10 December 1948) GA Res 217, UN Doc A/811.

[89] Protocol to the Convention for the Protection of Human Rights and the Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 ('European Convention on Human Rights', as amended) (ECHR).

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.

Even though the First Protocol to the European Convention on Human Rights does not contain the word 'expropriation', the European Court of Human Rights has provided guidance in its case law on whether measures taken by a State amount to expropriation. Indeed, the *Tecmed* Tribunal referred to the judgments rendered by the European Court of Human Rights in *Matos e Silva, Lda v Portugal, Mellacher v Austria*, and *Pressos Compania Naviera v Belgium*.[90] The Tribunal explained that there 'must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriation measure'; in applying this test of proportionality the Tribunal referred to the case law developed by the Court. The *Azurix* Tribunal also referred to European Court of Human Rights case law and applied the criterion of proportionality between the charge or burden to the investor and the aim sought to be realised.[91]

8.63 Thus, the decisions of the European Court of Human Rights as well as the decisions of other regional human rights courts should also be taken into consideration when seeking to understand customary international law on expropriation as well as the investment treaty elaboration of customary international law (as interpreted by arbitral tribunals).

The relationship of municipal and international law in expropriation claims

8.64 The property rights that are the subject of protection under the international law of expropriation are created by the host State law. Thus, it is for the host State law to define the nature and extent of property rights that a foreign investor can acquire.[92] However, the fact that a 'taking' of that property by the host State may be legal under municipal law does not affect the question of whether the State's conduct is expropriatory under international law. Article 3 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts ('Draft Articles on State Responsibility') states: 'The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.'[93]

8.65 However, the relationship of municipal and international law in an expropriation claim can be both complex and hotly disputed. In *EnCana Corp v Ecuador*,[94] the Tribunal characterised the foreign investor's claims as follows: 'Either Ecuador has wrongfully denied rights to

---

[90] *Tecnicas Medioambientales Tecmed SA v Mexico* (Award) ICSID Case No ARB(AF)/00/2, 10 ICSID Rep 130, IIC 247 (2003, Grigera Naón P, Bernal Verea & Fernández Rozas) para 122: *Matos e Silva, Lda v Portugal* [1996] ECHR 37, (1997) 24 EHRR 573; *Mellacher v Austria* Series A No 169, (1989) 12 EHRR 391; and *Pressos Compania Naviera v Belgium* (1995) Series A No 332, (1996) 21 EHRR 301.

[91] *Azurix Corp v Argentina* (Award) ICSID Case No ARB/01/12, 14 ICSID Rep 374, IIC 24 (2006, Rigo Sureda P, Lalonde & Martins) paras 311–12.

[92] See paras 3.98 *et seq* above.

[93] See ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (Crawford, Special Rapporteur) [2001] 2(2) YB ILC 26, art 3. See also the discussion in paras 3.121– 3.122 above.

[94] *EnCana Corp v Ecuador* (Award) LCIA Case UN3481, IIC 91 (UNCITRAL, 2006, Crawford P, Thomas & Grigera Naón (dissenting)).

refunds owing to EnCana subsidiaries under Ecuadorian law, or irrespective of the legality of its measures, it has engaged in conduct having an equivalent effect to the expropriation of the investment.'[95] As a matter of indirect expropriation, it was noted that foreign investors do not have—in the absence of a commitment from the host State—any legitimate expectation that a tax regime will not change: only in an extreme case will taxation 'which is general in its incidence' be determined an expropriation.[96]

8.66 No indirect expropriation was found by the Tribunal; moreover—and here the issue of applicable law becomes most pointed—no direct expropriation was found by the tribunal majority on the grounds that, inter alia, 'the denial of an incidental public law right (in an unclear, nascent domestic taxation regime) by an executive organ acting in good faith' does not amount to an expropriation of that right.[97] That is, the BIT did not convert the arbitral tribunal into an Ecuadorian tax court.[98] The Dissenting Opinion (Grigera Naón) took issue with the ruling on direct expropriation, principally on the grounds that, in his view, the ruling meant that an expropriation under a BIT was exclusively governed by the host State's local laws and had to be settled by the local courts. The divergence in the views of distinguished international lawyers in this case highlights the difficulties that future tribunals will undoubtedly confront in assessing the question of applicable law in reaching decisions on expropriation claims.

C. Direct and Indirect Expropriation

8.67 Expropriation can take numerous different forms. Although, as discussed above, the definitions of expropriation given by treaties are often very general, they usually indicate a difference between 'direct' expropriation and 'indirect' expropriation (the latter is also sometimes referred to as de facto expropriation). These definitions also mention 'measures having effect equivalent' to expropriation or measures 'tantamount to' expropriation. In the following section, these different forms of expropriation are discussed in more detail and, in particular, as they have been considered and explicated by influential international arbitral tribunals.

Direct expropriation

8.68 'Direct expropriation' is generally understood as expropriation in its traditional meaning. Arbitral tribunals have considered direct expropriation as being relatively easy to recognise: for example, 'governmental authorities take over a mine or factory, depriving the investor of all meaningful benefits of ownership and control',[99] or there has been 'a compulsory transfer of property rights'.[100] In fact, the central element is that property must be 'taken' by State authorities or the investor must be deprived of it by State authorities.[101]

[95] ibid para 171.
[96] ibid para 173.
[97] ibid fn 138.
[98] ibid.
[99] *Feldman v Mexico* (Award) ICSID Case No ARB(AF)/99/1, 7 ICSID Rep 341 (2002, Kerameus P, Gantz & Covarrubias Bravo (dissenting)) para 100.
[100] *Amoco International Finance Corp v Iran* (1987) 15 Iran-USCTR 189, 220.
[101] The Tribunal in *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran* (1984) 6 Iran-USCTR 219, 225, stated that it 'prefers the term "deprivation" to the term "taking", although they are

Case law often refers to this as 'direct takings'.[102] This is apparent from the following descriptions:

> ... expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect;[103]
>
> In general, the term 'expropriation' carries with it the connotation of a 'taking' by a governmental-type authority of a person's 'property' with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the 'taking'.[104]
>
> ... expropriation under NAFTA includes ... open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, to the obvious benefit of the host State.[105]
>
> ... Direct expropriation occurs when the title of the owner is affected by the measure in question. In the present case Egypt, commencing with Resolution No 83, formally transferred ownership of the land in Taba from Siag Touristic (and hence the Claimants) to the Government.[106]

These descriptions are consistent with those found in leading texts, for example *Oppenheim's International Law*: 'Expropriation conveys in a general sense a deprivation of a former property owner of this property, and is equivalent to a "taking" of property'.[107]

8.69 The determination of direct expropriation by courts and tribunals does not usually raise conceptual difficulties. However, the definition of direct expropriation is often considered by tribunals in the context of a comparison with indirect expropriation, a concept that has posed many complexities.

Indirect expropriation

8.70 It may be helpful to attempt to grasp the sometimes slippery concept of indirect expropriation by first considering briefly, and in general terms, what some arbitral tribunals have held it *not* to comprise, and then to approach it by examining in more detail the various forms of indirect expropriation identified by tribunals.

Events not constituting indirect expropriation: effect of omissions and consent

8.71 Some arbitral tribunals have emphasised that 'omissions' are not sufficient:

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

---

largely synonymous, because the latter may be understood to imply that the government has acquired something of value, which is not required'.

[102] *Feldman v Mexico* para 100.

[103] *Tecmed v Mexico* para 103.

[104] *SD Myers Canada* (First Partial Award on the Merits) para 280.

[105] *Metalclad Corp v Mexico* (Award) para 103.

[106] *Siag v Egypt* (Award) ICSID Case No ARB/05/15, IIC 374 (2009, Williams P, Pryles & Orrego Vicuña (dissenting)) para 427.

[107] See Oppenheim vol 1, 916 fn 9. See also Shaw 603: 'Expropriation involves a taking of property, but actions short of direct possession of the assets in question may also fall within the category.'

driven action for it to occur; *omissions*, however egregious they may be, are not sufficient for it to take place.[108]

In this regard, the Iran–US Claims Tribunal has observed that:

> A claim founded substantially on omissions and inaction in a situation where the evidence suggests a widespread and indiscriminate deterioration in management, disrupting the functioning of the port of Bandar Abbas, can hardly justify a finding of expropriation.[109]

8.72 However, it should be kept in mind that for other arbitral tribunals a 'teleologically driven action' of the State does not appear to have been required. These tribunals do not find a distinction between actions or inactions to be relevant; for them the key point in defining indirect expropriation is the effect of the measure on the investment.[110] This lack of attention to State purpose is troubling, and the *Olguín* 'teleologically driven' test is to be preferred: the *Olguín* test is more closely connected to the historical origins of expropriation claims; it recognises the proposition that investment treaties do not give foreign investors a guarantee of investment success; and it further recognises that for most tribunals an assessment of indirect expropriation in any of its forms has not somehow been disconnected from a requirement of State conduct of some sort.

8.73 It is clear that not all refusals to act are omissions. In *Suez Sociedad General de Aguas de Barcelona SA v Argentina* (and *AWG Group v Argentina*), the Tribunal rejected the claimants' argument that Argentina's failure to revise a tariff applied to Aguas Argentinas SA (AASA), an Argentine company, and held that a concession contract granted by the Argentine government was an expropriatory measure.[111] Citing the 'teleologically driven' test in *Olguín*, the Tribunal held that a 'measure' (which was not defined in any of the applicable three BITs in the case) was usually interpreted to mean 'an action taken to achieve a particular purpose.'[112] On this definition, a failure to revise a tariff was a measure, and not an omission. The Tribunal stated:[113]

> [A]lthough Argentina refused to revise the tariff that action of refusal was not an omission but the result of a carefully considered decision formally communicated to AASA and that decision constitutes a measure within the meaning of all three treaties. The decision not to revise the tariff in response to AASA's request was certainly teleologically driven.

8.74 Whether a State has by actions or inactions committed what might be considered an expropriatory measure, if the investor has effectively consented to such actions or inactions, a finding of indirect expropriation will generally not be made. That is, the investor must be the subject of a compulsory measure. The *Tradex* Tribunal held: 'As expropriation by definition is a "compulsory" transfer of property rights ... an agreement reached in consent with the

[108] *Olguín v Paraguay* (Award) ICSID Case No ARB/98/5, 6 ICSID Rep 164, 18 ICSID Rev-FILJ (2003), IIC 97 (2001, Oreamuno Blanco P, Rezek & Alvarado) [unofficial translation from Spanish in ICSID Rev-FILJ, emphasis added] ('*Olguín*') para 84.

[109] *Sea-Land Service Inc v Iran* (1984) 6 Iran-USCTR 149, 166.

[110] See *CME Czech Republic BV v Czech Republic* (Partial Award) 9 ICSID Rep 121, IIC 61 (UNCITRAL, 2001, Kühn P, Schwebel & Hándl (dissenting)) para 604, discussed at 8.158 below.

[111] *Suez Sociedad General de Aguas de Barcelona SA v Argentina* (Decision on Liability) ICSID Case No ARB/03/19, IIC 443 (2010, Salacuse P, Kaufmann-Kohler & Nikken); *AWG Group Ltd v Argentina* (Decision on Liability) (UNCITRAL, 2010, Salacuse, Kaufmann-Kohler & Nikken) para 141.

[112] *Suez* para 141.

[113] ibid.

foreign investor and signed by it as in the Dissolution Agreement dated 21 April 1992 can hardly be seen as an act of expropriation in itself.'[114]

The different forms of indirect expropriation

8.75 Several terms, in addition to 'indirect', are used to describe indirect expropriation, for example 'de facto', 'creeping' expropriation, or measures 'tantamount to' or 'equivalent to' expropriation. Various arbitral tribunals have sought to attempt to explicate these terms and define the extent to which they should be differentiated. In a decision applying art 1110 of NAFTA, the Tribunal seemed to take the approach that the phrase 'indirect' expropriation comprised the above-mentioned terms:

> Generally, it is understood that the term '… equivalent to expropriation …' or 'tantamount to expropriation' … 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.[115]

Creeping expropriation

8.76 It is generally recognised that expropriation does not necessarily result from a single act of the State. An investment can be taken gradually, by measures eventually resulting in expropriation. This situation, known as 'creeping' expropriation, was described by an ICSID Tribunal as follows:

> As is well known, there is a wide spectrum of measures that a state may take in asserting control over property, extending from limited regulation of its use to a complete and formal deprivation of the owner's legal title. Likewise, the period of time involved in the process may vary—from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership. It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title. What has to be identified is the extent to which the measures taken have deprived the owner of the normal control of his property.[116]

8.77 Arbitral tribunals have also given the following descriptions of creeping expropriation:

[114] *Tradex Hellas SA v Albania* (Award) ICSID Case No ARB/94/2, 5 ICSID Rep 70, IIC 263 (1999, Böckstiegel P, Fielding & Giardina) para 177.

[115] *Tecmed v Mexico* para 114. In *Feldman v Mexico* para 101, the Tribunal also held that creeping expropriation is a form of 'indirect expropriation', and may accordingly constitute measures 'tantamount to expropriation'.

[116] *Compañía del Desarrollo de Santa Elena SA v Costa Rica* (Award) ICSID Case No ARB/96/1, 5 ICSID Rep 153, IIC 73 (2000, Fortier P, Lauterpacht & Weil) para 76.

Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State *over a period of time* culminate in the expropriatory taking of such property.[117]

Under the terms of NAFTA and under general international law limitations on a state's right to expropriate private property include so-called 'creeping' expropriation, a process that has the effect of taking property through staged measures.[118]

The conclusion that the Claimant was deprived of its property by conduct attributable to the Government of Iran, including NIOC, rests on a series of concrete actions rather than any particular formal decree, as the formal acts merely ratified and legitimised the existing state of affairs.[119]

8.78 The Restatement (Third) of the Foreign Relations Law of the United States refers to 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 ... A state is responsible ... when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory. Depriving an alien of control of his property, as by an order freezing his assets, might become a taking if it is long extended.[120]

The Restatement (Third) summarises creeping expropriation as a situation where the State seeks 'to achieve the same result [as with formal expropriation] by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned'.[121]

Measures 'tantamount to' or 'equivalent to' expropriation

8.79 As discussed above, the expression 'tantamount to' expropriation can be found in art 1110 of NAFTA as well as in many BITs,[122] whereas the expression 'equivalent to' expropriation is used, for example, in art 13(1) of the ECT as well as in various BITs.[123]

8.80 In *Waste Management II*, the Tribunal stated that:

> An indirect expropriation is still a taking of property. By contrast where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant ... Evidently the phrase 'take a measure tantamount to nationalization or expropriation of such an investment' in Article 1110(1) was intended to add to the meaning of the prohibition, over and above the reference to indirect expropriation. Indeed there is some

[117] *Generation Ukraine Inc v Ukraine* (Award) ICSID Case No ARB/00/9, IIC 116 (2003, Paulsson P, Salpius & Voss) para 20.22.

[118] *Pope & Talbot v Canada* (Interim Award) para 83 (a definition submitted by the investor).

[119] *Phillips Petroleum Co Iran v National Iranian Oil Co* (1989) 21 Iran-USCTR 79 para 100. The methods by which the Iranian Government progressively assumed control over foreign enterprises after the 1979 Revolution often did not involve outright seizure. The Iran–US Claims Tribunal therefore had occasion to give elaborate consideration to situations involving creeping expropriation, see the discussion and authorities cited at 8.88–8.89 below.

[120] Section 712, comment g.

[121] ibid.

[122] See for example the Germany–Bosnia and Herzegovina BIT (2001), paras 8.48 to 8.49 above.

[123] See for example the UK–Sierra Leone BIT (2000), paras 8.44 to 8.45 above.

indication that it was intended to have a broad meaning, otherwise it is difficult to see why Article 1110(8) was necessary.[124]

8.81 In *Pope & Talbot v Canada*, the investor argued that the phrase 'tantamount to expropriation' appearing in art 1110 of NAFTA went beyond the meaning of expropriation ordinarily accepted in customary international law.[125] However, this argument was rejected by the arbitral tribunal, which fused the two expressions 'tantamount to' and 'equivalent to' in order to limit their scope:

> ... the Tribunal does not believe that the phrase 'measure tantamount to nationalization or expropriation' in Article 1110 broadens the ordinary concept of expropriation under international law to require compensation for measures affecting property interests without regard to the magnitude or severity of that effect ... 'Tantamount' means nothing more than equivalent. Something that is equivalent to something else cannot logically encompass more.[126]

8.82 This conclusion was approved in a later case:

> The primary meaning of the word 'tantamount' given by the Oxford English Dictionary is 'equivalent'. Both words require a Tribunal to look at the substance of what has occurred and not only at form. A Tribunal ... must look at the real interests involved and the purpose and effect of the government measure ... The Tribunal agrees with the conclusion in the Interim Award of the Pope & Talbot Arbitral Tribunal that something that is 'equivalent' to something else cannot logically encompass more. In common with the Pope & Talbot Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word 'tantamount' to embrace the concept of so-called 'creeping expropriation', rather than to expand the internationally accepted scope of the term expropriation.[127]

8.83 **Actions of State courts** The actions of State courts in unjustifiably preventing the enforcement of a valid award may constitute measures 'tantamount to' or 'equivalent to' expropriation. For example, the tribunal in *Saipem SpA v Bangladesh* held that a contractual right to arbitrate was an asset having economic value and hence constituted an investment.[128] Thus, a court's failure to enforce a valid award could constitute expropriation. Specifically, the Tribunal held that, 'the right to arbitrate and the rights determined by [an] Award are capable in theory of being expropriated.'[129] In this case, the Tribunal considered that 'the alleged expropriated property is [the investor's] residual contract rights under the investment as crystallized in the ICC Award.'[130]

8.84 The Tribunal held that the actions of the Bangladeshi courts in preventing the enforcement of a valid ICC Award won by the investor against a Bangladeshi State entity constituted an expropriation. The Tribunal stated:

---

[124] *Waste Management Inc v Mexico* (Award) ICSID Case No ARB(AF)/00/3, 11 ICSID Rep 361, IIC 270 (NAFTA/ICSID (AF), 2004, Crawford P, Civiletti & Magallón Gómez) ('*Waste Management II*').

[125] The Tribunal in *Pope & Talbot v Canada* (Interim Award) noted that the investor argued that 'the phrase "measure tantamount to expropriation" appearing in Article 1110 comprehends a measure beyond the outright taking or creeping expropriation. It contends that the term includes "even non-discriminatory measures of general application which have the effect of substantially interfering with the investments of investors of NAFTA Parties"' (para 24).

[126] *Waste Management II* paras 96–104.

[127] *SD Myers v Canada* (First Partial Award on the Merits) paras 285–6.

[128] *Saipem SpA v Bangladesh* (Award) ICSID Case No ARB/05/7, IIC 378 (2009, Kaufmann-Kohler P, Otton & Schreuer).

[129] ibid para 122.

[130] ibid para 128.

In respect of the taking, the actions of the Bangladeshi courts do not constitute an instance of direct expropriation, but rather of 'measures having similar effects' within the meaning of Article 5(2) of the BIT. Such actions resulted in substantially depriving [the investor] of the benefit of the ICC Award. This is plain in light of the decision of the Bangladeshi Supreme Court that the ICC Award is 'a nullity.' Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallized in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the BIT.'[131]

8.85 Yet not all actions by State courts unfavourable to investor-claimants are expropriatory. In order to constitute expropriation, the actions of the State courts must be illegal. In *Swisslion*, the Tribunal cited *Saipem* in recognising that a 'predicate for alleging a judicial expropriation is unlawful activity by the court itself'.[132] In *Swisslion*, there was no expropriation in the national courts' finding that the host State's actions were legitimate responses to the investor's contractual breaches. The Tribunal stated:[133]

In the Tribunal's view, the courts' determination of breach of the Share Sale Agreement and its consequential termination did not breach the Treaty and therefore was not unlawful. 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; otherwise, a State could not exercise the ordinary right of a contractual party to allege that its counterparty breached the contract without the State's being found to be in breach of its international obligations. Since there was no illegality on the part of the courts, the first element of the Claimant's expropriation claim is not established.

8.86 Another case where the claimant unsuccessfully challenged the actions of State courts is *Arif v Moldova*.[134] There, the Moldovan judiciary (including the Supreme Court) declared the agreements in question invalid. The claimant alleged that the Moldovan judiciary had misapplied Moldovan law and that such misapplication constituted expropriation.[135] The Tribunal rejected this argument for two reasons. First, there was no evidence to suggest that the Moldovan judiciary had not applied Moldovan law legitimately and in good faith.[136] Certainly there was no evidence of 'collusion between the courts and the investor's competitors in the Moldovan courts over the ... agreements or that the Moldovan courts have acted in denial of justice in any way'.[137] Secondly, the Tribunal held that the claimant had a fair opportunity to defend its position before the Moldovan courts.[138] The Tribunal was not to be treated as 'a court of appeal of last resort.' Further, there was 'no compelling reason that would justify a new legal analysis by this Tribunal regarding the validity of these agreements which ha[d] already been repeatedly, consistently and irrevocably denied by the whole of the Moldovan judicial system.'[139] Thus, the Tribunal

[131] ibid para 129.
[132] *Swisslion DOO Skopje v Macedonia* (Award) ICSID Case No ARB/09/16, IIC 558 (2012, Guillaume P, Price & Thomas) para 313.
[133] ibid para 314.
[134] *Arif v Moldova* (Award) ICSID Case No ARB/11/23, IIC 585 (2013, Cremades P, Hanotiau & Knieper).
[135] ibid para 415.
[136] ibid.
[137] ibid.
[138] ibid para 416.
[139] ibid.

held that no wrongful taking arose from the Moldovan courts' legitimate application of Moldovan law.[140]

8.87 **The many forms of indirect expropriation** Thus, forms of indirect expropriation are numerous and cannot readily be differentiated. Some tribunals do not even seek to differentiate these expressions, noting that their scope should be regarded as 'functionally equivalent':[141]

> The essence of any claim of expropriation is that there has been a taking of property without prompt and adequate compensation. However, many investment protection treaties and the Treaty which is the basis for the present arbitration extend the notion of a taking to include what has often been referred to as 'creeping' or 'indirect' expropriation by the State through measures which so substantially interfere with the investor's business activities that they are considered to be 'tantamount' to an expropriation.[142]
>
> When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation or, as in the BIT, as measures 'the effect of which is tantamount to expropriation'.[143]
>
> Such measures are sometimes referred to as 'indirect', 'creeping' or '*de facto*' expropriation and are frequently assimilated to formal expropriation as regards their legal consequences.[144]

8.88 For some tribunals, as indicated above, 'the form of the measures of control or interference is less important than the reality of their impact'[145] on the owner of the investment. Along the same lines, it has been decided that a positive act of the State may not even be necessary: 'it makes no difference whether the deprivation was caused by actions or by inactions'.[146] However, the 'sole effect doctrine' (ie that the effect on the investor is the only relevant criterion) remains a highly controversial approach to indirect expropriation.[147]

A significant interference

8.89 Although the 'sole effect doctrine' is controversial, it is clear that an indirect expropriation will at least in part be assessed on the basis of the effect of the measure in dispute on the investor: 'De facto expropriations or indirect expropriations measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims.'[148]

---

[140] ibid para 417.

[141] *Feldman v Mexico* discusses the expressions 'indirect expropriation' and measures 'tantamount to expropriation' used in NAFTA art 1110(1). As far as the required degree of interference with the investment is concerned, see paras 8.128–8.155 below.

[142] *Link Trading v Moldova* (Award) IIC 154 (UNCITRAL, 2002, Herzfeld P, Buruiana & Zykln).

[143] *Middle East Cement Shipping and Handling Co SA v Egypt* (Award) ICSID Case ARB/99/6, 7 ICSID Rep 173, IIC 160 (2002, Böckstiegel P, Bernardini & Wallace).

[144] *Petrobart Ltd v Kyrgyz Republic* (Award) SCC Case No 126/2003, IIC 184 (2005, Danelius C, Bring & Smets).

[145] *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran* (1984) 6 Iran-USCTR 219, 226 ('*Tippetts*').

[146] *CME Czech Republic BV v Czech Republic* (Partial Award).

[147] R Dolzer, 'Indirect Expropriation: New Developments?' 79.

[148] *CME Czech Republic BV* (Partial Award). See also the award in *Seismograph Service Corp v National Iranian Oil Co* (1988) 22 Iran-USCTR 3: 'On the basis of the foregoing and in the circumstances of this Case the Tribunal is not convinced, however, that this finding warrants the conclusion that CFPS thereby was deprived of the effective use, benefit and control of its Property so as to constitute an expropriation.'

8.90 Although there is not a traditional 'taking' of the investment, if the State authorities interfere to a significant degree with the enjoyment of its use or its benefit, an indirect expropriation may be found. The definition of expropriation given in the *Metalclad v Mexico* case is particularly pertinent on this point:

> 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.[149]

8.91 Discussion of the concept of significant interference can also be found, for example, in *Feldman v Mexico*: 'indirect expropriations and measures "tantamount" to expropriation ... potentially encompass a variety of government regulatory activity that may significantly interfere with an investor's property rights.'[150]

8.92 Since it is the effect of the alleged expropriatory acts upon the investor's use or enjoyment of its property that is a key consideration, it is not necessary that the investor has been divested of legal title to his property. Expropriation can have occurred in cases where, although legal title to the investment may remain with the original owner, the rights that go with that title have been rendered useless:

> ... it is recognised in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[151]
>
> 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.[152]
>
> The Tribunal agrees with the Claimant in that expropriation need not involve the transfer of title to a given property, which was the distinctive feature of traditional expropriation under international law. It may of course affect the economic value of an investment.[153]

8.93 A useful summary of the international law position on this issue may be found in the *Revere Copper* award.[154] The Tribunal found the host government's tax increases—which Jamaica implemented despite a stabilisation clause in the concession agreement with the foreign

---

[149] Although the *Metalclad Corp v Mexico* Tribunal's findings on expropriation were subsequently set aside by the Supreme Court of British Columbia on the grounds that the Tribunal had erroneously relied on a requirement of transparency, the Court did not, as discussed above, review (though it did query) this definition, which has been relied on as authority by numerous international tribunals: *Mexico v Metalclad Corp* [2001] BCSC 664, ICSID Case No ARB(AF)/91/1, 5 ICSID Rep 236, IIC 162 (S Ct BC) para 105.

[150] *Feldman v Mexico* para 100.

[151] *Starrett Housing Corp v Iran* (Interlocutory Award) (1983) 4 Iran-USCTR 122, 154.

[152] *Tippetts* 225. See also *Foremost Tehran Inc v Iran* 10 Iran-USCTR 228, 243–4: 'It is well settled, in this Tribunal's practice as elsewhere, that property may be taken under international law through interference by a State in the use of that property or with the enjoyment of its benefits. This remains true in the absence of a formal expropriatory decree even where the formal legal title of the property is not affected'; *Sola Tiles Inc v Iran* (1987) 14 Iran-USCTR 223, 230; *Compañía del Desarrollo de Santa Elena SA v Costa Rica* para 76.

[153] *Occidental Exploration and Production Co v Ecuador* (Award) LCIA Case No UN3467, 12 ICSID Rep 59, IIC 202 (UNCITRAL, 2004, Orrego Vicuña C, Barrera Sweeney & Brower).

[154] *Revere Copper and Brass Inc v Overseas Private Investment Corp* (1980) 56 ILR 258 (1978, Haight, Bergan & Wetzel).

investor—'have substantially the same impact on effective control over use and operation as if the properties were themselves conceded by a concession that was repudiated'.[155] Thus, even though the investor maintained its mining lease and was in possession of the plant and other facilities, its 'control' of the use and operation of its properties was no longer 'effective' in view of the destruction by Government actions of its contract rights.[156] This decision encapsulates the international law position on indirect expropriation, though, as the discussion below indicates (as well as the 2012 US model BIT considered above), a case-by-case fact-finding inquiry is at the centre of a determination on whether an action or series of actions by a State constitutes expropriation.

D. The Case-by-Case Approach of Tribunals

8.94 It is well settled in international law that the question of whether an expropriation has occurred is to be determined on a case-by-case basis. There are no specific rules as to which acts do or do not constitute expropriation. Arbitral tribunals conduct a balancing test in light of all the circumstances. International tribunals regularly comment on how difficult it is to draw a line between actions constituting an expropriation and those being valid governmental activities that do not require compensation. They examine different criteria, often explaining that each of them alone would be insufficient, although their combination could amount to expropriation. The outcome of disputes relating to expropriation is therefore often difficult to predict. The ensuing review seeks to foster a degree of predictability by isolating the criteria often employed by tribunals in making their expropriation determination.

Criteria considered by international tribunals

Expropriation is only lawful if certain conditions are met

8.95 As the Tribunal in *Siag v Egypt* made clear, expropriation is not 'in and of itself an illegitimate act'.[157] However, expropriation is lawful only where certain conditions are met, namely those set out in the relevant BIT or MIT.[158] In the Italy–Egypt BIT in *Siag*, expropriation was unlawful unless it was done for 'a public purpose in the national interest of the State, for adequate and fair compensation, according to legal procedures and on condition that such measures are taken on a non-discriminatory basis and in accordance with process of law'.[159]

8.96 The Tribunal found that Egypt had unlawfully expropriated the claimants' investment by taking their land, based on five factors arising out of the definition of expropriation in the BIT:

(1) There was no public interest at the time of the taking—the Tribunal found that Egypt had not justified its taking of the claimants' land on public interest grounds at the time that it passed a ministerial resolution authorising the taking of the land. 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'.[160]

---

[155] ibid 291–2.
[156] ibid.
[157] *Siag v Egypt* (Award) ICSID Case No ARB/05/15, IIC 374 (2009, Williams P, Orrego Vicuña & Pryles (dissenting)) para 428.
[158] ibid.
[159] ibid.
[160] ibid para 432.

(2) Egypt had failed to provide prompt compensation—Although the BIT only required 'adequate and fair' compensation, the Tribunal found that such compensation also had to be promptly provided.[161] The Tribunal held that the 'absence of the word ["promptly"] ought not to be seen as permit[ing] Egypt to refrain from paying compensation indefinitely'.[162] Egypt's 12-year delay in providing compensation could not, 'even on the most charitable' view, be considered 'prompt'.[163]

(3) Egypt had not followed proper legal procedure to carry out the expropriation—Egypt had not obtained the proper authority for the expropriation.[164]

(4) There was insufficient evidence to show whether Egypt had acted with discriminatory intent.[165]

(5) Due process was denied both substantively and procedurally. Substantively, the Tribunal found that Egypt had no basis to cancel the contract in question and expropriate the claimants' land. Although the Tribunal recognised that there were delays to the project in question, these delays were not sufficiently grave so as to justify Egypt's cancellation of the contract.[166] Procedurally, Egypt had passed the ministerial resolution authorising expropriation of the claimants' land without giving the claimants prior notice. The Tribunal found that as occupiers of the land subject to this resolution, the claimants were entitled to receive notice that the government authorities were considering expropriating their investment.[167]

8.97 Accordingly, based on the five cumulative conditions required for lawful expropriation (some more relevant than others in this particular case), the Tribunal found that Egypt's expropriation of the claimants' investment violated the expropriation clause in the Egypt–Italy BIT.

8.98 The State's failure to meet any one of the criteria for lawful expropriation may make the State action in question illegal. In *OI European Group BV v Venezuela*, the Netherlands–Venezuela BIT forbade expropriation or nationalisation unless such measures were: (1) taken in the public interest; (2) taken in accordance with due process; (3) not discriminatory; and (4) were compensated for fairly.[168] In the particular circumstances of the case, the Tribunal found that Venezuela had expropriated the investor's investment because its Expropriation Decree failed to satisfy *all* four elements. The Tribunal stated:

> Although this Tribunal has reached the conclusion that the expropriation was carried out in the public interest, and is not discriminatory, Venezuela has failed to ensure due process of law, by failing to precisely identify the property it intended to expropriate, and there has been excessive and *unjustified delay in the payment of the fair value* due under the [Expropriation Decree]. Therefore, the expropriation of the Claimant's investment is not in accordance with the provisions of the Treaty and must be considered illegal.[169]

---

[161] ibid para 434.
[162] ibid.
[163] ibid.
[164] ibid paras 436–7.
[165] ibid para 439.
[166] ibid para 441. Note however, Orrego Vicuña's dissent: he was not convinced, as the majority was, that the project was close to completion at the time the claimants' land was repossessed. He implies that Egypt rightfully exercised its right to cancel the contract (at 5).
[167] ibid para 442.
[168] *OI European Group BV v Venezuela* (Award) ICSID Case No ARB/11/25, IIC 678 (2015, Fernández-Armesto P, Mourre & Orrego Vicuña) para 322.
[169] ibid para 426 [emphasis added].

8.99 The particular requirements for establishing the lawfulness of an expropriation may be contained not only in an investment agreement but also a country's investment law. For example, in *Khan Resources Inc v Mongolia*, the relevant standard for determining expropriation was contained in arts 8.2 and 8.3 of Mongolia's Foreign Investment Law.[170] The Tribunal found that under this law, a lawful expropriation had both a substantive component (the seizure of property had to have a valid legal justification) and a procedural component (the seizure had to be undertaken in accordance with due process of law).[171]

Degree of interference required

8.100 In cases of indirect expropriation, tribunals usually consider that measures are covered only if they achieve the same result as expropriation. 'The test is whether that interference is sufficiently restrictive to support the conclusion that the property has been "taken" from the owner.'[172]

8.101 This position is also reflected in the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), mentioned above, which refers to interference that would 'justify an inference that the owner ... will not be able to use, enjoy, or dispose of the property'.[173]

8.102 However, the Restatement (Third) is less restrictive, in speaking of 'action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment or an alien's property'.[174] Again, tribunals will generally take into consideration all the circumstances of a case in order to reach their decision, and will closely examine the extent to which the State interference has affected the investment.

8.103 For example, in *Pope & Talbot v Canada* the investor claimed that Canada's Export Control Regime constituted expropriation, as it interfered with the investor's ability to continue to export softwood lumber to the United States. The Tribunal did not accept this position. It noted that, even if the interference had, according to the investor, resulted in reduced profits on the investment, the investor nonetheless continued to export substantial quantities of softwood lumber to the United States and to earn substantial profits on those sales. Accordingly, the interference of the State was not substantial enough to amount to expropriation.[175]

---

[170] *Khan Resources Inc v Mongolia* (Award on the Merits) PCA Case No 2011-09, IIC 719 (UNCITRAL, 2015, Hanotiau P, Fortier & Williams) para 293.

[171] ibid para 318.

[172] *Pope & Talbot v Canada* (Interim Award) para 102 relating to 'tantamount to expropriation'. See the interpretation of the *Pope & Talbot v Canada* requirement in *GAMI Investments Inc v Mexico* (Award) 13 ICSID Rep 147, IIC 109 (NAFTA/UNCITRAL, 2004, Paulsson P, Muró & Reisman): the 'affected property must be impaired to such an extent that it must be seen as "taken"'. See also *Otis Elevator Co v Iran and Bank Mellat* (1987) 14 Iran-USCTR 283: 'For Otis to be successful ... it is necessary for it to prove ... that its property rights had been interfered with to such an extent that its use of those rights or the enjoyment of their benefits was substantially affected'. See LY Fortier and SL Drymer, 'Indirect Expropriation in the Law of International Investment: I Know it When I See it, or *Caveat Investor*' (2004) 19 ICSID Rev-FILJ 293, especially 299–305, for a discussion of the distinction between non-compensable regulation and indirect expropriation.

[173] Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, art 10(3)(a) of which states: '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 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' (1961) 55 AJIL 545, 553.

[174] American Law Institute, *Restatement (Third)* s 712.

[175] *Pope & Talbot v Canada* (Interim Award) para 96.

8.104 In contrast, in *Quiborax SA v Bolivia*, the Tribunal found that the respondent State's revocation of the claimant's concessions did substantially deprive the claimant of the value of its investment in Bolivia, namely the shares that the claimant held in a certain investment vehicle (a company).[176] Although the claimant did not submit proof of that diminution in value, the Tribunal held that, in the absence of the concessions, which were the *raison d'être* of the company, the claimant's investment was rendered 'virtually worthless'.[177] The company had no other business than to exploit the concessions. In the circumstances of this case, the Tribunal found there was indirect expropriation, which was permanent and not justified by the exercise of the State's police powers.[178]

8.105 In *Mamidoil Jetoil Greek Petroleum Products Societe SA v Albania*, the Tribunal stated that the 'decisive criterion' for a finding of expropriation is 'not the fact of having incurred a damage and/or the loss of value as such', but the finding 'that the owner has truly lost all the attributes of ownership'.[179] Citing *El Paso Energy International Co v Argentina*, the Tribunal stated that, 'at least one of the essential components of the property rights must have disappeared for an expropriation to have occurred'.[180] The Tribunal explained that a 'mere loss of value or a loss of benefits that is connected to and caused by the dissolution of at least one attribute of property, does not constitute indirect expropriation'.[181] Further, the Tribunal said that, '[I]llegal conduct will not give rise to a claim for expropriation ... if the substance and attributes of the property are left intact'.[182] On the particular facts of this case, the Tribunal held that the claimant's 'simple allegation that (the lack of) policy measures "made it impossible to earn any profits which could be distributed to Claimant" did not elevate the conduct of the State into the "sphere of a loss of the investment"'.[183] The claimant could not substantiate, with evidence, its claim that the lack of regulation and the distortion of the fuel market made it impossible for it to earn any profits.[184]

8.106 In *Enkev Beheer BV v Poland*, the Tribunal recognised a *jurisprudence constante* on indirect expropriation.[185] It stated: '[T]he 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.'[186]

---

[176] *Quiborax SA v Bolivia* (Award) ICSID Case No ARB/06/2, IIC 739 (2015, Kaufmann-Kohler P, Lalonde & Stern) para 239.
[177] ibid.
[178] ibid.
[179] *Mamidoil Jetoil Greek Petroleum Products Soc SA v Albania* (Award) ICSID Case No ARB/11/24, IIC 682 (2015, Knieper P, Banifatemi & Hammond (dissenting)) para 566, citing *Compañia del Desarrollo de Santa Elena SA v Costa Rica* (Award) ICSID Case No ARB/96/1, 5 ICSID Rep 153, IIC 73 (2000, Fortier P, Lauterpacht & Weil) para 76.
[180] *Mamidoil v Albania* para 566, citing *El Paso Energy International Co v Argentina* (Award) ICSID Case No ARB/03/15, IIC 519 (2011, Caflisch P, Bernardini & Stern) para 245.
[181] ibid para 570.
[182] ibid para 571.
[183] ibid para 561.
[184] ibid.
[185] *Enkev Beheer BV v Poland* (First Partial Award) PCA Case No 2013-01 (UNCITRAL, 2014, Veeder P, Sachs & van den Berg).
[186] ibid para 344.

A temporary interference The issue has also arisen of whether expropriation can consist of temporary measures. Some arbitral tribunals, such as the *Tecmed* Tribunal, refer to the requirement of a certain degree of permanence, sometimes adopting restrictive wording: '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.'[187] However, in *SD Myers v Canada*, while the Tribunal agreed, as a matter of principle, that an expropriation 'usually amounts to a lasting removal of the ability of an owner to make use of its economic rights', it may be that, 'in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary'.[188] The Tribunal did not find that the temporary deprivation in the case before it—a temporary closure of a border that postponed the export of hazardous waste to the investor's facilities in the United States for eighteen months—constituted an expropriation. The Tribunal held that Canada did not benefit from the measure and the evidence did not support a transfer of property or benefit directly to others; rather, an opportunity had been delayed.[189] **8.107**

But in *Wena Hotels*[190] a temporary deprivation was found to be sufficient to support an expropriation. The claimant had signed agreements with a company in the Egyptian public sector to lease and develop two hotels. Disputes arose concerning the terms of the lease, and the Egyptian company seized the hotels for approximately one year. Egypt argued before the Tribunal that this deprivation was merely 'ephemeral' and therefore did not constitute an expropriation. The Tribunal held that the seizure and illegal possession for approximately one year was more than an ephemeral interference in the use of that property or in the enjoyment of its benefits. **8.108**

In *Belokon v Krygyz Republic*, the Tribunal found that the Krygyz National Bank's imposition of an administration and sequestration regime on Manas Bank (the claimant's investment) 'with no end in sight, for a period of at least four years' amounted to a 'disguised taking and expropriation of Manas Bank'.[191] The Tribunal stated that a measure equivalent to a taking requires a deprivation that is 'permanent or imposed for a substantial period of time'.[192] The Tribunal found that while Kyrgyz law placed limits on how long the Krygyz National Bank could impose temporary administration or sequestration administration, the Krygyz National Bank had 'extended both forms of administration in apparent contradiction with these limits'.[193] The Tribunal noted that the respondent could not explain the legal basis for its continuing application of the sequestration regime to Manas Bank.[194] Further, the Respondent provided no assurances that the 'temporary' administration would 'soon be at an end'.[195] The severity of the deprivation was compounded by the Tribunal's finding that **8.109**

---

[187] *Tecnicas Medioambientales Tecmed SA v Mexico* (Award) ICSID Case No ARB(AF)/00/2, 10 ICSID Rep 130, IIC 247 (2003, Grigera Naón P, Bernal Verea & Fernández Rozas) para 116.

[188] *SD Myers v Canada* (First Partial Award on the Merits) para 283.

[189] ibid paras 284–8.

[190] *Wena Hotels Ltd v Egypt* (Award) ICSID Case No ARB/98/4, 6 ICSID Rep 67, IIC 273 (2000, Leigh P, Fadlallah & Wallace). Another case where temporary measures have been considered as expropriatory is *Consortium RFCC v Morocco* (Award) ICSID Case No ARB/00/6, IIC 75 (2003, Briner P, Cremades & Fadlallah).

[191] *Belokon v Krygyz Republic* (Award) IIC 760 (UNCITRAL, 2014, Hobér P, Paulsson & Schiersing) para 215.

[192] ibid para 207.

[193] ibid para 208.

[194] ibid.

[195] ibid para 207.

Manas Bank's profitability and operations had been 'severely affected to the point that even if [Manas Bank] were returned to the Claimant's control it has little or no residual value'.[196] Accordingly, the Tribunal found that the Respondent had indirectly expropriated the claimant's investment.[197]

8.110 In a different context, the *Achmea BV v Slovakia* decision also recognised that a temporary interference may constitute expropriation.[198] The Tribunal distinguished between two types of temporary deprivation of an investor's enjoyment of its rights of ownership of an investment:

(1) a 'deprivation' for what is, from the outset, intended to be a limited (and relatively short) period; and
(2) a 'deprivation' that is intended, at the time of its adoption, to be permanent but whic is, in fact, reversed after a relatively short period of time.[199]

8.111 Deprivations of the former kind would not usually constitute expropriation (even thoug such deprivation may violate other treaty protections, such as provisions against discrimina tory treatment or against treatment that is not fair and equitable).[200] However, deprivation of the latter kind may or may not constitute expropriation depending on the time at whic the Tribunal is asked to assess the expropriatory nature of the measure. If a deprivation i intended, at the outset, to be permanent, then such deprivation may well constitute expro priation. However, the Tribunal must take into account the facts as they exist at the time c the hearing.[201] If, by the time of the hearing, the measure, which was intended to be perm nent, has been reversed and no longer applies, or only applies for a temporary period, the the measure may not constitute expropriation.

8.112 In *Achmea*, the State's ban on profits had, by the time of the hearing, been reversed by t Constitutional Court of Slovakia. The Court deemed the ban to be unconstitutional.[2 The Tribunal acknowledged that if it had been asked to decide the case *before* the Cour decision, it would likely have found the ban to be a 'permanent' deprivation amounting expropriation in violation of the relevant treaty.[203] But since the Court had reversed the b by the time the Tribunal made its decision, the ban had become temporary and therefo not expropriatory. As the Tribunal put it: 'Although the episode [referring to the ban] d constitute a temporary interference with the investment and cause injury to the invest it is not to be regarded as having resulted in a permanent deprivation of the investor of investment.'[204] In this case, the ban 'was a wrong corrected by the proper operation of chec and balances within the Slovak legal system'.[205] The fact that the ban turned out to be te porary only diluted the significance of the State's interference with the investor's prope

[196] ibid para 209.
[197] ibid para 210.
[198] *Achmea BV v Slovakia* (Final Award) PCA Case No 2008-13, IIC 649 (UNCITRAL, 2012, Lowe P, den Berg & Veeder).
[199] ibid para 289.
[200] ibid.
[201] ibid para 292.
[202] ibid para 290.
[203] ibid para 291.
[204] ibid para 292.
[205] ibid.

rights.[206] Thus, the Tribunal found no violation of the protection against expropriation in The Netherlands–Czech and Slovak Federal Republic BIT.[207]

8.113 **Partial interference** The *SD Myers v Canada* award is also important in that it recognised the possibility for a deprivation of a 'partial' nature to support a finding of expropriation. This approach is supported by the broad definition of expropriation given in *Metalclad v Mexico*, which specifies that the investor can be deprived 'in whole or in significant part' of the use of its property.[208] Similarly, the *Bogdanov* Tribunal stated that the 'concept of indirect expropriation applies only to measures having the effect of expropriation that affect the totality or a substantial part of the investment'.[209]

8.114 The Tribunal in *Waste Management II* commented that the *Metalclad* 'Tribunal held that Mexico, by tolerating and acquiescing in the action of the municipal authorities which prevented the operation of the fully constructed landfill, notwithstanding the approval and endorsement of the federal authorities, was responsible for a measure tantamount to expropriation of Metalclad's investment in breach of Article 1110 [of NAFTA]'.[210]

8.115 *Waste Management II* also held that a municipal authority's denial of a construction permit on grounds which were not open to it and which contradicted earlier federal commitments, and the absence of a timely, orderly and substantial basis for the denial of the municipal permit amounted to an indirect expropriation. The Tribunal considered that the Ecological Decree, setting aside the area as a reserve and thus preventing the land from being used as provided for in the agreement, was an act tantamount to expropriation and a further ground for finding a breach of art 1110 of NAFTA.[211]

8.116 According to the *Waste Management II* Tribunal, 'an enterprise is not expropriated just because its debts are not paid or other contractual obligations are breached ... It is not the function of Article 1110 [of NAFTA] to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise'.[212] The award in *Azurix* included a similar holding: 'contractual breaches by a State party or one of its instrumentalities would not normally constitute expropriation. Whether one or a series of such breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as a party to a contract'.[213]

8.117 The *Tecmed* Tribunal, deciding a case under the provisions of the Spain–Mexico BIT,[214] conducted a proportionality test in order to determine whether the measure taken by the

---

[206] ibid.
[207] ibid at 293.
[208] *Metalclad Corp v Mexico* (Award) para 103.
[209] *Bogdanov v Moldova* (Award) SIAR No 2006:3, IIC 33 (2005, Cordero Moss (sole)) para 79.
[210] *Waste Management Inc v Mexico* (Award) ICSID Case No ARB(AF)/00/3, 11 ICSID Rep 361, IIC 270 (NAFTA/ICSID (AF), 2004, Crawford P, Civiletti & Magallón Gómez) ('*Waste Management II*') para 153.
[211] ibid.
[212] ibid para 160.
[213] *Azurix Corp v Argentina* (Award) ICSID Case No ARB/01/12, 14 ICSID Rep 374, IIC 24 (2006, Rigo Sureda P, Lalonde & Martins) para 315.
[214] Acuerdo para la Promocion y Proteccion reciproca de invesiones ('Agreement on the Promotion and Reciprocal Protection of Investment') (Spain–Mexico) (signed 23 June 1995, entered into on 18 December 1996) 1965 UNTS 148.

State constituted expropriation under the BIT. The Tribunal explained that there 'must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure'.[215] As noted above, the Tribunal relied in this regard on case law developed by the European Court of Human Rights.

Objective impact or subjective intention?

8.118 It has been asserted by several arbitral tribunals that, when identifying expropriation, the State's intention is less important than the effects of the measure. This does not mean that the intention of the State is irrelevant. These tribunals do not necessarily adhere to the 'sole effect doctrine'.[216] It may be that the effect on the investment weighs more heavily in the balance than the motivation of the State, but the motivation can nonetheless assist in assessing whether there has been an indirect expropriation. For example, in *CCL v Kazakhstan*,[217] the claimant had concluded a concession agreement with the State for the transfer of the right to use Kazakhstan's shares in a refinery owned by the State for a period of five years. Before the signature of the agreement, a financial analysis performed by a consulting firm made the parties aware of the considerable debt of the State company, including a court action brought against it by another Kazakh company (Company X). Company X gained the right to take over the ownership of the refinery's assets in satisfaction of its claims against the Kazakh company. The claimant alleged that this amounted to an expropriation. The Tribunal rejected the expropriation claim, stating that the claimant had not shown, and the Tribunal had not discovered, any evidence or indication that any motivation to expropriate lay behind any of the government's actions in connection with the agreement.

8.119 The following dicta are instructive on this process of weighing the effect on the investment versus the motivation of the State:

> 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.[218]
>
> ... Tribunal precedent makes clear that the key issue is the objective impact of measures affecting shareholder interests, not the subjective intention behind those measures.[219]
>
> ... The Respondent's reasons and concerns for taking control of [the company] cannot relieve it from responsibility to compensate the Claimant for the taking ... Moreover, a Government cannot avoid liability for compensation by showing that its actions were taken legitimately pursuant to its own laws.[220]
>
> ... a government's liability to compensate for expropriation of alien property does not depend on proof that the expropriation was intentional ...[221]

[215] *Tecmed v Mexico* para 122. A proportionality test was also applied by the *Azurix* Tribunal.
[216] See 8.88 above.
[217] *CCL v Kazakhstan* (Award) SCC Case No 122/2001 (2004, Chairman unidentified, Carter & Söderlund).
[218] *Tippetts* 225.
[219] *Ebrahimi (Shahin Shaine) v Iran* (1994) 30 Iran-USCTR 170, 190.
[220] ibid para 7, citing *Harold Birnbaum v Iran* (1993) 29 Iran-USCTR 260, 270.
[221] *Phillips Petroleum Co Iran v Iran* (1989) 21 Iran-USCTR 79 para 98.

The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case ...[222]

... 'Expropriation' consists of the State, in exercise of its sovereign powers, dispossessing an investor protected by the Treaty, depriving it of the control or the ownership of a protected investment. Dispossession means that the investor suffers the loss of the use and enjoyment (and sometimes also the ownership) of the investment. Thus, the definition in the BIT centers on the investor, not on the State. It does not require that the dispossession of the investor result in an appropriation in benefit of the State. However, in most cases, the investor's loss will lead to reciprocal gain of a public entity, which will facilitate the classification of the action as expropriatory. The definition in the Treaty does not require that the intent to dispossess exist.[223]

8.120 In the same way, the description given to the alleged expropriatory acts does not change their effect. The test is objective:

While the [Decree] describes the managers as 'trustees' and the administration of the factory as 'provisional', it does not indicate that they are trustees for the shareholders, and it makes clear that the factories are not to be returned to their owners unless and until debts owed to Government agencies ... are repaid out of profits.[224]

The phrase 'tantamount to expropriation' in Article 1110 [of NAFTA] does, however, require a tribunal to take a hard look at whether government conduct amounts in substance to an expropriation. The protection offered by Article 1110 does not cease to apply merely because an expropriation is dressed up in a more innocuous form, or accomplished by subtle or indirect means. The real purpose and real impact of a measure must be considered, not merely the official explanations offered by government or the technical wrapping in which the measure is cloaked.[225]

Degree of expectation of the investor

8.121 Since the *Metalclad* award, international tribunals have generally considered the 'reasonably to be expected' economic benefit of property as being one of the touchstones for an assessment of the validity of an expropriation claim. But *Metalclad* was not alone in bringing the matter of the investor's legitimate expectations to the centre of analysis. For example, the *Texaco* Tribunal in 1979 based a finding of expropriation, albeit not explicitly, on the breach by the State of the legitimate expectations of the investor.[226] Libya nationalised the property it had granted to TEXACO by means of a concession agreement (which contained a stabilization clause). The Tribunal held that:

... where the state has concluded with a foreign contracting party an internationalized agreement ... The state has placed itself within the international legal order in order to guarantee vis-à-vis its foreign contracting party a certain legal and economic status over a certain period of time. In consideration of this commitment, the partner is under the obligation to make a certain amount of investments in the country concerned and to explore and exploit at its own risk the petroleum resources which have been conceded to it ... The result is that a state cannot

[222] *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre* (Awards) 95 ILR 183 (1993) (1989 and 1990, Schwebel P, Monroe Leigh & Wallace).
[223] *OI European Group BV v Venezuela* (Award) ICSID Case No ARB/11/25, IIC 678 (2015, Fernández-Armesto P, Mourre & Orrego Vicuña) para 326.
[224] *Phelps Dodge Corp v Iran* (1986) 10 Iran-USCTR 121, 130.
[225] *SD Myers v Canada* (Separate Opinion, Schwarz) para 217.
[226] *Texaco Overseas Petroleum Co v Libya* (Award) (1979) 53 ILR 389 (Ad Hoc, 1977, Dupuy).

> invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty and cannot, though measures belonging to its internal order, make null and void the rights of the contracting party which has performed its various obligations under the contract.

The *Methanex* Tribunal has also dealt with the case where the State offers specific commitments to the investor: 'as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.'[227]

8.122 The foreign investor's degree of expectation is commonly at issue in indirect expropriation claims, particularly in those where a State or State entity has undertaken regulatory measures that, at least arguably, are part of a lawful administrative programme. It has also been argued that in considering the legitimate expectations of investors, tribunals are able to focus on the legal situation in the host country, reconciling the proposition that States have the right to set their 'own rules of property which the foreigner accepts when investing' and 'the notion that expectations deserve more protection as they are increasingly backed by an investment'. It also permits consideration of 'adaptations which are consistent with internationally held values and general principles of law as reflected in major domestic systems'.[228] The question is whether the foreign investor could reasonably have expected that the economic value of its property would have been lost in whole or significant part by the regulatory measures taken by the State. The Tribunal in *International Thunderbird Gaming Corp v Mexico* held:

> Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages. The threshold for legitimate expectations may vary depending on the nature of the violation alleged under the NAFTA and the circumstances of the case.[229]

The expectation of economic benefit thus becomes part of the array of considerations that a tribunal must take into account in determining whether a deprivation for which the State is responsible has actually occurred.[230]

---

[227] *Methanex Corp v United States of America* (Award) (NAFTA/UNCITRAL 2005, Veeder P, Reisman & Rowley).

[228] R Dolzer, 'Indirect Expropriation: New Developments?' 78–79. For further discussion of the application of the doctrine of legitimate expectations see paras 7.179–7.190 above.

[229] *International Thunderbird Gaming Corp v Mexico* (Award) (NAFTA, 2006, van den Berg P, Portal Ariosa & Wälde (partially dissenting)), para 147 [internal citations omitted]. See also *Petrobart Ltd v Kyrgyz Republic* (Award) SCC Case No 126/2003, IIC 184 (2005, Danelius C, Bring & Smets); *Azurix Corp v Argentina*; and *EnCana Corp v Ecuador* (Award) LCIA Case UN3481, IIC 91 (UNCITRAL, 2006, Crawford P, Thomas & Grigera Naón (dissenting)) paras 173–7.

[230] See LY Fortier and SL Drymer, 'Indirect Expropriation in the Law of International Investment: I Know it When I See it, or *Caveat Investor*' (2004) 19 ICSID Rev-FILJ 293, 306–8.

Date of expropriation

8.123 International tribunals have been relatively robust in determining for themselves, based on the facts of the case, the date of expropriation for the purposes of assessing liability. In circumstances where the 'taking' does not arguably consist of one act, tribunals will consider the relevant chain of events, and 'the taking will not necessarily be found to have occurred at the time either of the first or the last such event', but rather when the interference has deprived the claimant of fundamental rights of ownership and such deprivation is 'not merely ephemeral', or when it becomes an 'irreversible deprivation'.[231] The *Azurix* Tribunal stated:

> There is no specific time set under international law for measures constituting creeping expropriation to produce that effect. It will depend on the specific circumstances of the case … When considering multiple measures, it will depend on the duration of their cumulative effect. Unfortunately, there is no mathematical formula to reach a mechanical result. How much time is needed must be judged by the specific circumstances of each case.[232]

8.124 The Tribunal in *ConocoPhillips Petrozuata BV v Venezuela* considered the issue of whether a series of expropriatory actions should be treated as a single taking.[233] The Tribunal decided that a 'single taking' theory could be successful only if all of the State's actions within a certain period of time were unlawful and expropriatory. In *ConocoPhillips*, the claimant contended that a series of actions taken by Venezuela between 2004 and 2007 constituted a 'single taking'. However, the tribunal found that some of the earlier measures taken by Venezuela during this period were lawful. Consequently, the Tribunal rejected the single-taking contention, in so far as this contention wrongly characterised the earlier changes as unlawful in order to make those actions relevant for the purposes of calculating quantum of damages.[234]

Governmental measures that may constitute expropriation

Organs of the State

8.125 The international law position on whether a measure has been taken by an organ of the State is expressed in art 4 of the International Law Commission's Draft Articles on State Responsibility:

> (1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government of a territorial unit of the State.
> (2) An organ includes any person or entity which has that status in accordance with the internal law of the State.[235]

8.126 It is of particular note from art 4 that judicial conduct comes within State responsibility; Paulsson has observed that in this respect the International Law Commission Articles 'reflect the emergence of a clear consensus'.[236]

---

[231] *Phillips Petroleum Co v Iran* para 101.
[232] *Azurix Corp v Argentina* para 313.
[233] *ConocoPhillips Petrozuata BV v Venezuela* (Decision on Jurisdiction) ICSID Case No ARB/07/30, IIC 605 (2013, Keith P, Abi-Saab & Fortier).
[234] ibid para 359.
[235] ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (Crawford, Special Rapporteur) [2001] 2(2) YB ILC 26, art 4.
[236] Paulsson 40.

8.127 Although art 4 may in all respects be considered as expressing the settled international law perspective on the principles by which to assess whether action has been taken (or omitted) that is attributable to the State, there nonetheless remains, in specific arbitration cases, some significant disagreement about the application of these principles to the factual matrix before the arbitral tribunal. For example, in *Eureko v Poland*[237] there was a divided tribunal on the issue of whether the disputes arising out of the contractual relations between the foreign (Dutch) investor and the State Treasury of Poland were attributable to the State. Both the majority and the dissenting positions were expressly based on art 4. The majority stated that the 'crystal clear' text of art 4, applied to the facts of the case, compelled the conclusion that the State Treasury constituted an organ of the Republic of Poland. However, Rajska opined that the majority's conclusion was inconsistent with this text, even broadly construed. First, Rajska commented that the State Treasury was exclusively liable for its obligations and was a juridical person separate from the State (ie an autonomous juridical person that could not exercise any public or regulatory functions). He further observed—and here one will note a divergence from the majority in the interpretation of the principles in art 4 and not merely their application in the particular case—that under art 4(2), since the State Treasury did not have the status of a State organ in accordance with Polish law, its conduct should not be considered an action of the State. Rajska read sub-article 2 as limiting sub-paragraph 1, whereas other international law scholars, as Crawford explains in his Commentary to art 4,[238] would consider that sub-paragraph 2 instead explains that it is 'not sufficient to refer to internal law for the status of State organs'; 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law'. Under this (undoubtedly majority) view, Crawford observes that the use of the word 'includes' in sub-paragraph 2 is crucial; sub-paragraph 2 thus should be understood to mean 'includes but is not limited to' and therefore does not limit but rather broadly clarifies sub-paragraph 1.

The character of State conduct under scrutiny

8.128 Arbitral tribunals have repeatedly emphasised that not every business problem experienced by a foreign investor is an expropriation; it is a fact of commercial life that individuals may be disappointed in their dealings with public authorities:[239]

> ... not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation under Article 1110 [of NAFTA]. Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.[240]

---

[237] *Eureko BV v Poland* (Partial Award) 12 ICSID Rep 331, IIC 98 (UNCITRAL, 2005, Fortier P, Schwebel & Rajska (dissenting)).

[238] ILC 'Responsibility of States for Internationally Wrongful Acts: Draft Articles with Commentaries' [2001] 2(2) YB ILC 30 art 4 commentary para 11.

[239] See, for example, *Azinian v Mexico* (Award) ICSID Case No ARB(AF)/97/2, 5 ICSID Rep 269, IIC 22 (NAFTA, 1999, Paulsson P, Civiletti & von Wobeser) para 83: 'It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities ... It may be safely assumed that many Mexican parties can be found who had business dealings with governmental entities which were not to their satisfaction.'

[240] *Feldman v Mexico* (Award) ICSID Case No ARB(AF)/99/1, 7 ICSID Rep 341, IIC 157 (2002, Kerameus P, Gantz & Covarrubias Bravo (dissenting)) para 112.

This is asserted with particular force in the *Tecmed* decision: '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.'[241] **8.129**

Certainly, foreign investors should take into account expropriation as a possible investment risk. Foreign investors are not immune from national laws that permit expropriation undertaken in compliance with the applicable legal requirements. In *Enkev Beheer BV v Poland*, the Tribunal rejected the claimant's suggestion that the respondent State had undertaken to protect the investor from lawful expropriation.[242] It said: **8.130**

> [F]rom the outset of its investment in 2000, the Claimant knew or should reasonably have known that Enkev Polska's industrial premises, located in the centre of Lódź, were subject to expropriation for urban renewal under Polish law, as any like premises could be in the cities of other European countries, including the Netherlands. Such lawful expropriation for urban planning (with compensation) is a business risk to be accepted by a foreign investor in Poland, just as it must be for a domestic Polish investor. It would have been extraordinary and contrary to Polish law for the City of Lódź to undertake to the Claimant that Enkev Polska would be immune from the rules and procedures imposed by Polish legislation, including the Road Legislation.[243]

In *British Caribbean Bank Ltd (Turks & Caicos) v Belize*, the Tribunal held that where an expropriation is challenged for lacking a legitimate public purpose, the respondent must explain the public purpose for which the expropriation was undertaken and also satisfy a prima facie burden of proving that the acquisition of the particular property was reasonably related to the fulfilment of that purpose.[244] In this particular case, the Tribunal was unconvinced by the reasons proffered by the respondent State for acquiring the investment in question. **8.131**

Not all actions taken by States are necessarily taken in their sovereign capacity. In *Suez*, the Tribunal rejected the claimants' argument that Argentina's termination of a concession agreement was an expropriatory exercise of sovereign authority.[245] Where a State is exercising its rights as an ordinary contracting party, no expropriation has taken place and the investor has recourse to only the contractual framework.[246] In this case, the Tribunal held that Argentina's termination of the concession agreement was 'taken according to the rights [Argentina] claimed under the [concession contract] and the legal framework'.[247] Indeed, the Tribunal continued, 'Argentina's behaviour in ending the [concession contract] seems not unlike the behaviour of a private contracting party faced with the threatened termination **8.132**

---

[241] *Tecmed v Mexico* para 119. See also *Emmanuel Too v Greater Modesto Insurance Associates and the United States of America* (1989) 23 Iran-USCTR 378, where the Tribunal held that 'a State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.'

[242] *Enkev Beheer BV v Poland* (First Partial Award) PCA Case No 2013-01 (UNCITRAL, 2014, Veeder P, Sachs & van den Berg).

[243] ibid para 352.

[244] *British Caribbean Bank Ltd (Turks & Caicos) v Belize* (Award) PCA Case No 2010-18 (UNCITRAL, 2014, van den Berg P, Beechey & Oreamuno Blanco) para 241.

[245] *Suez Sociedad General de Aguas de Barcelona SA v Argentina* (Decision on Liability) ICSID Case No ARB/03/19, IIC 443 (2010, Salacuse P, Kaufmann-Kohler & Nikken) para 147.

[246] ibid para 154.

[247] ibid.

of an important long-term supply contract: it quickly made other provisions for supply of the needed commodity or service and then took steps to end the deterioriated contractual relationship itself.'[248]

8.133 *Tulip Real Estate Investment and Development Netherlands BV v Turkey* also affirms that a host State's legitimate exercise of its contractual right to terminate a contract in the face of the investor's breach does not constitute unlawful expropriation.[249] In this case, the Tribunal held that, 'the evidence offered by the Claimant falls short of establishing a violation of the BIT, inasmuch as the termination was pursued within the framework of the Contract and in [the State party's] perceived commercial best interests'.[250]

8.134 Similarly, the Tribunal in *Gold Reserve v Venezuela* found that the respondent government's acts in question were legitimate exercises of regulatory powers under Venezuelan law and not sovereign acts of an expropriatory nature.[251] In this case the alleged expropriation had arisen from Venezuela's termination of two mining concessions owned by the claimant. The Tribunal agreed with the claimant that, 'an action purportedly taken under a contractual regime may constitute expropriation where the true nature of the act was one of exercising sovereign authority'.[252] The Tribunal said that, 'This is not a straight-forward issue, as the political motivations that undoubtedly existed make it difficult to distinguish between sovereign and regulatory acts.'[253] Thus, the Tribunal 'debated at some length whether to give prevalence to the State's interference leading to the termination of the Brisas Project or to the formal compliance with the 1999 Mining Law and the Mining Titles as a ground for the terminations'.[254] On balance, the Tribunal found that the claimant's contractual breach, namely its failure to commence exploitation within the contractually required timeframe, meant that Venezuela's termination of the concessions could not be seen as merely a 'pretext designed to conceal a purely expropriatory measure'.[255] The contractual timeframe to commence expropriation was 'an important provision in both Concessions which Claimant had not complied with, and neither Respondent's prior reassurances nor its political motivations alter the fact that a contractual right to terminate existed upon plausible grounds'.[256] As such, the Tribunal found that Venezuela's reasons for terminating the concessions in question were valid and its termination of the concessions was therefore not expropriatory under international law.[257] Rather, Venezuela's acts were valid exercises of regulatory power under the applicable Venezuelan laws.[258]

8.135 In *Vigotop Ltd v Hungary*, the tribunal set out a helpful three-stage analysis to assess whether a State action is a sovereign act constituting expropriation, or merely the ordinary exercise of

---

[248] ibid.

[249] *Tulip Real Estate Investment and Development Netherlands BV v Turkey* (Award) ICSID Case No ARB/11/28, IIC 641 (2014, Griffith P, Jaffe & Knieper).

[250] ibid para 418.

[251] *Gold Reserve Inc v Venezuela* (Award) ICSID Case No ARB(AF)/09/1, IIC 660 (2014, Bernadini P, Dupuy & Williams) para 668.

[252] ibid para 666.

[253] ibid para 667.

[254] ibid para 664.

[255] ibid para 667, citing *Malicorp Ltd v Egypt* (Award) ICSID Case No ARB/08/18, IIC 476 (2011, Tercier P, Olavo Baptista & Tschanz) para 142.

[256] *Gold Reserve* para 667.

[257] ibid.

[258] ibid para 668.

of an important long-term supply contract: it quickly made other provisions for supply of the needed commodity or service and then took steps to end the deterioriated contractual relationship itself.'[248]

8.133 *Tulip Real Estate Investment and Development Netherlands BV v Turkey* also affirms that a host State's legitimate exercise of its contractual right to terminate a contract in the face of the investor's breach does not constitute unlawful expropriation.[249] In this case, the Tribunal held that, 'the evidence offered by the Claimant falls short of establishing a violation of the BIT, inasmuch as the termination was pursued within the framework of the Contract and in [the State party's] perceived commercial best interests'.[250]

8.134 Similarly, the Tribunal in *Gold Reserve v Venezuela* found that the respondent government's acts in question were legitimate exercises of regulatory powers under Venezuelan law and not sovereign acts of an expropriatory nature.[251] In this case the alleged expropriation had arisen from Venezuela's termination of two mining concessions owned by the claimant. The Tribunal agreed with the claimant that, 'an action purportedly taken under a contractual regime may constitute expropriation where the true nature of the act was one of exercising sovereign authority'.[252] The Tribunal said that, 'This is not a straight-forward issue, as the political motivations that undoubtedly existed make it difficult to distinguish between sovereign and regulatory acts.'[253] Thus, the Tribunal 'debated at some length whether to give prevalence to the State's interference leading to the termination of the Brisas Project or to the formal compliance with the 1999 Mining Law and the Mining Titles as a ground for the terminations'.[254] On balance, the Tribunal found that the claimant's contractual breach, namely its failure to commence exploitation within the contractually required timeframe, meant that Venezuela's termination of the concessions could not be seen as merely a 'pretext designed to conceal a purely expropriatory measure'.[255] The contractual timeframe to commence expropriation was 'an important provision in both Concessions which Claimant had not complied with, and neither Respondent's prior reassurances nor its political motivations alter the fact that a contractual right to terminate existed upon plausible grounds'.[256] As such, the Tribunal found that Venezuela's reasons for terminating the concessions in question were valid and its termination of the concessions was therefore not expropriatory under international law.[257] Rather, Venezuela's acts were valid exercises of regulatory power under the applicable Venezuelan laws.[258]

8.135 In *Vigotop Ltd v Hungary*, the tribunal set out a helpful three-stage analysis to assess whether a State action is a sovereign act constituting expropriation, or merely the ordinary exercise of

[248] ibid.
[249] *Tulip Real Estate Investment and Development Netherlands BV v Turkey* (Award) ICSID Case No ARB/11/28, IIC 641 (2014, Griffith P, Jaffe & Knieper).
[250] ibid para 418.
[251] *Gold Reserve Inc v Venezuela* (Award) ICSID Case No ARB(AF)/09/1, IIC 660 (2014, Bernadini P, Dupuy & Williams) para 668.
[252] ibid para 666.
[253] ibid para 667.
[254] ibid para 664.
[255] ibid para 667, citing *Malicorp Ltd v Egypt* (Award) ICSID Case No ARB/08/18, IIC 476 (2011, Tercier P, Olavo Baptista & Tschanz) para 142.
[256] *Gold Reserve* para 667.
[257] ibid.
[258] ibid para 668.

a contractual right.[259] The Tribunal stated that the 'key question' was whether the respondent State 'stepped out of the contractual shoes' and 'in fact, acted in its sovereign capacity' when it took the action in question (for example, terminating a contract).[260] The Tribunal first had to determine whether the respondent had a 'hidden political agenda' in terminating the contract, by which the Tribunal meant whether the respondent 'in fact took this decision in order to give effect to a change in government policy, and thus in its sovereign capacity'.[261] The Tribunal noted that even if it concluded that the respondent did have public policy reasons to terminate the contract, this would not 'necessarily in itself lead to a finding that the termination amounted to an expropriation because [the respondent] could at the same time have had contractual grounds for terminating the [contract]'.[262]

8.136 Second, the Tribunal had to determine whether contractual grounds for terminating the contract in fact existed.[263] In the Tribunal's view:[264]

> [A] finding that none of the contractual grounds invoked by Respondent were sufficiently well-founded, while not being dispositive of the expropriation question in itself, could indicate that they were merely a pretext designed to conceal a purely expropriatory measure. If on the other hand, the Tribunal were to reach the contrary conclusion, *i.e.*, that Respondent had contractual termination grounds in addition to its public policy reasons, this would require a further analysis.

8.137 In the event of a parallel cause, that is, where both public policy reasons and contractual grounds justify the State's actions, the Tribunal would have to take a third and final step: to determine 'whether the contractual termination was legitimate, *i.e.*, consistent with the good faith principle'.[265] Specifically, the Tribunal 'would have to determine whether the termination constituted an abuse of the contractual right in order to avoid liability to compensate, that is, whether it involved a "*fictitious*" or "*malicious*" exercise of the right to terminate'.[266]

8.138 Having conducted the above three-step analysis, if the Tribunal concluded that, '[I]t was indeed legitimate for [the respondent] to invoke its contractual grounds for terminating the [contract], this would exclude a finding of an expropriation, despite the parallel existence of public policy reasons'.[267]

Regulatory activity

8.139 Although certain governments have rejected the position that regulatory activity can constitute expropriation, several arbitral decisions have firmly held that regulatory activity is not, per se, outside the scope of expropriation: 'Regulations can indeed be exercised in a way that would constitute creeping expropriation … Indeed, much creeping expropriation could be

[259] *Vigotop Ltd v Hungary* (Award) ICSID Case No ARB/11/22; IIC 721 (2014, Sachs P, Bishop & Heiskanen).
[260] ibid para 328.
[261] ibid.
[262] ibid.
[263] ibid para 329.
[264] ibid.
[265] ibid para 330.
[266] ibid.
[267] ibid para 331.

conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protection against expropriation.'[268]

8.140 However, in responding to the widely expressed contention, notably in academic writings, that 'regulatory takings' may be incorporated in art 1110 of NAFTA, Schwartz stated in his Separate Opinion in *SD Myers v Canada* that 'in the vast run of cases, regulatory conduct by public authorities is not remotely the subject of legitimate complaints under Article 1110'.[269] Schwartz emphasised three main differences between expropriation and regulation: first, 'expropriations tend to be severe deprivations of ownership rights; regulations tend to amount to much less interference'.[270] Secondly, 'Expropriations tend to deprive the owner and to enrich—by a corresponding amount—the public authority or the third party to whom the property is given. There is both unfair deprivation and unjust enrichment when an expropriation is carried out with compensation. By contrast, regulatory action tends to prevent an owner from using property in a way that unjustly enriches the owner.'[271] Finally, 'Expropriations without compensation tend to upset an owner's reasonable expectations concerning what belongs to him, in law and in fairness. Regulation is something that owners ought reasonably to expect. It generally does not amount to an unfair surprise.'[272]

8.141 Arbitral tribunals have also considered the criterion of reasonableness in order to distinguish between regulatory and expropriatory measures. The Tribunal in *Link Trading v Moldova*[273] held as follows:

> As a general matter, fiscal measures only become expropriatory when they are found to be an abusive taking. Abuse arises where it is demonstrated that the state has acted unfairly or inequitably towards the investment, where it has adopted measures that are arbitrary or discriminatory in character or in their manner of implementation, or where the measures taken violate an obligation undertaken by the state in regard to the investment.[274]

8.142 Additionally, an expropriation is unlikely to be abusive or inequitable where the State has followed due process before carrying out regulatory activity. The standard of due process under international law, specifically in the expropriation context, is summarised in *ADC Affiliate Ltd v Hungary* (and affirmed in *Quiborax v Bolivia*) as demanding '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'.[275] The *ADC* Tribunal elaborated:

> 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

[268] *Pope & Talbot Inc v Canada* (Interim Award) 7 ICSID Rep 69, IIC 192 (NAFTA/UNCITRAL, 2000, Dervaird P, Belman & Greenberg), para 99, followed by *Feldman v Mexico*.
[269] *SD Myers v Canada* (Separate Opinion, Schwarz) para 207.
[270] ibid para 211.
[271] Ibid para 212.
[272] ibid para 213.
[273] *Link Trading v Moldova* (Award) IIC 154 (UNCITRAL, 2002, Herzfeld P, Buruiana & Zykln).
[274] ibid para 64.
[275] *Quiborax SA v Bolivia* (Award) ICSID Case No ARB/06/2, IIC 739 (2015, Kaufmann-Kohler P, Lalonde & Stern) para 221, citing *ADC Affiliate Ltd v Hungary* (Award) ICSID Case No ARB/3/16, 15 ICSID Rep 534, IIC 1 (2006, Kaplan P, Brower & van den Berg) para 435.

of such nature exists at all, the argument that 'the actions are taken under due process of law' rings hollow.[276]

8.143 In *Enkev Beheer BV v Poland*, the respondent State demonstrated the existence of such due process by supplying a 'road-map' of the 'different and successive administrative, legal and judicial steps which could lead to the eventual expropriation of the claimant's real property'.[277] The Tribunal found that the claimant's claim was premature: the claimant could not demonstrate any want of due process under Polish or international law. Indeed, the Tribunal decided that the claimant did have recourse to the Polish courts, and there were 'no reasons to assume that the Polish legal system, including the procedures and practices of Polish administrative bodies and Polish courts, would violate in the future the Respondent's obligations [not to expropriate unlawfully] under [the applicable treaty]'.[278]

8.144 Due process may also be observed where the investor has had the opportunity to negotiate a solution with the State to prevent expropriation. In *Venezuela Holdings, BV v Venezuela*, the Venezuelan National Assembly had enacted laws, supported by decisions by the Venezuelan President, whose purpose was to create new mixed companies in which the State would own more than half of all of the shares.[279] There was a process for oil companies to negotiate with the government, and nationalisation was only contemplated if those negotiations failed. The Tribunal acknowledged the fact that, although the claimant's negotiations with Venezuela in this case failed, negotiations between Venezuela and other oil companies had been successful. The Tribunal considered that this process, 'which enabled the participating companies to weigh their interests and make decisions during a reasonable period of time', was compatible with the due process obligations in the applicable BIT.[280] Additionally, the Tribunal pointed out that the mere fact an investor has not received compensation does not, by itself, make the expropriation unlawful.[281] As it stated: 'An offer of compensation may have been made to the investor and, in such a case, the legality of the expropriation will depend on the terms of 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.'[282]

8.145 The discriminatory character of the taking has long been an influential factor in determining expropriation.[283] The Restatement (Third) of the Foreign Relations Law of the United States comments that '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 power of states, if 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'.[284] The Restatement (Third) also points to a distinction between 'taking' and 'regulation', and observes that not every regulatory restraint can be linked to

---

[276] *ADC Affiliate Ltd v Hungary* para 435.
[277] *Enkev Beheer BV v Poland* para 350.
[278] ibid para 351.
[279] *Venezuela Holdings BV v Venezuela* (Award) ICSID Case No ARB/07/27, IIC 656 (2014, Guillaume P, El-Kosheri & Kaufmann-Kohler) para 297.
[280] ibid.
[281] ibid para 301.
[282] ibid.
[283] See *BP Exploration Co (Libya) Ltd v Libya* 53 ILR 297 (Ad Hoc 1973, Lagergren); *Libyan American Oil Co [LIAMCO] v Libya* (1982) 62 ILR 140 (Ad Hoc, 1977, Mahmassani).
[284] American Law Institute, *Restatement (Third)* s 712 comment g.

expropriation. One test that it suggests for determining whether regulation and taxation programmes are intended to achieve expropriation is whether they are applied to locally-owned enterprises as well as to alien enterprises or only to the latter. Another test relies on the degree of interference with the property interest.[285]

8.146 The Tribunal in *Suez* further explained that the fact that the governmental measures 'may have diminished the value of an investment does not, in and of itself, constitute an indirect expropriation'; the interference must be substantial.[286] In evaluating whether a governmental measure is expropriatory, the Tribunal stated it was 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.'[287] The Tribunal cited the American Restatement sentence quoted above that *bona fide* regulatory measures are legitimate, so long as they are not discriminatory.[288]

8.147 Regulatory activity that is undertaken in a lawful manner will unlikely constitute unlawful expropriation. In *Al-Warraq v Indonesia*, the Tribunal did not consider a bank bailout carried out by the Indonesian government to constitute expropriation.[289] In this case, the claimant held shares in an Indonesian bank, Bank Century. Bank Century faced liquidity issues during the 2008 global credit crisis. As part of the bailout, Bank Century received short-term credit facility loans from Bank Indonesia. The Tribunal found that the claimant had not been deprived 'totally or partially or his ownership' of its shares in Bank Century nor of 'his basic rights in the exercise of his ownership' of the shares, as a result of the bailout.[290] The Tribunal pointed out that the claimant's holdings in Bank Century had remained exactly as they were before the bailout. The Indonesian regulators had not taken the claimant's shares and had not seized the bank.[291]

8.148 In *Hulley Enterprises Ltd (Cyprus) v Russia*, the Tribunal found that the taxation measures imposed by the respondent were not *bona fide* taxation.[292] The Tribunal defined *bona fide* tax measures as those which are 'motivated by the purpose of raising general revenue for the State.'[293] It held that: 'By contrast, actions that are taken only under the guise of taxation but in reality aim to achieve an entirely unrelated purpose' did not qualify for the exemption from protection.'[294] The Tribunal applied that test to the evidence before it.[295] It concluded on the basis of that evidence that the protection from expropriation under the Treaty was engaged.[296]

---

[285] ibid. See also *Pope & Talbot v Canada* (Interim Award) fn 73.
[286] *Suez v Argentina* para 137.
[287] ibid para 139.
[288] ibid para 139, citing American Law Institute, *Restatement (Third)*, s 712, comment g.
[289] *Al-Warraq v Indonesia* (Final Award) IIC 718 (UNCITRAL, 2014, Cremades P, Hwang & Nariman).
[290] ibid para 524.
[291] ibid.
[292] *Hulley Enterprises Ltd v Russia* (Final Award) PCA Case No AA 226 (UNCITRAL, 2014, Fortier P, Poncet & Schwebel).
[293] ibid para 1407.
[294] ibid.
[295] ibid para 1579.
[296] ibid para 1585.

Where contractual rights constitute assets capable of expropriation

8.149 The nature of an investment is such that it carries with it certain contractual rights. They are an integral part of the investment. Consequently, a taking of these rights may amount to an expropriation of part or all of the investment. It is clear from the *LIAMCO* award in 1977[297] that contractual rights can be the subject of an expropriation. Further, in *Starrett v Iran*, where the investor, through its Iranian subsidiary, held contractual rights to develop a housing project, the Iran–US Claims Tribunal held that the introduction of legislation restricting the rights of companies to manage housing projects constituted expropriation of those contractual rights: 'The Tribunal holds that the property interest taken by the Government of Iran must be deemed to comprise the physical property as well as the right to manage the Project and to complete the construction in accordance with the Basic Project Agreement and related agreements, and to deliver the apartments and collect the proceeds of the sales as provided in the Apartment Purchase Agreements.'[298] In *Phillips Petroleum* the Iran–US Claims Tribunal commented that 'expropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as the contract rights involved in the present Case'.[299]

8.150 In a case in which the State argued that expropriation did not apply to contractual and other incorporeal rights but only to real property rights, the arbitral Tribunal disagreed:

> ... the Tribunal [cannot] accept the argument that the term 'expropriation' applies only to *jus in rem*. The Respondent's cancellation of the project had the effect of taking certain important rights and interests of the Claimants. What was expropriated was not the land nor the right of usufruct, but the rights of SPP(ME), as a shareholder of ETDC, derived from EGOTH's right of usufruct, which had been 'irrevocably' transferred to ETDC by the State. Clearly, those rights and interests were of a contractual rather than *in rem* nature. However, there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefor. Moreover, it has long been recognized that contractual rights may be indirectly expropriated.[300]

The Tribunal also relied on the judgment of the Permanent Court of International Justice concerning *Certain German Interests in Polish Upper Silesia*, where the Court ruled that by taking possession of a factory, Poland had expropriated the operating company's contractual rights. The Tribunal concluded that 'the duty to compensate in the event of expropriation cannot be evaded by contending that municipal regulations give a narrow meaning to the term of "expropriation" or apply the concept only to certain kinds of property'.[301]

---

[297] *Libyan American Oil Co [LIAMCO] v Libya* (1982) 62 ILR 140 (Ad Hoc, 1977, Mahmassani).

[298] *Starrett Housing Corp v Iran* (Interlocutory Award) (1983) 4 Iran-USCTR 122, 156–7.

[299] *Phillips Petroleum Co Iran v National Iranian Oil Co* 106.

[300] *Southern Pacific Properties (Middle East) Ltd [SPP] v Egypt* (Award) 3 ICSID 189 (1992, Jiménez de Aréchaga P, El Mahdi & Pietrowski) para 165.

[301] ibid para 168. The PCIJ judgment that the Tribunal cited is at (1926) PCIJ Rep Series A No 7 at 44. That contractual rights can be the subject of expropriation was also endorsed by the Tribunal in *CME Czech Republic BV v Czech Republic* (Partial Award). See paras 8.158–8.162 below for a discussion of the approach taken to expropriation in the *Lauder v Czech Republic* (Award) 9 ICSID Rep 62, IIC 205 (UNCITRAL, 2001, Briner C, Cutler & Klein) and *CME* arbitral awards.

8.151 In a notable ICSID award in 2003, the Tribunal held that any right arising out of a contract which is considered as an investment is a right that can be the object of expropriation.[302] More generally, it has been held that expropriation 'may extend to any right which can be the object of the commercial transaction, i.e., freely sold and bought, and thus has a monetary value'.[303]

8.152 In *Emmis v Hungary*, the Tribunal summarised the legal position of rights capable of being expropriated under international law in this way:

> [T]he loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed. The claimant must own the asset at the date of the breach. It is the asset itself—the property interest or chose in action—and not its contractual source that is the subject of the expropriation claim. Contractual or other rights accorded to the investor under host state law that do not meet this test will not give rise to a claim of expropriation.[304]

8.153 Affirming the approach taken by the *Emmis* Tribunal, the *Accession Mezzanine Capital LP v Hungary* Tribunal helpfully explained the importance of distinguishing between property rights, which are capable of being expropriated, and purely personal rights, which are not.[305] This distinction—'between a contract as a source of bilateral personal obligations and the contract as a source of property rights'—is important, because 'international law distinguishes between a state's mere non-performance of its contractual obligations to a foreign party, which cannot constitute an expropriation, and a state's taking of intangible property, which can'.[306]

8.154 In distinguishing between property rights and purely personal rights, the *Accession* Tribunal elaborated:

> [I]t is important to recognise that there is a profound difference between property rights and purely personal rights in the context of adjudging a claim for expropriation. The defining characteristic of a property right is that it is capable of alienation or assignment. One investor's property right might just as well be the property of another investor or of the state. It is precisely because property rights can be alienated or assigned that makes them susceptible to being appropriated or expropriated. What cannot, on the other hand, be appropriated or expropriated are personal rights because the right is not separable in law from the person who has it. A personal right cannot enter circulation in the market like a property right can. By way of example, taxi licenses in some countries are capable of alienation and hence are a property right. But it is unlikely that a license to practice medicine is alienable in any country because it cannot be separated from the person to whom it is granted. It is not, therefore, a property right.
>
> This is not, of course, to suggest that personal rights cannot be interfered with by the state in a manner that violates international law. A licence to practise medicine can be annulled

[302] *Consortium RFCC v Morocco* (Award) ICSID Case No ARB/00/6, IIC 75 (2003, Briner P, Cremades & Fadlallah) para 60: 'des droits issus d'un contrat peuvent être l'objet de mesure d'expropriation, à partir du moment où ledit contrat a été qualifié d'investissement par le Traité lui-même. Les créances détenues par l'investisseur font partie de cet investissement.'

[303] *Amoco International Finance Corp v Iran* (1987) 15 Iran-USCTR 189, 220.

[304] *Emmis International Holding BV v Hungary* (Award) ICSID Case No ARB/12/2, IIC 722 (2014, McLachlan P, Lalonde & Thomas) para 169.

[305] *Accession Mezzanine Capital LP v Hungary* (Award) ICSID Case No ARB/12/3 (2015, Rovine P, Douglas & Lalonde).

[306] ibid para 157.

> by a state regulatory body on an arbitrary basis. That might give rise to complaints of a lack of due process or breach of legitimate expectation. But it makes no sense to talk about the annulment as an 'expropriation'. The state has not taken the licence and used it for its own purposes or given it to someone else because that is impossible: it is not capable of alienation or assignment.[307]

8.155 The Tribunal added that pure contractual rights cannot be expropriated because they do not have 'an independent existence from the personalized contractual relationship in which [they are] embedded'[308] and because they are 'incapable of being alienated to a third party'.[309] However, intangible property such as debts and other choses-in-action, while having their source in contracts, are capable of being expropriated.[310] To be clear, the 'object of the expropriation in such a case is the debt or chose-in-action and not the contract itself'.[311]

E. Conclusion

8.156 It is apparent from the above review of cases that there is increasing convergence in the principles applied by tribunals to determine whether expropriation exists in particular cases. As noted above, the Tribunal in *Enkev Beheer BV v Poland* recognised an 'accumulated mass' of international legal materials, both cases and doctrine, establishing a high threshold for proving indirect expropriation: namely that any deprivation of the investor's interest in an investment must be substantial.[312] What has changed in the decade since the first edition of this text is that the various tests for determining different elements of expropriation have become further defined. For example, *Vigotop v Hungary* has set out a helpful three-stage test for determining when a State action is a sovereign act capable of constituting an expropriatory act or merely an ordinary exercise of a contractual right.[313] Today, there are also more ready examples illustrating when a certain State action (such as a decision by a national judiciary) is expropriatory or not: see the examples of *Saipem v Bangladesh* cf. *Swisslion v Macedonia*, as well *Arif v Moldova*.[314]

8.157 While principles provide the framework, cases will rise or fall depending on their facts. Further, context is important. For instance, the *Venezuela Holdings* Tribunal stated that the mere absence of payment of compensation may not establish an unlawful expropriation: it is necessary to consider all the relevant circumstances, including, for example, whether an offer of compensation was made and on what terms.[315] Similarly a court decision unfavourable to an investor will not necessarily indicate expropriation—it will be necessary to consider the nature of the decision and the basis for which the court drew its conclusions. A finding of expropriation will depend on a case-by-case, fact-based inquiry.

8.158 It may be instructive to consider how two different arbitral tribunals, reviewing the same set of facts (albeit under two different BITs), came to opposite decisions on the expropriation

---

[307] ibid paras 147–8.
[308] ibid para 153.
[309] ibid para 154.
[310] ibid.
[311] ibid.
[312] *Enkev Beheer BV v Poland* para 344.
[313] Discussed above at paras 8.135 to 8.138.
[314] Discussed above in paras 8.83 to 8.86.
[315] *Venezuela Holdings BV v Venezuela* (Award) ICSID Case No ARB/07/27, IIC 656 (2014, Guillaume P, El-Kosheri & Kaufmann-Kohler).

claims before them: in *Lauder v Czech Republic*[316] the Tribunal rejected the foreign investor's claim of expropriation; in *CME v Czech Republic*[317] the Tribunal found that the expropriation claim was justified. Even a brief outline of the claims and holdings on expropriation in these two cases reveals current approaches and current uncertainties regarding the application of the principle of expropriation in investment treaty arbitration.

8.159 The respective claimants (Lauder, a US national, and CME, a Dutch company) were in the business of television broadcasting in the Czech Republic. Their complaints, including expropriation, arose out of the conduct of a public body, the Czech Media Council. Actions of the Media Council damaged a CME subsidiary.

8.160 In *Lauder v Czech Republic* the Tribunal dismissed the claim of expropriation.[318] The Tribunal noted that BITs do not generally define the terms expropriation and nationalisation; indirect expropriation is also not clearly defined, but involves a measure that effectively neutralises the enjoyment of property. The Tribunal found that the CME subsidiary was not deprived to any degree of any relevant rights or economic benefits of its licence, but if such action arguably occurred, it had not been shown to be attributable to the Czech Republic. On these bases, the claimant had not demonstrated that a measure taken by the State had directly or indirectly interfered with his property or with the enjoyment of its benefits.

8.161 On the other hand, in *CME v Czech Republic*, the Tribunal focused on the conduct of the Media Council, and found that such conduct and actions had resulted in the destruction of the commercial value of the foreign investor company's investment.[319] In particular, CME caused the subsidiary's licence to become worthless. The Tribunal accepted that deprivation of property or rights must be distinguished from a State's ordinary measures in properly executing the law. However, the State's actions in this case were not normal regulations in compliance with the law, and were not part of proper administrative proceedings. Thus, although the State had not taken express measures of expropriation, the Media Council had effectively neutralised the benefit of the property of the Dutch owner. Accordingly, the expropriation claim was upheld.

8.162 In short, the two Tribunals applied expropriation principles that did not diverge significantly—though the *CME* Tribunal was clearly more influenced by the relatively broader approach to expropriation advanced in the *Metalclad* award, in particular the section on the significance of covert or incidental interference with use of property which has the effect of depriving the owner of its reasonably expected economic benefit, even if not to the obvious benefit of the State. However, their characterisation of the key facts within the context of these broad principles was significantly different and led to opposite rulings. Two different panels of distinguished international lawyers came to opposite conclusions by, for example, cutting into the seamless web of investment history at different times or by placing different emphases on the reasonably expected commercial value of an investment to a foreign investor and the State's obligations not to diminish that value.

---

316 *Lauder v Czech Republic* (Award).

317 *CME Czech Republic BV v Czech Republic* (Partial Award) 9 ICSID Rep 121, IIC 61 (UNCITRAL, 2001, Kühn P, Schwebel & Hándl (dissenting)).

318 *Lauder* paras 196–204.

319 *CME v Czech Republic* (Partial Award) paras 591–609.

8.163 As suggested at the beginning of this chapter, such uncertainties involving alleged 'takings' are not peculiarly the provenance of international investment arbitration. An expropriation claim may, depending on the perspectives of the individual members of the arbitral tribunal, be assessed on the grounds of some well-settled principles, albeit the application of such principles may be greatly influenced by the relative weight accorded by the tribunal to certain alternatives—for example, is the effect on the investment more important than the State's purpose or benefit? Is a substantial deprivation sufficient or is a complete deprivation required? Is protection of the investor's reasonably expected economic benefit a lesser public interest than the government's promotion of other public welfare objectives? Is the level and nature of governmental interference consistent with the exercise of reasonable regulatory activity?

8.164 It would be unhelpful to set out a schematic chart for the assessment of an expropriation claim under an investment treaty in view of the vast array of potential considerations as well as the significant disagreement that has emerged in the investment treaty case law on certain points of principle. There is nevertheless, as a starting-point, a fundamental consensus that if an investor suffers a deprivation of the use or enjoyment of its investment that can in some manner be linked to conduct of the State, an expropriation claim may be viable.

8.165 In *Pope & Talbot v Canada*,[320] the Tribunal conducted a useful exercise by identifying elements that were not fulfilled in the particular case and, if they had been demonstrated, could have led to a decision by the Tribunal in favour of the expropriation claim. In so doing, the Tribunal provided a checklist of points to guide an assessment of governmental interference when expropriation is alleged. The checklist is merely that—a compilation of some of the issues that an arbitral tribunal might wish to explore further in conducting its enquiry:

(1) Does the investor remain in control of the investment?
(2) Does the investor direct the day-to-day operations of the investment?
(3) Have officers or employees of the investment been detained?
(4) Did the State supervise the work of the officers or employees of the investment?
(5) Did the State take any proceeds of the company sales (apart from taxation)?
(6) Did the State interfere with the management or shareholders' activities?
(7) Did the State prevent the investment from paying dividends to its shareholders?
(8) Did the State interfere with the appointment of the directors or management?
(9) Did the State take any other actions to oust the investor from full ownership and control of the investment?[321]

8.166 Another important factor which has emerged is the legitimate expectations of the foreign investor: 'the extent to which the government action interferes with distinct, reasonable investment-backed expectations'.[322]

[320] *Pope & Talbot Inc v Canada* (Interim Award) 7 ICSID Rep 69, IIC 192 (NAFTA/UNCITRAL, 2000, Dervaird P, Belman & Greenberg).
[321] ibid para 100. Energy Charter Treaty, art 13(3) expressly provides that the taking of shares is expropriation: 'For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting State has an Investment, including through the ownership of shares.' (Appendix 2 below).
[322] 2012 US model BIT, Annex B para 4(a)(ii) (Appendix 6 below).

8.167 Other tribunals have affirmed the checklist approach in *Pope & Talbot v Canada*, including, for example, the Tribunal in *Tidewater Investment SRL v Venezuela*.[323]

8.168 The following general considerations arise from the substantive principles and authorities discussed in this chapter:

(1) Although the text of the expropriation provision in the relevant treaty must be carefully scrutinised, most tribunals are reluctant to draw sharp distinctions between the forms of expropriation that would have an impact on the sustainability of a claim.
(2) Indirect expropriation in all of its forms (for example creeping, de facto) is recognised as part of international investment law.
(3) Among the various tests applied by arbitral tribunals to assess expropriation claims are the following:

(a) Has the investor been deprived of the use or enjoyment of its investment, at least in significant part and over a significant period, based on a reasonable expectation of economic benefit?
(b) Can the deprivation be linked to State conduct of some type?
(c) What was the specific nature of the State conduct and can it be characterised as an interference with the investor's investment?
(d) What are the specific aspects of the interference?
(e) What was the underlying purpose of the interference and can the purpose be characterised as regulatory and taken in good faith, in support of reasonable public welfare objectives?
(f) If the interference can be characterised as regulatory, can it also be characterised as non-discriminatory in the sense that the particular investor was not singled out for interference?
(g) Can the claim reasonably be compared to a claim decided by an arbitral tribunal applying the same or a substantially similar expropriation provision in an investment treaty?

[323] *Tidewater Investment SRL v Venezuela* (Award) ICSID Case No ARB/10/5 (2015, McLachlan P, Rigo Sureda & Stern) para 105.