Zoltán Víg

Taking in international law

Zoltán Víg

Taking in international law

Patrocinium
Budapest, 2019

Kiadja: A Patrocinium Kft.
Felelős vezető a Patrocinium Kft. ügyvezetője
A Kiadvány szerkesztéséért felelős: dr. Hegedűs Bulcsú
Nyomdai munkálatok: Vareg Hungary Kft.

© Dr. Víg Zoltán, PhD, 2019

ISBN

Minden jog fenntartva, beleértve a mű sokszorosítását, bővített vagy rövidített változatban történő kiadását is. A szerző írásos hozzájárulása nélkül a mű, illetőleg annak része semmilyen formában nem sokszorosítható.

Reviewed by

Dr. Stefan Messmann
Professor Legal Studies Department Central European University

Dr. Csongor István Nagy
Associate professor Head of Department, Department of Private International Law Faculty of Law and Political Sciences University of Szeged

Dr. Zoran Čajka
Professor of English language Faculty of Economics, Finance and Administration Singidunum University

The publication of this book was supported by the Hungarian Academy of Sciences University of Szeged Federal Markets "Momentum" Research Group

TABLE OF CONTENTS

Preface
1. Introduction
1.1. Importance of foreign direct investments
1.2. Risks for foreign investors
1.3. Instruments for the protection of foreign investments
1.3.1. Bilateral investment treaties
1.3.2. Multilateral investment treaties
1.4. Conclusion
2. Notions
2.1. Property
2.2. Taking
2.3. Expropriation, nationalization
2.4. Intervention
2.5. Confiscation
2.6. Indirect expropriation
2.7. Indirect expropriation: case law
2.8. The issue of repudiation or breach of contract by the state
2.9. Relevant notions in bilateral investment treaties and in related academic literature
2.10. Conclusion
3. The right to take property and 'public purpose'
3.1. Introduction
3.2. Standard of treatment of foreign investors
3.3. 'Public purpose'
3.4. The right to take property and the 'public purpose' in chosen multilateral instruments and in related academic literature
3.4.1. Energy Charter Treaty (ECT)
3.4.2. International Center for Settlement of Investment Disputes (ICSID)
3.4.3. Multilateral Investment Guarantee Agency (MIGA)
3.4.4. North American Free Trade Agreement (NAFTA)

3.4.5. Organization for Economic Co-operation and Development – "Multilateral Agreement on Investment" Proposal (MAI)
3.5. The right to take property and the public purpose in bilateral investment treaties and in related academic literature
3.6. The right to take property and 'public purpose': case law
3.7. Conclusion
4. The principle of non-discrimination
4.1. Introduction
4.2. The principle of non-discrimination
4.3. Principle of non-discrimination in chosen multilateral instruments and in related academic literature
4.3.1. Energy Charter Treaty (ECT)
4.3.2. International Center for Settlement of Investment Disputes (ICSID)
4.3.3. Multilateral Investment Guarantee Agency (MIGA)
4.3.4. North American Free Trade Agreement (NAFTA)
4.3.5. Organization for Economic Co-operation and Development – "Multilateral Agreement on Investment" Proposal (MAI)
4.4. Principle of non-discrimination in bilateral investment treaties and in related academic literature
4.5. Principle of non-discrimination: case law
4.6. Conclusion
5. Compensation for the taken property
5.1. Development of compensation theories
5.1.1. Norwegian Shipowners' Claims case – 'just' compensation
5.1.2. Chorzow Factory case – 'fair' compensation
5.1.3. Hull Doctrine – 'prompt, adequate and effective' compensation
5.1.4. Calvo Doctrine
5.1.5. United Nations documents – 'appropriate' compensation
5.2. Issue of compensation under the Restatement (Third) of Foreign Relations Law of the United States of America § 7125.3.

5.3. Issue of compensation in United States bilateral investment treaties
5.4. Compensation for the taken property: case law
5.4.1. The case law of the Iran – United States Claims Tribunal
5.4.2. ICSID case law
5.4.3. NAFTA case law
5.5. Conclusion
6. Conclusion

Bibliography
Books
Periodical materials
Internet sources
Cases
Other sources

The author

Preface

This monograph is based on the SJD dissertation of the author. The primary goal of the work is to examine the requirements of lawful taking of foreign property in international law. Furthermore, it tries to prove that there are three[1] requirements of such taking, that is to say, taking should be for public purpose, non-discriminatory and appropriate compensation should be provided. To prove this, international jurisprudence, related academic literature, and international case law is analyzed.

Taking of foreign property is one of the so-called non-commercial risks foreign investors have to face abroad.[2] There might be other non-commercial risks as well, like that of currency inconvertibility, repatriation limitation, currency devaluation, political violence (which includes war, terrorism and revolution), and deterioration in investment environment.[3] However, the risk of taking property constitutes the greatest risk for a foreign investor.[4] This does not need much explanation: when the investment is taken it is not possible to operate it any more. Thus, for many investors the issue of decreasing the risk of taking their investment

1 Additional requirement is that during taking 'due process' should be respected. However, this last requirement is not examined in this book because of its procedural character.

2 Some examples for commercial risk: rescission or cancellation of contract, suspension of performance, non-payment because of insolvency or default of the debtor. *See* Hans van Houtte, The Law of International Trade 286 (2002).

3 *See* J. W. Yackee, *Political Risk and International Investment Law*, 24 Duke J. Comp. & Int'l L. 477, 478-83 (2013-2014); Robert B. Shanks, Protecting Against Political Risk, Including Currency Convertibility and Repatriation of Profits in Eastern Europe 26 (1992).

4 *See* Sebastián López Escarcena, Indirect Expropriation in International Law 1 (2014).

is a crucial one. With good investment protection systems (*e.g.*, investment protection treaties, investment insurance) the risk of taking cannot be avoided entirely - but, the loss to the investor can be minimized. However, many times, even a good investment protection system can only mitigate the loss. The reason is that even if there is compensation paid for the property taken, usually it does not gratify foreign investors. For example, they will not be compensated for (as *appropriate* or *full* compensation usually does not include)[5] the expected future profits, or for the business idea and know-how of where (it can be geographic place or an economic branch) and how to look for good profit. Transferred technology and transferred know-how can also constitute a considerable value, for what there is usually no compensation paid. Therefore, the risk factor is many times present for the investors. In addition, many investments require high initial expenditure. This means that in the case of indirect expropriation, it is very expensive to withdraw from the host state quickly if the investment environment becomes hostile. Therefore, investors usually look for investment opportunities with low risk of taking. Such law risk of taking exists in countries with long tradition of stable political and economic system.

5 *See infra.*

1. Introduction

1.1. Importance of foreign direct investments

During the last two decades the net inflow of foreign direct investments has showed huge growth worldwide. It is important, as foreign direct investment can contribute significantly to the development and modernization of the economy. Furthermore, it can offer new technologies and technical knowledge for the modernization of key important processing industry branches (although, it is also true that developed countries frequently export-outdated technology). Foreign direct investments can also contribute to the training of the workforce, and to the improvement of the management. Foreign investors can offer necessary information on foreign markets, and how to use these markets. Besides, foreign investors can help developing countries to access and seize foreign markets already in the hands of these foreign investors. In addition, they can facilitate privatization processes. For example, foreign capital that streamed in during the privatization process helped East European countries in transition to maintain the delicate equilibrium of the balance of payments.[6] The enterprise restructuring would also have been unthinkable without the expertise and capital of foreign investors.

On the other hand, one should be under no delusion that foreign investors are investing in the hope of good profit, what is not always in the interest of the host country. The Southeast Asian economic crisis of 1997 was a good example for this. In countries without strict investment regulation (routing the investments into particular sectors) like Thailand or Malaysia, foreign investments went into sectors where they could realize

6 *See* Vlastimir Stevanović, *Okrugli Sto: Strane Direktne Investicije – Defektno Efektne [Round Table: Foreign Direct Investments – Defectively Effective]*, Ekonomist, Dec. 2001, at 25.

the highest profit (*e.g.* financing domestic consumption, luxury goods), and they were "wasted". The crisis hit much stronger these countries.[7]

There is high competition worldwide to attract foreign working capital. Therefore, if a country wants to attract foreign capital, first it has to find out what are motivational factors of investors. There are many motivational factors that encourage foreign investors to invest in a country. Economist John H. Dunning categorizes these factors into the following four groups: investments aimed at (1) acquiring resources, (2) securing markets, (3) enhancing efficiency, (4) and establishing strategic advantages for the investors to improve their long-run competitiveness.[8] These motivational factors cannot be directly influenced by the investment recipient country. These factors objectively exist. However, these factors will influence the investment policy of investors, and the implementation of this policy. And this can be influenced by the investment recipient country by macroeconomic conditions.

Thus, capital 'allurement' has, besides motivational factors, also so-called general macroeconomic conditions, and these conditions can be substantially influenced by the host country. These conditions involve, among others, a safe political, legal and institutional environment, and of course the proper protection of foreign investments. The existence of such general conditions is essential precondition for investments. According to a survey of Ernst and Young international corporations during their international investments find the most retardant force to be political instability.[9] Besides political stability, a well-functioning legal and judicial system is also necessary. Therefore, theoretically, political stability, a perspicuous legal system, and an efficient judicial system can raise the inflow of foreign capital.

---

7 *See* Joe Studwell, How Asia Works 139-144 (2013).

8 *See* John H. Dunning, Sarianna M. Lundan, Multinational Enterprises and the Global Economy 63-77 (2008).

9 Ernst and Young (visited on Oct. 16, 2018) <www.ey.com/gl/en/issues/business-environment/ey-attractiveness-surveys>.

1.2. Risks for foreign investors

There are two categories of risks that foreign investors have to face: commercial (*e.g.* rescission or cancellation of contract, suspension of performance, non-payment because of insolvency or default of the debtor, etc.)[10] and non-commercial. This latter can be any of the following: taking (expropriation, nationalization), currency inconvertibility, issues related to the transfer of profit, currency devaluation, political violence (*e.g.* war, terrorism, revolution), and deterioration in investment environment.[11] However, with good investment protection systems (*e.g.* investment protection treaties, investment insurance) the loss of the investor can be minimized, though these risks cannot be avoided entirely. The reason is that even if there is compensation paid for the property taken, in some cases it will not gratify foreign investors. For example, important value is often constituted by the transferred technology and transferred know-how, for what there is usually no compensation paid. In addition, many investments require high initial expenditure, this means that in case of indirect expropriation, it is very expensive to withdraw from the host country quickly if the investment environment becomes hostile. Therefore, investors usually look for investment opportunities with low risk, which is typical for countries with long tradition of stable political and economic system.

1.3. Instruments for the protection of foreign investments

International legal instruments for the protection of foreign investments are crucial in this field if uncertainty wants to be avoided. Examining these instruments, first of all, distinction should be made between diplomatic and legal protection of foreign investments. Here, legal protection, that is to say, legal instruments are examined, which can be divided into

---

10 *See* Hans van Houtte, The Law of International Trade 286 (2002).

11 *See* Miklós Király, Ferenc Mádl, A külföldi beruházások jogi védelme [Legal protection of Foreign Investments] 43 (1989).

domestic (those of the host state) and international instruments. The foreign investor might have theoretically the right to take his case to a local court under the local laws in the host state. However, there is always the risk of bias and partiality of local courts and political influence of the host state. Therefore, foreign investors prefer international instruments of protection. These can be individual agreements between the investor and the host country, bilateral investment treaties (BITs), or multilateral agreements.[12] Host states are usually reluctant to conclude individual agreements with foreign investors except when the investment is of crucial importance for the former. Such agreements usually contain investment protection provisions, and the host states agrees to treat the investor equal (*e.g.* in case of dispute to accept international arbitration, etc.). However, often investors are not influential enough to conclude such individual agreements, and highly appreciate the existence of bilateral or multilateral investment protection agreements.

1.3.1. *Bilateral investment treaties*

It can be said, that most important international legal tools for the protection of foreign investments are bilateral investment treaties. During the last few decades bilateral investment treaties have proliferated enormously. Currently, there are 2358 bilateral investment treaties in force worldwide.[13] Their spread was initiated and powered by capital exporting countries in the first place. They have become the major international instruments through which investments are protected worldwide.

For some commentators, bilateral investment treaties are tools for entrenching customary principles of international law related to the

12 Imre Vörös, A nemzetközi gazdasági kapcsolatok joga I. 133-134 (2015).

13 Source: Investment Policy Hub of UNCTAD (visited on Oct. 12, 2018) <http://investmentpolicyhub.unctad.org/IIA>.

protection of foreign investment.[14] Kishoiyian is of the opinion that the reason for concluding so many bilateral investment treaties in the last decades is that there is uncertainty in international law concerning the protection of foreign investment in the case of taking of foreign property (all bilateral investment treaties have special provisions establishing conditions for taking of foreign property).[15] According to him, it follows that these treaties are "*lex specialis* between parties designed to create a mutual regime of investment protection,"[16] but they do not evidence customary international law. However, accepting certain practices in international relations of States by States creates international custom, and international custom is the bases of international law.[17] At the same time, somehow paradoxically, Kishoiyian argues that: "The essential function of a treaty is to represent the consent of its parties, but it may be used as well to demonstrate the existence of a rule of customary law."[18] Dixon makes distinction between law making treaties in international law, that are multilateral treaties and so called 'contract' treaties that are bilateral

14 Kishoiyian agrees with F.A. Mann who was on the opinion that these treaties "establish and accept and thus enlarge the force of traditional conceptions of the law of State responsibility for foreign investment." Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 Northwestern Journal of International Law and Business 2 (1993). *On this issue see also* Bergmann (1997); Miklós Király, Ferenc Mádl, A külföldi beruházások jogi védelme [Legal protection of Foreign Investments] (1989).

15 *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 379 (1997).

16 Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 Northwestern Journal of International Law and Business 3 (1993).

17 ICJ Statute art 38 (1) (b) states: "international custom, as evidence of a general practice accepted as law".

18 Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 Northwestern Journal of International Law and Business 9 (1993). *Also* Ian Brownlie, Principles of Public International Law 13 (1998).

treaties. With such distinction he suggests that bilateral international treaties have no effect in general on international law, they have international legal effect only between the parties.[19] However, one might argue that if there has evolved a body of bilateral investment treaties that support the same standard for a longer period of time, it can represent customary international law. Many standards and provisions of multilateral treaties are the result of standards that were first applied in bilateral treaties. Thus, some other authors state that the main idea of these treaties is to create clear international legal rules and an effective enforcement mechanism to protect foreign investments in host states. At the end of the day, violation of bilateral investment treaty is at the same time violation of international law, and it infers international responsibility.[20]

Bilateral investment treaties aim to protect foreign direct investments and at the same time they are devices to boost investor confidence. Guarantees given on international level are usually more reliable than national guarantees of the host country. It is easier to manipulate domestic legislation than to abrogate unilaterally international treaties. For example, domestic legislation that is detrimental to foreign investors can be many times justified with social reasons. However, if international agreements are unilaterally abrogated, it can have much worse negative effect on the whole foreign policy of the country concerned (and such political decision does not affect only investments). A study of the United Nations' Center on Transnational Corporations on bilateral investment treaties reports, that although appropriate legal protection of foreign direct investments has a large influence on the willingness of foreign investors to invest in a country, the existence of bilateral investment treaties, as a

---

19 *See* Martin Dixon, Textbook on International Law 25 (2002).

20 *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Virginia Journal of International Law 642 (1998); Joachim Karl, *The Promotion and Protection of German Foreign Investment Abroad*, ICSID Review, Spring 1996, at 3.

matter of fact, do not influence the inflow of foreign investment.[21] That is to say, generally, there cannot be proven direct conjunction between the investment inflow and the number of bilateral investment treaties concluded. The study also mentions that the existence of such a treaty is only one of several factors that can influence investors to invest to a certain country, however, this is not the most decisive one. This conclusion of the study is based on the results of empirical research. However, a well-organized regime of bilateral investment treaties can largely contribute to the growth of foreign investments. With a bilateral investment treaty regime the host state can target certain investors, grant certain privileges that make the host country more attractive, in one word it can offer a 'customized' investment environment. Thus, it could be said that bilateral investment treaties have two major advantages: for the investors they offer legal protection, and for the investment receiving country (host state) they help to attract investments. However, Guzman claims that it only 'seems' that they are beneficial for both parties. He asserts that while such treaties increase efficiency on the global level, at the same time they probably reduce the overall welfare of developing countries.[22] This might be true, as from the examined bilateral investment treaties concluded by large economic powers, like the United States of America, it can be seen that the stronger party 'many times' imposes its conditions on the economically weaker party (this is assumed from the fact that the United States is very rarely willing to depart from its model treaty).[23]

Besides the above-mentioned major arguments, there are many other reasons that can motivate countries to conclude bilateral investment

21 United Nations Conference on Trade and Development (visited on Jun. 4, 2005) <http://unctc.unctad.org/aspx/index.aspx>.

22 *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Virginia Journal of International Law 643 (1998).

23 The latest version of the Model Bilateral Treaty is from 2012: US Model Bilateral Treaty (visited on Dec. 22, 2018) <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

treaties. Among others, such treaties for example facilitate entry of investment by inducing other states to remove impediments in their regulatory system, help investors to gain market and improve political climate between states.[24] Another very important argument for, or advantage of the new generation of bilateral investment treaties, is that they offer a binding mechanism resolving investment disputes, or an important practical implications of such treaties is that their existence is usually condition for obtaining insurance against taking in the home country of the investor.[25]

1.3.2. *Multilateral investment treaties*

Multilateral instruments (and organizations established by them) in the field of investment protection also play an important role, because of the enormous growth of investments worldwide, growing number of free trade zones, and international character of the guarantees these treaties can provide for foreign investments. Regarding the relation of bilateral investment treaties and multilateral treaties, it should be mentioned that the rule *lex posterior derogat legi priori* applies.[26]

---

24 *Id.*

25 *E.g.,* such insurance is usually obtained from international investment insurance companies (*e.g.*, Nippon Export and Investment Insurance (*see* Nippon Export and Investment Insurance (visited on Nov. 22, 2018) <http://nexi.go.jp/e/> or it can be also obtained from the government of the investor, provided such scheme exists in the investor's home country (*e.g.,* Overseas Private Investment Corporation (OPIC) that is partially financed by the government of the United States, partially from insurance fees (*see* Overseas Private Investment Corporation (OPIC) (visited on Nov. 25, 2018) <http://www.opic.gov>.

26 International Law Commission, art. 30 (3) of the Vienna Convention on the Law of Treaties International Law Commission (visited on Nov. 25, 2018) <http://www.un.org/law/ilc/texts/treaties.htm>.

Discussing multilateral investment protection treaties, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States should be mentioned first. This treaty has established the International Centre for Settlement of Investment Disputes (ICSID) in 1965, as an autonomous international organization to facilitate the settlement of investment disputes between member states and nationals of other member states (both natural and legal persons).[27] The organisation's importance is in providing conciliation and arbitration facility and rules, with seat in Washington. ICSID arbitrators are nominated by member states, they should be experts from the field of law, commerce, industry or finances, and first of all impartial.[28] However, the arbitrators can proceed only if the parties to the dispute consent in writing to submit their dispute to the Centre (this is usually done in BITs or individual investment agreements). Another important provision of the Agreement is that the arbitral award of the ICSID tribunals is binding on the parties and should not be subject to any appeal or to any other remedy except those provided for in the ICSID.[29]

The Organization for Economic Co-operation and Development in 1998 worked out and proposed a Multilateral Agreement on Investment (MAI). The main aim of the proposal was to establish a uniform system of investment protection with a broad multilateral framework and high standards that fosters liberalization of investment regimes and investment protection. It also planned to create an effective dispute settlement system. However, negotiations were discontinued and it seems that they will not be resumed.[30]

---

27 ICSID art. 25 (1) states: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." ICSID (visited on Nov. 26, 2018) <https://icsid.worldbank.org>.

28 Art. 14, ICSID (visited on Nov. 26, 2018) <https://icsid.worldbank.org>.

29 Art. 53, ICSID (visited on Nov. 26, 2018) <https://icsid.worldbank.org>.

30 OECD MAI (visited on Nov. 12, 2018) <www.oecd.org/investment/inter-

A good example for functioning multilateral investment protection treaty containing substantive law is the Energy Charter Treaty (ECT) that was launched in the beginning of the 90's, when the energy sector offered an excellent opportunity for cooperation between the West (that had the necessary money and increased need for energy) and Russia and some of its neighbors (having energy, but no money to invest into its exploitation). The ECT, besides creating a legal framework for striving towards open, efficient, sustainable and secure energy markets, it contains a whole chapter on investment promotion and protection. Among others, this chapter contains provisions related to the treatment of investors, expropriation of investment, transfers of profit. There is an ever growing case law related to the treaty, including the famous Yucos case.[31]

One of the main obstacles for the spread of foreign direct investments in the second half of the last century was that the non-commercial risk (nationalization, exchange restrictions, revolutions) was high. Therefore, a special type of multilateral instruments for the protection of foreign investment (in fact a kind of insurance for foreign investors) was introduced by the Multilateral Investment Guarantee Agency (MIGA). The Agency was created by the World Bank to promote foreign direct investment in developing countries. Besides reduction of poverty, research on investment opportunities in developing countries and informing potential investors, MIGA offers investment guarantees (insurance) to foreign investors from member states (for investments in other member states) against non-commercial risk (*e.g.,* expropriation). From the time of its establishment, it has issued 28 billion USD investment insurance. It should be mentioned that assuror can be only citizen or legal person with its seat in a member country, and only for foreign investments. In case of insurance event MIGA pays the compensation to the assuror and the claim cedes to MIGA.[32]

---

nationalinvestmentagreements/multilateralagreementoninvestment.htm>.

31 Energy Charter Treaty (visited on Nov. 23, 2018) <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>.

32 Multilateral Investment Guarantee Agency (MIGA) (visited on Nov. 17,

And finally, some of the most important modern free trade agreements - as international multilateral treaties - should be also mentioned, as they also contain investment protection provisions, and there is a tendency to replace bilateral investment treaties with such treaties.

The North American Free Trade Agreement (NAFTA) is a trilateral economic agreement concluded among the United States, Mexico and Canada, whose objectives include eliminating trade barriers, promoting fair competition, increasing investment opportunities, providing effective protection of intellectual property rights and resolving disputes throughout these countries. This Agreement deals with the issue of investment protection and expropriation in its Chapter 11. The case law under this Chapter has unleashed a vast body of scholarly commentary.[33] At the same time the NAFTA might serve as a model multilateral trade agreement in the future.

New generations of EU free trade agreements should be also mentioned here, which among others regulate investment protection issues.[34] Economically the most significant from these is the EU-Canada Comprehensive Economic and Trade Agreemen (CETA). This Agreement has entered provisionally into force in 2017, however, provisions related to investments will enter into force only following its ratification.[35] It contains substantive law related to investment protection similar to bilateral investment treaties (clarifies the standards of treatment, FET standard, right to regulate of the host state, etc.), however, there is a novel

---

2018)<http://www.miga.org>; Imre Vörös, A nemzetközi gazdasági kapcsolatok joga I. 150 (2015).

33 NAFTA cases can be found on: US Department of State NAFTA cases (visited on Nov. 18, 2018) <http://www.state.gov/s/l/c3742.htm> and NAFTA Claims.com (visited on Nov. 28, 2018) <www.naftalaw.org>.

34 European Parliament, Benefits of EU international trade agreements (visited on Dec. 21, 2018) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603269/EPRS_BRI(2017)603269_EN.pdf>.

35 Csongor Nagy, *'Editorial: Missed and New Opportunities in World Trade'*. 58 Acta Juridical Hungarica 379-383 (2017).

solution regarding procedural rules: the Agreement intends to establish a permanent investment court.[36] At the same time, according to some opinions, the regulatiory system under CETA might cause a so called „regulatory chill" effect, meaning that host countries will abstain from environmental, labor and other legislation that might be contrary to the interest of foreign investors, fearing of high legal and compensation costs in case a dispute arise between the host state and the investor.[37]

1.4. Conclusion

The importance of foreign investments in a globalised world cannot be denied. There are several ways of protecting these investments. However, it can be said that the most important legal instruments for the protection of foreign investments are still bilateral investment treaties. At the same time, there is clear tendency towards their replacement by new generation multilateral free trade agreements. NAFTA and CETA are good examples for this, especially the novel solution of the latter regarding the establishment of a permanent investment court. Another issue, related to the descending importance of bilateral investment treaties, although only on regional (European) level, is a recent decision of the European Court of Justice that an arbitration clause in a bilateral investment treaty concluded between two European Union member states is incompatible with European Union law. However this decision does not invalidate automatically bilateral investment treaties in force between the member states, and there are some new arbitral decisions rejecting some of the arguments of the court in this case.[38]

36 European Commission (visited on Nov. 18, 2018) <http://ec.europa.eu/trade/policy/in-focus/ceta/>.

37 Zoltan Víg, Gábor Hajdu, *CETA and Regulatory Chill*. In Görög, Márta, Mezei, Péter (eds), A szellemi tulajdonvédelem aktuális kérdései. 44-49 (2018).

38 Info Curia (visited on Nov. 20, 2018) <http://curia.europa.eu/juris/liste.jsf?num=C-284/16>.

2. Notions

2.1. Property

Before examining the notion of taking, few words should be devoted to the notion of property and also to the issue of what can be object of taking. The term property is defined in Black's Law Dictionary as "an aggregate of rights which are guaranteed and protected by the government"[39]. According to Bergmann, a German scholar, there is no common notion of property in international law. International law deduces this notion from different national laws.[40] Another scholar, Sacerdoti, claims that all rights having an economic content (including immaterial and contractual rights) are covered by international law in the case of taking, thus any of such rights can be considered property (and thus can be taken) in his understanding.[41] Regarding case law, in Starett Housing Corporation case the Iran – United States Tribunal[42] stated that shareholder rights and contractual rights can also be the object of expropriation.[43] Or in another case, Amoco v. Iran, the Tribunal

---

39 Black's Law Dictionary 845 (6th ed. 1991).

40 *See* Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen 31 (1997); It is interesting to mention that the Chinese Constitution stipulates that "the State protects the right of citizens to own lawfully earned income, savings, houses and other lawful property". (Wenhua Shan, The Legal Protection of Foreign Investment 47 (2012)).

41 *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 381 (1997).

42 The Iran - United States Claims Tribunal was established to solve disputes related to expropriated American property following the Iranian revolution in 1979.

43 Starrett Housing Corporation v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 156-57 (1983); *See also* Richard B. Lillich et al., The Iran-Unit-

stated that "Expropriation, […], may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value".[44] Based on all this, it can be concluded that the term property is relatively widely defined.

2.2. Taking

Academic literature, treaties, court and arbitral decisions frequently use interchangeably the notions *taking*, *expropriation* and *nationalization* for a very similar legal concept. Hence, it is a very difficult task to define what is exactly understood under the notion of *taking* of foreign property. We use this term, as we have found it the most comprehensive and general of the above mentioned three notions. In Black's Law Dictionary the notion of *taking* is formulated as:

> The government's actual or effective acquisition of private property either by ousting the owner and claiming title or by destroying the property or severely impairing its utility. There is a taking of property when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property.[45]

This definition can be considered broad, as it includes not only direct, but also indirect *taking* of property, the owner is not in the position of using and enjoying his property. Richard Epstein gives an even broader definition when he argues that any governmental action, that interferes

---

ed States Claims Tribunal: Its Contribution to the Law of state Responsibility 189 (1998); V. Heiskanen, *Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8 J. World Investment & Trade 215, 221-25 (2007); Andrew Newcombe Lluís Paradell, Law and Practice of Investment Treaties 327 (2009).

44 Amoco Int'l Finance Corp. v. Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib. Rep. 220 (1987).

45 Black's Law Dictionary 1467 (7th ed. 1999).

with any aspect of the use of private property protected by common law, constitutes a *taking*.[46] Under this theory, every regulation, even taxation (not only excessive taxation, but the regular one as well), would constitute a *taking*.[47] Folsom and Gordon, two American authors, formulate this notion as the loss, to various degrees, of the "use and/or ownership incidents, which accompany the private ownership of property".[48] The above definitions might sound general, but at the same time they cover the comprehensive nature of the term. *Infra*, where the notion is examined in related case law, this comprehensive nature is showed, in the sense that there is no single definition for taking, and that even rights, like contractual rights, can be included, that is to say, 'taken'.

Not only in international legal literature, as already mentioned above, but also in legislation of individual countries and in international agreements, many times, *taking*, *expropriation* and *nationalization* are used interchangeably. The problem is usually not with the usage of these terms, but more with the issue what is in practice covered by them. Sometimes these terms are defined in detail in legal texts containing these words. However, the majority of documents examined show that

---

46 *See* Neil K. Komesar, Law's Limits 93 (2001) [Primary source was not available].

47 There is an interesting article on this issue by P. B. Stephan (Taxation and Expropriation - The Destruction of the Yukos Oil Empire. Houston Journal of International Law. Vol. 35, Issue 1 (Winter 2013), pp. 1-52.

48 *See* Ralph H. Folsom, Michael W. Gordon, International Business Transactions 639 (3d ed. 1995); Ian Brownlie defines it as: "[…] deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control". The right of management also constitute a right that has a value and can be taken. *See* Ian Brownlie, Principles of Public International Law 534 (5th ed. 1998); Restatement (Second) Foreign Relations Law of the United States, sec. 192 (1965) defines it as "conduct attributable to state that is intended to and does, effectively deprive an alien of substantially all the benefit of his interest in property even though the state does not deprive him of his entire legal interest in property".

there is frequently a lack of exact definition of the concept of *taking* (*expropriation*, *nationalization*), and it is not at all clear what is covered by these terms in certain situations.[49] The reason might be that it is the interest of capital exporting countries to understand *taking* of property as widely as possible, and therefore, they will refrain from any definition that is too narrow. These countries might sometimes even prefer vague definitions when concluding investment protection agreements to avoid dispute at the time of concluding such agreements. However, such policy might result in later disputes with a very uncertain outcome. It should be noted, that it is also very difficult to draw the line between *de jure* and *de facto* expropriation. However, this issue is discussed in detail *infra*.

Some authors use the term *taking* as a collective notion, covering even *intervention* and *confiscation*.[50] Following this path, the analysis of the notion is channeled accordingly. However, it has to be emphasized again that both in practice and in theory, terms *taking*, *expropriation* and *nationalization* are many times used interchangeably.[51] It follows

---

49 Here under 'certain situation' we mean cases when legal norms are applied in practice.

50 *See* Ralph H. Folsom & Michael W. Gordon, International Business Transactions 639 (3d ed. 1995); Sacerdoti even simply defines taking of property as non-commercial risk. *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 380 (1997).

51 For example some awards of the Iran – United States Claims Tribunal deliberately confuse these terms. *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 66 (1994); Moreover, in the award Dames and Moore of the Tribunal, the two terms (taking and expropriation) were equated. *See* Dames and Moore v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 223 (1985); Pellonpaa and Fitzmaurice in connection with the Iran-US Claims Tribunal study use the term taking as "general concept of deprivation by the state of alien-owned property, and as such it encompasses both 'expropriation' and 'nationalization'". *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 53, 55 (1988).

that there is no elaborated concept on these terms in international law, which might give opportunity for abuse and for legal uncertainty.

2.3. Expropriation, nationalization

The most widespread term connected to taking of foreign investment, though it does not have such a general meaning as the term taking, is *expropriation*. The simplest definition of *expropriation* is given in Black's Law Dictionary, which defines it as a "governmental taking or a modification of an individual's property rights."[52] However, this is a fairly general definition again. It can include both *de facto* and *de jure* taking. *Nationalization* is defined in the same dictionary as the "act of bringing an industry under governmental control or ownership."[53] It is, in one aspect, narrower than the definition of *expropriation*: it emphasizes the taking of 'industry', and not property or property rights which definitely makes it narrower. However, it is worth mentioning that the wording "governmental control" does not make the definition of *nationalization* wider compared to the definition of *expropriation*, as this control is not more and not less than "taking or a modification of an individual's property rights" as it is stated in the definition of *expropriation*.

Folsom and Gordon define *expropriation* as an 'angry' taking of property of foreigners where the two (or more) states are involved in political conflict. They suggest that *expropriation* has a harsher tone than *nationalization*,[54] but at the same time they argue that an important element of the term *expropriation* is that in such case we assume that there is some compensation for the taken property.[55] In their opinion, *nationalization* is the taking of property on a permanent basis by the government, with

52 Black's Law Dictionary 602 (7th ed. 1999).

53 *Id.* at 1046.

54 *See* Ralph H. Folsom, Michael W. Gordon, International Business Transactions 640 (3d ed. 1995).

55 *See id.*

the intention to become the owner and the operator. In their opinion, it is a softer word than *expropriation*.[56] Folsom and Gordon assume some kind of conflict between the home state of the investor (or the individual investor) and the expropriating state. However, we do not find necessary the existence of conflict for *expropriation*, first of all, because regulatory taking is the reason for many *expropriations*; and also, as usually in the case of conflict between the nations, there is no good chance for adequate compensation.

A very simple, but good "textbook" definition of *expropriation* is given by O'Keefe, when he writes that:

> Expropriation may be defined as a compulsory acquisition of property by the state. Usually this means that the property of a private person is directly taken over by the state, the former being divested of ownership which is reinvested in the latter.[57]

Sacerdoti, a European scholar, gives a concise and simple definition. He defines *expropriation* as a "coercive appropriation by the state of private property".[58] In his opinion, *nationalization* differs only in the fact that it is directly statutory based and has a wider coverage.[59] He also emphasizes the socio-economic element in the case of *nationalization*.[60] Though Sacerdoti's

---

56 *See id.*

57 *See* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 JOURNAL OF WORLD TRADE LAW 239, 256 (1974).

58 *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 379 (1997).

59 *See id.*; Pellonpaa and Fitzmaurice makes similar distinction between the two terms: under expropriation is meant "single, more or less isolated deprivation, while the term nationalization denotes large-scale takings,…" *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 55 (1988).

60 Brownlie and Kronfol also place the emphasis on the social and economic reform element: "Expropriation of one or more major national resources

definition seems simple, it touches the heart of the matter better.

Another distinguished European commentator in the field, Dolzer, offers a different and more 'modern' definition of *expropriation* and *nationalization*. He defines *expropriation* as "individual measures taken for a public purpose,“ as opposed to *nationalization*, which he defines as "large-scale taking on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain.“[61] In our understanding, the difference is in the scale of the measure and in the character of the underlying legislation. In the case of *expropriation*, it should be based on a 'general' legislation as opposed to *nationalization* that is based on 'specific' legal act which is created with the purpose to take a certain property. In both cases public purpose is a precondition and this requirement makes it 'modern' not only in the sense that it is new (the requirement of public purpose became widely accepted by international law in the seventies) but also that it requires justification (the 'public purpose') for an act that infringes with one of the oldest human rights, the right to property. Thus, the latter definitions are

---

as part of a general programme of social and economic reform is now generally referred to as nationalisation or socialisation." *See* Ian Brownlie, Principles of Public International Law 535 (5th ed. 1998); "[Expropriation is]… the utilization of all or part of the means of production in the interests of society and not of private individuals." *See* Zouhair A. Kronfol, Protection of Foreign Investment 20 (1972). In comparison Foighel emphasizes the economic element when she writes: "[Nationalization is] the compulsory transfer to the state of private property dictated by economic motives and having as its purpose the continued and essentially unaltered exploitation of the particular property." *See* we. Foighel, Nationalization 19 (1957); As O'Keefe places the emphasis on both: "[Nationalization] whereby certain industries or means of production, distribution or exchange are, in pursuance of social or economic policies, concentrated in public hands.". *See* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 Journal of World Trade Law 239, 256 (1974).

61 *See* Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 98 (1995).

modern, in the sense that they focus on the public interest in the case of taking, and also that they suggest some kind of obligation of the state, so the state is subjected to the interest of its citizens.

Examining international case law, we can say that there were only a few awards that tried to define these terms. For example, the case law of the Iran - United States Claims Tribunal is a good example of how inconsequentially these terms are used.[62] At the same time the essence is not in what term is used, but what is understood under the concept (which is basically the same here). In Dames and Moore case the claimants filed claims for breach of contract, or, as an alternative, for reasonable value of services rendered by this corporation.[63] The Tribunal was of the opinion that: "unilateral taking of possession of property and the denial of its use to the rightful owners may amount to expropriation".[64] Here, the Tribunal used the wording "may amount," meaning in our interpretation that it depended on the circumstances. Here, taking the possession of the property and denying the rightful owner the use of it, in the Tribunal's opinion, was sufficient to constitute expropriation.

In another decision, Amoco Int'l Fin. v. Government of the Islamic Republic of Iran, the Tribunal required "transfer of property rights" from the original owner (claimant) to the expropriating state to consider it as taking.[65] In the opinion of the Tribunal, the act of the state is qualified

---

62 The Tribunal itself stated that Claims Settlement Declaration applies equally to expropriation, nationalization and other forms of taking not making distinction among these terms, or separately defining them. *See* American International Group, Inc. v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 96,101 (1983).

63 The Tribunal found that it has no jurisdiction over the claim and dismissed it. *See* Dames and Moore v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 220 (1985).

64 Dames and Moore v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 223 (1985).

65 Amoco Int'l Fin. v. Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987).

as expropriation only if these rights have been transferred.[66] However, such requirement might be interpreted broadly, and might mean that the transfer of all the classical rights related to property are required, which is, in fact, a narrow interpretation for the rightful owner and gives more elbow-room to the expropriating state. Another decision of the Tribunal raises an interesting question: does the *expropriated* (*nationalized*) property have to be taken by the state itself to constitute expropriation? This decision was related to the Eastman Kodak Company case, where Kodak claimed that due to the acts of the Government of Iran it lost control over a subsidiary in Iran, and that it holds liable the Government of Iran for the debts owed by its subsidiary to Eastman Kodak Company. It also alleged that Iran expropriated the subsidiary, and claimed compensation. The Tribunal found for the respondent.[67] In his dissenting opinion, Judge Brower, an arbitrator in Iran – United States Claims Tribunal, formulated the term *expropriation* as "when the state involved has itself acquired the benefit of the affected alien's property or at least has been the instrument of its redistribution".[68] Meaning that the 'intermediary' role of the state can already equal *expropriation*.[69]

It can be concluded that both in the case of *expropriation* and *nationalization* private property is taken by the state on permanent basis. According to some writers, in the case of *nationalization*, compensation is generally not assumed. In the case of *expropriation* the expropriating state usually provides some compensation. Another important difference is that *nationalization* is usually related to some socio-economic and/or political

---

66 *Id.*

67 Eastman Kodak Company v. Islamic Republic of Iran, 17 Iran-U.S. Cl. Trib. Rep. 161 (1985).

68 Eastman Kodak Company v. Islamic Republic of Iran, 17 Iran-U.S. Cl. Trib. Rep. 167 (1985).

69 Throughout the history there were some takings when the ruling political elite tried to gain supporters by 'redistributing' the property of the old elite to its own supporters. *See e.g.,* Tanzania.

changes in the given society, and there is a 'specific' underlying legislation, while, in case of *expropriation*, 'general' legislation constitutes the basis of the taking.

2.4. Intervention

Few words should be devoted to terms *intervention* and *confiscation*. *Intervention* means an action of the government, when it assumes control of a business (or any other private property) with the intention of operating the business for a limited period of time and to achieve a particular goal.[70] It is important that after a reasonable period of time the property gets back to the original owner.[71] Here the question may arise as to what compensation the original owner is entitled to, even if there was no expropriation in question. According to experts in the field, owners of such property are entitled to compensation for the time they were not able to use their property.[72]

2.5. Confiscation

Confiscation is taking of private property without compensation.[73] We can find some similarities to the definition of nationalization and expropriation, in the sense that, in case of *confiscation*, there always should be underlying public interest (either social or economic). Alternatively, Wortley defines *confiscation* as deliberate seizure of property by the

---

70 *See* Ralph H. Folsom & Michael W. Gordon, International Business Transactions 639 (3d ed. 1995).

71 *See id.*

72 *See* Loukis G. Loucaides, *The protection of the right to property in occupied territories* 53 ICLQ 677 (2004); H. Lauterpacht ed., Oppenheim's International Law II: Disputes, War and Neutrality 234-5 (7th ed., 1952); However, the right of states for intervention is usually limited by laws that foresee compensation (*e.g.,* confiscation of goods during war time).

73 *See id.* at 641; Ian Brownlie, Principles of Public International Law 534 (5th ed. 1998).

state, without providing adequate compensation.[74] This means that he still implies some compensation, however not necessarily 'adequate'. According to him, c*onfiscation* also typically implies the denial of any right to restitution or to damages. Wortley finds confiscation justifiable by international law only in the following two exceptional cases: when there is a forfeiture or a fine to punish or suppress crime[75], or when the loss is indirectly caused by the territorial state imposing legislation restricting the use of property, thereby confiscating or limiting rights normally enjoyed by an owner (*e.g.,* environmental regulations).[76] Wortley is of the opinion that taxation is in no case *confiscation*, as in the case of taxation there is some consideration received for the tax paid.[77] We agree that there is some kind of reward, as taxpayers receive certain services for the tax paid. However, there is the case of excessive taxation that, in our opinion, falls under *indirect expropriation*, and in such case compensation is due.

2.6. Indirect expropriation[78]

Distinction can be made between *de jure* and *de facto* expropriation (taking).[79] The host state may take measures which in fact (*de facto*) dispossesses the owner of his property, but legally do not affect the

74 *See* Ben Atkinson Wortley, Expropriation in Public International Law 39 (1959).

75 *E.g.,* The Serbian Criminal Code provides the confiscation of goods that result from a criminal delict (*e.g.,* art. 199 (5) of the Code).

76 *See id.*

77 Wortley cites Adam Smith in support: "Every tax, however, is to the person who pays it a badge, not of slavery, but of liberty." *See* Ben Atkinson Wortley, Expropriation in Public International Law 39,46 (1959).

78 The expression "indirect expropriation" instead of "indirect taking" is used by scholars, thus we use this one.

79 *See* Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 99 (1995); Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 70 (1994).

ownership – this is called *indirect* or *de facto expropriation*.[80] *Creeping expropriation* is also a kind of such indirect expropriation. Such measures (*e.g.,* requiring undue permits, restricting the activities of the business, extensive taxation) may significantly reduce the investor's economic opportunities and prospects of making profit. This is the reason why, for example, in bilateral investment treaties investor states usually include quite general clauses concerning the definition of expropriation.

Sacerdoti defines *indirect expropriation* as "measures which, even if they are not aimed at transferring property rights, imply an interference with the exercise of such rights equivalent to that of a measure of expropriation"[81]. Sacerdoti gives two other definitions as well. He also defines it as a measure that "do not involve an overt taking but that effectively neutralizes the benefit of the property for the foreign owner".[82] Another definition he uses is a "progressive erosion of the investor's rights by regulatory measures".[83] "Neutralizing the benefits" means that there is no chance given to the investor to make profit, although the objective of investments is making profit. It can be also defined as loss over the use of the enjoyment of the owner's property, but at the same time the owner does not relinquish the title to the property.[84] Examples of *indirect expropriation* could be

80 *See* Andrew Newcombe Lluís Paradell, Law and Practice of Investment Treaties 325 (2009); Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 100 (1995); According to the European Court of Human Rights *de facto* expropriation occurs when a state deprives the owner of his "right to use, let or sell property." *See also* Mellacher and Others judgement of 15.12.1989. Mellacher and Others v. NN, 20 Eur. Ct. H.R. (ser. B) at 23 (1989).

81 *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 383 (1997);

82 *See id.* 382.

83 *See id.* 339.

84 Marisa Yee, *The Future of Environmental Regulation After Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases,* 9 Hastings W.-N.W.J. Env. L. & Pol'y 85, 88 (2002).

excessive taxation, prohibition of dividend distribution, refusal of access to raw materials, restricting the repatriation of profits, imposing new labor or local content requirements, etc.[85] Thus, it would be very difficult task to find uniform criteria for this kind of taking.[86]

We can agree that the issue of *indirect expropriation* is a very delicate issue, because it is difficult to determine what constitutes such expropriation, and to evaluate legal effects of certain measures. The examination of international case law might be of some help. For example, in the case law of the Iran – United States Claims Tribunal, at first glance it seems that the Tribunal easily solved the problem of definition: it stated that the term *expropriation* covers both *de jure* and *de facto* expropriation, that is to say, all kinds of taking whether formal and direct or informal and indirect (like *creeping expropriation*).[87] At the same time, it does not

85 The Commentary to article 3 of the OECD Draft Convention on the Protection of Foreign Property of 1967; *See also* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Virginia Journal of International Law 644 (1998). *See also* Markus Perkam, *The concept of indirect expropriation in comparative public law – searching for light in the dark,* in International investment law and comparative public law (Ed. Stephan W. Schill), 127 (2010).

86 The Commentary to article 3 of the OECD Draft Convention on the Protection of Foreign Property of 1967 defined it as: "[…] measure otherwise lawful applied in such a way as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation."; Article 11.a.ii. of the 1985 MIGA Convention: "A creeping nationalization would exist besides when there is no immediate prospect that the owner will be able to resume the enjoyment of his property." *See* Multilateral Investment Guarantee Agency Info page (visited Aug. 10, 2011) <http://www.miga.org/screens/about/about.htm>.

87 In Mouri's opinion, the jurisprudence of the Tribunal shows that "de facto expropriation relates to the actual seizure or control over property, coupled with its use by the government or beneficiaries appointed by it". *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 69 (1994). *See also* V. Heiskanen,

solve the problem of determining an action of the state (does not give conditions), if it constitutes *de facto* expropriation at all. Concerning the practice of international tribunals in general, including that of the Iran – United States Claims Tribunal, Dolzer, in one of his writings, argues that courts tend to bring decisions on the basis of clearly identifiable measures of the host state, and not on the basis of general economic or social developments that can be connected to the alien property affected only indirectly.[88]

Indirect expropriation can also have another important effect on the compensation in case of expropriation: it can devalue the property in the state where such expropriation happens.[89] Sometimes only the threat of formal expropriation or further regulatory change leads to property devaluation. And taking the advantage of this loss of value of the property, the host state might *de facto* and *de jure* expropriate the investment on low value.[90]

2.7. Indirect expropriation: case law

Examining case law, in one of the latest awards of the United States-Iran Claims Tribunal, in the Frederica Lincoln Riahi v. the Government of the Islamic Republic of Iran case, the Tribunal tries to give a very precise definition of *de facto* expropriation.[91] In this case the claimant (Frederica

---

Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal, 8 J. World Investment & Trade 215, 218-19 (2007).

88 Rudolf Dolzer, *Indirect Expropriation of Alien Property,* 1 ICSID Review 41, 65 (1986).

89 *See* Patrick Del Duca, The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization 51 UCLA L. Rev. 35, 56 (2003).

90 *See id.*

91 Frederica Lincoln Riahi v. The Government of the Islamic Republic of Iran, Iran-U.S. Cl. Trib. Rep. cite: IRAN FINAL AWARD 600-485-1, signed February 27, 2003, filed February 27, 2003.

Lincoln Riahi), a United States citizen, filed a claim against the Iranian Government seeking compensation for expropriation of her property.[92] This property included, among others, equity interests in different Iranian businesses.[93] Concerning *de facto* expropriation, the Tribunal stated in this case that: "[…] measures taken by a state can interfere with property rights to such an extent that these rights must be deemed expropriated, even though no law or decree was issued in this respect."[94] Examples of such taking given by the Tribunal are the following: when the owner is deprived of the effective use, control or benefits of his/her property. So, expropriation can happen even if the state does not formally recognize it, and even if the legal title of the property formally remains with the original owner (the one whose property was *de facto* expropriated).[95] In the opinion of the court, once the owner is deprived of fundamental rights of ownership (provided such measures are not temporary, because then it is intervention) the intent of the Government is not relevant any more, the factual state of affairs has to be taken into consideration when examining whether taking has happened.[96] However, the Tribunal emphasized an additional requirement, that is to say, such action has to be attributable to the state.[97] This broad interpretation of expropriation is supported by some other decisions and authors as well.[98] For example, in Otis case the Tribunal was of the opinion that there is expropriation

---

92 *Id.* para. 1.-40.

93 *Id.* para. 2.

94 *Id.* para. 3.

95 *Id.* para. 344. *See also* V. Heiskanen, *Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8 J. World Investment & Trade 215, 220 (2007).

96 Frederica Lincoln Riahi v. The Government of the Islamic Republic of Iran, para. 345.

97 Frederica Lincoln Riahi v. The Government of the Islamic Republic of Iran, para. 136-138.

98 *See* Iran-US Claims Tribunal Reports 15 (1997) at 220; *See also* V. Heiskanen, *Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8 J. World Investment & Trade 215, 217 (2007).

if the claimant proves 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 and that it suffered a loss as a result [...]." In this case, the claimant Otis claimed compensation for its shares expropriated in an Iranian elevator producing company.

It is also worth examining case law of the International Centre for Settlement of Investment Disputes (ICSID) when we talk about the issue of *indirect expropriation*. The convention does not define the term expropriation. However, this might be ascribed to its nature. Thus, we examine the latest cases decided under the convention (the Eudoro Armando Olguin case, the Compania del Desarrollo de Santa Elena S.A. case, the Tradex Hellas S.A. case and the Tecnicas Medioambientales case) and see how is taking (expropriation and creeping expropriation) interpreted in these cases. It should be emphasized that issues that have relevance to parts on bilateral investment treaties will be also examined under ICSID convention.

In the Eudoro Armando Olguin v. Republic of Paraguay case,[99] the claimant argued that Paraguay's actions, with respect to the claimant's investment, were tantamount to an expropriation.[100] Olguin alleged that the Republic of Paraguay carried out indirect expropriation through a series of omissions like not preventing the financial institution, into which Olguin had invested his money, from becoming insolvent and from the ongoing economic crisis.[101] In 1993 E. A. Olguin, a citizen both of Peru and the United States, with residence in the United States, transferred a certain amount of money to Mercantil, a Paraguayan financial institution, with the intention of financing an establishment of a corn product plant in Paraguay. Investment titles issued by Mercantil on the name

99 Yearbook Commercial Arbitration Vol. XXVII – 2002, International Council for Commercial Arbitration, Gen. ed. Albert Jan van den Berg, The Hague, 2002 at 48.

100 *Id.* at 55 para 20.

101 *Id.* at 60 para 46.

of E. A. Olguin were signed by a Banco Central del Paraguay official and by an official of the authority supervising financial institutions in Paraguay. In 1995, during the financial crisis in Paraguay, Mercantil stopped payments under these investment titles. Following this, E. A. Olguin initiated ICSID arbitration against the Republic of Paraguay under the Bilateral Investment Protection Treaty between Paraguay and Peru claiming that the Republic of Paraguay was responsible for unpaid investment titles under the investment protection treaty. The Tribunal dismissed E. A. Olguin's claims. In the award, among others, the Tribunal stated the following:

> In expropriation, a person is deprived of a good by an act of the state which appropriates this good and is logically bound to pay its price. It cannot be said in this case that Paraguay appropriated Olguin's investment, which was lost in the crisis of La Mercantil and of the Paraguayan financial system in general.[102]

Furthermore, the Tribunal admitted that there can be cases where the state indirectly acquires possession, or at least profits from private property (acknowledging the concept of *de facto* or creeping expropriation). Meanwhile, it also stated that "expropriation also requires an intention to expropriate; omissions, serious as they may be, do not suffice for expropriation to exist".[103]

In another case, Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica,[104] the Tribunal analyzed at some length the notion of "creeping expropriation". Among others, it stated that:

---

102 *Id.* at 56 para. 26.

103 *Id.* at 60 para. 47.

104 Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (ICSID Case No. ARB/96/1). The award can be found at: ICSID Info page, ICSID Cases (visited on Jan. 24, 2011) <http://www.worldbank.org/icsid/cases/santaelena_award.pdf>.

> […] 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.[105]

It concluded that it is crucial to establish the "extent to which the measures taken have deprived the owner of the normal control of his property".[106] In Compania del Desarrollo, the Tribunal concluded that the expropriation had happened, even though the investor remained in possession of his property, but he could not use freely his property (for the purpose of commercial development).[107] Thus, the expropriation is subject to compensation when the state's "interference has deprived the owner of his rights or had made those rights practically useless".[108] It also established that it is the task of the Tribunal, case by case, to determine whether it has happened.[109]

In Tradex Hellas S.A. v. Republic of Albania case Tradex, a Greek company, commenced arbitration proceedings against the Republic of Albania for alleged expropriation of an agricultural joint venture in Albania.[110] Tradex, following negotiations with the Albanian Government, entered into a joint-venture (in the field of agricultural production) with T.B. Trovitsa, an Albanian state-owned company.[111] Tradex claimed that shortly after the conclusion of the joint-venture agreement, Albania had expropriated "substantial" part of the agriculture land owned by the

---

105 *Id.* para. 76.

106 *Id.*

107 *Id.* para. 81.

108 *Id.* para. 78.

109 *Id.* Related to this *see* Max Gutbrot, Steffen Hindelang, Steffen, *Externalization of Effective Legal Protection against Indirect Expropriation*, 7 J. World Investment & Trade 59, 63 (2006).

110 *Id.* para. 1-4 and 52-58 in Tradex Hellas S.A. v. Republic of Albania (ICSID Case No. ARB/94/2), (visited on Jan. 24, 2013) <http://www.worldbank.org/icsid/cases/tradex_award.pdf >.

111 *Id.* para. 52.

joint-venture and had given it to local farmers.[112] Furthermore, Tradex claimed that, following the grant of land to villagers, local farmers stole crops and other property (not expropriated) of the joint-venture, and the Albanian state did not intervene.[113] Therefore, Tradex claimed that Albania had expropriated its investment.[114] The Tribunal concluded that Tradex could not prove that expropriation occurred, and therefore denied Tradex's claim.[115] What is relevant to us, is the Tribunal's interpretation of the provision of the applicable law[116] that states: "foreign investment shall not be expropriated: (1) directly; (2) indirectly; (3) or by any measure of tantamount effect."[117] Thus, the Tribunal concluded that this provision covers:

> A wide range of takings and makes it clear that not only government measures expressly denominated as 'expropriations' or directly taking away all or part of the investment are prohibited, but also other measures that indirectly or by their effect lead to the foreign investor losing acquired rights […][118]

In Tecnicas Medioambientales case[119], Tecnicas Medioambientales Tecmed S.A. (Tecmed), a Spanish company, requested arbitration against Mexico based on the bilateral investment treaty concluded between Spain and

---

112 *Id*. para. 57.

113 *Id*.

114 *Id*. para. 59.

115 *Id*. para. 208.

116 Albanian Law No. 7764 of 2 November 1993 on Foreign Investments, para. 68.

117 *Id*. para. 133.

118 *Id*. para. 134.

119 Award in Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2). ICSID web page (visited on March 16, 2013) <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>. *See also* Carlos Jiménez Piernas (ed.), The Legal Practice in International Law and European Community Law, 218-22 (2007).

Mexico.[120] Tecmed, among others, claimed that Mexican authorities had in fact expropriated its investment by denying the renewal of the license to operate Tecmed's landfill.[121] The claimant also argued that not granting the permit deprived the investment of its market value.[122] The respondent argued that it had the discretionary powers for not granting the permit, as it was regulatory measure[123] within the state's police power.[124] The Tribunal concluded that such denial was in fact expropriation of the investment and awarded damages of USD 5.5 million to the claimant.[125] As the bilateral investment treaty did not define what is to be understood by expropriation, the Tribunal tried to define it. It based the definition of expropriation on the opinion of the Tribunal in the Metalclad case and defined expropriation as follows:

> Although formally an expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect, the term also covers a number of situations defined as de facto expropriation, where such actions or laws transfer assets to third parties different from the expropriating state or where such laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the Government.[126]

As we can see, the Tribunal interpreted the term of expropriation very broadly, including *de facto* taking as well. It also construed terms contained in the treaty like "equivalent to expropriation" and "tantamount to

---

120 Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States, para. 1-4.

121 *Id.* para. 35-45.

122 *Id.* para. 96.

123 Regarding the issue of regulatory measures that are for public purpose, the Tribunal referred to the Compania del Desarollo case. *Id.* para. 121.

124 *Id.* para. 97.

125 The claimant originally requested USD 52 million. *Id.* para. 201.

126 Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States, para. 113.

expropriation" meaning "indirect expropriation", "creeping expropriation" or "*de facto* expropriation".[127] It set up the following test to determine whether not granting of the permit constituted expropriation: "[…] if the claimant, […], was radically deprived of the economical use and enjoyment of its investment, as if the rights related thereto – […] - had ceased to exist".[128] Basically, it examined to what extent did the investment lost its "value and economic use".[129] It also concluded that measures

> adopted by a state, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that "…any form of exploitation thereof…" has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed.[130]

It also stated that:

> Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary.[131]

Furthermore, it concluded that the intention of the government, when implementing such measure, is less important than the actual effects of the measure on the investor.[132]

127 *Id.* para. 114.
128 *Id.* para. 115.
129 *Id.*
130 *Id.* para. 116.
131 *Id.*
132 *Id.*

There is a recent ICSID case, which shows how complicated can be the factual background of expropriation of foreign investment. In this case, CEAC Holdings Limited (hereafter: CEAC), a company incorporated under the laws of Cyprus was the claimant.[133] The case concerns an aluminum plant located in Montenegro, known as Kombinat Aluminijuma Podgorica, A.D. (hereafter: KAP). Originally, this plant was state-owned, but in 2003, the Montenegrin Government initiated a public tender process with the goal of privatizing it. This was accomplished when in 2005, Rusal Holdings Limited submitted a winning bid for the plant. CEAC was an affiliate company of Rusal, and thus it was the company that purchased KAP's shares. According to the agreement, CEAC paid 48.5 million Euros to acquire about 65% of the company's shares and also committed to invest 75 million euros over a five-year period, for the dual purposes of improving KAP's facilities and implementing various social and environmental programs. Later in 2005, CEAC also deigned to acquire a minority block of shares in Rudnici Boksita Nikšić, A.D. (hereafter: RBN), the company chiefly responsible for supplying the aluminum plant with raw materials, for 6 million Euros. To further ensure the profitability of KAP, CEAC decided to provide the plant with a dedicated source of electricity. This was accomplished by purchasing all the shares in the state-owned coal power plant, TE Pljevlja, and a 31% stake in the state-owned coal mine Rudnik Uglja. Despite these steps, CEAC began experiencing troubles in 2006, when the Claimant allegedly learned that the Montenegrin Government misled it about KAP and RBN during the tender process. Namely, the Government understated KAP's debts and obligations by tens of millions of euros. To further compound this revelation, the Montenegrin Parliament decided to terminate the privatization of TE Pljevlja and Rudnik Uglja, with scant reasoning. This severely compromised KAP's critical need for competitively-priced electricity. As a result of these issues, CEAC initiated arbitration against the Respondent (Montenegro) in 2007. This was discontinued in 2009, when the parties settled. As a result of the settlement, CEAC transferred

133 CEAC Holdings Limited v. Montenegro (ICSID Case No. ARB148).

50% of its shares in KAP to the Montenegrin Government (giving it an equal stake), and a seat on KAP's board of directors. In exchange for this, Montenegro committed to subsidize KAP's electricity supply and issue 135 million Euros in state guarantees to KAP.

However, the relationship between CEAC and the Government further deteriorated, as CEAC alleged that its attempts to restructure and modernize the aluminum plant were frustrated by the Respondent, which supposedly undertook several actions aimed at causing the plant to default on its debts. These alleged actions included Montenegro refusing to provide KAP with the electricity subsidies that were promised in the settlement. To aggravate this, CEAC alleged that the state-owned electricity company actually reduced KAP's supply of electricity. Enhancing this alleged malignancy, CEAC also claimed that Montenegro's representative on the KAP board of directors refused to approve the plant's 2012 financial statements and its business plan, which approvals were conditions of a loan agreement between KAP and Deutsche Bank. Lastly, CEAC suggested that Montenegro refused to provide its written consent as guarantor under this loan agreement.

These events apparently led to KAP defaulting on its debt. In 2013, the Montenegrin Ministry of Finance commenced insolvency proceedings against KAP in the Commercial Court of Podgorica, and appointed an insolvency manager for the plant. The conduct of this manager was allegedly highly irregular. In particular, he had KAP enter into an agreement with a state-owned oil trading company. CEAC claimed that this enabled the Montenegrin Government to reap the benefit of the revenues associated with KAP's aluminum production. The insolvency manager subsequently announced a public tender for the sale of all of KAP's assets, without seeking the approval of the plant's Board of Creditors, which was supposedly responsible for major decisions in the bankruptcy proceedings. The value estimate provided by the insolvency manager, 52 million Euros, was alleged by CEAC to be far below the actual market value of the property. Moreover, the Claimant also alleged

that Montenegro attempted to intimidate CEAC by initiating criminal proceedings against the chief financial officer of CEAC and KAP, for stealing electricity. CEAC described this criminal proceeding as „absurd and unfounded", and when the case was brought to ECHR, Montenegro promptly dismissed the local proceedings. Based on the alleged misconduct described above, CEAC filed a case against Montenegro, based on the 2005 BIT between Montenegro and Cyprus, on March 20 2014. CEAC claimed that Montenegro has breached several of its obligations under the BIT, including its obligation to provide fair and equal treatment; to provide full protection and security; to provide national and most-favoured-nation treatment, including with respect to the "management, maintenance, use, enjoyment, expansion or disposal" of investments; to not expropriate, except in cases in which such measures are taken in the public interest, observe due process of law, are not discriminatory, and are accompanied by adequate compensation effected without delay; to guarantee the free transfer of payments and to "encourage and create stable, equitable, favourable and transparent conditions for [foreign investors] to make investments in its territory".

However, before the merits of the case could have been debated, the issue of „seat" arose. The arbitration tribunal decided to dedicate first phase of the proceedings to determining whether CEAC has a „seat" under Article 1(3)(b) of the BIT.[134] This would eventually grow into the central – and only – question of the proceedings, and the arbitration tribunal came to the conclusion, that CEAC did not have a „seat" in Cyprus at the relevant time. Thus, CEAC is not an investor within the meaning of the BIT, and the arbitration tribunal has no jurisdiction to

134 „The term "investor" shall mean: [...] b) a legal entity incorporated, constituted or otherwise duly organised according to the laws and regulations of one Contracting Party having its seat in the territory of that same Contracting Party and investing in the territory of the other Contracting Party." (visited on Dec. 12, 2018) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4738>.

hear the case. Still, the case is a good example of the complexity of an international investment case.

The case law of the North American Free Trade Agreement (NAFTA) is also rather interesting.[135] In the recent years the issue of regulatory takings has become more and more actual in North America. There is an extensive literature on this issue, primarily in United States legal literature concerning article 1110 of NAFTA.[136] Article 1110 of NAFTA actually

---

135 This Agreement deals with the issue of foreign direct investment and expropriation of investment in its Chapter 11. It distinguishes between 'direct' taking and 'indirect' taking (and 'measures tantamount to expropriation'). NAFTA Secretariat (visited Nov. 15, 2013) <http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?articleid=79>. *See also* on this issue Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 Envtl. L. 851, 859-60 (2003).

136 *E.g.* Kevin Banks, *NAFTA's Article 1110 – Can Regulation Be Expropriation?* 5 NAFTA: L. & Bus. Rev. Am. 499 (1999); Joel C. Beauvais, *Regulatory Expropriation under NAFTA: Emerging Principles and Lingering Doubts* 10 N.Y.U. Envtl. L.J. 245 (2002); Maurizio Brunetti, *The Iran – United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation* 2 Chi. J. Int'l L. 203 (2001); Raymundo E. Enriquez, *Expropriation Under Mexican Law and Its Insertion Into a Global Context Under NAFTA* 23 Hastings Int'l & Comp. L. Rev. 385 (2000); Julian Ferguson, *California Concerned About Contaminated Water: Canadian Corporation Files NAFTA Expropriation Claim Against U.S.* 1999 Colo. J. Int'l Envtl. L. & Pol'y 65 (2000); Elyse M. Freeman, *Regulatory Expropriation Under NAFTA Chapter 11: Some Lessons From the European Court of Human Rights* 42 Colum. J. Transnat'l L. 177 (2003); David A. Gantz, *Protection of Foreign Investment under the NAFTA Chapter 11—UNCITRAL Arbitration Rules—National Treatment—Performance Requirements—Fair and Equitable Treatment—Expropriation—Damages—Allocation of Costs* 97 American Journal of Int'l L. 937-51 (2003); Jason L. Gudofsky, *Shedding Light on Article 1110 of the North American Free Trade Agreement (NAFTA) Concerning Expropriations: an Environmental Case Study* 21 Nw. J. Int'l L. & Bus. 243 (2000); Tali Levy, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective" Standard, Stanford Journal of International Law* Vol. 31, No. 1,

makes distinction between direct and indirect expropriation, and also recognizes the institution of “measures tantamount to expropriation” when it states that:

> No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”).[137]

The term ‘measure’ is also defined in NAFTA, under Chapter II, article 201: “*measure* includes any law, regulation, procedure, requirement or practice.“[138] In connection with NAFTA article 1110 Mark Poirier defines indirect expropriation as actions of the States based on regulatory power of the same that reduces the scope of use of property and thus cause the owner economic harm (*e.g.,* environmental and land-use regulations intended to address negative externalities from particular uses of property). He also argues that such regulation is entered and

---

Winter 1995, 423-448; Sean D. Murphy, *NAFTA Waste Management Tribunal Finds No Arbitrary Treatment, No Expropriation* 98 Am. J. Int'l L. 838 (2004); Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist* 33 Envtl. L. 851 (2003); Gregory M. Starner, *Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional Protection of Property* 33 Law and Policy in International Business 405-437 (2002); Joseph A. Strazzeri, *A Lucas Anallysis of Regulatory Expropriation Under NAFTA Chapter Eleven* 14 Geo. Int'l Envtl. L. Rev. 837 (2002); Timothy Ross Wilson, *Trade Rules: Ethyl Corporation V. Canada (NAFTA Chapter 11) Part II: Are Fears Founded?* 6 NAFTA: L. & Bus. Rev. Am. 205, 215-16 (2000), Marisa Yee, *The Future of Environmental Regulation After Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases* Hastings West-Northwest Journal of Environmental Law and Policy, Vol. 9, p. 85-108.

137 *See* NAFTA Secretariat (visited Nov. 15, 2004) <http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?articleid=160#A1110>.

138 *See* NAFTA Secretariat (visited Nov. 15, 2004) <http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?articleid=84>.

applied in good faith, and is not merely a pretext for expropriation, with this distinction between legal and illegal expropriation.[139]

Marisa Yee argues that the term *expropriation* within article 1110 of NAFTA is not clear, as only on the bases of the text of the Agreement it is not possible to tell what measure 'tantamounts' to expropriation (there is no test offered by the Agreement's text). This vagueness leaves States vulnerable to lawsuits by foreign investors whenever the host country's actions reduce the companies' profits. She further argues that this may put at risk many regulations in the host country like efforts to protect the environment.[140]

Examining case law, we can get broader view of what covers the term expropriation, and what is meant under creeping expropriation under the NAFTA. In the Metalclad case, a U.S. waste disposal company, Metalclad Corporation, initiated arbitration proceedings against Mexico alleging, among others, breach of NAFTA articles 1110. Its notice of arbitration asserted that Mexico wrongfully refused to permit Metalclad's subsidiary to open and operate a hazardous waste facility that the company had built in La Pedrera, despite the fact that the project was allegedly executed in response to the invitation of certain Mexican officials and allegedly met all Mexican legal requirements.[141] Metalclad sought damages of

---

139 *See* Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist* 33 Envtl. L. 851, 871-72 (2003); *See also* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302; *See also* Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 22 Utah L. Rev. 1, 6 (2000).

140 Furthermore, Yee claim that this article gives foreign investors the right to sue host governments while offering no such protection to domestic investors. Thus, in her opinion foreign investors gain an unfair advantage over domestic companies. *See* Marisa Yee, *The Future of Environmental Regulation After Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases,* 9 Hastings W.-N.W.J. Env. L. & Pol'y 85, 101-03 (2002).

141 The Metalclad case is of crucial importance also for the "Trade and envi-

USD 43,125,000 and damages for the value of the enterprise taken.[142] In this case, the ICSID Arbitral Tribunal interpreted expropriation[143] as including:

> […] not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host state, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state.[144]

The Arbitral Tribunal was of the opinion that Mexico took measures that "amount to an indirect expropriation" in violation of article 1110 of NAFTA by allowing and/or tolerating[145] the conduct of the local government.[146] It also added that the implementation of Ecological Decree

---

ronment debate". *See* Balázs Horváthy, *Az Észak-amerikai Szabadkereskedelmi Egyezmény környezetvédelmi összefüggései [Environmental Aspects of the North American Free Trade Agreement]*. 56 Külgazdaság Jogi Melléklet, 71-90 (2013).

142 United States Department of state, Metalclad Corp. (visited on Apr. 27, 2013) <http://www.state.gov/s/l/c3752.htm>; *See also* on this case Patrick Del Duca, The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization 51 UCLA L. Rev. 35, 85-94 (2003); A*lso* Charles H. Brower II, *Beware the Jabberwock: A Reply to Mr. Thomas*. 40 Columbia Journal of Transnational Law 454, 465 (2012).

143 Under article 1110 of NAFTA.

144 ICSID CASE No. ARB(AF)/97/1 (visited on May 5, 2013) <http://www.worldbank.org/icsid/cases/mm-award-e.pdf>, para 103.

145 *Id.* para. 107. These measures, taken together with the representations of the Mexican Federal Government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation. (*Id.* para. 107 of ICSID CASE No. ARB(AF)/97/1 (visited on May 14, 2012) <www.worldbank.org/icsid/cases/mm-award-e.pdf>).

146 Para. 107 and 112 of ICSID CASE No. ARB(AF)/97/1 (visited on May 14, 2013) <www.worldbank.org/icsid/cases/mm-award-e.pdf>.

issued by the local governor, that also affected the rights of Metalclad, would have in itself tantamounted to an act of expropriation. But, even without such decree, the events preceding the announcement of the decree (conduct described above) themselves constituted expropriation.[147] However, we have to mention that the Supreme Court of British Columbia was in part on different opinion when the case reached this court.[148] *It concluded that:*

> [...] the Tribunal did decide the matter beyond the scope of the submission to arbitration when it concluded that the acts preceding the announcement of the Ecological Decree amounted to an expropriation within the meaning of article 1110 because it based its conclusion, at least in part, on a lack of transparency."[149]

The Court also found that the Arbitral Tribunal gave "an extremely broad definition of expropriation" for the purposes of NAFTA article 1110.[150] However, as the definition of expropriation was a question of law, the

---

147 *Id.* para. 109. *See also* Sebastián López Escarcena, Indirect Expropriation in International Law 1-2 (2014); Alberto R. Salazar V., *NAFTA Chapter 11, Regulatory Expropriation, and Domestic Counter-Advertising Law.* 27 Ariz. J. Int'l & Comp. L. 31, 38 (2010); Justin R. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law.* 16 J. Transnat'l L. & Pol'y 275, 280-83 (2006-2007).

148 Reasons for Judgement of the Honourable Mr. Justice Tysoe lexis *2 Asper Rev. Int'l Bus. & Trade L. 473.*

149 Reasons for Judgement of the Honourable Mr. Justice Tysoe lexis *2 Asper Rev. Int'l Bus. & Trade L. 473.* at 498, 499; According to Yee 'transparency' means access of investor to relevant information for the operation of the investment. *See* Marisa Yee, *The Future of Environmental Regulation After Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases,* 9 Hastings W.-N.W.J. Env. L. & Pol'y 85, 101 (2002).

150 Reasons for Judgement of the Honourable Mr. Justice Tysoe lexis *2 Asper Rev. Int'l Bus. & Trade L. 473* at 500.

Court did not try to define it.[151] Finally, the Court concluded that the Arbitral Tribunal was correct when stating that the Ecological Decree constituted an act tantamount to expropriation without compensation, and did not set aside the arbitral award.[152]

Pope and Talbot, Inc. v. Canada is the next NAFTA case worth examining. In this case, Pope and Talbot claimed that, by reducing its quota of lumber that could be exported to the United States without paying a fee, Canada "had taken actions that so extensively interfered with claimant's Canadian production and exports" that these actions were tantamount to expropriation in violation of article 1110.[153] Pope and Talbot based its claim on the following arguments: (i) Canada's export control regime deprived the investment of its "ordinary ability" to sell its products to its traditional markets,[154] (ii) expropriation under international law "refers to an act by which governmental authority is used to deny some benefit to property",[155] (iii) the Canadian action tantamounted to expropriation in violation of article 1110.[156] Pope and Talbot argued that the phrase 'tantamount to expropriation' expanded to the concepts of indirect taking and creeping expropriation, covering even non-discriminatory measures of general application which have the effect of substantially interfering with investments of investors.[157] Canada, in contrast, argued that: (i) Pope and Talbot could continue to export lumber, (ii) "mere interference is not expropriation; rather, a significant degree of deprivation

151 *Id.*

152 *Id.*

153 Pope and Talbot interim award (visited on Apr. 8, 2013) <http://www.naftalaw.org>. *See also* Justin R. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*. 16 J. Transnat'l L. & Pol'y 275, 286-88 (2006-2007).

154 *Id.* para. 81.

155 *Id.* para. 83.

156 *Id.* para. 84-86.

157 *Id.*

of fundamental rights of ownership is required,"[158] (iii) 'tantamount' simply means 'equivalent' and did not expand article 1110's coverage beyond creeping expropriation to cover regulatory action.[159] The Tribunal was of the opinion that the investment's access to the U.S. market (meaning that the investor is allowed to invest in the U.S. market) is a property interest subject to protection under article 1110.[160] The Tribunal also rejected the claim that "those regulatory measures constitute an interference with the investment's business activities substantial enough to be characterized as an expropriation under international law", or that the expression 'tantamount' to nationalization or expropriation widened the ordinary concept of expropriation under international law.[161] It was the Tribunal's opinion that 'tantamount' means nothing more than equivalent.[162] The Tribunal rejected the claim of expropriation under article 1110, because it considered it significant that Pope & Talbot "continues to export substantial quantities of softwood lumber to the U.S. and to earn substantial profits on those sales". It suggested further that in determining "whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner".[163]

---

158 *Id.* para. 87-88.

159 *Id.* para. 89.

160 *Id.* para. 96.

161 *Id.*

162 *Id.* para. 104.

163 *Id.* para. 100-102; "First of all, there is no allegation that the Investment has been nationalized or that the [export control] Regime is confiscatory […] The investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the Investment have been detained [...] Canada does not supervise the work of the officers or employees of the Investment, does not take any part of the proceeds of company sales […,…] does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions

Another NAFTA case where article 1110 was scrutinized is the S. D. Myers case. S. D. Myers, a U.S. company, was in the business of remediation of hazardous waste. Canada had an inventory of waste contaminated with polychlorinated biphenyls. S. D. Myers wanted to enter to the business of transporting such waste to the United States. There, S. D. Myers planned to recycle the waste, or dispose of it in a safe manner. S. D. Myers' affiliate in Canada was Myers Canada, which also had to be involved in this business.[164] We should mention that S. D. Myers spent considerable effort and money in Canada and in the United States to develop its business.[165] Among others, it lobbied long and hard to obtain regulatory approval from U.S. authorities to import waste into the U.S. It got the permit in 1995. However, immediately after this, Canada imposed a ban on the export of PCB wastes into the United States.[166] The Government of Canada said that it had "environmental concerns about the proposed export of PCBs by companies like S.D. Myers".[167] Following this, S. D. Myers claimed that the export ban amounted in substance to a nationalization or expropriation.[168]

In this case, the Tribunal defined the difference between expropriation and regulation:

> Expropriations tend to be severe deprivations of ownership rights; regulations tend to amount to much less interference. The distinction between expropriation and regulation screens out most potential cases of complaints about regulatory conduct

---

outing the Investor from full ownership and control of his investment." (*Id.* para. 100.).

164 S.D. Myers, Inc. and Government of Canada NAFTALA.ORG Info page (visited on May 22, 2013) <http://www.naftalaw.org>. *See also* JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 316 (2009).

165 S.D. Myers, Inc. and Government of Canada.

166 *Id.*

167 *Id.*

168 *Id.*

> by the state, and reduces the risk that governments will be harassed or chilled as they go about managing public affairs.[169]

The Tribunal further stated that article 1110 of NAFTA applies to indirect expropriations or measures tantamount to expropriation, but the phrase 'tantamount to expropriation' in such case needs deeper scrutiny. The Tribunal examined whether the governmental conduct amounted in substance to an expropriation. It concluded that the real purpose and impact of a measure must be considered, not merely the official explanations offered by the government:

> A government might proceed with a gradually unfolding series of disparate measures; none of them individually may amount to expropriation, but the whole series might in some cases be substantially equivalent to an expropriation. Usually, an expropriation amounts to a lasting removal of the ability of an owner to make use of its economic rights. The export ban here was temporary. It may be that in some contexts and circumstances, it would be appropriate for international law to view a deprivation as amounting to an expropriation, even though it is partial or temporary. But the temporary nature of the impairment here is one factor, albeit not decisive in itself, in refraining from characterizing the export ban as an expropriation.[170]

Whole in whole, the Tribunal did not qualify the export ban as expropriation.[171]

In another, relatively new case decided by the Permanent Court of Arbitration, Mytilineos v. Serbia (II),[172] indirect expropriation was also

---

169 *Id.*

170 *Id.*

171 *Id.*

172 *See* Investment Policy Hub (visited on Dec. 11, 2018) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1478>.

the issue. This case concerned the Greek corporation known as Mytilineos Holdings as Claimant. The Claimant signed multiple collaboration agreements with a Serbian state-controlled company, known as RTB-Bor. RTB-Bor was one of the largest metallurgical and mining companies[173] for copper extraction and production in the world (a typical socialist giant of strategic importance once). These collaboration agreements date back to 1996, and under their provisions, RTB-Bor was obliged to pay the Claimant regularly in metal and money, in exchange for the working capital and copper ore provided by the Claimant. However, starting from 2004, RTB-Bor refused to honor its obligations towards the Claimant. The Claimant was furthermore unable to seek resolution for this issue in Serbia, as the Serbian Government took a number of administrative and legal measures in order to prevent the enforcement of RTB-Bor's obligations.

As a result of this, the Claimant turned to the Permanent Court of Arbitration in 2014, invoking the 1998 BIT between Greece and Serbia as a basis for its claims. The resulting arbitration case was then administered according to UNCITRAL rules. The Claimant alleged indirect expropriation, and breach of the requirement of fair and equitable treatment, which included claims that the Serbian state denied justice to the Claimant. The requested damages amounted to 100 million USD. Although the award's full text is not public, it is known from the Claimant's press release[174] and various journalistic writings, that the Tribunal accepted the Claimant's allegations, and found that the measures taken by Serbia between 2004 and 2012 to prevented the enforcement

173 In the Serbian media it is sometimes referred to as „mine of debts".

174 *See* 4-traders (visited on Dec. 11, 2018) <http://www.4-traders.com/MYTILINEOS-HOLDINGS-1408783/news/MYTILINEOS-PREVAILS-IN-INTERNATIONAL-ARBITRATION-AGAINST-SERBIA-REGARDING-RTB-BOR-25020514/>, *also* Reuters (visited on Dec. 11, 2018) <https://www.reuters.com/article/us-mytilineos-serbia-arbitration/mytilineos-wins-40-million-compensation-in-arbitration-against-serbia-idUSKCN1B90ZG>.

of RTB-Bor's obligations amounted to indirect expropriation without compensation, and frustrated the Claimant's legitimate and reasonable expectations to be afforded fair and equal treatment by the host country. However, it ultimately only awarded 40 million USD to the Claimant in 2017. The award, as mentioned before, was not made public. However, according to the Serbian media, there is another case going on against RTB Bor lodged in front of a Greek court for 60 million USD. The above mentioned Greek company claims in this case that RTB Bor did not fulfill three contracts concluded in the nineties.[175] However, some sources claim that Mytilineos promised to revoke its claim, once the above mentioned 40 million USD is paid by Serbia.[176]

2.8. The issue of repudiation or breach of contract by the state

Few words should be devoted to the problem of repudiation or breach of contract by states. The issue examined here is whether contractual rights can be taken (expropriated) or not. In general, contracts between a state and a foreign investor are governed by the municipal law of the host state.[177] From this follows that, if the state breaches the contract, it will not automatically infer international liability, it will not be in breach of international law *per se*.[178] However, according to Dixon, there are few exceptions.[179] One of these is the case when the investor

---

175 *See* Insajder (visited on Dec. 11, 2018) <https://insajder.net/sr/sajt/vazno/9600/>.

176 *See* Insajder (visited on Dec. 11, 2018) <https://naslovi.net/2018-02-09/insajder/mitilineos-povlaci-tuzbu-protiv-rtb-bor-nakon-isplate-duga-od-40-miliona-evra/21204425>.

177 *See* Martin Dixon, Textbook on International Law 218 (1993); P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 Journal of World Trade Law 239, 254 (1974); A good example is China.

178 *See* Martin Dixon, Textbook on International Law 218 (1993); P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 Journal of World Trade Law 239, 255 (1974).

179 *See* Martin Dixon, Textbook on International Law 218 (1993).

is prevented from obtaining due process of law, in which case the home state of the investor has the right to make an international claim against the state that denied the due process of law against the investor. Another exception is when contractual rights are regarded as property that may be unlawfully expropriated.[180] The most interesting exception is when the contract becomes 'internationalized'. This can be achieved with a so-called stabilization clause in the contract.[181] Such clauses provide that, even if the legislation is changed after the signature of the investment contract, only that law applies to the investment contract and to the investment that was in force at the time of signing the contract. If the state agrees to add such a clause to the contract, it becomes an international obligation, and it may mean that property or property rights connected to such contract cannot be lawfully expropriated.[182]

The case law of the Iran – United States Claims Tribunal also supports that contractual rights can be expropriated. In the Mobil Oil case, a consortium of companies negotiated a 20 years long concession agreement in 1973 for purchase of crude oil produced in Iran. Following the revolution in 1980 the Revolutionary Council of Iran nullified the concession contract.[183] One of the issues in this case was whether Iran had breached the concession agreement, and, with this, unlawfully expropriated property interest of the company.[184] The Tribunal found Iran liable and stated that a concession (that is to say, contract) might be the object of taking ('nationalization', with the words of the Tribunal).[185]

---

180 Example for this might be concession contracts between the state and a company.

181 *See* Martin Dixon, Textbook on International Law 218 (1993); *See also* United Nations Centre on Transnational Corporations, Bilateral Investment Treaties 57 (1988).

182 *See* Martin Dixon, Textbook on International Law 218 (1993).

183 Mobil Oil Iran Inc. v. Islamic Republic of Iran, 16 Iran-U.S. Cl. Trib. Rep. 25 (1987).

184 *Id.* para. 128.

185 Regardless of the law the parties chose as the law of the contract. *Id.* para. 175.

In Phillips Petroleum Co. Iran (claimant) v. Islamic Republic of Iran case, the claimant, a Delaware corporation, had rights to explore and exploit petroleum resources in Iran on the basis of the contract signed with the National Iranian Oil Company in 1965. Following the Iranian revolution,[186] the Government of Iran declared these contracts null and void *ab initio*.[187] The claimant asked for compensation on the basis of expropriation of contractual rights.[188] However, the Tribunal was of the opinion that if there is liability, it should be assessed on the basis of taking of foreign property in international law. Finally, the Tribunal found Iran liable for taking of contractual rights, maintaining that: "expropriation by or attributable to a state of the property of an alien gives rise under international law to liability [...] whether the property is tangible, […], or intangible, such as the contract rights […]".[189] These cases of the Tribunal strengthen the proposition that not only tangible assets but also contractual rights can be expropriated.[190] This is based on the above findings and on other case law and academic literature that will be examined *infra* in this work.[191]

186 Phillips Petroleum Co. Iran v. Islamic Republic of Iran, 21 Iran-U.S. Cl. Trib. Rep. 106 (1989), para. 1-4.

187 *Id.*

188 *Id.* para. 75.

189 *Id.* para. 76.

190 *See* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 192 (1998).

191 Norwegian Shipowners' Claims [Norway v. U.S.A in Reports of International Arbitral Awards, Vol. 1, New York: United Nations, 1948 at 332]; *See* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 JOURNAL OF WORLD TRADE LAW 239, 255 (1974); American Law Institute, Restatement of the Law, Second, Foreign Relations Law of the United States (1965), pt. IV, Responsibility of States for Injuries to Aliens, at 587.

2.9. Relevant notions in bilateral investment treaties and in related academic literature

Bilateral investment treaties usually define what is to be understood under taking of foreign property, expropriation or other relevant term. These definitions typically try to cover all forms of actions of the host State that might be detrimental to foreign investors.[192] Sacerdoti argues that bilateral investment treaties intend to protect foreign investments in respect of political or non-commercial risk disregarding the language used in these agreements.[193] We agree with this statement; however we find it important to have a clear-cut definition in bilateral investment treaties of taking or similar measures, as when it comes to disagreement between the parties, it is very difficult to prove the original intent of the parties. In bilateral investment treaties we can find a large variety of terms that intend to cover the above mentioned and defined[194] notion of taking. Usually the term expropriation or nationalization is used in these agreements.[195] However, the term 'taking' itself is many times used, as well as 'dispossession', 'deprivation' or 'privation'.[196] Although,

---

192 For example, bilateral investment treaties have contributed to the expansion of a concept of property in international law to include intellectual property rights as well. *See* Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 Northwestern Journal of International Law and Business 16 (1993).

193 *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 380 (1997).

194 *See supra* II.A.1.

195 This is based on the examination of all bilateral investment treaties in force concluded by the United States, and by the writing of scholars like Rudolf Dolzer and Margarete Stevens (Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties (1995)). It is also true that most BITs do not even differentiate between expropriation and nationalization, even though we could see in the forgoing that there is substantial difference.

196 *See* Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen 48 (1997).

we are on the opinion that for legal certainty, the heart of the matter has to be a precise definition of the term; but at the same time it is also important for investors to see what is or can be covered by such definitions under the host country's legal system. Capital exporting countries try to define taking as broad as possible. The reason is that host States may take measures that do not constitute *de jure* taking, but they are *de facto* takings.[197] Such measures might be extensive taxation, restrictions on the repatriation of profit, or obligatory local contents. This is the reason that capital exporting States try to cover in these treaties every and all kind of measures, even if these actions do not constitute direct taking of property. The determination of what may constitute indirect expropriation is naturally of significance also to the host State. The host State usually tries to exclude indirect expropriatory measures from these treaties, and tries to define taking as narrow as possible.

However, we may not forget that whenever it comes to dispute and such dispute is taken to arbitration or court, it is the arbitrator or the court that interprets the wording of the treaty and gives meaning to it.

2.10. Conclusion

We can see that there are many different definitions for the terms mentioned above: *taking*, *expropriation*, *nationalization*, *intervention*, *confiscation* and *creeping expropriation*. Generally, we may conclude that capital exporting countries try to define the term taking (expropriation, nationalization) as general as possible, while capital importing countries try to give an interpretation to the term as narrow as possible. As we could see, in common usage, the term *expropriation* is used both in wide and narrow sense, as an individual measure for a public purpose, generally decided on the basis of a pre-existing law. *Nationalization* is a matter of public policy concerning a state's internal order. It may affect a whole branch of the economy or some of the major enterprises.

197 *See supra* II.A.5.

Defining these terms should be the first and basic step towards a secure legal environment for foreign investors. These investors want to have clear and internationally valid definitions and rules that will protect their investments to the maximum extent possible.

In the following chapters we will study three issues of dominant importance that arise in connection with taking, and which constitute the core of the work: the issue of the right to take property, the issue of non-discrimination, and the issue of compensation. Each of the foregoing issues will be discussed in a separate chapter.

3. The right to take property and 'public purpose'

3.1. Introduction

Before examining the requirements of taking of foreign property in international law, a short overview of the rules of customary international law will be given regarding the treatment of foreigners, and accordingly, the treatment of foreign investors. These rules are mainly derived from the practice of states (and from different international treaties),[198] therefore they are not uniform.[199] First of all, it is apparent under international customary law that in principle (historically) there is no obligation to admit foreigners to the territory of sovereign states.[200] From this follows that, theoretically, there is also no obligation on the state to allow foreigners to undertake investments on their territory. However, if they do, it should be borne in mind that foreign investors, as a general rule, are subject to national laws.[201]

198 Of course, there are many international treaties that establish some basic standards.

199 *See* Zouhair Kronfol, Protection of Foreign Investment 13 (1972); Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 The International Lawyer, 655, 660 (1990); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 13-16 (1998).

200 *See* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 Journal of World Trade Law 239, 252 (1974); Zouhair Kronfol, Protection of Foreign Investment 13 (1972); Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries,* 24 The International Lawyer 655, 660 (1990); Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 321 (1997); Wenhua Shan, The Legal Protection of Foreign Investment 27 (2012).

201 "The alien rights are not derived directly from international law, but from

Of course, states can voluntarily limit their sovereignty through treaties,[202] and, in this case, investors are also subject to treaties, conventions and, in some cases, even to contracts concluded between investors and the host state. In general, according to international law, sovereign states have the right to expropriate foreign property under certain conditions.[203] This is supported by several international documents and agreements. The General Assembly Resolution 1803 on Permanent sovereignty over natural resources is one of the first documents of the United Nations that laid down the right of sovereign states to take property. In its Preamble, it emphasizes the right of sovereign nations to dispose with their natural resources. In its article IV, it explicitly grants the right to states to expropriate foreign property.[204] Another important document of the United Nations was the Declaration on the Establishment of a New International Economic Order of 1974. This document reinforces the rights granted by the General Assembly Resolution 1803 as to "full permanent sovereignty of every state over its natural resources and all economic activities". To achieve this end, the Declaration empowers sovereign states to "nationalize or to transfer

---

municipal law of the state of residence, […]" *See* Zouhair Kronfol, Protection of Foreign Investment 14 (1972*); Also supported* by Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 321 (1997).

202 *See* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 Journal of World Trade Law 239, 242 (1974).

203 *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 53, 60 (1988); P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 Journal of World Trade Law 239, 256 (1974); Abi-Saab, Permanent Sovereignty over natural resources and economic activities, in international law: achievements and prospects 608-609 (1991); Verwey and Schrijver, *The taking of foreign property under international law: a new legal perspective?* 15 Neth. Y. B. Int'l 1, 3-9 (1984); Xiaodong Yang, State Immunity in International Law 298 (2012).

204 General Assembly resolution 1803 (XVII) of 14 December 1962 on Permanent sovereignty over natural resources (visited on May 11, 2013) <http://www.hri.ca/uninfo/treaties/8.shtml>.

[the] ownership to its nationals".[205] We assume that the expression 'to its nationals' in the provision of this document must have been inserted to emphasize that, primarily, the property of foreign nationals is targeted by taking, as, in these countries, mostly the property of the ex-colonizers and foreign investors had been taken. This attitude was the result of social justice promotion efforts of newly de-colonized countries.[206] Taking of foreign property was one of the tools for promotion of this 'justice'. Newly de-colonized countries internationally declared and succeeded to make the international community to accept the right of sovereign states to take property of foreigners. However, this principle is still valid nowadays. Another international document of importance for the issue of right of sovereign states to take private property is the Charter of Economic Rights and Duties of States of 1974, which states in its article 2 that "each state has the right: […] to nationalize, expropriate or transfer ownership of foreign property, […]".[207] These documents constitute strong basis and support for our claim that sovereign states have the right to take private property, as they are primary sources of international law. However, states should be liable for the taking of foreign property both under national and international law. According to Martin Dixon state responsibility occurs when a state "violates an international obligation owed to another state." Such obligation may be derived from a treaty or customary law or may consist of the non-fulfillment of a binding judicial decision. According to Dixon, responsibility may also occur when a state ill-treats the national of another state, and the origin of the international obligation is irrelevant for the purposes of state responsibility. Furthermore, he states that state responsibility comprises

205 Art. 4 (e) of the Declaration on the Establishment of a New International Economic Order (1974). The text of the declaration can be found at The Robinson Rojas Archive web page (visited on Feb. 21, 2011) <http://www.rrojasdatabank.org/basdv03.htm>.

206 *Id.* art. 4 (d).

207 Art. 2 of the Charter of Economic Rights and Duties of States, Dalhousie University Info page (visited on Apr. 16, 2011) <http://www.dal.ca/~wwwlaw/kindred.intllaw/EcRtsandDuties.htm>.

two elements: an unlawful act, which is attributable to the state.[208] At the same time, it should be mentioned that a distinction can be made between responsibility for lawful and unlawful acts of states according to technical literature in the field.[209] The basic assumption is that sovereign states can take foreign property lawfully only under well-established conditions in international law.[210] At the beginning, there was no accord regarding

---

208 Dixon also states that "It is clear, however, that responsibility may be avoided if the state is able to raise a valid defense. If not, the consequences of responsibility is a liability to make reparation." *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW, 197 (1993); *See also* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 73,74 (1988). Dixon also writes that: "[…] conduct in international law is judged by international rules." *See id.* 198. "[…] responsibility can arise from either an act or an omission, so long as this causes a breach of an international obligation." *See id.* 198. "In order for a state to be fixed with responsibility, not only must there be an unlawful act or omission, but that unlawful act or omission must be attributable to the state. In other words, it must be an unlawful act of the state itself and not of some private individuals acting for themselves." *See id.* 200. "[…], it should be noted that according to the International Law Commission, 'damage' is not a precondition of international responsibility. In other words, for responsibility to arise it is enough that there has been an internationally unlawful act attributable to the state." *See id.* 204. "In general, every state is under an obligation not to ill-treat foreign nationals present in its territory." *See id.* 205.

209 *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 197-205 (1993); M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 74 (1988).

210 "According to general international law a state is free to adopt measures of expropriation or nationalization of a foreign investment in its territory." *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 380 (1997); HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 24 (1997); SEBASTIÁN LÓPEZ ESCARCENA, INDIRECT EXPROPRIATION IN INTERNATIONAL LAW 4 (2014); *See also* Pellonpaa M., Fitz-

these conditions. The United States Supreme Court stated in 1964 that: "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.".[211] Circumstances have changed since then, and, respecting certain requirements, sovereign states have the power to take the property of foreigners. These requirements are the following: the taking has to serve public purpose, has to be non-discriminatory, accompanied by

---

maurice M., Taking of Property in the Practice of the Iran-United States Claims Tribunal in Netherlands Yearbook of International Law, Vol. 19, (1988) 53-178 at 60. But what constitutes international law? The answer for this question we can find in art. 38 (1) o the Statute of the International Court of Justice, as this provision is usually accepted as constituting a list of the sources of international law. *See* PETER MALENCZUK, AHEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 36 (7th ed. 1997). These are the following sources: (a) international conventions; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations. *See* International Court of Justice Info page (visited on Nov. 2, 2012) <http://www.icj-cij.org/icjwww/ibasicdocuments/Basetext/istatute.htm>. However, we can say that bilateral investment treaties are the major instruments in international relations related to the protection of foreign investments. *E.g.,* Western countries have concluded more than thousand bilateral treaties promoting and protecting foreign investments to clarify the relevant legal framework. *See* PETER MALENCZUK, AHEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 37 (7th ed. 1997*); See also* Taylor, J. Michael, The United States' Prohibition On Foreign Direct Investment In Cuba-Enough Already?!? 8 SPG L. & Bus. Rev. Am. 111, 118 (2002). Bergmann quotes arbitrator Dupuy (original source not available) who wrote the following: "The exercise of the national sovereignty to nationalize is regarded as the expression of the state's sovereignty." *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 24 (1997); *See also* Pellonpaa M., Fitzmaurice M., Taking of Property in the Practice of the Iran-United States Claims Tribunal in Netherlands Yearbook of International Law, Vol. 19, (1988) 53-178 at 60.

211 Banco National de Cuba v. Sabbatino, 376 U.S. 428 (1964).

appropriate compensation and due process of law should be guaranteed for the investor whose property is taken.[212] If these conditions are not fulfilled, the assumption is that the taking is unlawful.[213]

3.2. Standard of treatment of foreign investors

The standard of treatment of foreign investors is closely related to the issue of conditions of taking. The strong protection of private property,

---

212 Section 712 of the Restatement (Third) of the Foreign Relations of the United States of America also emphasizes these three basic principles; *See also* RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS - A PROBLEM-ORIENTED COURSEBOOK 1020 (3d ed. 1995); MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 214-15 (1993); M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW, 53, 65 (1988); HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 40 (1997); GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 381 (1997); HANS VAN HOUTTE, THE LAW OF INTERNATIONAL TRADE 248 (2002); *E.g.,* The International Law Association on August 30, 1986 adopted the Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order. Article 5 (5) of this Declaration states: "A state may nationalize, expropriate […] subject to the principle of international law requiring a public purpose and non-discrimination, and subject to appropriate compensation as required by international law and to any applicable treaty […]". *See* para. 46 Sola Tiles, Inc. v. the Government of Iran, Award No. 298-317-1.

213 In this case principles applying to state responsibility for a wrongful conduct is applicable. *See also* L. C. A. Barrera, *Lack of Definition of Compensation in International Investment Disputes for Non-Expropriation Claims: Is There an Appropriate Mechanism to Determine It*, 10 Revista E-Mercatoria, 81, 84 (2011); GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 389 (1997); However, for the purpose of compensation a distinction should not be made between lawful and unlawful taking of foreign property. Interview with Prof. David J. Bederman, Law Professor, *Emory Law School* (Apr. 21, 2004).

as well as property of foreigners, that came into existence in the 19th century, following decolonization has lost its strength. Therefore, it was desirable for capitalist states to develop and promote in international law the so-called *minimum standard* of protection of foreigners.[214] According to this theory, there are rights created and defined by international law: once a state lets the investor and his investment to enter the country, it has to ensure for the investor and his investment the same protection as it ensures for its own citizens, and the investor, in addition, has the right for protection that is considered *fair and equitable* under international law.[215] These rights may be claimed by or on behalf of aliens who were

---

214 *See* RUDOLF DOLZER, EIGENTUM, ENTEIGNUNG UND ENTSCHÄDIGUNG IM GELTENDEN VÖLKERRECHT [PROPERTY, EXPROPRIATION AND COMPENSATION IN CURRENT INTERNATIONAL LAW] 128 (1985); HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 39 (1997).

215 Martin Dixon writes about State responsibility the following: "State responsibility occurs when a State violates an international obligation owed to another State. […] The obligation may be derived from a treaty or customary law or may consist of the non-fulfillment of a binding judicial decision. Similarly, responsibility may occur when a State ill-treats the national of another State […] The origin of the international obligation is irrelevant for the purposes of State responsibility. […] In general terms, State responsibility comprises two elements: an unlawful act, which is imputable [attributable] to the State. It is clear, however, that responsibility may be avoided if the State is able to raise a valid defense. If not, the consequences of responsibility is a liability to make reparation." See MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW, 197 (1993); See also M. Pellonpaa, M. Fitzmaurice, Taking of Property in the Practice of the Iran-United States Claims Tribunal 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 73,74 (1988). Dixon also writes that: "[…] conduct in international law is judged by international rules." See id. 198. "[…] responsibility can arise from either an act or an omission, so long as this causes a breach of an international obligation." See id. 198. "In order for a State to be fixed with responsibility, not only must there be an unlawful act or omission, but that unlawful act or omission must be attributable to the State. In other words, it must be an unlawful act of the

lawfully admitted to the state and acquired property.[216] According to this standard, foreigners should be treated in a *fair and equitable* manner.[217] The theory of *minimum standard* rejects the Calvo Doctrine, according to which aliens have only the same rights as local nationals.[218] This standard requires more than national treatment of foreign investors, because sometimes, national treatment of private property can be poor (*e.g.*, Cuba). In other words, the investment recipient state has to respect minimal international norms (international public order), irrespectively of what is allowed by the municipal law concerning the treatment of its own citizens in the case of taking.[219] States that do not respect these basic principles of *minimum standard*, and thus harm foreign investors, commit international wrong, according to this theory.[220]

State itself and not of some private individuals acting for themselves." See id. 200. "[…], it should be noted that according to the International Law Commission, 'damage' is not a precondition of international responsibility. In other words, for responsibility to arise it is enough that there has been an internationally unlawful act attributable to the State." See id. 204. "In general, every State is under an obligation not to ill-treat foreign nationals present in its territory." See id. 205.

216 *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 341 (1997).

217 *See id.*

218 *See* Detlev Vagts, *Minimum Standard, in* 3 Encyclopaedia of Public International Law 408 (Rudolf Bernhardt ed., 1997); Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen 40 (1997); Martin Dixon, Textbook on International Law 212-13 (1993).

219 *See* Martin Dixon, Textbook on International Law 206 (1993); Detlev Vagts, *Minimum Standard, in* 3 Encyclopaedia of Public International Law 408 (Rudolf Bernhardt ed., 1997); Hans van Houtte, The Law of International Trade 4 (2002).

220 With committing international wrong States become liable. *See* Hans van Houtte, The Law of International Trade 248 (2002).

A similar standard to the *minimum standard* mentioned above is the *standard of equitable treatment*. This requires states to apply their law in a "fair, reasonable, equitable and adequate manner" to foreigners.[221] Both of these standards could be applied without any treaty provision among states.

There is also a standard, called the *standard of national treatment* in international law that is a special one, in connection with the treatment of foreign investors, which can be applied only on treaty basis (an exception might be if the host state unilaterally grants this treatment). Under this treatment, investors should not have less favorable treatment than that granted to domestic investors.[222]

The *standard of most favored treatment* requires that all the benefits conceded to any other investor in the host state, also have to be given to the investor under *most favored treatment*.[223] This treatment can be of crucial importance if there is a strong international competition present in the field of the specific investment.[224]

Finally, *preferential treatment* is a kind of exception to the most *favored treatment*, and it is used within custom unions and free trade areas.[225]

Both international multilateral instruments and bilateral treaties are based on the combination of the above-mentioned treatment standards.[226]

---

221 *See id.* at 4.

222 *See id.*; *Also* Zouhair Kronfol, Protection of Foreign Investment 15 (1972); Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 348 (1997).

223 *See* Hans van Houtte, The Law of International Trade 5 (2002); Zouhair Kronfol, Protection of Foreign Investment 16 (1972). Wenhua Shan, The Legal Protection of Foreign Investment 21-22 (2012).

224 *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 350 (1997).

225 *See* Hans van Houtte, The Law of International Trade 6 (2002).

226 *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 343-45 (1997).

It has to be noted, regarding these international standards of treatment of foreign investors, that different states apply (depending on whether they are investment expropriating or investor states) different standards. These standards are laid down in international bilateral or multilateral treaties concluded between parties.

3.3. 'Public purpose'

It is seldom disputed by international legal literature that lawful taking should be only for public purpose.[227] Many other international documents, like multilateral and bilateral treaties, mention this requirement explicitly and, almost without exception, require the existence of public purpose in the case of taking. This requirement is not only widely accepted in

---

227 *See e.g.,* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 Journal of World Trade Law 239, 256 (1974); Abi-Saab, Permanent Sovereignty over natural resources and economic activities, in international law: achievements and prospects 608-609 (1991); Verwey and Schrijver, *The taking of foreign property under international law: a new legal perspective?* 15 Neth. Y. B. Int'l 1, 3-9 (1984); M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 54, 65 (1988); Ralph H. Folsom et al., International Business Transactions - A Problem-Oriented Coursebook 1020 (3d ed. 1995); Martin Dixon, Textbook on International Law 214-15 (1993); Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen 40 (1997); Taylor, J. Michael, The United States' Prohibition On Foreign Direct Investment In Cuba-Enough Already?!? 8 SPG L. & Bus. Rev. Am. 111, 125 (2002); Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 381 (1997); Hans van Houtte, The Law of International Trade 248 (2002); M. Sornarajah, The International Law on Foreign Investment 395 (2004). Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order and The Restatement (Third) of the Foreign Relations of the United States.

legal doctrine, but has also found expression in state practice.[228] Some documents use the expression *public interest*, *general interest* or *public utility* instead of public purpose with the same meaning. For example, the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, article 1 (Protection of property) states that:

> 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.[229]

However, more important issue is what is covered by this concept (*i.e.,* these terms), than what term is used to express it. It is still not clear in international law what should be understood under public purpose, that is to say, what is covered by this concept. International legal

---

228 *See* LILLICH ET. AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 200 (1998); Folsom, Ralph H., International Business Transactions , 2 International Business Transactions § 33.7 (2d ed.) Source: Westlaw; A Project of the American Society of International Law Interest Group on International Economic Law (June 12, 1990) Document III-H World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment para. 38 (Source: Westlaw). *See also* art.1 (1) of the Protocol No. 1 to the European Convention on Human Rights and UN General Assembly Resolutions 1803.

229 The same article also states that: "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.". Art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms European Court of Human Rights (visited on Apr. 5, 2012) <http://www.echr.coe.int/Convention/webConvenENG.pdf>; *See also* RACHELLE ALTERMAN (ED.), TAKINGS INTERNATIONAL 26 (2010).

instruments do not define this term. Therefore, in the following we try to find the answer to the question who and on the basis of what and how determines what is public purpose. First, let us see what does the academic literature say about this issue. Some authors argue that public purpose must principally be directed toward improving the quality of life in the nation.[230] It might be defined as well as the improvement of the social welfare or economic betterment of the nation.[231] As a matter of fact, public purpose is somehow defined in almost all legal systems in legal norms in a certain way (however, it should be noted that these are not international but national legal instruments).[232] In the United States, the legislative defines what is considered public purpose, and when there is a dispute, courts have the power to decide on it. In the Hawaii Housing Authority case, the Court wrote the following in its opinion regarding the issue of public purpose:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially

230 *See* Ralph H. Folsom & Michael W. Gordon, International Business Transactions (3d ed. 1995); Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 12-13, vol. 1 (1986); F.A. Mann, Studies In International Law 476 (1973); Kurt J. Hamrock, The ELSI Case: Toward an International Definition of "Arbitrary" Conduct, 27 Tex. Int'l L.J. 837 (1992); Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 391 (1997); A.F.M. Maniruzzaman, state Contracts with Aliens: The Question of Unilateral Change by the state in Contemporary International Law, 9 J. INT'L ARB. 141, 165-68 (1992); Ian Brownlie, System of the Law of Nations: state Responsibility 81 (1983).

231 *See* Ralph H. Folsom & Michael W. Gordon, International Business Transactions (3d ed. 1995).

232 *See* Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen 24 (1997); M. Sornarajah, The International Law on Foreign Investment 316 (1994).

> the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it […] be Congress legislating concerning the District of Columbia [..] or the States legislating concerning local affairs.[…] This principle admits of no exception merely because the power of eminent domain is involved.[…].[233]

Black's Law dictionary defines public purpose as "an action by or at the direction of a government for the benefit of the community as a whole".[234] We agree with authors who claim that states have to exercise good faith concerning the issue and definition of public purpose when taking foreign property.[235] For example, Sacerdoti argues that although

---

233 *Id.*, at 32 (citations omitted). HAWAII HOUSING AUTHORITY v. MIDKIFF, 467 U.S. 229 (1984).

234 Westlaw legal database Blacks (visited on Apr. 19, 2013) <http://international.westlaw.com/search/default.wl?rs=WLIN5.04&spa=intbaltic-000&db=blacks&fn=_top&mt=WestlawInternational&vr=2.0&sv=Split&rp=%2fsearch%2fdefault.wl>.

235 *See* A.F.M. Maniruzzaman, state Contracts with Aliens: The Question of Unilateral Change by the state in Contemporary International Law, 9 J. INT'L ARB. 141, 165-68 (1992); Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 12-13, vol. 1 (1986); Kurt J. Hamrock, The ELSI Case: Toward an International Definition of "Arbitrary" Conduct, 27 Tex. Int'l L.J. 837 (1992); Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 391 (1997); Ian Brownlie, System of the Law of Nations: state Responsibility 81 (1983); F.A. Mann, Studies In International Law 476 (1973); The Project of the American Society of International Law Interest Group on International Economic Law (June 12, 1990) Document III-H World Bank: Report to the Development Committee and Guidelines on the Treatment

public purpose (interest) is superior to contractual undertakings towards private parties, expropriation has to be justified and taking must be evaluated under a strict good-faith standard.[236]

Many times, foreign investors argue that public purpose should be defined by international law, as this might be more favorable for them when it comes to taking of their property in the host state. We are of the opinion that international law should have some kind of rational public purpose definition laid down in an international instrument that is accepted by the international community. Under rational public purpose we understand reasons that are beneficial for the wider society, respecting human rights. For example, Resolution of the United Nations on Permanent Sovereignty over Natural Resources (1962) states that nationalization, expropriation or requisitioning "shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign".[237] This provision defines public interest broadly, including public utility, security and national interest. It is also good that individual interests are expressly excluded by the wording of the Resolution. A similar definition of public purpose could be acceptable in our opinion when foreign property is taken by sovereign states.

Important issue is who determines what falls under public purpose (public interest, etc.) if the term is not defined, defined vaguely or if there is a dispute regarding it. And also the basis on which it should be construed. Should it be the court of the host state, the court of the state of origin of the investor or maybe some international judicial body?

---

of Foreign Direct Investment para. 38 and 48 (Source: Westlaw) also emphasises this requirement.

236 *See id.* at 393.

237 *See* Human Rights Internet (visited Apr. 5, 2013) <http://www.hri.ca/un-info/treaties/8.shtml>.

3.4. The right to take property and the 'public purpose' in chosen multilateral instruments and in related academic literature

3.4.1. *Energy Charter Treaty (ECT)*

This document recognizes the right of States to take property. The document uses the term 'public interest' instead of public purpose as one of the requirements for taking foreign property. The Energy Charter Treaty expressly requires the existence of public interest in case of expropriation:

> Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; [emphasis added][238]

However, the Treaty does not give the definition of public purpose, and it gives no indication who should determine what is public purpose and on what grounds. We could find no case law related to the Energy Charter Treaty, thus we cannot examine practical application of this provision of the Treaty. However, we can establish that the provision follows the standard laid down in earlier multilateral treaties like that of NAFTA regarding the requirements of lawful taking of foreign property.

3.4.2. *International Center for Settlement of Investment Disputes (ICSID)*

Because of the character of the Convention it itself does not contain any provision related to our study. Although, we do not examine the Convention itself, we analyze the related case law throughout this work that constitutes a very important source of international cases.

---

238 Art. 13 (1) of the ECT. ECT info page (visited on March 18, 2005) <www.encharter.org/upload/1/TreatyBook-en.pdf>.

Regarding the issue of the right of States to take foreign property, no case questions this right provided the taking is lawful.[239]

In the case law of the International Center for Settlement of Investment Disputes the issue of public purpose (or public interest) was raised in the Tecmed case (for the facts of the case *see supra*). In this case Mexico claimed that because of existence of public purpose (environmental regulation) it is not obliged to pay compensation. In some sense, the Mexican State misused the requirement of public purpose, interpreting it as excuse for not paying compensation. However, the Tribunal was on the opinion that the environmental regulation was itself an expropriation, and the fact that it was taken for environmental reason was only one of the requirements of lawful expropriation – *i.e.,* this was the public purpose requirement. Thus the Tribunal stated that:

> Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a State may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the State's obligation to pay compensation remains.[240]

However, the Tribunal did not give any definition regarding public purpose and we could not find any other ICSID case where the issue of public purpose was raised.

---

239 It is lawful if it is for public purpose, non-discriminatory, for appropriate compensation and with due process.

240 *See* Para. 121. Award in Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2). ICSID web page (visited on March 16, 2005) <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>.

3.4.3. *Multilateral Investment Guarantee Agency (MIGA)*

The Multilateral Investment Guarantee Agency Convention in its article 11 provides for some kind of public purpose requirement: "measures of general application which the governments normally take for the purpose of regulating economic activity in their territories"[241] This provision is very similar to provisions used by national laws when determining what should be understood under public purpose (*see supra*). Actually, it authorizes the government of the expropriating State to determine the content of public purpose. However, as it can be seen from the above quotation, this purpose is restricted to "regulating economic activity".

3.4.4. *North American Free Trade Agreement (NAFTA)*

The North American Free Trade Agreement recognizes the right of States to take foreign property. It contains a provision that requires the existence of public purpose in case of taking of foreign property:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
> (a) for a public purpose[.][242]

The NAFTA provision regarding its content is very similar to the Energy Charter Treaty, thus we presume that this text had influence on the drafting of the latter.

---

241 Art. 11 (a) (ii) MIGA Info page (visited March 10, 2005) <http://www.miga.org/screens/about/convent/convent.htm>.

242 Art. 1110 of the NAFTA (visited Apr. 10, 2005) <http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?articleid=160#A1110>.

Wilson, an American author, examines the issue of the definition of public purpose in connection with the Ethyl Corporation v. Canada case.[243] Invoking Shrybman, he states that public purpose might have broad application and is basically concluding that this requirement is essentially "not subject to effective reexamination by other States".[244]

We did a profound research regarding the issue of public purpose in NAFTA case law and related academic literature. Our research covered NAFTA cases published at NAFTALaw.org[245] web page and several Westlaw databases[246]. However, we found no other case where this issue was discussed.

3.4.5. *Organization for Economic Co-operation and Development – "Multilateral Agreement on Investment" Proposal (MAI)*

The Multilateral Agreement on Investment Proposal also recognizes the right of States to take foreign property and contains the requirement of public interest:

> A Contracting Party shall not expropriate or nationalize directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure

---

243 Wilson analyses the possible outcome of the case.

244 *See* Wilson, Timothy Ross: Trade Rules: Ethyl Corporation V. Canada (NAFTA Chapter 11) Part II: Are Fears Founded? 6 NAFTA: L. & Bus. Rev. Am. 205, 215-16 (2000).

245 *See* NAFTALaw.org web page (visited May 15, 2005) <http://www.nafta-law.org/>.

246 The following databases were discussed: Dictionary of NAFTA Terms (NAFTATERMS); North American Free Trade Agreement (NAFTA); Enhanced Text of NAFTA (NAFTATEXT); International Business Transactions (INTBUSTRAN); International Commercial Arbitration Treaties (ICA-TREATIES); Latin American Mexico and NAFTA Report (LANAFTAR); North American Free Trade Agreement – Bi-national Panel (NAFTA-BIP); Law & Business Review of the Americas (LBUSRAM).

> or measures having equivalent effect (hereinafter referred to as "expropriation") except:
> a) for a purpose which is in the public interest[247]

Given that the agreement still did not enter into force, there is no related case law or comments on the implication of the above provision. Hopefully, it will enter into force soon and after passing the test of time it will show if it works.

3.5. The right to take property and the 'public purpose' in bilateral investment treaties and in related academic literature

Bilateral investment treaties examined, likewise multilateral treaties, recognize the right of States to take property of foreigners. Capital exporting States have leading role in insuring their investments through bilateral investment treaties (however, this is not the only mean, there are also insurance and guarantee systems).[248] Some authors argue that in and through bilateral investment treaties developed States do not want to question the right of the other States to take foreign property. They only want to secure the respect of substantive and procedural requirements prescribed by international law concerning redemption in case of taking.[249] Examining bilateral investment treaties concluded by the United States we find the above assertion to be true. These treaties do not question the right of sovereign States to take foreign property.

According to the study of United Nations Center on Transnational Corporations on bilateral investment treaties, "practically all" of examined

---

247 Art. IV.2.1.a. The MAI Negotiating Text OECD Info page (visited Apr. 10, 2005) <http://www.oecd.org/dataoecd/46/40/1895712.pdf>.

248 HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 22 (1997).

249 *See* GIORGIO SACERDOTI, BILATERAL TREATIES AND MULTILATERAL INSTRUMENTS ON INVESTMENT PROTECTION 380 (1997); RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (1995).

treaties subject expropriation of foreign property to the four 'classical' conditions, that is: public purpose, non-discrimination, compensation and judicial review.[250] It means that the concept of public purpose[251] can be found in "practically all bilateral investment treaties."[252] The same study states, supporting our previous claims, that there is no agreed definition of public interest in international law nor is there a standard definition common to all national legal systems.[253] The study also ascertained that when there is disagreement between an investor and the investment recipient State, it is usually international arbitral body that has to decide on what should be regarded as public purpose.[254] However, the same study came to the conclusion that in practice international arbitral bodies grant countries relatively wide discretion to define what falls under the definition of public purpose (interest), as according to this study it is widely accepted that national legislation should determine what is and what is not public purpose.[255]

3.6. The right to take property and the 'public purpose': case law

One of the cases dealing with the issue of public purpose is the case of James and others v. the United Kingdom. In this case, James and others represented the Westminster Family Trust against the United Kingdom. A legislative act of the United Kingdom entitled tenants (only with long term lease contract) of certain properties owned by the Trust to become owners on price determined on the basis of conditions given by the

---

250 *See* United Nations Centre on Transnational Corporations, Bilateral Investment Treaties, 76 (1988).

251 Many times different terminology is used, like: public interest, public benefit, national interest, social interest. *See* United Nations Centre on Transnational Corporations, Bilateral Investment Treaties, 76-77 (1988).

252 *See* United Nations Centre on Transnational Corporations, Bilateral Investment Treaties 76 (1988).

253 *See id.* 77.

254 *See id.*

255 *See id.*

legislation. In many cases, the Trust (lessor) provided the land for the tenants (lessees) to build houses on it on their own cost, which did not become their property. They were only leasing it on long term. As the property of the Westminster family was affected by this legislation, the representatives of the Family Trust claimed that the compulsory transfer was against article 1 of Protocol No. 1 (P1-1) to the Convention.[256] The European Court on Human Rights ruled for the defendant, and stated that: "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest.".[257] The only limit set up by the court was that this appreciation has to "[…] respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation".[258] The judgment clearly supports the idea that public purpose should be determined by national courts based on the norms of the national legislation.[259]

Examining further international case law, we can see that it also supports the assumption that one of the prerequisites for lawful taking is the existence of a public purpose.[260] However, similarly to the case above, the definition of public purpose is not always clear. Thus, some awards

---

256 James and Others v. the United Kingdom, published in A98 (visited on Oct. 14, 2013) <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=12&Action=Html&X=121025707&Notice=0&Noticemode=&RelatedMode=0>.

257 *Id.* para. 46

258 *Id.*

259 This is also supported by authors (*e.g.,* Taylor, J. Michael, The United States' Prohibition On Foreign Direct Investment In Cuba-Enough Already?!? 8 SPG L. & Bus. Rev. Am. 111, 125 (2002).

260 *See* Pellonpaa M., Fitzmaurice M., *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53-178, 60 (1988). *See also* Eisenber, Andra: "Public purpose" and Expropriation: Some Comparative Insights and the South African Bill of Rights, 11 South African Journal on Human Rights 207-209 (1995).

of the Iran - US Claims Tribunal expressly state that it is in the ambit of the host state to determine this term.[261] Therefore it is not easy to cast doubt on the existence of this requirement in certain cases, as it would be, at the same time, question of the policy of a sovereign state.[262] Thus, international tribunals usually do not examine the existence of this prerequisite, so to say, they take it for granted.[263]

However, returning to the practice of the Iran – United States Tribunal, on the bases of the examined cases, we can say that the existence of public purpose was always required, but did not play a decisive role, as it was rarely used as base of dispute.[264] At the same time, the Tribunal confirmed the continuing existence of this requirement.[265] For example, in the American International Group case,[266] the Tribunal stated that it cannot be held that the "[…] nationalization of Iran America was by itself unlawful, either under customary international law or under the Treaty of Amity […], as there is not sufficient evidence before the Tribunal to show that the nationalization was not carried out for a public purpose as part of a larger reform program […]".

In the case of the Amoco International Finance Corporation the Tribunal stated that there is no definition for public purpose "agreed upon in international law nor even suggested".[267] Furthermore, it stated that "as a

---

261 Pellonpaa M., Fitzmaurice M., Taking of Property in the Practice of the Iran-United States Claims Tribunal in Netherlands Yearbook of International Law, Vol. 19, (1988) 53-178 at 62.

262 *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 387 (1997).

263 *See id.*

264 *See* Lillich et. al., The Iran-United States Claims Tribunal: its contribution to the law of state responsibility 201 (1998).

265 *See id.* at 202-205.

266 American Int'l Group, Inc. and Islamic Republic of Iran, 4 C.T.R. 96 and 105 (1983-III)

267 15 IRAN-U.S.C.T.R. 189, Amoco International Finance Corporation v. the

result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that states, in practice, are granted extensive discretion".[268]

Similar view was taken in the INA Corporation and Islamic Republic of Iran case regarding the requirement of existence of public purpose.[269] In 1981 INA Corporation (INA), a United States corporation incorporated under the laws of Pennsylvania, filed with the Tribunal a claim for compensation for the expropriation of its 20 percent shareholding in Bimeh Shargh (public joint-stock company) (Shargh), an Iranian insurance company. INA claimed USD 285,000 representing what it alleged to be the going concern value of its shares, together with interest at 17 percent and legal costs. The issue in this case was not if expropriation happened, but the determination of the level of compensation for the taken property. At the same time, in the INA Corporation case, the separate opinion of Judge Lagergren clearly states the requirement of public purpose: "It is generally accepted that some types of expropriation are inherently unlawful - among these one can cite cases in which foreign assets are taken [...] for something other than a public purpose".[270] However, this case did not deal with the issue of who determines what is considered to be public purpose.

In the case law of the International Center for Settlement of Investment Disputes, the issue of public purpose (or public interest) was raised in the Tecmed case. In this case Mexico claimed that, because of the existence of public purpose (environmental regulation) it is not obliged to pay compensation. In a certain way, the Mexican State misused the requirement of public purpose, interpreting it as an excuse for not paying compensation. The Tribunal was of the opinion that the environmental

Government of the Islamic Republic of Iran, award no. 310-56-3, 1987 para. 145.

268 *Id*. para. 145, 146.

269 INA Corporation and Islamic Republic of Iran 8 C.T.R. 373 (1985-I).

270 IRAN-U.S.C.T.R. 373, INA Corporation v. the Government of the Islamic Republic of Iran, award no. 184-161-1, 1985, para. Separate Opinion of Judge Lagargren.

regulation was itself an expropriation. However, the fact that the proprty was taken for environmental reasons was only one of the requirements of lawful expropriation – *i.e.,* this was the public purpose requirement. Thus, the Tribunal stated that:

> Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[271]

However, the Tribunal did not give any definition regarding public purpose and no other ICSID case was found during the research, where the issue of public purpose was raised.

Wilson, an American author, examined the issue of the definition of public purpose in connection with the Ethyl Corporation v. Canada, a NAFTA case. Invoking Shrybman, he stated that public purpose might have broad application and concludes that this requirement is essentially "not subject to effective reexamination by other States".[272]

3.7. Conclusion

On the basis of the foregoing, we can conclude that the requirement of public purpose, in the case of taking foreign property, undoubtedly

---

271 Para. 121. Award in Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2). ICSID web page (visited on March 16, 2011) <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>.

272 *See* Wilson, Timothy Ross: Trade Rules: Ethyl Corporation V. Canada (NAFTA Chapter 11) Part II: Are Fears Founded? 6 NAFTA: L. & Bus. Rev. Am. 205, 215-16 (2000).

exists in international law. In practice, many different expressions are used to denote public purpose; however, it is generally of no relevance. The real issue is how to define public purpose. We have seen that there is no general definition of public purpose in international law. The determination of what is considered public purpose is left to national legal systems and national courts. Thus, it seems that sovereign states have broad power to determine the content of public purpose based on legislative norm in good faith. The examined case law also supports our findings. The little case law that is related to this issue show that courts and tribunals are reluctant to re-examine the definition of public purpose given by state legislations. However, it has to be based on legislation respecting the principle of good faith. We have also noticed that, in the case of expropriation, public purpose is the least tested requirement of all.

Considering all the arguments, we believe that it would be useful to have some kind of definition of public purpose created and accepted by the wider international community that would give an unambiguous definition of public purpose or at least clear guidelines for international tribunals as to what should fall under public purpose.

4. The principle of non-discrimination

4.1. Introduction

In this chapter, we will show that the principle of non-discrimination, as a requirement in the case of taking foreign property, is a generally accepted principle in international law. Non-discrimination is, in fact, the principle of equal treatment in international law expressed in negative form. As regards to the requirement of non-discrimination, a specific question is whether this treatment should be applied to the relationship between nationals and foreigners, between foreigners and foreigners or to both relationships. In our opinion, and also in the opinion of some authors, in both cases discriminative treatment tends to be considered forbidden under international law.[273] Otherwise, the basic principle of freedom of competition would be infringed. Thus, we can talk about discrimination if the measure is directed against a particular party, and for reasons unrelated to the substance of the matter, persons in the same situation are treated in a not equivalent manner.[274]

---

273 *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 388 (1997); Maniruzzaman, A. F. M.: *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview.* Journal of Transnational Law and Policy Fall, 57 (1998); Ian Brownlie, System of the Law of Nations: state Responsibility 81 (1983); However, if discriminative treatment (in regulatory mechanisms) is based on legitimate grounds, it is considered legitimate. *See* M. Sornarajah, International Law of Foreign Investment 380 (2004).

274 *See* Kronfol, Zouhair A., Protection of Foreign Investment 25 (1972); Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 390 (1997).

4.2. The principle of non-discrimination

Based on our research (documents referred to in this very chapter), we found that discriminatory treatment of foreign investment, in the case of taking foreign property, is not accepted. However, it should be mentioned that opinions regarding the issue of non-discrimination were not as uniform a few decades ago as they are nowadays. Following the Second World War, when many former colonies became independent, there were some opinions in international legal literature that supported discrimination with the following justification:

> [D]eveloping countries, which had to rebuild their national economies from the legacy left by colonialism, were not prepared to accept, equally with the highly developed countries, an obligation to guarantee the same economic rights to their nationals and to non-nationals. That was not discrimination; but it would be discrimination to compel countries of unequal strength to carry the same load. The developing countries held inevitably to correct the consequences of the discrimination practiced under the colonial regime by taking certain measures which might conflict with the interests of a privileged minority.[275]

In our understanding, this is a certain kind of affirmative action that is aimed to restore equality between newly de-colonized countries and developed countries. However, such arguments are more socio-political considerations than legal, and therefore cannot give legal foundation for discriminatory

275 Summary of Records of Meetings of 3d Committee, U.N. GAOR, 3d Comm., 17th Sess., at 358, U.N. Doc. A/C.3/SR.1206 (1962); This opinion is also supported by: Sornarajah (M. SORNARAJAH, The Pursuit Of Nationalized Property 187 (1986)); Baade (Hans W. Baade, Permanent Sovereignty over Natural Wealth and Resources, in Essays on Expropriation 24 (Richard S. Miller & Roland J. Stanger eds., 1967)); Schachter (Oscar Schachter, Sharing the World's Resources, in International Law: A Constructive Perspective 525, 528 (R. Falk ed., 1985)).

taking. Moreover, in our opinion, such discriminatory treatment can lead to unjust economic advantages and unfair competition both on local and global levels. Such socio-political considerations must be the reason why the United Nations Resolution on Permanent Sovereignty over Natural Resources and the Charter of Economic Rights and Duties do not mention the principle of non-discrimination.[276] The issue of discrimination was a very sensitive one in the decades following the de-colonization. Capital exporting countries secured non-discriminatory treatment for their investors through bilateral investment treaties. A good example is the United States of America. This way, newly de-colonized countries preserved their face and, at the same time, complied with the requirements of investors.

Contrarily to developing countries, American and other western authors emphasize the importance of the principle of non-discrimination when taking foreign property.[277] The reason must be that the United States is

---

276 U.N. GAOR, 17th Session, U.N. Doc. A/5217 (1962); A/RES/3281 (XXIX) art 2.; United Nations Dag Hammarskjöld Library (visited on 10. Oct. 2012) <http://daccessods.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement>; CHARLES N. BROWER & JOHN B. TEPE, THE CHARTER OF ECONOMIC RIGHTS AND THE INTERNATIONAL LAWYER 306 (Vol. 9, 1975).

277 *See* P. C. Choharis, *U.S. Courts and the International Law of Expropriation: Toward a New Model for Breach of Contract*, 80 S. Cal. L. Rev. 1, 5-6 (2006-2007); Kenneth Robert Redden ed.: Modern Legal Systems Cyclopedia. North America. Vol. 1A. Buffalo, New York, USA: William S. Hein & Co. Law Publisher, 1988, p. 1.A.30.10; Nevertheless, the United States itself does not respect the principle of non-discrimination. In theory, constitutional protection is guaranteed for any person, citizen or alien in the United States, but according to Redden, practice shows that judges are more likely to protect only resident aliens (*See* at 1.A.30.12). Non-resident aliens are subject to the protection of the Fifth Amendment only when fundamental human rights are involved (*See* Kenneth Robert Redden ed.: Modern Legal Systems Cyclopedia. North America. Vol. 1A. Buffalo, New York, USA: William S. Hein & Co. Law Publisher, 1988, p. 1A.30.12); This raises the question of whether property rights can be treated as fundamental human rights. Article 1 of the First Protocol

the biggest foreign investor in the world, and therefore, it is of crucial importance for it to get equal treatment with other investors. Besides, as already mentioned, discriminatory treatment disables free competition.

---

to the Convention for the Protection of Human Rights and Fundamental Freedoms ensures the peaceful enjoyment of property (First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 – 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. 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" (visited on July 22, 2012) <http://www.echr.coe.int/Convention/webConvenENG.pdf>) In the case of corporations, there is also a distinction made between corporations registered in the United States and corporations registered in other countries. (*See* Kenneth Robert Redden ed.: Modern Legal Systems Cyclopedia. North America. Vol. 1A. Buffalo, New York, USA: William S. Hein & Co. Law Publisher, 1988, p. 1A.30.12; "There has always been considerable support for the view [in international public law] that the alien can only expect equality of treatment under the local law because he submits to local conditions with benefits and burdens and because to give the alien a special status would be contrary to the principles of territorial jurisdiction and equality. Before examining the validity of the principle of national treatment, it must be observed that it is agreed on all hands that certain sources of inequality are admissible." Ian Brownlie, Principles of Public International Law 526 (5th ed. 1998). "A state may place conditions on the entry of an alien on its territory and may restrict acquisition of certain kinds of property by aliens." "Apart from such restrictions, an alien individual, or a corporation controlled by aliens, may acquire title to property within a state under the local law." Ian Brownlie, Principles of Public International Law 534 (5th ed. 1998)).

4.3. Principle of non-discrimination in chosen multilateral instruments and in related academic literature

In this part we scrutinize chosen international multilateral treaties to examine whether they contain provision regarding non-discrimination of foreign investments or any other provision from which such conclusion can be drawn.

4.3.1. *Energy Charter Treaty (ECT)*

The Energy Charter Treaty does expressly states that foreign investment may not be taken in discriminatory way:

> 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:
> […]
> (b) not discriminatory;[278]

This is an important legal guarantee for investors whose home country has signed the Agreement.

4.3.2. *International Center for Settlement of Investment Disputes (ICSID)*

We scrutinized ICSID case law, and could not find any case in which the issue was related to the principle of non-discrimination. This might mean that there are no such cases, as States expropriating do care not to violate this principle. This fact might indirectly support the opinion that the non-discrimination principle became a well-established principle of international law.

278 Art. 13 (1) of the ECT (visited June 14, 2004) <http://www.encharter.org/upload/1/TreatyBook-en.pdf>.

4.3.3. *Multilateral Investment Guarantee Agency (MIGA)*

Article 11 of the Multilateral Investment Guarantee Agency agreement supports our claim that the principle of non-discrimination is internationally recognized and widely used in international treaties.

> [A]ny legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which the governments normally take for the purpose of regulating economic activity in their territories[279]

4.3.4. *North American Free Trade Agreement (NAFTA)*

The same principle can be found in the North American Free Trade Agreement that states the following:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another [p]arty in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
> […]
> (b) on a non-discriminatory basis[280]

279 Art. 11 (a) (ii) MIGA Info page (visited Apr. 5, 2005) <http://www.miga.org/screens/about/convent/convent.htm>.

280 Article 1110: Expropriation and Compensation NAFTA (visited May 14, 2004) <http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?articleid=160#A1110>.

4.3.5. *Organization for Economic Co-operation and Development – "Multilateral Agreement on Investment" Proposal (MAI)*

The language of the Multilateral Agreement on Investment Proposal is very similar to that of the NAFTA. This proposal also rejects discrimination:

> A Contracting Party shall not expropriate or nationalize 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:
> […]
> b) on a non-discriminatory basis,[281]

4.4. Principle of non-discrimination in bilateral investment treaties and in related academic literature

Reference to the requirement of non-discrimination is generally included in bilateral investment treaties.[282] Concerning the non-discrimination principle (condition) most bilateral investment treaties examined by the United Nations Center on Transnational Corporations either stipulate that taking (expropriation or nationalization) shall not be discriminatory, or they provide for most-favored-nation treatment, or sometimes both.[283] Bilateral investment treaties examined by us show that the principle of non-discrimination in case of taking of foreign property is requirement in these treaties.

---

281 Art. IV.2.1.b. The MAI Negotiating Text OECD Info page <http://www.oecd.org/dataoecd/46/40/1895712.pdf>

282 *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 386 (1997). *See also* examined treaties *infra* IV.C.1. and IV.C.2.

283 *See* United Nations Centre on Transnational Corporations, Bilateral Investment Treaties, 76 (1988).

4.5. Principle of non-discrimination: case law

The existence of the requirement of non-discrimination is confirmed by international case law.[284] However, it has to be admitted that, during our research, we found only a few cases dealing with this issue. At the same time, none of these cases rebutted the principle of non-discrimination.

In one of the cases of the Iran - US Claims Tribunal, the Amoco International Finance Corporation case, the Tribunal stated that discrimination is "widely held as prohibited by customary international law in the field of expropriation".[285] In this case, Amoco, an American corporation, had a joint-venture (Khemco) with the Iranian National Petrochemical Company (NPC) in the petrochemical industry.[286] Following the Iranian revolution, all American interests in petrochemical joint-ventures were expropriated, including that of Amoco.[287] Whereas, in another of NPC's joint-venture with a Japanese company, the Japanese share was not taken. [288] Therefore, Amoco argued that the fact that another joint-venture in the same economic branch had not been taken is discriminatory and therefore it had been unlawful expropriation.[289] In its decision the Tribunal accepted that the principle of non-discrimination

284 In American International Group and in Amoco cases. *See also* Pellonpaa M., Fitzmaurice M., Taking of Property in the Practice of the Iran-United States Claims Tribunal in Netherlands Yearbook of International Law, Vol. 19, (1988) 53-178 at 63-64). Lillich, Richard B., Daniel Barstow Magraw ed.: The Iran-United States Claims Tribunal: its contribution to the law of state responsibility. Irvington-on-Hudson, N.Y.: Transnational Publishers, c1998.at 205-207.

285 IRAN-U.S.C.T.R. 189, Amoco International Finance Corporation v. the Government of the Islamic Republic of Iran award no. 310-56-3, 1987 para. 140.

286 *Id.* para. 28, 29 and 30.

287 *Id.* para. 139.

288 *Id.*

289 *Id.* para. 139 and 142.

should be respected in the case of expropriation of foreign property, however, at the same time, it stated that characteristics of some cases could justify different treatment:

> The Tribunal finds it difficult, in the absence of any other evidence, to draw the conclusion that the expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was not expropriated. Reasons specific to the non-expropriated enterprise, or to the expropriated one, or to both, may justify such a difference of treatment [...]. In the present Case, the peculiarities discussed by the Parties can explain why IJPC was not treated in the same manner as Khemco. The Tribunal declines to find that Khemco's expropriation was discriminatory.[290]

The 'peculiarities' referred to by the Tribunal were the two issues brought by the defendant as defense. The first one is that the operation of the IJPC joint venture was not closely linked with other contracts relating to the exploitation of oil fields, whereas the operation of the Khemco plant was linked to the supply of gas from the oil fields operated jointly by Amoco and NIOC.[291] The second, that the Japanese-Iranian joint-venture was not yet an operational concern at the relevant time.[292] In our opinion, these are weak arguments. First of all, both companies were working (or at least were planning to work) in the same economic branch. Thus, we should not place emphasis on the fact that the Japanese joint-venture did not conclude specific contracts for the supply of gas. And secondly, the joint-venture was existing legally between the Japanese and the Iranian company, whether operating or not at the relevant time. However, it might easily be that the reason why it was not operating was the political situation in Iran.

290 *Id*. para. 142.

291 *Id*. para. 141.

292 *Id*.

In another case, the one of the INA Corporation, the issue was not the non-discrimination requirement. However, the separate opinion of Judge Lagergren clearly refers to the requirement of non-discrimination as one of the requirements of lawful taking of foreign property: "It is generally accepted that some types of expropriation are inherently unlawful - among these one can cite cases in which foreign assets are taken on a discriminatory basis."[293]

4.6. Conclusion

Based on the findings above, it can be concluded that the principle of non-discrimination, in the case of taking of foreign property is a generally accepted principle of international law nowadays. Though, during the sixties and seventies, following the last phase of de-colonization, there were views that, under certain circumstances, discrimination may be allowed. However, the majority of authors support the idea that discriminatory taking of foreign property is unlawful. This is not only supported by legal writers, but also by international multilateral and bilateral treaties, and the related case law examined.

In a free market economy, discrimination is impediment to free competition. Notwithstanding, such discriminatory treatment happens usually when a government wants to win the political support of its own nationals, strengthen national economy, or simply needs revenue by expropriating foreign property. At the same time, there are also examples for discrimination between foreigners, *e.g.*, when the government prefers and treats better strategic investors or investors from countries with political influence on the expropriating government. However, on long term, it cannot be profitable.

---

293 In this case, following the revolution, the Iranian state expropriated the share (20%) owned by INA Corporation (INA), a United States corporation, in an Iranian insurance company. *See* 8 IRAN-U.S.C.T.R. 373, INA Corporation v. the Government of the Islamic Republic of Iran award no. 184-161-1, 1985 para. Separate Opinion of Judge Lagargren.

5. Compensation for the taken property

5.1. Development of compensation theories

As it has been already showed in previous chapters, the right of sovereign states to exercise power on their territory and to take (expropriate) foreign property is recognized in international law. That is to say, we proceed from the assumption that the majority of states[294] recognize the lawfulness of expropriation provided the taking is non-discriminatory, there is a public purpose and there is compensation for the taken property.[295] In the previous

294 This is also recognized by many constitutions of independent states, several international documents, international arbitral awards, and by the majority of authors dealing with the issue. *See* Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen 47 (1997); Martin Dixon, Textbook on International Law 213-14 (1993); M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 53, 60 (1988).

295 *See* United Nations Centre on Transnational Corporations, Bilateral Investment Treaties 70 (1988); Ian Brownlie, Principles of Public International Law 535 (5th ed. 1998); Martin Dixon, Textbook on International Law 215 (1993); M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 53, 69 (1988); It is interesting to mention that in the text of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR Info page (visited on June 14, 2012) <http://www.echr.coe.int/Convention/webConvenENG.pdf>) there is no explicit reference to the duty of states to compensate (if "the conditions provided for by law" ensure such right then there is). However, the European Court of Human Rights stated that there is obligation of compensation of the state,

chapters, we have seen several proofs that the existence of public purpose and of non-discrimination is an indispensable requirement of lawful taking of foreign property. In this chapter, we will examine what standards of compensation exist as requirement of lawful taking, and if there is common agreement in international law on this issue. Indeed, the majority of states recognize that some form of compensation is due for taken foreign property. The dispute is usually about the standard of compensation.[296] Therefore, in

---

and this obligation has to be of reasonable amount. *See* TAMAS BAN, *A TULAJDONJOG VEDELME AZ EMBERI JOGOK EUROPAI EGYEZMENYEBEN [THE PROTECTION OF RIGHT TO PROPERTY IN THE EUROPEAN HUMAN RIGHTS CONVENTION], IN* CSALAD, TULAJDON ES EMBERI JOGOK [FAMILY, PROPERTY AND HUMAN RIGHTS] 132 (1999).

296 Since, according to international law, every violation of an international obligation creates the duty to make reparation. The principle of restitution or compensation is also included in the Draft articles on Responsibility of States for internationally wrongful acts of the International Law Commission:
"A state responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
(a) is not materially impossible;
(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.
The state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."
See art. 35 and 36 of Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), UN Info page (visited on Sep. 28, 2012) <http://www.un.org/law/ilc/texts/state_responsibility/responsibilityfra.htm>; *See also* L. C. A. Barrera, *Lack of Definition of Compensation in International Investment Disputes for Non-Expropriation Claims: Is There an Appropriate Mechanism to Determine It*, 10 Revista E-Mercatoria, 81 (2011); HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 24 (1997).

the following, the emphasis will be placed on the analysis of the standard of compensation in the case of taking foreign property.

In the first part of this chapter, we examine the development of compensation theories and the current state of international law concerning the issue of compensation in the case of taking property of foreign investors. The development of compensation theories will be examined through the two most important international landmark cases (the Norwegian Shipowners' Claim Case and the Chorzow Factory Case), the Hull and Calvo Doctrines and the documents of the United Nations related to the protection of foreign property. Following this, we will give a general overview of the current state of international law and practice in the field, with special emphasis on the Restatement of Foreign Relations Law of the United States and the work of the Iran – United States Claims Tribunal. During this examination, besides international legal sources and the above-mentioned ones, the opinion of distinguished authors in the field of international law will be invoked. This historical overview will help us to find out what compensation standard is the most acceptable and recognized in international law.

Many issues and questions can arise in connection with compensation; however it is beyond the scope of this book to examine all these issues. Thus, we will concentrate only on the most important ones when focusing on the development of compensation theories. The first of these will be the issue of the applicable law (whether this is the law of the host state, the investor's home state or maybe some other source of law). The next important issue will be the standard of compensation. There is a strong interdependence between the standard of compensation and the method of valuation, thus the issue of valuation standard will be also examined. And finally, we will take a look at the form and the time of payment of the compensation. We begin our discussion with the first landmark case in the history of the development of compensation standards in international law.

5.1.1. *Norwegian Shipowners' Claims case – 'just' compensation*

The first well-known international case related to compensation of expropriated foreign property was the Norwegian Shipowners' Claims case, in which the arbitrators decided that *just* compensation should be paid.[297] In 1917 the United States entered the First World War. The President of the United States was authorized to order the cancellation of shipbuilding contracts, the taking of legal title to ships and the requisition of shipyards in the United States in return for *just* compensation.[298] This

---

297 Kevin Smith, *The Law of Compensation for Expropriated Companies and the Valuation Methods Used to Achieve That Compensation.* Law & Valuation. Spring 2001, (visited on May 20, 2012) <http://www.law.wfu.edu/courses/Law&value-Palmiter/Papers/2001/Smith.htm>; We have to note that the government of the United States originally also promised, and later even offered *just* compensation, though this was a much lower amount that the one determined by the Tribunal. *See* Norwegian Shipowners' Claims Case (Nor. v. U.S.), 1 Reporters of International Arbitral Awards (UN) 313-14 (1948).

298 Excerpt from the award: "It is common ground between the Parties to this arbitration that the fifteen claims against the United States are presented by the Government of the Kingdom of Norway, which Government, and not the individual claimants, "is the sole claimant before this Tribunal". L ' The claims arise out of certain actions of the United States of America in relation to ships which were building in the United States for Norwegian subjects at a time, during the recent Great War, when the demand for ships was enormous, owing to the needs of the armies and to the losses of mercantile ships. For some time before the United States declared war, the shortage of shipping was serious both in European countries and in the United States. In these circumstances, Norwegian subjects, amongst others, directed their attention to the possibilities of shipbuilding in the United States. From July 1915 onwards, various contracts were placed by Norwegian subjects with shipyards in the United States. Meanwhile, from the summer of 1916 onwards, the United States Government took a series of steps for the protection of its interests and these steps made possible the later "mobilisation for war purposes of the commercial and industrial resources of the United States". […] On the 4th of March 1917 (after the severance of diplomatic relations between the United States and Germany

action affected Norwegian ship owners as well, who were promised *just* compensation for the physical property taken.[299] However, Norway

---

on February 3rd, 1917), a Naval Emergency Fund Act was passed. This Act authorized and empowered the President, "in addition to all other existing provisions of law" within the limits of the appropriation available, "to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person." Such orders were given precedence over all other orders and compliance was made obligatory. In the case of noncompliance, the President was authorized to "take immediate possession of any factory3 or of any part thereof."5 The President was furthermore empowered, under the same penalty, "to modify or cancel any existing contract for the building, production, or purchase of ships or war material," to place an order for the whole or any part of the output of a factory in which ships or war material were being built or produced, and to "requisition and take over for use or operation by the Government any factory or any part thereof." Norwegian Shipowners' Claims Case (Nor. v. U.S.), 1 Reporters of International Arbitral Awards (UN) 314-18 (1948).

299 "In all cases where these powers were exercised, provision was made for "just compensation" to be determined by the President, with the customary provision for an appeal to the courts. Then on June 15th, 1917, two months after the declaration of War, further important powers were given to the President by the Emergency Shipping Fund Provision of the Urgent Deficiencies Act. The relevant provisions of this Act are as follows: The President is hereby authorized and empowered, within the limits of the amounts herein authorized: (a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the War and which are of the nature, kind and quantity usually produced or capable of being produced by such person. (6) To modify, suspend, cancel, or requisition any existing or future contract for the building, or purchase of ships or material. (c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output thereof in such quantities and at such times as may be specified in the order. (d) To requisition and take over for use or operation by the United States any

claimed compensation also for the affected contractual rights.[300] The Tribunal was of the opinion that contracts were also taken, not only physical property:

---

plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant. (e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed or any part thereof, or charter of such ship. Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient. Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner […]" *Id.* at 318-25.

300 Compensation offered by the United States for the physical property taken was only approximately USD 2.7 million, while the amount claimed by Norway amounted to about USD 18 million. *See id.* at 313-14.

> The Tribunal is therefore of opinion: 1. That, whatever the intentions may have been, the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be constructed. 2. That in fact the claimants were fully and for ever deprived of their property and that this amounts to a requisitioning by the exercise of the power of eminent domain within the meaning of American municipal law.[301]

And that this taking was exercise of the power of eminent domain under the United States law.[302] Regarding the applicable law, the United States claimed that its municipal law should be applied; while Norway was of the opinion that it was the international law.[303] The Tribunal stated that as long as international public order is not violated thereby, the municipal law of the United States was applicable.[304] Concerning the issue of compensation, the Tribunal accepted that *just* compensation was due, however it interpreted it as: "*Just* compensation implies a complete restitution of the *status quo ante*, based, not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with other owners of similar property. [*emphasis added*]."[305] The Tribunal also stressed that Norway was a friendly nation and that there were no extraordinary circumstances that would warrant the disregard of due process of law in the course

301 "It is common ground that the word 'property' in the fifth Amendment of the United States Constitution, is treated as a word of most general import, and that it is liberally construed and includes *every so called 'interest' in the thing taken*. [*emphasis added*]" *See id.* at 332.

302 "1… the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be constructed. 2. That in fact the claimants were fully and for ever deprived of their property and that this amounts to a requisitioning by the exercise of the power of eminent domain within the meaning of American municipal law." *See id.* at 325.

303 *See id.* at 330.

304 *See id.* at 331.

305 *See id.* at 338.

of the taking.[306] Discussing the amount and time of compensation, the Tribunal added that Norway was entitled to *immediate* and *full* compensation.[307] The Tribunal, furthermore, stated that the value of

---

306 *See id.* at 338-39.

307 Excerpt from the award: "It is common ground between the Parties that just compensation, as it is understood in the United States, should be liberally awarded, and that it should be based upon the net value of the property taken. It has been somewhat difficult to fix the real market value of some of these shipbuilding contracts. The value must be assessed *ex æquo et bono*. The Parties have obviously acted in a way which would not have been usual or even possible under ordinary circumstances, when peaceful shipping and shipbuilding were entirely free, and not hampered in their customary activities by the intervention of enemy or friendly Governments. The growing scarcity of ships in 1917, the risks and difficulties due to submarine warfare and to the extension of the field of hostilities, contributed to make speculative shipbuilding transactions possible and even unavoidable. Belligerents and neutrals alike were fearful for their existence. The hardships of neutrality were felt so deeply by the United States themselves that they declared war on Germany ELS the only means of defence against its "repeated acts of War against the Government and the people of the United States of America". All neutral Nations needed ships for their food, materials and other commodities. Some governments took measures to protect themselves against speculation in ships and other property; they imposed standard prices and requisitioned ships for use during the war, etc. As a rule, abnormal circumstances, speculative prices, etc., cannot form, the legal basis of compensation in condemnation awards. While fair compensation cannot be artificially increased by such methods as were adopted by one of those interested in the case and which have been brought to the notice of this Tribunal, it would be equally unjust to attach much weight to artificial reduction of hire, chartering or purchase price of ships, as fixed under compulsion, requisition or other environmental action during the war. For the reasons already stated, the Tribunal is not bound by section 3477 of the Revised Statutes of the United States, 1878 (quoted in U.S. Case Appendix page 51); nor by section 24 of the Judicial Code of the United States 1911 ; nor by section 4 of the Naval Emergency Fund Act of 4th March, 1917 ; nor by any other municipal law, in so far as these

the claimants' initial property should be determined by the standard of

---

provisions restricted the right of the claimants to receive immediate and full compensation, with interest from the day on which the compensation should have been fully paid ex aquo et bono. Just compensation should have been paid to the Claimants or arranged with them on the basis of the net value of the property taken: 1. On the 6th October, 1917, for use, during the war (whenever such use was possible without destroying the property, according to the contract, state of completion of ship, etc.), and 2. At the latest on the 1st July 1919, as damages for the unlawful retaining of the title and use of the ships after all emergency ceased; or On the 6th October, 1917, as full compensation for the destruction of the Norwegian property. Liberal compensation should be allowed in each case, inasmuch as the United States "recognizes its liability to make just compensation for the value of the property taken on August 3rd, 1917".1 The amounts offered as compensation by the United States are shown in the table set out at the commencement of this award. After careful comparative examination of the results of the two systems above described, the Tribunal is of opinion that the compensation hereinafter awarded is the fair market value of the claimants' property. In assessing the net amount of compensation, the Tribunal has taken into consideration in each case all the circumstances pertaining to the net value of the property requisitioned or taken by the United States and especially the following: the date of each contract or sub-contract between shipbuilder and shipowner; the technical characteristics and qualities of each contract (type and dead weight tonnage of the ship; its speed, etc. ; the reputation, experience, technical and financial situation of the shipyard); the legal value of the contract, namely the liens, rights and interests in each original contract, etc. ; the original contract (or sub-contract) price; the progress (and brokerage) payments made by each of the parties on the original contract price; the date of delivery promised in the contract ; the date of delivery which was expected at or about the date of the general requisition order and about the date of the effective requisition of each contract as far as these can be ascertained; the various elements pertaining to the value and degree of completion of the tangible objects of completion as: for instance, the percentage of materials ordered, and the percentage of materials on hand ; the date at which the keel was laid, before or after the general requisition; and the date when the ship was launched; the contracts, settlements, etc. made by the United

fair market value.[308] Finally, about USD 15 million was awarded, a sum which included interest.[309] From the fact that the Tribunal ordered the

States and by Norwegian or other shipowners, or by third parties, whether governments or private persons, whether with shipowners or shipbuilders, for the construction or purchase or hire of ships ; the statistics, reports and opinions of experts produced by the Parties ; the Award of the United States Claims Committee on the present claims ; the reports of the Ocean Advisory Committee on just compensation for certain American ships lost in the service of the government; etc. On the other hand the Tribunal has taken into consideration all the facts, which are exclusively or principally due to the United States' action (whether before or after the requisition of the shipyards and the effective requisition of the claimants' property), and which therefore may be considered as res inter alios acta, or as being without or of negligible influence upon the net value of property lost by the claimants." *See id.* at 340.

308 *See id.* Investorwords Dictionary defines *fair market value* as: "The price that an interested but not desperate buyer would be willing to pay and an interested but not desperate seller would be willing to accept on the open market assuming a reasonable period of time for an agreement to arise." (visited on Dec. 14, 2012) <http://www.investorwords.com/cgi-bin/getword.cgi?1878>; or Money Glossary defines it as: "Fair market value is the price, in cash or equivalent, that a buyer could be expected to pay, and a seller could be expected to accept, if the asset were exposed for sale on the open market for a reasonable period of time, both buyer and seller being knowledgeable of the facts, and neither being under any compulsion to act." (visited on Dec. 14, 2012) <http://www.moneyglossary.com/?w=-Fair+Market+Value>.

309 Excerpt from the award: "For these reasons the tribunal of arbitration decides and awards that: I. The United States of America shall pay to the Kingdom of Norway the following sums: In claim No. 1 by the Skibsaktieselskapet "Manitowoc" the sum of $845,000 In claim No. 2 by the Skibsaktieselskapet "Manitowoc" the sum of 845,000 In claim No. 3 by the Dampskibsaktieselskapet" Baltimore" the sum of. 1,625,000 In claim No. 4 by the Dampskibsaktieselskapet "Vard II" the sum of 2,065,000 Out of this amount of $2,065,000 the United States are entitled to retain a sum of $22,800 in order that this sum be paid to Page Brothers; In claim No. 5 by the Aktieselskapet SOrlandske Lloyd the sum of $2,045,000 In claim

respondent to pay the compensation in US Dollars we can infer that the form of compensation fulfilled the criterion of *effectiveness*, that is to say, it was in a *realizable form*. It should be mentioned that the United States complied with the arbitral award, however, it officially denied its precedential value in international law.[310] Based on this landmark case, we can establish that *just* compensation means complete restitution of the taken property, including the lost profit.

5.1.2. *Chorzow Factory case – 'fair' compensation*

The next landmark case in the history of compensation for taken foreign property was the Chorzow Factory case in front of the Permanent Court of International Justice.[311] The subject matter of this case was the land in

---

No. 6 by the Dampskibsaktieselskapet Ostlandet the sum of. 2,890,000 In claim No. 7 by Jacob Prebensen jun. the sum of 160,000. In claim No. 8 by the Dampskibsaktieselskapet "Tromp" the sum of. $160,000 In claim No. 9 by the Aktieselskapet "Maritim" the sum of 175,000 In claim No. 10 by the Aktieselskapet "Haug" the sum'of.... 175,000 In claim No. 11 by the Aktieselskapet "Mercator" the sum of 190,000 In claim No. 12 by the Aktieselskapet Sôrlandske Lloyd the sum of 205,000 InclaimNo. 13 by H. Kjerschow the sum of 205,000 In claim No. 14 by Harry Borthen the sum of 205,000 InclaimNo. 15 by E. & N. Evensen the sum of. 205,000 II. The claim made by the United States of America on behalf of Page Brothers is disallowed as against the Kingdom of Norway, but a sum of $22,800 may be retained by the United States as stated under claim No. 4 above." Norwegian Shipowners' Claims Case (Nor. v. U.S.), 1 Reporters of International Arbitral Awards (UN) 343-44 (1948). *See also* Dolzer, Rudolf: Norwegian Shipowners' Claims Arbitration in Encyclopedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1997, Vol. 3, 693.

310 *See* Dolzer, Rudolf: Norwegian Shipowners' Claims Arbitration in Encyclopedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1997, Vol. 3, at 693.

311 *See* Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 5-24.

Chorzow on which a nitrate factory had been established. The land was originally registered in the name of Germany. However, Germany conveyed the land and the factory to Oberschlesische Stickstoffwerke AG in 1919.[312] Following the First Word War, the region of Chorzow was transferred from German to Polish control. Under the Geneva Convention, countries that took over German territory had the right to seize certain land property on these territories owned by the Government of Germany and credit the value of this property to Germany's reparation obligations.[313] Disputes arising under the Convention were to be referred to the Permanent Court of International Justice.[314] Shortly after Poland took over Chorzow, a Polish court decreed in 1922 that the land belonging to Oberschlesische Stickstoffwerke AG should be assigned to Poland, as Poland argued that the property belonged to the German State, and that it was not the private property of the above-mentioned company.[315] The dispute finally reached the Permanent Court of International Justice. The Court concluded that the land was privately owned at the time of taking, and that Poland had seized private property that was not lawful according to international law.[316] The Court stated that the rules of law governing the reparation were the rules of public international law in force between the two states concerned, and not the law governing relations between the state which committed the wrongful act and the individual who suffered damage.[317] This case sets forth the basic principles that govern reparation after the breach of an international obligation.[318] It gives priority to restitution in kind, however,

312 *See id.* at 18-21.

313 *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Virginia Journal of International Law 643 (1998*); See* Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 18, 21.

314 *See id.* at 26.

315 *See id.* at 21.

316 *See id.* at 46.

317 *See id.* at 28.

318 *See* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on state Responsibility, 96* The American Journal International Law *833,* 835 (2002).

if it is not possible, it turns to the solution of monetary compensation.[319] Thus, concerning the question of compensation, the Court stated that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[320] The Court qualified the Polish measure as "seizure of property", and in its opinion there was only one remedy for such an act, that is *fair* compensation which equals *full*[321] compensation.[322] Related to this, Dinah Shelton argues that one widely accepted form of reparation is correcting the injustice done by restoring the *status quo ante*.[323] Shelton further argues that the objective of reparation is "to place the aggrieved party in the same position as if no wrongful act had occurred, without respect to the cost or consequences

---

319 *See* Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 46, 47; Mouri calls this "restitution compensation". *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 383 (1994).

320 Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 46, 47.

321 Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission also sets forth the *full* reparation principle: "The responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act." *See* art. 31 of Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) UN Info page (visited on Jan. 24, 2013) <http://www.un.org/law/ilc/texts/state_responsibility/responsibilityfra.htm>; *See also* L. C. A. Barrera, *Lack of Definition of Compensation in International Investment Disputes for Non-Expropriation Claims: Is There an Appropriate Mechanism to Determine It*, 10 Revista E-Mercatoria, 81 (2011).

322 Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 46; Ralph H. Folsom et al., International Business Transactions - A Problem-Oriented Coursebook (3d ed. 1995).

323 *See* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on state Responsibility, 96* The American Journal International Law *833,* 844 (2002).

for the wrongdoer".[324] This principle was also the basis of the Chorzow decision.[325] Furthermore, it is interesting to analyze issues concerning valuation raised by the Court and referred to by experts. Thus, the Court asked experts to determine the value of the property not on the date on which the Polish Treasury was registered as owner[326], but when the Treasury *de facto* took possession of the factory.[327] According to our opinion, the original owner, the German company, should have been entitled to compensation not from this date (*de facto* taking), but from the date when the Polish Treasury was registered as the owner of the factory. The reason is, that already following the registration of the Treasury as owner (without taking it *de facto*), the German owner could no longer dispose of the property (*e.g.,* could not sell it or use it as collateral). Another remarkable issue is that the Court asked for the determination of the value of the property on a very broad basis, that is to say, including even goodwill and future prospects of the factory concerned.[328] The Court also requested experts to determine financial results of the undertaking from the time of the taking until the time of the judgment, instead of determining the value of the taken property at the time of the taking along with the interest from that time.[329] It also ordered the determination of the present value plus, among others, the company's future prospects.[330] Practically, the Court was of the opinion that there should be *full* compensation (what in the Court's opinion equaled *fair* compensation), including *lucrum cessans*[331], less the amount of the maintenance of the factory.[332] All in all, the Court stated

324 *See id.*
325 *See id.* at 845.
326 July 1, 1922. (Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 21).
327 *See id.* at 22, 51.
328 *See id.* at 51.
329 *See id.* at 51.
330 *See id.* at 28.
331 Ceasing gain.
332 Case Concerning The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.we.J. (ser. A) No. 17, at 53.

that it would fix the amount of the compensation, the conditions and form of payment in a future judgment. It indicated that compensation can be paid in the form of a lump sum, and set off might be possible; However, it did not make a concrete decision on the matter:[333]

> The Court,having heard both Parties,by nine votes to three,
> (1) gives judgment to the effect that, by reason of the attitude adopted by the Polish Government in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to pay, as reparation to the German Government, a compensation corresponding to the damage sustained by the said Companies as a result of the aforesaid attitude;
> (2) dismisses the pleas of the Polish Government with a view to the exclusion from the compensation to be paid of an amount corresponding to all or a part of the damage sustained by the Oberschlesische Stickstoffwerke, which pleas are based either on the judgment given by the Tribunal of Katowice on November 12th, 1927, or on Article 256 of the Treaty of Versailles;
> (3) dismisses the submission formulated by the Polish Government to the effect that the German Government should in the first place hand over to the Polish Government the whole of the shares of the Oberschlesische Stickstoffwerke Company, of the nominal value of 110,000,000 marks, which are in the hands of the German Government under the contract of December 24th, 1919;
> (4) dismisses the alternative submission formulated by the Polish Government to the effect that the claim for indemnity, in so far as the Oberschlesische Stickstoffwerke Company is concerned, should be provisionally suspended;
> (5) dismisses the submission of the German Government asking for judgment to the effect that, until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany,

333 *Id.* at 64.

to the United States of America, to France or to Italy, or, in the alternative, that the Polish Government should be obliged to cease working the factory or the chemical equipment for the production of nitrate of ammonia, etc.
(6) gives judgment to the effect that no decision is called for on the submissions of the German Government asking for judgment to the effect that the Polish Government is not entitled to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the said claim for indemnity, and, in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments;
(7) gives judgment to the effect that the compensation to be paid by the Polish Government to the German Government shall be fixed as a lump sum;
(8) reserves the fixing of the amount of this compensation for a future judgment, to be given after receiving the report of experts to be appointed by the Court for the purpose of enlightening it on the questions set out in the present judgment and after hearing the Parties on the subject of this report;
(9) also reserves for this future judgment the conditions and methods for the payment of the compensation in so far as concerns points not decided by the present judgment. [p65]
[…]

Finally, the parties reached a compromise, and the Court terminated the proceedings in 1929.[334] Based on this case, we can say that *fair* or *full* compensation does not differ much from the *just compensation standard* examined in the Norwegian Shipowners' Claims case. Basically,

334 *See* Ignaz Seidl-Hohenveldern: German Interests in Polish Upper Silesia Cases in Encyclopedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1995, Vol. 2, 550-553 at 551.

both cases require, in the case of taking foreign property, *in integrum restitutio*, taking into consideration the lost profits of the owner of the taken property.[335] In both cases, the valuation is based on *fair market value* of the taken property. In our opinion, applying these standards, these early cases of international law already offered strong protection of foreign investment. These cases also recognized that if in kind restitution is not possible, monetary compensation is the most practical. On the basis of the before-said, we can conclude that these decisions use, in fact, different terms for the same concept. This supports our assumption that, many times, terms (expressions) in international law cannot be defined until they are tested in practice by courts or tribunals.

5.1.3. *Hull Doctrine – 'prompt, adequate and effective' compensation*

In 1938 the so-called Hull Doctrine came into existence, when the property of the citizens of the United States of America was expropriated in Mexico.[336] The doctrine was named after the United States Secretary of State Cordel Hull, who, in his famous letter to the Mexican Government, demanded *prompt*, *adequate* and *effective* compensation for the agrarian properties owned by United States citizens, and expropriated by the

335 For example, Sacerdoti argues that *full* restitution is in principle "reparation in the form of monetary compensation as an alternative [to *in integrum restitutio*] should cover all connected losses including *lucrum cessans* and indirect damages". *See* Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection 389 (1997).

336 *See* Kevin Smith, *The Law of Compensation for Expropriated Companies and the Valuation Methods Used to Achieve That Compensation*, Law & Valuation. Spring 2001 (visited on Apr. 5, 2012) <www.law.wfu.edu/courses/Law&value-Palmiter/Papers/2001/Smith.htm>; Rudolf Dolzer*, New Foundations of the Law of Expropriation of Alien Property,* The American Journal International Law, July, 1981, at 558; On the issue of expropriation in Mexico *see*: Patrick Del Duca, The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization 51 UCLA L. Rev. 35 (2003).

Mexican Government.[337] With this doctrine, new terms evolved in international law in the field of compensation, as this doctrine claimed *prompt*, *adequate* and *effective* compensation. We can define these terms based on the literature dealing with the Hull doctrine. *Prompt* means that the owner of the expropriated property has to be compensated reasonably soon after the taking, without undue delay.[338] However, in practice, it is rarely the case. A payment of compensation in installments, even if it takes years, is an accepted practice,[339] provided a considerable sum of money is paid immediately following the expropriation.[340] One of the problems related to *prompt* compensation is the lack of international enforcement mechanisms against states which are unwilling to pay the required compensation, even if it was awarded by an international tribunal. *Adequate*[341] means that the compensation is based on a fair

---

337 *See* Smith, Kevin: The Law of Compensation for Expropriated Companies and the Valuation Methods Used to Achieve That Compensation. Law & Valuation. Spring 2001 (visited on Apr. 5, 2012) <www.law.wfu.edu/courses/Law&value-Palmiter/Papers/2001/Smith.htm>.

338 *See* Ralph H. Folsom & Michael W. Gordon, International Business Transactions 606 (3d ed. 1995; Zouhair A. Kronfol, Protection of Foreign Investment 42 (1972); W. M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 692, 694 (1984-1985); *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 53, 107 (1988).

339 Usually not more than ten years. *See* Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen 42 (1997).

340 *See* Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen 42 (1997).

341 John H. Dunning argues that until the independence of many colonies in the sixties the traditional rule in international law was that in case of taking *adequate* compensation had to be paid. However, with the appeareance of newly indepnedent states, and with the moral support of socialist countries, appeared a new, progressive theory, according to which *adequate* compensation had to be paid provided that the flow of capital and technology

valuation, which is basically the fair market value of the property.[342] This criterion can be equated with *full* compensation, which means that the compensation should correspond to the full value of the expropriated rights.[343] And finally, the criterion of *effectiveness* means that the compensation should be in a realizable form,[344] that is to say, it should be transferable in convertible currency or other form (*e.g.,* gold).[345] As a matter of fact, the standard laid down by the Hull doctrine is the refined version of the *just* and *fair* (or *full*) compensation standard theories, in our opinion. All three above-mentioned components of the Hull doctrine are present under the *just* compensation standard (laid down in the Norwegian Shipowners' Claims case) and the *fair* compensation standard (established in the Chorzow Factory case). It is common to

---

that foreign investment generates is beneficial to the developing country. *See* JOHN H. DUNNING, INTERNATIONAL INVESTMENT, 44 (1972). Sornaraja already in the seventies claimed that "there is little doubt that foreign investment does have beneficial effects on the host country." (M. Sornarajah, *Compensation for Expropriation*, 13 JOURNAL OF WORLD TRADE LAW, 109, 110-13 (1979). However, we are of the opinion, that there are exceptions in many cases. It would be incorrect to say that foreign direct investment is uniformly beneficial for the recipient country.

342 *See* RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 606 (3d ed. 1995.

343 *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 43 (1997); In American International Group case. *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 105-07 (1988).

344 *See* RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 606 (3d ed. 1995).

345 Like securities, etc., that are negotiable on the stock exchange. *See* HEIDI BERGMANN, DIE VÖLKERRECHTLICHE ENTSCHÄDIGUNG IM FALLE DER ENTEIGNUNG VERTRAGSRECHTLICHER POSITIONEN 42 (1997); *See also* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 107 (1988).

all these theories that compensation should be paid *reasonably soon* in a *realizable form*, for the *full value* (including lost profits), based on *fair market value*.

The standard of the Hull Doctrine can be found today in the North American Free Trade Agreement and in bilateral investment treaties concluded by the United States.[346] In bilateral investment treaties, investors enjoy protection even exceeding the requirements of the Hull Doctrine, *e.g.,* as these treaties many times prescribe interest at a "commercially reasonably rate"[347].[348] Nevertheless, this doctrine was regarded as international only by the United States.[349] However, even the US abandoned it officially following the Second World War, when it began to propagate the *just* compensation doctrine. At the same time, the United States, as we are going to see in the part of this book dealing with the Restatement (Third) of Foreign Relations Law of the United States § 712, still interprets *just* compensation as *prompt*, *adequate* and *effective*.[350] Furthermore, Brownlie also argues that it is a common opinion in the West that expropriation is lawful if *prompt*, *adequate*, and *effective*

346 *See* JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 324 (2009).

347 Art. 6 (3) of the US Model Bilateral Treaty, US Department of state (visited on June 6, 2012) <http://www.state.gov/documents/organization/38710.pdf>.

348 *See* Andrew T. Guzman, *Explaining The Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties That Hurt The,* 1997 Jean Monnet Working Papers (visited on Apr. 5, 2012) <http://www.jeanmonnetprogram.org/papers/97/97-12.html>.

349 "The argument that the *prompt, adequate* and *effective* formula is traditional international law finds little support in state practice or authoritative treaties and monographs." *See* Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 33 (1993).

350 *See* Kevin Smith, *The Law of Compensation for Expropriated Companies and the Valuation Methods Used to Achieve That Compensation.* Law & Valuation. Spring 2001 (visited on Apr. 20, 2012) <http://www.law.wfu.edu/courses/Law&value-Palmiter/Papers/2001/Smith.htm>.

compensation is provided for the property.[351] Contrarily to this, authors from developing countries argue that this doctrine is supported by the United States and other developed countries in order to put developing countries into a disadvantageous position.[352] Here we would agree with the German author, Professor Dolzer, who claims that this doctrine was applied, even before the de-colonization occurred, "in rational manner among and against" developed, western countries.[353] The above-examined Norwegian Shipowners' Claims case and the Chorzow Factory cases are good examples to support this assertion. At the same time, Dolzer admits that this rule is not always observed in practice (for example, sometimes there is no *prompt* payment in case of expropriation).

5.1.4. *Calvo Doctrine*

Concerning the issue of compensation, the majority of capital importing countries[354] refuse the Hull Doctrine, and refer to the Calvo Doctrine

---

351 The Restatement defines *just* compensation as compensation that is "in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national". *See* Restatement 712 (1) (c).
See Ian Brownlie, Principles of Public International Law 535 (5th ed. 1998); Joachim Karl, *The Promotion and Protection of German Foreign Investment Abroad*, ICSID Review, Spring 1996, at 3.

352 *See O. A. Abede,* The Doctrine of Sovereign Immunity Under International Commercial Law: An Observation On Recent Trends*, 17 The Indian Journal of International Law* 245, 254-55 (1977); Mohamed *Khalil, Treatment of Foreign Investment in Bilateral Investment Treaties*, ICSID Review, Fall 1992, at 339.

353 *See* Rudolf Dolzer*, New Foundations of the Law of Expropriation of Alien Property,* The American Journal International Law, July 1981, at 558.

354 Francesco Francioni, *Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity*, 24 International and Comparative Law Quarterly 255, 255 (1975).

instead.[355] The Calvo Doctrine was named after Carlos Calvo, an Argentine diplomat and historian. He expressed this principle in his work "International Law in Theory and Practice". According to this doctrine, in case of taking of foreign property, every state has to have the right to decide on its own future and economic development, that is to say, no state may be forced to pay *adequate*, *effective* and *prompt* compensation.[356] The doctrine also says that foreign investors may not be better treated than the citizens of the expropriating state.[357] The Calvo Doctrine also prohibits the use of diplomatic intervention as a method of enforcing private claims before local remedies have been exhausted. Hereinafter, we are going to see that this principle is reflected in many United Nations documents of the sixties and seventies.

In practice, the Calvo Doctrine is represented by the Calvo Clause. Such clauses may be part of investment contracts concluded by the host state and the foreign investor, and in them, the investor agrees in advance to submit all disputes to the local law and waives all kind of diplomatic protection. In practice, it means that, regardless of the outcome of the exhaustion of local remedies by the foreign investor, the investor will find himself in the same position as any other national of the host state.[358] All disputes between the host state and the foreign investor are exclusively

---

355 The Columbia Encyclopedia, Sixth Edition, 2001 (visited on Sep. 12, 2012) <http://www.bartleby.com/65/ca/Calvo-Ca.html>.

356 *See* Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen 44 (1997); Martin Dixon, Textbook on International Law 212-13 (1993).

357 *See* Sebastián López Escarcena, Indirect Expropriation in International Law 19 (2014); Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen 40 (1997); Martin Dixon, Textbook on International Law 212-13 (1993).

358 *See* Martin Dixon, Textbook on International Law 212-13 (1993); Encyclopaedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1995, Vol. 1, 521-523 p. 522 F.V. Garcia-Amador Calvo Doctrine, Calvo Clause.

reserved for the courts of the host state, ruling out any kind of international arbitration or adjudication. In our opinion, such clause can be detrimental for foreign investors and this must be the reason why the Calvo Clause is not widespread.[359] Regarding this issue, it is interesting to mention that the majority of bilateral investment treaties exclude the requirement of exhaustion of local remedies. Paul Peter in the nineties analyzed 409 BITs, and found that only five of them required exhaustion of local remedies.[360] Clauses that require the exhaustion of local remedies might deter foreign investors, as many times foreign investors are not familiar with the local legal system or are mistrustful about local judiciary and other authorities. Furthermore, the investment recipient state might have influence on these institutions. Therefore, a foreign investor might prefer international arbitration or other international dispute settlement mechanism when having disputes about compensation for taken property.

5.1.5. *United Nations documents – 'appropriate' compensation*

According to certain authors, the most recognized standard in international law is the *appropriate* compensation standard.[361] This view is supported

---

359 Lluís Paradell argues for example that it has never attained the statues of a principle in customary international law. ANDREW NEWCOMBE LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 13-14 (2009).

360 *See* Paul P., *Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties,* 44 NETHERLANDS INTERNATIONAL LAW REVIEW 233, 234 (1997).

361 *See* RUDOLF DOLZER, EIGENTUM, ENTEIGNUNG UND ENTSCHÄDIGUNG IM GELTENDEN VÖLKERRECHT [PROPERTY, EXPROPRIATION AND COMPENSATION IN CURRENT INTERNATIONAL LAW] 63 (1985); O. A. Abede, *The Doctrine of Sovereign Immunity Under International Commercial Law: An Observation On Recent Trends*, 17 THE INDIAN JOURNAL OF INTERNATIONAL LAW 241, 245 (1977); P.J.we.M. de Waart, *Permanent Sovereignty Over Natural Resources As a Cornerstone for International Economic Rights and Duties*. 24 NETHERLANDS INTERNATIONAL LAW REVIEW 300, 304 (1977); Maarten H. Muller, *Compensation for Nationalization: A North-South Dialogue*, 19 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 31, 35 (1981); Karol N. Gess, *Permanent Sovereignty Over Natural*

by the fact that the huge majority of states accepted this standard in many international multilateral and bilateral documents. The most important international document in which this standard first appeared was the General Assembly Resolution[362] 1803 (on Permanent Sovereignty over Natural Resources) of the United Nations, passed on December 14, 1962.[363] Some authors[364] are of the opinion that in the full context of adoption of the General Assembly Resolution 1803, the expression

---

Resources, 13 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 398, 398-99 (1964).

362 General Assembly Resolution is defined by the Dictionary of International & Comparative Law as: "primary legislative product of the United Nations General Assembly. Generally, they are not binding, but serve as evidence of customary international law and are authoritative when they interpret the United Nations Charter.". *See* Dictionary of International & Comparative Law, Fox, James R., Oceana Publications, Inc., 1992, at 380; Resolutions of the UN General Assembly are not listed among the formal sources of law of the International Court of Justice. *See* art. 38 of the Statute of the International Court of Justice, ICJ Info page (visited on Dec. 14, 2012) <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>; However, this does not mean that they cannot be considered as source of international law. So-called western, developed countries tend to deny resolutions' normative quality, as third world countries tend to accept them as sources of international law. *See* Edward McWhinney, United Nations Law Making 44,55,56 (1984); *See* P. O'Keefe, *UN Permanent Sovereignty Over Natural Resources*, 8 JOURNAL OF WORLD TRADE LAW 239, 248-51 (1974).

363 The text of the Resolution and an analytical study can be found in the article of Karol N. Gess. *See* Karol N. Gess, *Permanent Sovereignty Over Natural Resources*, 13 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 398, 444 (1964). For another analytical study on the issue *see* P. O'Keefe, *UN* Permanent Sovereignty Over Natural Resources, 8 JOURNAL OF WORLD TRADE LAW 239, 239-82 (1974); ANDREW NEWCOMBE LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 27 (2009).

364 *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights,* 9 THE INTERNATIONAL LAWYER 304 (1975); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW, 639, 646 (1998).

appropriate compensation can only mean *prompt*, *adequate* and *effective* compensation.[365] They further argue that there is no doubt that this is a mandatory obligation under international law. Therefore, *prompt*, *adequate* and *effective* compensation has to be paid.[366] On the other hand, there are experts who do not accept this view, and argue that *appropriate* compensation is in no case equal to *prompt*, *adequate* and *effective* compensation.[367] Based on our research, we are of the opinion that there is still little case law to support either the former or the latter view with certainty. However, we would say that the standard of *prompt*, *adequate* and *effective* compensation is stricter standard and offers better protection, regarding the compensation of investors.

In the following, we will have a brief look at two other important United Nations documents in which the standard of *appropriate* compensation can be found. One of them is the Declaration on the Establishment of a New International Economic Order.[368] This is a resolution of the General Assembly of the United Nations. This Resolution was initiated by a group of less developed countries following the oil crisis of 1973,[369]

---

365 The United States of America also held that 'appropriate' compensation could only mean 'prompt, adequate and *effective' compensation. See* Karol N. Gess, *Permanent Sovereignty Over Natural Resources*, 13 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 398, 427 (1964).

366 *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights,* 9 THE INTERNATIONAL LAWYER 304 (1975); Francesco Francioni, *Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity*, 24 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 255, 255 (1975).

367 *See* Francesco Francioni, *Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity*, 24 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 255, 255 (1975); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW, 639, 647-48 (1998).

368 A/RES/3201 (S-VI), United Nations Dag Hammarskjöld Library (visited on Oct. 10, 2012) <http://daccess-ods.un.org/doc/RESOLUTION/GEN/NR0/071/94/IMG/NR007194.pdf?OpenElement>.

369 *See* JOHAN KAUFMANN, UNITED NATIONS DECISION MAKING 81, 82 (1980).

and was the result of a so-called pseudo-consensus, that is to say, the text of the Resolution was adopted without voting.[370] The president of the General Assembly simply stated that "it is the desire of the meeting to adopt the text", and the Resolution was adopted.[371] The significance of this Resolution is in the fact that it considers unacceptable any form of sanction on a state that has expropriated property of foreign investors.[372] In theory, this provision is very important as it prevents investor states from protecting their investors through sanctions in case of expropriation of their property.

The Charter of Economic Rights and Duties of States (December 12, 1974)[373] is the other resolution of the United Nations General Assembly. This Resolution was adopted by the General Assembly with an overwhelming majority of the world's countries. Only Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom and the United States voted against the Resolution.[374] The Resolution was drafted with the support of the United Nations Conference on Trade and Development.[375] Developing countries wished to achieve several goals with this document: the freedom to dispose of natural resources,

---

370 *See id.* at 81,82,128.

371 Several developed countries were opposed to the Program for a New International Economic Order that was represented by this Resolution. *See* Johan Kaufmann, United Nations Decision Making 81, 81,82,128 (1980).

372 A/RES/3201 (S-VI), United Nations Dag Hammarskjöld Library (visited on Oct. 10, 2012) <http://daccess-ods.un.org/doc/RESOLUTION/GEN/NR0/071/94/IMG/NR007194.pdf?OpenElement>.

373 *Id.*

374 *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights*, 9 The International Lawyer 295 (1975); Encyclopedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1995, Vol. 1, 561-566 at 562 (Ernst-Ulrich Petersmann: Charter of Economic Rights and Duties of States).

375 *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights,* 9 The International Lawyer 295 (1975).

the right to adopt the economic system of their own will, subjection of foreign capital to domestic laws, and other goals.[376] Brower argues that developing countries tried to use the United Nations for their economic campaign at this time.[377] Provision concerning the compensation in case of expropriation is contained in article 2 (2) (c) of the Resolution, which states that in case of taking:

> appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinen. [378]

As we can see, the text uses the word *should* that lessens the obligatory character of this provision.[379] It is more interesting, that this appropriate compensation is determined on the grounds of domestic legislation[380], and there is no mentioning of international legal standards. However, the last part of article 2 (2) (c) which states that the expropriating state has the absolute right to decide which factors will be taken into consideration

---

376 *See id.* at 296.

377 He also argues that behind this economic campaign stood partially political, partially economic reasons. *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights,* 9 The International Lawyer 296 (1975).

378 Art. 2 (2) (c) A/RES/3281 (XXIX), United Nations Dag Hammarskjöld Library (visited on Oct. 12, 2012) <http://daccessods.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement>; Charles N. Brower & John B. Tepe, *The Charter of Economic Rights,* 9 The International Lawyer 305 (1975).

379 *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights,* 9 The International Lawyer 305 (1975).

380 According to de Waart the determination of compensation on the grounds of local law met strong opposition among western states. *See* P. J. we. M. de Waart, *Permanent Sovereignty Over Natural Resources As a Cornerstone for International Economic Rights and Duties*, 24 Netherlands International Law Review 313 (1977).

when determining compensation, makes it less objective.[381] This rejection of international law and legal standards is strengthened even more by the next sentence of the same paragraph:

> In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. [382]

In the first part of this provision we can find the above-mentioned Calvo Clause. However, the second part of the same provision gives the opportunity to parties to mutually agree on other means of conflict resolution (*e.g.,* international arbitration). The original intention of the working group that worked out the proposal of the Resolution was to make a draft that will be binding on states and be part of the "corpus of the international law".[383] However, some western authors question if it had any effect at all on international law.[384] The largest investor in

---

381 *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights,* 9 The International Lawyer 305 (1975).

382 Art. (2) (2) (c) A/RES/3281 (XXIX), United Nations Dag Hammarskjöld Library, (visited on Oct. 12, 2012) <http://daccessods.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement>; Charles N. Brower & John B. Tepe, *The Charter of Economic Rights,* 9 The International Lawyer 305 (1975).

383 *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights,* 9 The International Lawyer 297 (1975).

384 *See* G. W. Haight*, The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 The International Lawyer 591, 596 (1975); For example, Petersmann suggests that the Hull Doctrine represented traditional international customary law before the Charter, and says that it has no practical value in the view of recent state practice and arbitration awards. *See* Ernst-Ulrich Petersmann, Charter of Economic Rights and Duties of States, in 1 Encyclopedia of Public International Law 564

the world, the United States, argued that such a document discourages rather than encourages foreign investors who are so much desirable by investment recipient countries.[385] The reason for such critic might be that the United States, being a large investor, wants to protect the interests of its own investors, and this document obviously does not serve this end because it is strongly influenced by the Calvo Doctrine. Brower argues that the biggest deficiency of the Resolution is in the lack of binding character - despite the original intent of the sponsors of the Resolution.[386] Brower also criticizes the Resolution for not stating clearly that "economic rights and duties of states are subject to international law".[387] However, we agree with Brower that this Resolution still places moral obligations on the members of the world community as it was passed by the General Assembly of the United Nations, an organization which represents the will of nations of the world.[388] Andrew T. Guzman touches the spot when he says that the relevance of the resolutions of the United Nations is not establishing new standards for expropriation in customary international law, but rather proclaiming that the countries voting for these resolutions do not consider the Hull doctrine part of customary international law.[389] Notwithstanding, it should be mentioned

---

(Rudolf Bernhardt ed.) (1995).

385 *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights,* 9 The International Lawyer 299 (1975).

386 This non-binding character is supported by the following two facts according to Brower: a large number of countries with large economic power voted against or many abstained and a resolution of the General Assembly of the United Nations is not a "multilateral convention or treaty, will in any event normally have only recommendatory force". *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights,* 9 The International Lawyer 301 (1975).

387 *See* Charles N. Brower & John B. Tepe, *The Charter of Economic Rights,* 9 The International Lawyer 302 (1975).

388 *See id.* at 301.

389 *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Virginia Journal of Interna-

that these countries still sign bilateral investment protection treaties that require *prompt*, *adequate* and *effective* compensation. In spite of this, the Charter of Economic Rights and Duties has had certain effects on international law, as this standard was also applied in major expropriation cases for determining compensation.[390]

5.2. Issue of compensation under the Restatement (Third) of Foreign Relations Law of the United States of America § 712

The United States of America is the largest foreign direct investor in the world. Thus, we should examine briefly its policy regarding the issue of compensation in the case of taking foreign investment. Under the Restatement, there is an obvious requirement of compensation in case of taking foreign property.[391] Regarding the standards of compensation, the Restatement accepts the standard of *appropriate* compensation. However, it supplements it with the requirement of *just* compensation.[392] Thus, it requires *just* compensation in the case of taking. The Restatement defines what should be understood under *just* compensation:

> […] be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national.[393]

This definition anticipates the determination of the value of the taken property, for what guidance is given in the Comment of the Restatement and the Reporters' Notes, which states that the *full value* of the property

---

TIONAL LAW 639, 648 (1998).

390 *E.g.,* TOPCO-Libyan case, Banco National case, Aminoil-Kuwait case. It is another issue, how is this standard interpreted by tribunals and courts.

391 Restatement 712 (1) (c).

392 Restatement Comm. (c) at 198.

393 Restatement 712 (1) (c).

must be paid.[394] If possible, this should be determined based on the *fair market value* of the property. When determining this fair market value, the *going concern value* of the enterprise should be taken into account primarily, but the Comment does not exclude other valuation methods.[395] As to the time of payment, the Restatement states that compensation should be paid at the time of the taking.[396] It further provides that if the compensation is not paid at this moment, interest should be paid from the time of the taking.[397] However, it is required that compensation is made, in any case, within a reasonable time[398], that is to say, within at least a six months period.[399] Defining the requirement of *reasonable* time helps avoiding disputes among the parties. The Restatement also tells us about the form of payment. The payment should be made in economically usable form for the foreign investor.[400] The Comment of the Restatement specifies it as "convertible currency without restriction on repatriation".[401] Payment in bonds is also allowed under certain circumstances. The requirement is that such bonds bear interest at an economically reasonable rate and have market through which their equivalent in convertible currency can be realized.[402]

394 Comment d; Reporters' Notes, 3; *See also* Lillich, Richard B.: The Valuation of Nationalized Property in International Law. Charlottesville: The University Press of Virginia, 1973 1,2,3,4 Bd.; Bergmann, Heidi: Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen. Baden-Baden: Nomos Verl. Ges., 1997; Kratovil, Robert, Harrison, Frank J.: Eminent Domain - Policy and Concept. California Law Review. Vol. 42, 1954, at 596.

395 Restatement, Reporters' Notes 3.

396 Restatement 712 (1) (c).

397 Restatement 712 (1) (c); Comment d; Reporters' Notes 3.

398 Restatement 712 (1) (c).

399 Reporters' Notes 3.

400 Restatement 712 (1) (c).

401 Comment (d) of the Restatement.

402 *Id.*

Current trends in the field of international law related to our topic can be best examined through current case law and related academic literature. Thus, we are going to scrutinize above all, the case law of the Iran – United States Claims Tribunal and the decisions of other international arbitral bodies (like that of the ICSID or NAFTA arbitration) and related analytical works. We will try to find out what is the most accepted compensation standard in international law nowadays.

5.3. Issue of compensation in United States bilateral investment treaties

During our research, in this part of the work, we examine model investment treaties of the United States and bilateral investment treaties in force signed by the United States of America, being the largest foreign investor in the word during the last decades. We examine: whether these treaties recognize the right of contracting States to take foreign property, whether compensation is required by these treaties, and if yes, what is the standard of compensation required by these treaties. Furthermore, we look at the valuation standard, valuation time, time of payment and transfer, interest payable and transferability requirements provided for by these treaties.

First, we examine earlier generation treaties (as well as the Model Bilateral Investment Treaty of 1992) that were signed before the text of the Model Bilateral Investment Treaty of 1994 was used. Following this we compare these earlier generation treaty provisions (and the Model Bilateral Investment Treaty of 1992) with those that were signed after 1994 (until nowadays), under the Model Bilateral Investment Treaty of 1994, and finally compare them with the text of the newest Model Bilateral Investment Treaty of 2012.

Regarding the right of contracting States to take property of foreign investors, all the examined treaties recognize this right under the condition that such taking is done for public purpose, it is non-discriminatory, there is compensation ('prompt, adequate, effective') and due process of law. As we have already discussed the issue of the right of States to take

foreign property in the previous chapters, thus, we turn to the issue of compensation in the following.

Bilateral investment treaties use different standards regarding issues related to compensation. In the following we give an overview of different standards used by these treaties. Following this, we analyze different provisions that can be found in these treaties.

Standard of compensation

- prompt, adequate, effective
  (Art. 6 of the Model Bilateral Investment Treaty of 2012 and art. 3 of the Model Bilateral Investment Treaty of 1992 (United States of America); Art. 4 (1) of The Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of The Treaty Between the United States of America and the Republic of Armenia Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Bulgaria Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment; (After the breakup of Czechoslovakia in 1993, this treaty continued in effect for the successor States, the Czech Republic and Slovakia); Art. 3 (1) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Estonia for the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and Grenada Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between United States of America and the Republic of Kyrgyzstan Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Latvia Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between

the United States of America and the Republic of Moldova Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment. (After the breakup of Czechoslovakia in 1993, this treaty continued in effect for the successor States, Slovakia and the Czech Republic); Art. 3 (1) of the Treaty between the United States of America and the Democratic Socialist Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and The People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the People's Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement of Reciprocal Protection of Investment; Art. 4 (1) of the Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment; Art. 7 (1) of the Treaty between the United States of America and the Republic of Poland Concerning Business and Economic Relations; Art. 3 (1) of the Treaty between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Tunisia Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) (2) of the Treaty between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and

Protection of Investments.; Art. 3 (1) of the Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment.

- prompt, just, effective
  (Art. 3 (2) (3) of the Treaty between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments.)

Valuation standard

- fair market value
  (All the treaties, except those concluded with the Kingdom of Morocco, Panama and Tunisia. The provision on 'fair market value' can be found in the same articles where the provision on 'compensation' standards can be found, see supra.)
- full value
  (Art. 3 (2) (3) of the Treaty between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments; Art. 4 (1) of the Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Tunisia Concerning the Reciprocal Encouragement and Protection of Investment.)

Valuation time

- immediately before the expropriatory action was taken or became known
  (All the treaties examined, except the one concluded with the Kingdom of Morocco.)
- value on the date of the expropriation
  (Art. 3 (2) (3) of the Treaty between the United States of America and the Kingdom of Morocco.)

Time of payment and transfer

- without delay
  (Art. 3 of the Model Bilateral Investment Treaty of 1992 (United States of America); Art. 4 (1) of The Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment. art. 3 (1) of The Treaty Between the United States of America and the Republic of Armenia Concerning the

Reciprocal Encouragement and Protection of Investment; art. 3 (1) of the Treaty between the United States of America and the Republic of Bulgaria Concerning the Encouragement and Reciprocal Protection of Investment.; Art. 3 (1) Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment (After the break-up of Czechoslovakia in 1993, this treaty continued in effect for the successor States, the Czech Republic and Slovakia); Art. 3 (1) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment.; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Estonia for the Encouragement and Reciprocal Protection of Investment.; Art. 3 (1) of the Treaty between the United States of America and Grenada Concerning the Reciprocal Encouragement and Protection of Investment.; Art. 3 (1) of the Treaty between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment.; Art. 3 (1) of the Treaty between United States of America and the Republic of Kyrgyzstan Concerning the Encouragement and Reciprocal Protection of Investment.; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Latvia Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Moldova Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment. (After the break-up of Czechoslovakia in 1993, this treaty continued in effect for the successor States, Slovakia and the Czech Republic); Art. 3 (1) of the Treaty between the United States of America and the Democratic Socialist Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment.; Art. 3 (1) of the Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America

and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement of Reciprocal Protection of Investment; Art. 4 (1) of the Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment; Art. 7 (1) of the Treaty between the United States of America and the Republic of Poland Concerning Business and Economic Relations; Art. 3 (1) of the Treaty between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) (2) of the Treaty between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments; Art. 3 (1) of the Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment.)

- promptly
  (Art. 3 (1) of the Treaty between the United States of America and The People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the People's Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (2) (3) of the Treaty between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments.)

Interest

- at commercially reasonable rate from the date of expropriation
  (Art. 6 of the Model Bilateral Investment Treaty of 2012 (United States of America); Art. 4 (1) of The Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment; art. 3 (1) of the Treaty Between the United States of America and the Republic of Armenia Concerning the Reciprocal Encouragement and Protection of Investment; art. 3 (1) of the Treaty between the United States of America and the Republic of Bulgaria Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment (After the break-up of Czechoslovakia in 1993, this treaty continued in effect for the successor States, the

Czech Republic and Slovakia); Art. 3 (1) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Estonia for the Encouragement and Reciprocal Protection of Investment.; Art. 3 (1) of the Treaty between the United States of America and Grenada Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between United States of America and the Republic of Kyrgyzstan Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Latvia Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Moldova Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment (After the break-up of Czechoslovakia in 1993, this treaty continued in effect for the successor States, Slovakia and the Czech Republic); Art. 3 (1) of the Treaty between the United States of America and the Democratic Socialist Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment; Art. 4 (1) of the Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment.)

- at a commercially reasonable rate, such as LIBOR plus an appropriate margin, from the date of expropriation

  (Art. 3 (1) of the Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment;

Art. 7 (1) of the Treaty between the United States of America and the Republic of Poland Concerning Business and Economic Relations; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement of Reciprocal Protection of Investment.)

- at a rate equivalent to current international rates from the date of expropriation

  (Art. 3 (1) of the Treaty between the United States of America and The People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the People's Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment.)
- payment for delay as may be considered appropriate under international law

  (Art. 3 (1) of the Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments.)
- an amount which would put the investor in a position no less favorable than the position in which he would have been, had the compensation been paid immediately on the date of expropriation

  (Art. 3 (1) (2) of the Treaty between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments.)

Transferability

- freely transferable

  (All of the examined treaties, except those concluded with Morocco and Tunisia.)

The Model Bilateral Investment Treaty of 1992 requires payment of 'prompt, adequate and effective' compensation.[403] Regarding the standard of compensation this requirement is present in almost all the treaties examined during the first phase of our research (examined treaties were those signed before 1994 during this first phase), that is to say, the treaties more or less follow in their wording the Model Bilateral Investment Treaty of 1992.[404] The only exception is the bilateral investment treaty concluded with Morocco, that uses the following

403 Art. 3 of the 1992 Model Bilateral Investment Treaty (United States of America) states: "Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at the time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable."

404 Art. 4 (1) of the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of The Treaty Between the United States of America and the Republic of Armenia Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Bulgaria Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment. (After the breakup of Czechoslovakia in 1993, this treaty continued in effect for the successor States, the Czech Republic and Slovakia); Art. 3 (1) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Estonia for the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and Grenada Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between United States of America and the Republic

language: "[…] each Party shall pay promptly just and effective

---

of Kyrgyzstan Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Latvia Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Moldova Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment (After the breakup of Czechoslovakia in 1993, this treaty continued in effect for the successor States, Slovakia and the Czech Republic); Art. 3 (1) of the Treaty between the United States of America and the Democratic Socialist Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the People's Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement of Reciprocal Protection of Investment; Art. 4 (1) of the Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment; Art. 7 (1) of the Treaty between the United States of America and the Republic of Poland Concerning Business and Economic

compensation to the nationals or companies of the other Party."[405] Here, the difference regarding the standard of compensation is only that this treaty requires 'just' instead of 'adequate' compensation. However, it should be mentioned that the relevant commentary of the Restatement (Third) of Foreign Relations Law of the United States § 712 (*see supra*) finds the two standards to be substitutable. Above, when examining the 'just' compensation standard in the Norwegian Shipowners' case, we found that the court has defined 'just' compensation requirement as "a complete restitution of the *status quo ante*" (*see supra*). In the same sub-chapter of this work we concluded that the 'adequate' requirement is fulfilled if the compensation is based on a fair valuation, and that this criterion can be equated with 'full' compensation, meaning that the compensation should correspond to the full value of expropriated rights (*see supra*). We also found that following the Second World War the United States propagated the 'just' compensation standard (*see supra*). Therefore, we assume that, at least the American party to the treaties, considers 'adequate' standard to be substitutable with 'just' standard, and the reason for using in the treaty concluded with Morocco the latter standard might be some kind of compromise between the parties. However, not being familiar with the history of drafting of this treaty, we can only speculate. It should be also mentioned that the treaty signed with Egypt uses words 'freely realizable' instead of

---

Relations; Art. 3 (1) of the Treaty between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Tunisia Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) (2) of the Treaty between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments; Art. 3 (1) of the Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment.

405 Art. 3 (2) (3) of the Treaty between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments.

‘effective’, however we are on the opinion that basically in their content they have the same meaning.[406]

Similarly, almost all of the treaties use the ‘fair market value’ (before the expropriation became known) as valuation standard.[407] There are only three exceptions that use as valuation standard the expression ‘full value’. These are treaties concluded with Morocco, Panama and Tunisia.[408]

Regarding the time of valuation all the treaties concluded, except one, provide that the value of the property “immediately before the expropriatory action was taken or became known” should be calculated. Here the value of the property before the taking became publicly know would be taken into account, that is to say, we can interpret this provision as valuing the property on the value not affected by the taking. This offers an objective and fair valuation in our opinion. However, the Treaty concluded with Morocco provides only for value “on the date of the expropriation” should be the base for valuation.[409] If the expropriation becomes publicly known on the same date, it can practically make ‘useless’ the whole provision in our opinion, as a property that is under expropriation has practically no market value (it cannot be alienated). For example, if the value of the expropriated company is determined based on the market value of its shares on the date of expropriation,

406 We defined the ‘effective’ criterion as meaning that the compensation should be in a realisable form. *See supra*.

407 The provision on ‘fair market value’ can be found in the same articles where the provision on compensation standards can be found, *see supra*.

408 Art. 3 (2) (3) of the Treaty between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments; Art. 4 (1) of the Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Tunisia Concerning the Reciprocal Encouragement and Protection of Investment.

409 *Id.*

and such market value is already influenced by the information that the company will be expropriated the same day, and not the opening price of its shares is taken into consideration. Another interesting issue is the provision that is contained in some of the treaties that states that ”occurrence of the events that constituted or resulted in the expropriatory action” should not affect the value of the property.[410] This provision is important, because many times first the event (*e.g.,* revolution, coup) occurs and only after that is foreign property expropriated. Therefore, valuing the property on its value before such event occurs can assure better compensation for the investor.

Regarding time of payment and transfer, the majority of agreements state that it has to be paid ‘promptly’ and add words ‘without delay’. However, there are some exceptions, that is to say, some of the treaties do not mention any other requirement than that of ‘prompt’ payment.[411] We are of the opinion that there should be no practical difference between

410 Art. 3 (1) of the Treaty between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments; Art. 3 (1) of the Treaty between the United States of America and the People’s Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment’ Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the People’s Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment.

411 Art. 3 (1) of the Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments; Art. 3 (1) of the Treaty between the United States of America and the People’s Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the People’s Republic of the Congo Concerning the

the provisions.

Regarding interest on late payment, many different solutions can be found in these treaties. One is "interest at a commercially reasonable rate from the date of expropriation."[412] Another is "current interest from the date of the expropriation at a rate equivalent to current international rates"[413] These definitions are very vague, however, at least they state from what point of time shall be the compensation counted. Some provide for 'commercially reasonable' rate, without specifying the starting point of payment of such interest.[414] This is in our opinion not the best solution as it can lead to disagreements later. Others provide

---

Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (2) (3) of the Treaty between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments; Art. 3 (1) of the Treaty between the United States of America and the Republic of Tunisia Concerning the Reciprocal Encouragement and Protection of Investment.

412 Argentine, Armenia, Bulgaria, Czech Republic, Slovakia, Ecuador, Estonia, Grenada, Kazakhstan, Kyrgyzstan, Latvia, Moldova, Mongolia, Romania, Sri Lanka, Jamaica, Senegal.

413 Art. 3 (1) of the Treaty between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the Government of the United States of America and the Government of the People's Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment; Art. 3 (1) of the Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment.

414 Art. 4 (1) of the Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment.

for similar standards, specifying that LIBOR[415] rate should be applied "plus an appropriate margin".[416] There is a treaty, the one concluded with Egypt that provides for some kind of lump sum in case of delay in payment that should be "appropriate under international law", what is also very vague. A bit less vague is the provision that can be found in the agreement concluded with Turkey, that states "an amount which would put the investor in a position no less favorable than the position in which he would have been, had the compensation been paid immediately on the date of expropriation." Treaties with Morocco and Tunisia contain no provision regarding late payment, that can place the investor whose property is expropriated into very disadvantageous position if the State pays late and there is a considerable devaluation of the currency in which the payment is made or the investor needs the funds for its operations.

Regarding form of payment, the majority of treaties provide for effective, fully realizable and freely transferable compensation at the "prevailing market rate of exchange on the date of expropriation."[417] However, these provisions do not specify what market rate should be used. The market rate in the expropriating country, or in the investor's country, or the market rate on the world foreign exchange market or maybe somewhere else? Some specify this, like the treaty concluded with Cameroon, when

415 LIBOR is the most widely used benchmark or reference rate for short-term interest rates. It stands for the London Interbank Offered Rate and is the rate of interest at which banks borrow funds from other banks, in marketable size, in the London interbank market. *See* British Bankers' Association (visited on Feb. 22, 2005) <http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=141>.

416 Lithuania, Poland, Ukraine.

417 Argentine, Armenia, Bulgaria, Czech Republic, Slovakia, Ecuador, Estonia, Grenada, Kazakhstan, Kyrgyzstan, Latvia, Moldova, Mongolia, Romania, Sri Lanka, Bangladesh, PR Congo, Jamaica, Lithuania, Poland (however, it adds "rate of exchange for commercial transactions"), Senegal, Zaire (without "fully realisable"), Egypt (without "effective") However, as above mentioned effective can be equated with freely realisable.

providing for exchange rate generally used by International Monetary Fund. Some do not specify criteria for exchange, only provide that the compensation has to be 'effective' and 'freely transferable'.[418] Treaties concluded with Morocco and Tunisia contain only the 'effective' criteria.

In sum, we can conclude that the greatest deficiency of these treaties is that they do not define what should be understood on 'fair market value'. It is understandable that there is such a great variety of different investments in various fields that it would be very difficult to lay down certain specified conditions for the determination of the fair market value in each case. However, a solution could be to determine in these treaties an international body (*e.g.* arbitral or some association of accountants or other professionals) that will be authorized to determine what should be "fair market value" of the taken investment, and such decision should be binding for both parties.

Another problem is that the majority of these treaties provide for 'before' the expropriation, however if it was preceded with a special event, like revolution, the effect of such event is not taken into account. Thus, our suggestion would be to complete these treaties with provision that will insure that any prior relevant event that had significant influence on the value of the investment be taken into account, that is to say, the value before such relevant event happened and not just before the taking should be taken into consideration when determining compensation. Furthermore, we find it a problem that when these treaties use the wording "freely usable currency" they do not specify where. In the expropriating country, in the home country of the investor or in the world? It is also not specified at what place should be counted the "prevailing market rate of exchange"? And when these treaties talk about interest rate, what do they understand under "commercially reasonable" rate? These issues should be clarified avoiding future disputes. In our opinion, these problems can be very easily solved by inserting a provision that refers to an internationally recognized

418 Treaties concluded with Panama, Turkey and Ukraine.

financial institution (*e.g.* freely usable currency that is traded at London Currency Exchange, rate of exchange that of the day of expropriation).

Here, in the second part of our research we examine bilateral investment treaties concluded following the Model Bilateral Investment Treaty of 1994. This Treaty, regarding the standard of compensation requires 'prompt, adequate and effective' compensation paid without delay. The determination of the value of the taken property shall be based on the fair market value of the taken property immediately before the expropriatory action was taken and it should not be affected by the fact that the expropriation became known before the date of expropriation. The Model Treaty also provides that the compensation is "fully realizable and freely transferable". As we can see these provisions follow the old pattern. However, there are more detailed provisions on the issue of protection against denomination, thus, it states that:

> If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accured from the date of expropriation until the date of payment.
> If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than
> (a) the fair market value on the date of expropriation, converted into freely usable currency at the market rate of exchange prevailing on that date, plus
> (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.[419]

419 Art. 6 of the Model Bilateral Investment Treaty of 2012 (United States of America).

The research has showed that this text was followed in always all the treaties concluded after 1994.[420]

The fact that a uniform text was followed after 1994 shows the commitment and at the same time economic strength of the United States to assure either safe environment for their investors, or not to conclude at all any treaty. However, not having access to the documents of the negotiations (bargaining procedure) processes of concluding United States bilateral investment treaties with other countries, we can only speculate.

---

420 Art. 3 (1) – (4) of the Treaty between the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment; Treaty Between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment; Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment; Treaty between the Government of the United States of America and the Government of the Republic of Croatia Concerning the Encouragement and Reciprocal Protection of Investment; Treaty between the Government of the United States of America and the Government of the Republic of Georgia Concerning the Encouragement and Reciprocal Protection of Investment; Treaty between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investment; Treaty between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment. However, there is a slight difference in the Treaty between the Government of the Republic of Trinidad and Tobago the Government of the United States of America Concerning the Encouragement and Reciprocal Protection of Investment. In this treaty provisions related to expropriation are placed into art. 4 (2), and it states that "Compensation shall be paid without delay and be equivalent to the fair market value of the expropriated investment immediately before the expropriatorv action was taken or became known, whichever is earlier; and be fully realizable and freely transferable."

The latest Model Bilateral Investment Treaty of 2012 also provides for 'prompt, adequate and effective' compensation. Such compensation should represent the 'fair market value' of the taken property before the expropriation took place and be paid without delay. The compensation has to be also 'fully realizable' and 'freely transferable' according to the Model Bilateral Investment Treaty 2012. It also provides for "interest at a commercially reasonable rate for the currency" from the date of taking until the date of payment of the compensation.[421] However, this new model treaty does not offer any solution to the problems we have discussed *supra* in this part.

We can conclude that the United States of America is very consistent regarding the issue of compensation in case of taking of the investments of its investors, that is to say their protection in its bilateral investment treaties. We have seen that it deviated from its model treaties only in few cases.

5.4. Compensation for the taken property: case law

5.4.1. *The case law of the Iran – United States Claims Tribunal*

The work of the Iran – United States Claims Tribunal represents one of the most important body of international case law on the issue of compensation for expropriated foreign property.[422] We give as detailed

421 Art. 6 of the Model Bilateral Investment Treaty 2012 (visited Dec. 16, 2018) <https://www.state.gov/documents/organization/188371.pdf>.

422 However, it should be mentioned that some authors, like Sornarajah, are of the opinion that the decisions of the Tribunal should not have binding precedential value because such bodies and their decisions are usually result of political agreements in his opinion. *See* M. Sornarajah, The Pursuit of Nationalized Property 202 (1986); M. Sornarajah, International Law of Foreign Investment 380 (1994). As opposed to Sornarajah, based on our research regarding international case law and academic writings related to investment protection, we agree with Lillich and Magraw who argue that decisions like those of the Iran – United States Claims Tribunal are observed and invoked by international lawyers. *See* Richard B. Lillich et

analysis as possible on the work of the Tribunal in this field.[423] However, first let us see in brief the background and the history of the establishment of the Tribunal. In 1979, following the Iranian revolution and the 'hostage crisis', the Government of the United States froze Iranian assets worth over USD 12 billion.[424] With the mediation of Algeria, the parties (the United States and Iran) agreed to adhere to two accords made by the Algerian Government (General Declaration[425] and Claims Settlement

---

al., The Iran-United States Claims Tribunal: Its Contribution to the Law of state Responsibility 37 (1998).

On the work of the Tribunal *see generally:* David D. Caron & John R. Crook eds., The Iran-United States Claims Tribunal and the Process of International Claims Resolution (2000); Richard B. Lillich et al., The Iran-United States Claims Tribunal: Its Contribution to the Law of state Responsibility (1998); Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal (1994); Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen (1997); M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 53 (1988); John A. Westberg, International transactions and claims involving government parties: case law of the Iran-United States Claims Tribunal (1991); Khan Ratmatullah, The Iran-United States Claims Tribunal: controversies, cases, and contribution (1990). George H. Aldrich, The jurisprudence of the Iran –United States Claims Tribunal (1996).

423 On the establishment, work and procedures of the Tribunal *see* David D. Caron & John R. Crook eds., The Iran-United States Claims Tribunal and the Process of International Claims Resolution (2000).

424 *See* Richard B. Lillich et al., The Iran-United States Claims Tribunal: Its Contribution to the Law of state Responsibility 2-8 (1998).

425 Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 19 January 1981 in Iran – United States Claims Tribunal Reports, 1 (Pirrie, S. R. ed.), 3-8 (1985). *See also* Richard B. Lillich et al., The Iran-United States Claims Tribunal: Its Contribution to the Law of state Responsibility 11-13 (1998).

Declaration[426]).[427] These documents established a tribunal that aimed to settle disputes between the parties.[428] This Tribunal applied at least five different sources of international law: (1) the Claims Settlement Declaration (and other agreements related to the Algiers Accords),[429] (2) the Treaty of Amity (Treaty) between Iran and the United States,[430] (3) other international agreements (as subsidiary means[431]),[432] (4) customary

---

426 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 in IRAN – UNITED STATES CLAIMS TRIBUNAL REPORTS, 1 (Pirrie, S. R. ed.), 9-12 (1985).

427 *See* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN – U. S. CLAIMS TRIBUNAL 1-6 (1994); *See* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 11-13 (1998).

428 As the General Declaration formulates: "to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration". *See* Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 19 January 1981- General Principles B. in IRAN – UNITED STATES CLAIMS TRIBUNAL REPORTS, 1 (Pirrie, S. R. ed.), 3 (1985); *See also* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 13-22 (1998).

429 *E.g.,* in cases Islamic Republic of Iran v. United States, 5 Iran-U.S. Cl. Trib. Rep. 251,266 (1984-we) and Sedco v. National Iranian Oil Company, 15 Iran-U.S. Cl. Trib. Rep. 23 (1987-II).

430 *E.g.,* in case Amoco International Financial Corp. v. Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 223 (1987-II).

431 *See* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 27 (1998).

432 *E.g.,* like interpreting the 1930 Hague Convention Concerning certain questions relating to the conflict of nationality laws. *See also* RICHARD B. LILLICH ET AL., THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 27 (1998).

international law[433] and (5) general principles of law[434].[435] Regarding the applicable law, in the opinion of Mouri, the Tribunal was hesitant to establish it, except in a few cases.[436] Bergmann, a German scholar, opines that the basis of the decisions of the Tribunal was not the international law, but primarily the Treaty of Amity between the United States and Iran.[437] Moreover, Mouri argues that the Tribunal was generally of the opinion that, regarding the standard of compensation, in the early stages of the Tribunal's work, the international law was applied. However, later there were many awards which found that the Treaty of Amity is the applicable *lex specialis*.[438] In some cases, the Tribunal even took the standpoint, that the United Nations General Assembly Resolutions are not directly binding upon states, thus, generally are not evidence of customary law.[439] Furthermore, they set "ambiguous" standards concerning the amount of compensation.[440] The Tribunal also rejected, as guidance for customary international law, the settlement practices of states and investors (or other states) in the case of investment disputes.[441] The reason for this might

433 *E.g.,* in case Amoco International Financial Corp. v. Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 223 (1987-II).

434 *E.g.,* in case Pomeroy v. Islamic Republic of Iran, 2 Iran-U.S. Cl. Trib. Rep. 372, 380 (1983-we).

435 *See* Richard B. Lillich et al., The Iran-United States Claims Tribunal: Its Contribution to the Law of state Responsibility 27 (1998).

436 *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 296 (1994).

437 *See* Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen 64 (1997).

438 *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 297, 301, 306 (1994).

439 In Sedco case. *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 53, 110-11 (1988).

440 *See id.*

441 *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 53, 111 (1988).

be that such settlements are usually the result of bargaining and are not based on legal norms and procedures. The Tribunal mostly relied on legal writing and judicial and arbitral precedents.[442] On the other hand, Matti Pellonpaa and Fitzmaurice argue that the Treaty of Amity was regarded as the *lex specialis* to be followed by the Tribunal. The Tribunal maybe wanted to avoid the uncertainty of international law and to have a firm legal framework for its decisions, an international instrument that is accepted by all the parties involved in the dispute. At the same time, we might presume that the Tribunal did not want to deprive its decisions of international recognition, and therefore it obviously found that its decisions are in line with international law and standards. For example, concerning expropriation issues, the Tribunal did not conceive Treaty standards different from the standards of customary international law.[443]

The Tribunal was not unanimous concerning the issue of the standard of compensation.[444] Accordingly, concerning the issue of the standard of compensation, awards were either based on international law or on the Treaty of Amity. The former, delivered on the basis of international law, can be further categorized: awards that applied the *standard of appropriate compensation*[445]

442 *See id.* at 112.

443 *See* Richard B. Lillich et al., The Iran-United States Claims Tribunal: Its Contribution to the Law of state Responsibility 187, 208 (1998).

444 *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 351 (1994); Richard B. Lillich et al., The Iran-United States Claims Tribunal: Its Contribution to the Law of state Responsibility 325-327 (1998).

445 Mouri is of the opinion that "the term *appropriate* denotes that the standard should strike a balance between the interests of the expropriating and expropriated parties and be able to fairly, justly, equitably or appropriately evaluate the circumstances pertinent to each particular case, which automatically brings into play the points of view of the expropriating States, together with their expectations". *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 364 (1994).

and those that applied the *full compensation*[446] *standard*.[447]

For example, in the Sola Tiles award[448], the Tribunal applied the *appropriate compensation standard*. In 1982 Sola Tiles, Inc., owner of Simat Ltd. (incorporated in Iran in 1975), filed a claim against the Government of Iran for damages and it asked for compensation of USD 3.2 million (including lost profits and goodwill) that arose from the expropriation of the assets of Simat Ltd.[449] Simat Ltd. was importing and reselling ceramic tiles.[450] The Israeli owner of Simat Ltd. established and registered Sola Tiles, Inc. in California in May 1979 with two American citizens.[451] On May 25, 1979 all the assets of Simat Ltd. were transferred to Sola Tiles, Inc.[452] The claimant alleged that from June 1979 "various steps were taken by the local Provisional Revolutionary Committee [of Iran] to interfere with the business of Simat". According to the claimant, the interference eventually amounted to taking of control and expropriation of the company's assets.[453] Iran denied the expropriation and at the same time disputed the valuation submitted by the claimant.[454] The Tribunal accepted the argument of the claimant that its assets were expropriated. Regarding the issue of valuation, the Tribunal was of the

---

446 Mouri further states that "the term[s] … *full* [is] usually looked at from the point of view of the price or the value that is required by the owner to replace the property taken." *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 364 (1994).

447 *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 363 (1994).

448 Sola Tiles, Inc. v. Islamic Republic of Iran, 14 Iran– U.S. Cl. Trib. Rep. 235 (1988).

449 *Id.* para. 1 and 3.

450 *Id.* para. 2.

451 *Id.* para. 4.

452 *Id.* para. 5.

453 *Id.* para. 3.

454 *Id.* para. 7.

opinion that the compensation should be based on the *fair market value* of the company.[455] Regarding the valuation method, the Tribunal opined that valuation should not be based only on the *going concern value*, but other circumstances should also be taken into account. The reason for this was an evidentiary problem, namely, the claimant had difficulties to access the complete documentation related to its property. First, the Tribunal took into consideration the estimation of physical assets and accounts receivable of Simat by business partners who wanted to acquire part of the company shortly before the revolution.[456] Actually, the opinion of these business partners was the starting point for the Tribunal's own assessment.[457] The Tribunal gave estimate of physical assets, accounts receivable and the expropriated cash.[458] The claimant claimed compensation also for the goodwill and lost future profits of the company.[459] However, the Tribunal, when deciding this issue, took into consideration the changed (deteriorated) business environment in Iran - that affected also newly established businesses - and decided not to award lost future profits or goodwill.[460] The Tribunal called the compensation awarded "a global assessment of the compensation due, representing the value of Simat's business".[461] The Tribunal also awarded interest. Although, there are many decisions of the Iran – United States Claims Tribunal in which the Tribunal awarded interest, this award is important because it explicitly tells us what standards and methods were used for the calculation of the awarded interest. The interest was calculated at a rate:

> based approximately on the amount that it would have been able to earn had it had the funds available to invest in a form

455 *Id*. para. 52.
456 *Id*. para. 54-56.
457 *Id*. para. 57.
458 *Id*. para. 60.
459 *Id*. para. 61.
460 *Id*. para. 62-64.
461 *Id*. para. 65.

> of commercial investment in common use in its own state. Six-month certificates of deposit in the United States are such a form of investment for which average interest rates are available from an authoritative official source, the Federal Reserve Bulletin.[462]

According to the award, the respondent had to pay to the claimant USD 625,000 plus simple interest at the rate of 10.75 percent per annum from January 1, 1980 up to and including the date on which the escrow agent instructed the depositary bank to effect payment out of the security account, plus costs of USD 20,000.[463] In this case, the Tribunal stated that *appropriate compensation standard* has a widespread use, noting, at the same time, that in its opinion the word *appropriate* in fact means *adequate*.[464]

A good example of an award requiring *full* compensation is the American International Group, Inc.[465] case. In 1979 all insurance companies operating in Iran were nationalized by a special law on nationalization of insurance companies. One of these was the Iran America Insurance Corporation which was organized under the laws of Iran in 1974. American International Life Insurance Company, a company incorporated in Delaware, and three other companies, wholly owned subsidiaries of American International Group, Inc., had 35 percent of shares in Iran America. American International Group, Inc. claimed compensation for the taken investment (USD 39 million). Regarding the issue of valuation, the Tribunal was of the opinion that it should be based on the *fair market value* of the business interest in the company of the claimant on the date of the nationalization. However, the problem that the Tribunal faced when it wanted to determine the *fair market value*

---

462 *Id*. para. 66.

463 *Id*. para. 68.

464 *Id*. para. 44-49.

465 American International Group, Inc. v. Islamic Republic of Iran (Award No. 93-2-34) IRAN-U.S.C.T.R. 96.

was that there was no active market for the shares of Iran America. The Tribunal concluded that, in such case, the best solution is to value the company as a going concern, taking into consideration all the relevant factors, like the opinion of independent appraisers, prior changes in the "general political, social and economic conditions" that might have affect on the business prospects of the company. It took into consideration not only the net book value of the company, but also the goodwill and future prospects and profits (had the company been allowed to continue its business under its former management). Based on all these factors, the Tribunal made an approximation of the value of the company.[466] The Tribunal awarded USD 7.1 million plus 'simple interest' at the annual rate of 8.5 percent from the date of the expropriation up to and including the date on which the escrow agent instructed the depositary bank to effect payment of the award.[467] In an interlocutory award, the Tribunal concluded that, before the Second World War, customary international law required *full* compensation, that is to say, "compensation equivalent to the full value of the property taken". However, the Tribunal, at the same time, admitted that, since then, this standard has been challenged by many countries and legal commentators.[468]

The first award to support the premise that standard of compensation, as established in the Treaty of Amity, has to prevail as *lex specialis* was

466 *Id.*

467 *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 371 (1994).

468 This is supported for example by lump sum agreements concluded, where compensation usually amounted only to the half value or even less of the property taken, and by United Nations Resolutions of the sixties and seventies. *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 53, 104-05 (1988).

in the INA Corporation[469] case.[470] Following the Iranian revolution Iran took (with the law on nationalization of insurance companies) the stake of INA Corporation in Sharg insurance company registered in Iran. INA claimed USD 285,000 representing what it alleged to be the "going concern value of its shares", together with interest at 17 percent. The Tribunal stated that the claimant is entitled to the *fair market value* of its shares in Sharg.[471] The Tribunal found that the price INA paid in an arm's length transaction for the shares one year before the nationalization represented the *fair market value* of the shares of Sharg as a going concern. The claimant, because of the relatively small amount of the claim, did not claim compensation for future profits (the valuation by experts would have been too costly having in mind the small amount of the claimed compensation), and the Tribunal accepted this. The Tribunal obliged Iran to pay USD 285,000 together with simple interest thereon at 8.5 percent *per annum* from the date of the expropriation up to and including the date of the award.[472] This case also shows that the Tribunal accepted, as one of valuation methods, the *going concern* valuation method.

The Treaty of Amity itself contains the *standard of just compensation*, which is defined by the Treaty as "full equivalent of the property taken". The Tribunal applied a wide property concept, meaning that, when determining the value of the property, the Tribunal took into consideration also the goodwill and the

---

469 INA Corporation v. Islamic Republic of Iran (Award No. 184-161-1) 8 IRAN-U.S.C.T.R. 373.

470 *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 378 (1994).

471 The Tribunal in this case defined *fair market value* as "the amount which a willing buyer would have paid to a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalisation itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares".

472 INA Corporation v. Islamic Republic of Iran (Award No. 184-161-1) 8 IRAN-U.S.C.T.R. 373.

future profitability (or expected profits) of the taken enterprise[473].[474] Hence, the Tribunal applied in many instances the *standard of just compensation*, interpreting it as *full equivalent* of the property taken.[475] Good examples are cases like the case of Thomas Earl Payne[476] and Phelps Dodge Corporation.[477]

In the former case, the claimant, Payne (American citizen) had ownership interest in Irantronics and Berkeh companies. These companies were dealing with electronic equipment and they were incorporated in Iran.[478] In 1980 the management of the company was taken over by a manager appointed by the Minister of Commerce of Iran.[479] The claimant claimed compensation of USD 7.2 million for his ownership interests in Irantronics and Berkeh, plus interest and costs.[480] The Tribunal applied the *standard of just compensation*, meaning compensation for the *full* equivalent of the taken property, based on its *fair market value*.[481] The Tribunal established

473 *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 53, 58 (1988).

474 *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 378 (1994); However, *see*: art. 4 (2) of the Treaty of Amity, Economic Relations, and Consular Rights, signed on 15 August 1955 and entered into force on 16 June 1957 between Iran and the United States of America. 8 U.S.T. 899, 284, U.N.T.S. No. 4132, at 933.

475 *See* Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal 380-81 (1994).

476 Payne v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 3 (1986).

477 Phelps Dodge Corp. v. Iran, 10 Iran-U.S. Cl. Trib. Rep. 121 (1986).

478 Payne v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 3 (1986), para. 3-5.

479 *Id.* para. 8.

480 *Id.* para. 1 and 2.

481 *Id.* para. 29-30. The Tribunal defined *fair market value* as "amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalization itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares".

that, at the time of the taking, the two companies were going concerns. Thus, it valued their shares on the *fair market value* basis. However, it took into consideration the effects of the revolution prior to the taking of the companies on the value of their shares, debts and tax liabilities.[482] The Tribunal awarded USD 900,000 plus simple interest at the rate of 11.25 percent *per annum*, calculated from the date of expropriation up to and including the date on which the escrow agent instructed the depositary bank to effect the payment out of the security account.[483]

In the latter case, the claimant, Phelps Dodge Corporation, a company from New York, became one of the founders of an Iranian company, SICAB. SICAB was established to manufacture wire and cable products in Iran.[484] Following the revolution, SICAB was expropriated, and Phelps Dodge claimed damages (USD 7.5 million) plus interest and costs.[485] When determining the compensation, the Tribunal has accepted the standard of *just* compensation which should be counted on the basis of *full* equivalent of the taken property.[486] However, based on the factual evidence presented to the Tribunal by the parties (SICAB without the support of the service companies like Phelps Dodge would have had no business prospects), the Tribunal refused to value the company as going concern (that is to say, it refused to value goodwill and future profits). It decided that the claimant, Phelps Dodge, is entitled to compensation that equals its investment and not more.[487] The Tribunal awarded USD 2,437,860 and "simple interest" at the rate of 11.25 percent per annum to the claimant, from the date of expropriation up to and including the date on which the escrow agent instructed the depositary bank to effect payment out of the security account.[488]

---

482 *Id.* para. 31.

483 *Id.* para. 42.

484 Phelps Dodge Corp. v. Iran, 10 Iran-U.S. Cl. Trib. Rep. 121 (1986), para. 1-4.

485 *Id.* para. 29.

486 *Id.* para. 28-29.

487 *Id.* para. 30-31.

488 *Id.* para. 34.

In both of the previous cases, the Tribunal scrutinized profoundly all the facts of the cases to determine the *just* compensation, that is to say, the *full* equivalent of the taken property based on its *fair market value*. In our opinion, it follows that there cannot be a uniform formula for determining *just* compensation. Such compensation is determined by taking into account all the circumstances of single cases.

Examining the latest award of the Tribunal in the Frederica Lincoln Riahi v. the Government of the Islamic Republic of Iran case, we can say that, in this award, the Tribunal invoked all the above mentioned milestone cases before reaching the final award.[489] In this case Frederica Lincoln Riahi filed a claim in 1982 against the Government of Iran in which she sought compensation for equity interests in a number of companies expropriated in 1980 by Iran.[490] Concerning the time when the claim is considered to have arisen, the Tribunal held that in its previous decisions it had been established that an expropriation claim is considered to arise on the date of the taking.[491] The claimant based some of its claims on *de facto* taking by the Government, that is to say, on creeping expropriation of Riahi's property.[492] Therefore the Tribunal has also argued that:

> In situations where the alleged expropriation is carried out through a series of measures interfering with the enjoyment of the claimant's property rights, the cause of action is deemed to have arisen on the date when the interference, attributable to the state, ripens into an irreversible deprivation of those rights, rather than on the date when those measures began. The point of time at which interference ripens into a taking

489 Frederica Lincoln Riahi v. The Government of the Islamic Republic of Iran, Iran-U.S. Cl. Trib. Rep. cite: IRAN FINAL AWARD 600-485-1, signed February 27, 2003, filed February 27, 2003.

490 *Id.* para. 1 and 2.

491 *Id.* para. 42.

492 *Id.* para. 343.

> depends on the circumstances of each case and does not require the transfer of legal title.[493]

Regarding the standard of compensation, in the Frederica Lincoln Riahi case, the Tribunal referred to previous decisions in which it had stated that, according to the Treaty of Amity and customary international law, taking requires compensation equal to the *full* equivalent of the value of the interests in the property taken.[494] Concerning valuation standard, in this case, the Tribunal invoked previous decisions, such as establishing that the valuation of the expropriated property should be made on the basis of the *fair market value*. This was defined in the INA case as:

> [T]he amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalisation itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares.[495]

The Tribunal stated, on the other hand, that "prior changes in the general political, social and economic conditions which might have affected the enterprise's business prospects as of the date the enterprise was taken should be considered".[496] Here, the Tribunal considered the effects of the Islamic Revolution, and acknowledged the possible influence of the turbulence on the economy, that is to say, on share prices of the company.[497] Since the shares were not traded freely on an active and free market, the Tribunal used different methods to determine the price that a reasonable buyer would be willing to pay for the company's

493 *Id.* para. 344.
494 *Id.* para. 394.
495 *Id.*
496 *Id.*
497 *Id.* para. 393-394.

shares in a free-market transaction.[498] In the opinion of the Tribunal, the company was a profitable, ongoing business at the time of the expropriation, and therefore it decided to value it as a going concern.[499] At this point, the Tribunal referred to the Amoco case, where it was held that "a going concern value encompasses not only the physical and financial assets of the undertaking", but, also the "intangible valuables which contribute to its earning power", like: contractual rights, goodwill and commercial prospects.[500] The Tribunal also noted that it is a settled rule of international law that compensation for speculative or uncertain damage cannot be awarded.[501]

Based on our research and some of the most important cases of the Tribunal discussed above, we can support the opinion of scholars like Pellonpaa, Fritzmaurice and Bergmann who concluded, on the bases of the case law, that the general tendency in the decisions of the Iran Claims Tribunal is to award compensation not only for the lost material property, but, in many cases, also for the lost future profits.[502] In addition, Pellonpaa and Fritzmaurice state that the standard of *full* compensation is still the rule of customary international law.[503]

Regarding valuation methods[504], as we can see from the cases examined, the Tribunal applied various methods. One of the most widely used

498 *Id.* para. 447.

499 *Id.* para. 448.

500 *Id.* para. 448-454.

501 *Id.* para. 450.

502 *See* Heidi Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen 68 (1997); *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 53, 123-26 (1988).

503 *See id.*

504 Valuation method is the technique of determining the value of the taken property.

methods was the valuation based on *fair market value* on the date of taking in cases when the foreign investors' equity interest in an enterprise was taken.[505] *Fair market value* was defined as "the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximise his financial gain, and neither was under duress or threat".[506] Another important valuation method in the practice of the Tribunal's work was the valuation as *going concern*.[507] This was defined as the full value of the property, business or rights in question as an income-producing asset. It also includes lost future profits and goodwill as we could see above.[508] However, in some cases, other methods were also employed, such as *discounted cash flow*[509]

---

505 *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 131 (1988).

506 *See id.*

507 *See id.* at 134. *Going concern* is defined by Encarta World English Dictionary as "a business that is operating successfully and is likely to continue to do so, especially when considered as an asset to which a value can be assigned". (visited on Nov. 22, 2013) <http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=561547195>. Investorswords dictionary defines it as: "The idea that a company will continue to operate indefinitely, and will not go out of business and liquidate its assets. For this to happen, the company must be able to generate and/or raise enough resources to stay operational." (visited on Nov. 22, 2013) <http://www.investorwords.com/cgi-bin/getword.cgi?2189>.

508 *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 53, 134 (1988).

509 According to Investopedia Dictionary *discounted cash flow* is a valuation method used to estimate the attractiveness of an investment opportunity. It uses future free cash flow projections and discounts them to arrive at a present value, which is used to evaluate the potential for investment. Most often discounted by the weighted average cost of capital. If the value arrived at through discounted cash flow analysis is lower then the current cost of the investment, the opportunity may be a good one. Investope-

method of valuation, methods based on *liquidation value*[510], *net book value*[511] and *replacement value*[512].[513]

As to the form of payment, *effectiveness* of payment was insured for claimants by the practice of the Tribunal. The Algerian Declaration established so-called 'security accounts' from which payments can be made to successful claimants in United States dollars.[514] Concerning the time of payment, the practice of the Tribunal suggests that *prompt* payment is not a condition of the legality of the taking, however, in general, it was of the opinion that the compensation should be paid at the time of the taking or it should be accompanied with interest from the time of the taking.[515]

---

dia Dictionary (visited on Oct. 5, 2013) <http://www.investopedia.com/terms/d/dcf.asp>.

510 According to Investorwords Dictionary, *liquidation value* is the estimated amount of money that an asset or company could quickly be sold for, such as if it were to go out of business. If the liquidation value per share for a company is less than the current share price, then it usually means that the company should go out of business (or that the market is misvaluing the stock), although this is uncommon. Investorwords Dictionary (visited on Oct. 5, 2013) <http://www.investorwords.com/2836/liquidation_value.html>.

511 According to Investorwords Dictionary the *net value* of an asset equals to its original cost (its book value) minus depreciation and amortization. Investorwords Dictionary (visited on Oct. 5, 2013) <http://www.investorwords.com/2836/net_value.html>.

512 According to Investorwords Dictionary replacement value is the value of an asset as determined by the estimated cost of replacing it. Investorwords Dictionary (visited on Oct. 5, 2013) <http://www.investorwords.com/4184/replacement_value.html>.

513 *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal* 19 Netherlands Yearbook of International Law 139, 149, 160, 163 (1988).

514 Art. 6 and 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 19 January 1981 in Iran – United States Claims Tribunal Reports, 1 (Pirrie, S. R. ed.), 5-6 (1985).

515 *See* M. Pellonpaa, M. Fitzmaurice, *Taking of Property in the Practice of the*

We are of the opinion that the Tribunal tried to compensate the investors as much as possible for their taken property, regardless of what term was used for the standard of compensation.[516] Comparing the standard of compensation in the case law of the Iran – United States Claims Tribunal to the standard used in other international cases examined in this work, it can be said that the Tribunal offers a high standard of compensation, protecting investors who lost their property in Iran. At the same time, it should be noted that, many times, the Tribunal based its valuation on approximation of the value. The reason for this might be a tendency in the decisions of the Tribunal, according to which it tries to take into consideration all the circumstances that had effect on the taking of the property.

5.4.2. *ICSID case law*

There are many ICSID arbitration cases related to expropriation of foreign investments. Because of lack of space, we examine only the most important of these cases, where the issue of compensation was raised. One of these is the Compania del Desasarrollo v. the Republic of Costa Rica, where the claimant, a company incorporated in the Republic of Costa Rica with majority ownership of United States citizens, initiated arbitration in 1995 against the Republic of Costa Rica, related to an expropriation dispute.[517] The dispute was about the amount of the

---

Iran-United States Claims Tribunal 19 Netherlands Yearbook of International Law 53, 131 (1988).

516 Whenever it was possible, it valued the companies taken as going concern taking into account the goodwill and the lost future profits. It based its valuation on the *fair market value* of the taken property.

517 Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, para. 1. (ICSID Case No. ARB/96/1). The award can be found at: ICSID Info page, ICSID Cases (visited on Jan. 24, 2013 <http://www.worldbank.org/icsid/cases/santaelena_award.pdf>. *See also* Carlos Jiménez Piernas (ed.), The Legal Practice in International Law and European Community Law, 221 (2007).

compensation for the expropriated property of the company. Costa Rica in 1978 expropriated a coastline property, bought by the claimant earlier for developing tourist resort, invoking environmental reasons. It offered as compensation for the expropriation USD 1.9 million, however the company did not accept it.[518] This was followed by long proceedings in front of Costa Rican Courts without any success.[519] Costa Rica was not willing to refer the matter to international arbitration until it was forced by the United States to do so (the United States threatened with non-approval of international financial aids to the country).[520] Finally, the issue was brought to ICSID arbitration. The claimant estimated that USD 41.2 million is the *fair* and *full* (based on *fair market value*) compensation for the property,[521] while the respondent's estimation of current *fair market value* was USD 2.9 million.[522] The respondent also took into consideration the 'current' environmental regulations (entered into force after the expropriation) that restricted the use of the property for commercial purposes.[523] The claimant contested that the arbitral Tribunal take into account, when estimating the value of the property, any regulation that entered into force after the expropriation decree was issued.[524] Thus, the central issue of the arbitration was to decide the amount of compensation to be paid to Compania del Desarrollo.[525] The arbitral Tribunal agreed with the parties that *fair market value* on the date of expropriation of the property should be paid as compensation.[526] Thus, the Tribunal was of the opinion that "full compensation for the fair market value of the property, *i.e.,* what a willing buyer would pay to a

518 Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, para. 3, 15-17.
519 *Id.* para. 19-26.
520 *Id.* para. 22-26.
521 *Id.* para. 29.
522 *Id.* para. 35.
523 *Id.*
524 *Id.* para. 37.
525 *Id.* para. 54.
526 *Id.* para. 70.

willing seller" has to be paid.[527] However, it stated that the environmental character of the expropriation does not affect the compensation.[528] Even so, the Tribunal had to establish the exact date of the expropriation first. Regarding this issue, the Tribunal examined different definitions of *de facto* expropriation,[529] since it was of the opinion that a property had been expropriated when the effect of the measures taken by the state "has been to deprive the owner of title, possession or access to the benefit and economic use of his property".[530] Finally, the Tribunal concluded that, notwithstanding that the claimant remained in the possession of the property, the expropriation occurred on the date when the expropriating governmental decree was issued.[531] Therefore, the value of the property on this date was taken into consideration.[532] As there were only two appraisals available to the Tribunal (one from each party from 1978), it made an approximation based on these valuations, and came to the value of USD 4.1 million.[533] This was corrected with the interest counted from the time of the expropriation. Moreover, the Tribunal did not want to use *full compound interest*[534], because the claimant remained in possession. At the same time, as the claimant could use neither the property for development purposes, nor the amount of compensation for

527 *Id.* para. 73.
528 *Id.* para. 71.
529 *See supra* the notion of *creeping expropriation*.
530 *Id.* para. 77.
531 May 5, 1978. *Id.* para. 80.
532 *Id.* para. 83.
533 *Id.* para. 90.
534 Merriam-Webster Online Dictionary defines the term as "interest computed on the sum of an original principal and accrued interest" (visited on Mar. 12, 2013) <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=compound+interest>; Money Glossary defines it as: "interest rate in which the interest is calculated not only on the initial principal but also the accumulated interest of prior periods." (visited on Mar. 12, 2013) <http://www.moneyglossary.com/?w=Compound+Interest>.

a long time, the Tribunal did not want to award simple interest either.[535] Consequently, the Tribunal awarded compound interest "adjusted by taking into account all the relevant factors",[536] and thus, the final amount was USD 16 million.[537]

In another case, Tecmed, a company with registered seat in Spain, claimed compensation from the Mexican Government for expropriation.[538] The claimant's claim, that is to say, the estimated market value of the investment was USD 52 million, based on *discounted cash flow* calculation method.[539] The respondent objected this method, because in its opinion the investment operated for too short period of time as going business, and it requested the calculation of damages based on "the investment made, upon which the investment's market value would be determined".[540] The Tribunal also took into consideration the money paid for the investment at the tender, USD 4 million.[541] After the examination of the facts, the Tribunal also concluded that, because of the short period of operation of

535 Compania del Desarrollo para. 105.

536 *Id.* para. 106.

537 *Id.* para. 107.

538 Award in Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2). ICSID web page (visited on March 16, 2013) <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>, para. 183.

539 *Id.* under para. 185. Home Glossary defines 'discounted cash flow' as: "A method to estimate the value of a real estate investment, which emphasizes after-tax cash flows and the return on the invested dollars discounted over time to reflect a discounted yield. The value of the real estate investment is the present worth of the future after-tax cash flows from the investment, discounted at the investor's desired rate of return." (visited on Jan. 25, 2013) <http://www.yourwebassistant.net/glossary/d7.htm#discounted_cash_flow >.

540 *See id.*; However, the respondent did not miss to challenge the result of the discounted cash flow method with the estimation of its own expert witnesses between USD 1,8 and 2,1 million. *See id.*

541 *Id.* para. 186.

the investment and the lack of objective data, the discounted cash flow calculation method should be disregarded.[542] The agreement between the parties, on which the arbitration was based, stated in its article 5.2. that in the case of expropriation:

> [C]ompensation shall be equivalent to the fair market value of the expropriated investment immediately before the time when the expropriation took place, was decided, announced or made known to the public […] valuation criteria shall be determined pursuant to the laws in force applicable in the territory of the Contracting Party receiving the investment.[543]

Therefore, the Tribunal examined the Mexican law on expropriation that stated that the compensation shall indemnify for the "commercial value of the expropriated property, which in the case of real property shall not be less than the tax value".[544] The Tribunal interpreted this requirement as compensation based on the *market value*.[545] When determining the value of the expropriated investment, the starting point for the Tribunal was the price for which the investment was acquired at the tender.[546] Besides, it also considered additional investments made by the claimant,[547] and net income of the investment for one additional year.[548] This latter, basically covered managerial and organizational skills and goodwill.[549] Finally, the Tribunal awarded USD 5.5 million.[550] The

542 *Id.*

543 *Id.* para. 187.

544 *Id.*

545 *Id.* 188.

546 *Id.* para. 191; Neither the respondent nor the claimant challenged this method for determining the *fair market value*.

547 However, it is a procedural matter. It should be mentioned that the court recognised as additional investment only investments that were supported by documentary evidence. *See id.* para. 195.

548 *Id.* para. 194.

549 *Id.*

550 *Id.* para. 201.

award required *effective* and *full* payment.[551] It also prescribed compound interest (at annual rate of 6 percent) until the payment from the date of the expropriation (this is actually the date on which the license to operate should have been prolonged)[552].[553]

In MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro case,[554] Zeljezara Niksic AD Niksic (ZN) was Montenegro's sole arc furnace steel mill, originally state-owned, and considered one of the largest manufacturing companies of Montenegro. It was privatized in 2006, when MN Specialty Steel Ltd. (MN) successfully bided for 66.7008 percent of the share capital of ZN. Later in that year, MN signed the shares sales agreement with the relevant government actors. Under this agreement, MN was obliged to make a series of investments. In particular, MN agreed to invest an aggregate amount of €114 million, in a 5-year period from the closing of the privatization agreement, with a minimum annual investment amount set by the parties (€14 million in 2007, €20 million in 2008, €40 million in 2009, €20 million in 2010 and €20 million in 2011). However, it appeared that ZN struggled to meet its obligations after the 2006 privatization, as production volumes were increased, without adequate working capital funding. This constrained ZN's ability to improve the steel mill's functioning. These difficulties led to MN selling its shares in ZN to one of the Claimants, MNSS B. V. (MNSS), a private company constituted under the laws of the Netherlands. This was done under a Share Purchase Agreement (SPA), for an aggregate consideration of €16,651,799 of which €2,023,597 was attributed to the ZN shares, and €14,628,202 to the assigned MN assets. The consideration of the SPA was satisfied through a cash payment of €7,050,000 from MNSS to MN, the assumption by MNSS of MN's long-term loan obligation to Prva Banka in an amount

551 *Id.*

552 *Id.* para. 39.

553 *Id.* 201.

554 *See* Investment Policy Hub (visited on Dec. 11, 2018) <http://investment-policyhub.unctad.org/ISDS/Details/494>.

of ca. €1.9 million, and the issuance of a 19% shareholding of MNSS by MN. A few days before this agreement took place, the Government of Montenegro amended the original privatization agreement in relation to the timing and amounts of required capital expenditure to be invested. In relation to this, MN assigned its rights under this agreement to MNSS in 2008. Besides this equity investment, MNSS made five loans to ZN between 2008 and 2011.

In 2009, MNSS assigned its outstanding loan claims under its first loan to the other Claimant, Recupero Credito Acciaio N.V (RCA), a private company constituted under the laws of Curaçao. The maturity date of the first loan was extended twice, first as part of a ZN refinancing plan approved by the Montenegro government, and secondly, as part of a restructuring plan. Before the agreement between MN and MNSS, MN and ZN had used Prva Banka. MNSS continued to use this Bank in relation to its obligations under the privatization agreement and for other purposes.

However, this bank suffered a liquidity crisis in 2007, which only worsened with the financial crisis in 2008. This led to Prva Banka delaying the honoring of MNSS payment orders between July 2008 and October 2009. In June 2009, Prva Banka, MNSS and ZN signed a refinancing protocol for the Bank, whereby the Bank would pay €2.5 million to ZN's creditor (CVS) from MNSS' CAPEX[555] account by 23 June 2009, but in return Prva Banka was entitled to apply the balance of the funds in ZN's account (following the transfer of those funds from MNSS' investment account to ZN's account) towards the full repayment of ZN's loans with Prva Banka.

Later, in July 2009, the Montenegro government (the Respondent of the case) and MNSS agreed to a refinancing protocol and amending the original privation agreement. The Respondent agreed to provide a guarantee for a €25 million loan to ZN by a commercial bank, including the guarantee of a €3.5 million short-term loan, and to reduce MNSS'

555 *Capital expenditure.*

investment obligations for 2009 and 2010. MNSS agreed to grant a loan facility of €10 million to ZN conditional on ZN obtaining such loan from a commercial bank. Later in July, ZN obtained such a short-term loan from BlueBay Multi-Strategy Investments, which was guaranteed by the Respondent. However, in 2009, ZN defaulted on this loan, forcing the Respondent to pay the outstanding amount. In relation to this, MNSS had earlier agreed with the Respondent to reimburse it, if BlueBay would call the guarantee, or it would transfer 25 percent of its ZN shares. MNSS opted to do the latter, and in January 2010, MNSS transferred 25 percent of its ZN shares to the Respondent.

However, problems at ZN escalated further during 2010, as in autumn and later in December, the workers occupied the ZN's management building and even physically assaulted the Chief Executive Officer. This situation was further worsened by the difference of opinion between MNSS and the Respondent about how to handle ZN's worsening situation, as MNSS' proposals were rejected. Finally, the Respondent acquiesced to MNSS' wish to reduce the number of workers employed in the steel mill, if MNSS would make the agreed minimum investment in 2011. MNSS was only prepared to invest a much lower amount. In fact, the Respondent later informed MNSS that it was in breach of the original privatization agreement, because it failed to present the performance bond for 2011, and didn't pay the workers' salaries for several months. During 2011, ZN's situation further worsened by lack of cooperation between MNSS and Respondent, a strike by the workers, and finally a bankruptcy petition of ZN by the workers' unions (the Respondent provided financial aid to these unions). The petition was successful, and ZN was declared bankrupt, and its assets were sold in 2012 April.[556]

After analyzing the facts, let us move on to the actual proceedings of the case. The two Claimants, MN Specialty Steel Ltd. (MNSS) and

556 *See* Investment Policy Hub (visited on Dec. 11, 2018) <http://investment-policyhub.unctad.org/ISDS/Details/494>.

Recupero Credito Acciaio N.V (RCA), originally initiated two arbitration proceedings under the Additional Facility of ICSID, for breaches of the 2002 Netherlands-Yugoslavia BIT, and for breaches of the Montenegrin Foreign Investment Laws 2000 and 2011. However, the parties agreed to consolidate the two proceedings into one. As the first step of these consolidated proceedings, the Respondent raised six objections in total to the jurisdiction of the Tribunal. These were the following: 1) Tribunal lacks jurisdiction because of the express waiver of jurisdiction in the original privatization agreement, 2) lack of jurisdiction because the Respondent has not consented to the Additional Facility Arbitration in its two foreign investment laws, 3) the Dutch nationality of the Claimants has been fabricated while the present dispute had already arisen, 4) MNSS' shares of ZN, MNSS' loans to ZN and RCA's assigned loan from MNSS do not qualify as investments, 5) these alleged investments were not in accordance with host State law, and 6) Claimants did not exhaust local remedies before turning to arbitration.

The Claimants responded by stating that as RCA was not part of the privatization agreement, it could have not waived its rights. Furthermore, the relevant clause in itself was argued to be not a waiver of jurisdiction, and in fact, MNSS could not waive its rights under the BIT. They also disputed the interpretation of the 2000 and 2011 foreign investment laws. As to the accusation of being shell companies, the Claimants argued that they qualify as investors under the BIT, and that the Respondent is conflating the nationality of individuals with the nationality of corporations, which is contrary to the principles of international law. In relation to the fourth objection, the Claimants stated that their investment meets the Salini test[557] for defining a protected investment under the

557 Salini test, which defines an investment as having four elements: (1) a contribution of money or assets (2) a certain duration (3) an element of risk and (4) a contribution to the economic development of the host state. *See* Chicago Journal of International Law (visited on Dec. 12, 2018) <http://chicagounbound.uchicago.edu/cjil/vol15/iss1/13/>.

ICSID Convention, and that the definition of investment in the BIT is very broad. For the fifth objection, Claimants pointed it out that there is no requirement of legality under the BIT that would affect the exercise by the Tribunal of its jurisdiction. Furthermore, the Respondent had a long-standing acceptance of the Claimant's investments, which thus precludes the use of the legality requirement to defeat the Tribunal's jurisdiction. Finally, the Claimants noted that the sixth objection is not applicable, as there is no pre-condition for a claimant to have to exhaust local remedies before being able to have recourse to an arbitration against a State that had previously given its consent, based on previous decisions.

Ultimately, the Tribunal rejected most the Respondent's objections, but accepted that MNSS validly waived its rights under the BIT to pursue contractual claims. Furthermore, based on the correct translation of the domestic 2000 and 2011 foreign investment laws, the Tribunal also found that it has no jurisdiction under those laws.

In relation to the alleged breaches of the BIT, the following claims have been made by the Claimants:

> "(i) not to impair the operation, management, maintenance, use, enjoyment or disposal by the Claimants of their investment (BIT Article 3(1)); (ii) to accord fair and equitable treatment (BIT Article 3(1)); (iii) to provide most constant protection and security (BIT Article 3(1)); (iv) to accord the most-favored-nation treatment (BIT Article 3(2)); (v) to ensure free transfer of payments (BIT Article 5(1)); and (vi) not to expropriate except under the conditions set forth in the BIT (BIT Article 6(1))"[558]

These allegations are based on the following actions and omissions of the Respondent: the Respondent's actions in relation to Prva Bank, its refusal to reduce the headcount, its funding of the labor union, its

558 *See* Page 77 of the Award. Investment Policy Hub (visited on Dec. 11, 2018) <http://investmentpolicyhub.unctad.org/ISDS/Details/494>.

refusal to allow scrapping of old equipment, the bankruptcy proceedings of ZN, its refusal to allow a debt-equity swap, its refusal to consent to the financing of ZN, its refusal to allow withdrawals from ZN's special account, its forced evictions of ZN's management, the Respondent's breach of obligation to maintain a stable legal and business environment and its discrimination against MNSS.

The Tribunal made the following decisions on these claims. It stated that the Respondent failed to ensure the protection of persons and property, but it didn't grant any compensation, as the Claimants didn't manage to show they suffered damages as a result. The Tribunal also dismissed the claim that the Respondent's failure to warn MNSS of the financial condition of Prva Banka breached the Respondent's obligations of fair and equitable treatment and non-impairment of the Claimants' investment.

Furthermore, the Tribunal decided to dismiss all other claims on the merits, because they fall outside its jurisdiction. As for the costs, the Tribunal declared that each party shall pay for its own costs, and that the Claimants shall pay for the fees and expenses of the Tribunal and the ICSID Secretariat.

These cases confirmed that the *fair market value* standard is used and applied in practice. On the basis of these cases, we can also conclude that the principle *of restitutio in integrum*, in the case of taking foreign property, is accepted by international tribunals like the ICSID. In our opinion, ICSID offers an effective way to the investors to get fair (here we use the term subjectively) compensation based on *fair market value* of the property taken.

5.4.3. *NAFTA case law*

The North American Free Trade Agreement does not say explicitly that *prompt*, *adequate* and *effective* compensation is required when foreign property is taken, however, with its provisions, it covers indirectly this standard. According to the Agreement, "compensation shall be paid

without delay and be fully realizable".[559] The Agreement also guarantees free transferability of the compensation, immediately on payment.[560] It contains an explicit formula - *fair market value* - for determining compensation:

> Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.[561]

The Agreement also makes precise provisions on the interest rates related to late payment, that is to say, for the period between the date of the expropriation and the payment date (because of the requirement of *prompt* payment). It provides that if the payment of compensation is done in G7[562] currency, the compensation has to bear a *commercially reasonable rate* from the date of the expropriation until the date of the actual payment.[563] If the payment is done in other than G7 currency, the Agreement provides the following, regarding the issue of the interest to be paid:

---

559 Art. 1110 (3) of the North American Free Trade Agreement, NAFTA Secretariat Info page (visited on Apr. 5, 2013) <http://www.nafta-sec-alena.org/english/index.htm>.

560 *Id.* art. 1110 (6).

561 *Id.* art. 1110 (2).

562 G7 is abbreviation for "Group of Seven". It is the group of seven most industrialized countries of the world: Canada, France, Germany, Italy, Japan, the United Kingdom and the United States. Source: Encarta World English Dictionary (visited on May 20, 2013) <http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=561533263>.

563 *Id.* art. 1110 (4) (5).

> […] the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.[564]

For example, in the Metalclad case the Tribunal stated that on the basis of its provisions,[565] NAFTA clearly supports the inclusion of interest in an award.[566] In this case, the Tribunal proceeded from the assumption that the investor completely lost its investment.[567] Both parties accepted to calculate the compensation on the basis of the *fair market value* standard.[568] However, they offered different methods for the calculation of this value. Metalclad suggested two alternative methods for the calculation of the compensation. One was the discounted cash flow analysis of future profits to establish the *fair market value*.[569] By this approach, Metalclad came up with an amount of USD 90 million.[570] The other one was the valuation of the actual investment made by the company.[571] Under this, it reached approximately USD 20 to 25 million. Mexico objected to the discounted cash flow method, claiming that it was not applicable because the expropriated company was not a going

564 *Id.* art. 1110 (4) (5).

565 *Id.* art. 1135 (1).

566 Metalclad case para. 128.

567 It should be noted that damages were sought under NAFTA art. 1105, however the court stated that counting damages (compensation) under the provisions of art. 1110 would be the same. *Id.* para. 113.

568 *Id.* para. 114-116.

569 *Id.* para. 114.

570 *Id.*

571 *Id.*

concern.[572] However, it offered a method of market capitalization,[573] that would result between USD 13 to 15 million.[574] At the same time, Mexico agreed with the second method proposed by Metalclad, however, referring to it as "direct investment value approach", and reaching only between USD 3 to 4 million.[575] The Tribunal rejected the first method suggested by the claimant. The investment was never operative, and therefore the Tribunal found that the application of the discounted cash flow analysis would not be appropriate. In the opinion of the Tribunal, for the application of this method, it is needed that the company operates for a sufficiently long period that gives appropriate basis for determining the estimated future profits, subject to discounted cash flow analysis.[576] In such case, the value of the goodwill of the company also has to be taken into consideration.[577] However, in the opinion of the Tribunal, this was not the case with Metalclad investment.[578] Thus, the Tribunal used the second method offered by the parties, that is to say, the *fair market value* method. When considering the issue of lost profits, it was of the opinion that they can be awarded, however the claimant had the burden of proof, that is to say, it had to provide a realistic estimate of lost profits.[579] The Tribunal also emphasized that, when making the award, it accepted the principles of the Chorzow Factory case, that is to say, that the award has to reestablish the *status quo ante*.[580] Regarding the

---

572 *Id.* para. 116.

573 Money Glossary defines it as: "The total dollar value of all outstanding shares. Computed as shares times current market price." (visited on Jan. 8, 2013) <http://www.moneyglossary.com/?w=Market+capitalization>; *See also* Bloomberg Financial Glossary (visited on Jan. 8, 2013) <http://www.bloomberg.com/analysis/glossary/bfglosm.htm#market_capitalization>.

574 Metalclad case para. 116.

575 *Id.* para. 117.

576 *Id.* para. 119-121.

577 *Id.* para. 120.

578 *Id.* para. 121.

579 *Id.* para. 122.

580 *Id.*

issue of interest, the Tribunal was of the opinion that interest should be part of the compensation and it should be counted from the date when the state became "internationally responsible" for the taking.[581] In this particular case, from the date on which Metalclad's application for construction permit was "wrongly denied".[582] The court determined a six percent per annum interest rate.[583] Thus, the Tribunal finally awarded USD 16.6 million plus interests to Metalclad.[584]

Another interesting ICSID case is the S. D. Mayers case, in which, in contrast to the previous case, the Tribunal did not find that the regulation (*i.e.,* the export ban) amounted to expropriation. In addition, the Tribunal refused to apply to breaches of article 1102 ("national treatment") and article1105 ("minimum standard of treatment") the principles laid down in article 1110 of NAFTA concerning expropriation.[585] In the opinion of the Tribunal, standard of article 1110 of NAFTA, like that of *fair market value*, was "expressly attached […] to expropriations" by the drafters of NAFTA.[586] Furthermore, it was of the opinion, that in cases that do not involve expropriation, drafters intentionally left it open to tribunals to determine compensation standards.[587] In such cases, tribunals have to take into consideration "the specific circumstances of the case," principles of international law and the provisions of NAFTA.[588] The Tribunal did not exclude theoretically the applicability of the *fair market value* standard; however, it was of the opinion that it was not applicable for this very case.[589] It stated that the suitable international law standard

581 *Id.* para. 128.
582 *Id.*
583 *Id.*
584 *Id.* para. 131.
585 S. D. Myers partial award para. 305, 306.
586 *Id.* para. 307.
587 *Id.* para. 309.
588 *Id.*
589 *Id.*

for this case could be found in the Chorzow Factory case.[590] That is to say, "the compensation should undo the material harm inflicted by a breach of an international obligation".[591] In his concurrent opinion, one of the members of the panel, Bryan P. Schwartz brings on interesting arguments. He claims that "fair market value might, in some cases, be less than fair value. An investment might be worth more to the investor for various reasons, including synergies within its overall operations, than it is to third parties." He also argues that the finding that the expropriation has happened, on the other hand, should not reduce the amount of compensation that is ought to be awarded. He further states, that the cumulative principle applies within Chapter 11 of NAFTA. When a government denies to investors the protection assured by specific provisions of Chapter 11, compensation may be required above and beyond that which would apply in the ordinary case of a lawful expropriation. However, at the same time he says that:

> […] even if we had found that the export ban did amount to an expropriation under the terms of article 1110, that finding would not necessarily have provided a basis for awarding any compensation above and beyond that already recoverable under the terms of article 1102 [National Treatment].[592]

In connection with this case, we have noticed that the Tribunal placed great emphasis on factual proof of the claims when determining the amount of compensation (supporting documentation, *e.g.,* tax filing, etc.).[593]

The NAFTA case law also supports the assumption that the valuation standard of *fair market value* is the most accepted in international law,

590 *Id.* para. 311.

591 *Id.* para. 315.

592 Concurrent opinion of Bryan P. Schwartz. Source: Lexis database, 1 Asper Rev. Intl Busl and Trade Law at 337, 406, 407.

593 Metalclad case, para. 124.

and also that the principle of *in integrum restitutio* forms the basis of awards in expropriation cases where the main issue is compensation. This proves the constantly rising standard of investment protection in the world, that might be the result of the growing importance of private property protection or simply the fact that international competition for investments got tighter with the globalization, and therefore, investment recipient countries try to offer the most in every field.

5.5. Conclusion

Examining the development of compensation theories and international case law that developed in line with it, we came to the conclusion that there is neither uniform theory nor uniform practice in the field of compensation standards related to taking of foreign investment. Besides, it is not easy to establish whether the taking was lawful or not, that is to say, whether the conditions discussed in the previous chapters were fulfilled (the taking was non-discriminatory, there was an existing public purpose and there was appropriate compensation). On the basis of the studied cases we can say that, even if the first two conditions are fulfilled, but there has been no adequate compensation, the taking is considered many times unlawful, however, not always. It is also the practice of tribunals to order *in integrum restitutio*. There are a number of cases that refer to the standard of the Chorzow Factory case, in which it was stated that the reparation must reestablish the *status quo ante*. This means usually *full* compensation, based on *fair market value*, which is, in our opinion, the most objective valuation standard. In some cases, compensation is awarded for lost future profits as well, and this solution can be equitable, however, it is difficult to calculate fairly the lost profits. All in all, the examination of the case law shows that the *prompt*, *adequate* and *effective* standard prevails in practice. At the same time, we may not forget that many international conventions contain provisions that formally do not comply with the above-said, and that many countries of the world formally do not accept it.

Thus, the majority of disputes is about the standard of compensation in the case of taking of foreign property. Therefore, it would be helpful to work out a more detailed and precise system of compensation on international level. We are convinced that making clear conditions for compensation can be beneficial for all the parties.

6. Conclusion

In the second chapter of this book the most important terms related to taking of foreign property were scrutinized. It was observed that notions like *taking*, *expropriation* and *nationalization* are often used indiscriminately to designate the same concept. In the case of *expropriation* and *nationalization*, private property is taken by the state on permanent basis. We noted that one of the differences between these two terms is that in the case of *nationalization* compensation is many times not assumed. However, there is no evidence that it is true in general. In the case of *expropriation* the expropriating state usually provides some compensation. Other important differences are that *nationalization* is usually related to some socio-economic changes in the given society and there is a specific underlying legislation, while in the case of *expropriation* general legislation constitutes the basis of the taking. Following this, the meaning of *intervention* was examined. It was concluded that *intervention* is an action of the government, whereby it assumes control of a business (or any other foreign private property) with the intention of operating it for a limited period of time, achieving a particular goal. It is important that the property gets back to the original owner after a reasonable period of time. The owner of such property is entitled to compensation for the time he was not able to use his property. *Confiscation* was defined as taking of foreign property with no compensation. We also concluded that distinction can be made between *de jure* and *de facto* taking. The host state might take measures that in fact (*de facto*) dispose the owner of his property, but legally do not affect the ownership – this is called *creeping*, *indirect* or *de facto taking*. We found that, in practice, the biggest problem is drawing the line between *taking* and *creeping expropriation*. *Creeping expropriation* basically has the same effect on the owner of the property as taking would have: it disables the owner to exercise all his rights related to his property. Generally, at the end of the chapter, it was established

that capital exporting states try to define the term *taking* (*expropriation, nationalization*) as general as possible, while capital importing states try to give as narrow interpretation to the term as possible.

The next two chapters dealt with two requirements of lawful taking of property: the existence of public interest (or purpose) and the requirement of non-discrimination when taking foreign property. It was concluded that sovereign states have the right to take foreign property if it is taken for public purpose, in a non-discriminatory manner, accompanied by appropriate compensation.[594] This is supported by international documents, as well as by international court and arbitral decisions. We established that these requirements rarely constitute basis for dispute. Thus, as we have seen *supra*, there are still few cases related to these issues in international case law. These cases supported our premise that these principles are requirements for lawful taking of foreign property.

In the fifth chapter we scrutinized the most challenging issue, the requirement of compensation in the case of taking foreign property. The standard of compensation and the form and time of payment of compensation were examined. We found that there are many disputes regarding the standard of compensation, and that the present situation in international law, regarding this issue, is not really clarified. It can be said that there are many different standards and opinions concerning this question. To get a clearer picture on the issue, the development of compensation theories was presented through the most important milestone cases. First, the Norwegian Shipowners' Claims case and the *just* compensation standard were scrutinized. Following this, we looked at the Chorzow Factory case and the standard of *fair* or *full* compensation. Based on these cases, it was concluded that the *just* compensation standard does not differ much from the *fair* or *full* compensation standard. In both cases, compensation was based on *fair market value* of the taken property and both required basically *in integrum restitutio* (if not

594 And of course, there is due process of law guaranteed for the investor.

possible, monetary compensation) including lost profits. The next step was to examine the Hull doctrine. During our research we came to the conclusion that the majority of capital exporting countries in fact support the requirements laid down in the Hull doctrine (expropriation should be *prompt*, *adequate* and *effective*), even if they usually use the expression of *just* compensation, or even accept *appropriate* compensation, interpreting it as *prompt*, *adequate* and *effective*, as the United States of America does. This interpretation is also supported by international case law. All in all, we found that capital importing states in general support the standard of *appropriate* compensation, however with different content. Related to this issue the so-called Calvo Doctrine was examined, which declares that the host country has the right to decide on the time, amount, and form of compensation, if there is no agreement to the contrary. When examining related international jurisprudence, we found that it is very colorful concerning this issue: there are mostly western authors who are of the opinion that the Hull Doctrine is too strict, and also, on other hand, there are some who claim that the Calvo Doctrine should be understood in a more flexible way. Some authors try to solve the problem with the principle of unjust enrichment ("what has the taker gained"), some would differentiate between industrialized and not-industrialized states (the latter should pay lower compensation in the case of takings), and there are some authors who would take into consideration how much did the foreign investor contributed to the development of the host state in the past. The debate during the last fifty years was mostly on the question what terminology should be used: *just*, *fair*, *prompt*, *adequate*, *effective*, *appropriate* or *full*. Concerning this, we fully agree with Professor Schachter who noticed very correctly that: "It is the definition of *appropriate* that matters, not the term itself, which might well be replaced by *fair*, *just* or a similar expression.".[595] We have also established that, in practice, developing countries, even if they hold on to classical principles of sovereignty over resources, accept the Hull

---

595 *See* Oscar Schachter in Lillich, Richard B. ed.: The Valuation of Nationalized Property in International Law IV. vii (1987).

Doctrine in bilateral investment treaties. In our opinion the reason for this is very simple: developing countries understand that they need foreign capital for economic development and if they are not fair when expropriating foreign investors` property, there will be no willing investor in the future who would invest in these countries.[596]

Following this historical development overview, we examined current trends in international jurisprudence regarding the issue of compensation in the case of taking foreign property. First, the case law of the Iran – United States Claims Tribunal was scrutinized. The most important finding was that the Tribunal placed the emphasis on the issue of *fair market value* of the taken property and not on the compensation standard. Thus, the Tribunal mentioned in several awards compensation standards like *just* and *full*, using the *fair market value* of the taken property at the same time. Besides the practice of the Iran – United States Claims Tribunal, some multilateral instruments and the related case law were investigated. Thus, we came to the conclusion that, regarding these multilateral instruments, the standard of compensation is *prompt*, *adequate* and *effective*.

All in all, in our opinion, investors require high standards of protection, meaning that, in the case of taking of their property, they wish to have full compensation based on the *fair market value*, as it was emphasized in most cases. Besides, it is also accepted that such compensation has to be paid *promptly* and has to be *effective*.

---

596 *E.g.,* the arbitral Tribunal (Paul Reuter, President) in Aminoil case found the fair treatment of investors correct both morally and economically: "But as regards States which welcome foreign investment, and which even engage in it themselves, it could be expected that their attitude towards compensation should not be such as to render foreign investment useless, economically. … [I]n the case of the present dispute there is no room for rules of compensation that would make nonsense of foreign investment." The Government of the State of Kuwait v. American Independent Oil Company at 1033 in International Legal Materials 1982, ed. Marilou M. Righini, American Society of International Law, 1983.

However, there is certain inconsistency in the practice and the position of developing countries. On the one hand, on international *fora*, these countries stand up for the principle that the issue of compensation and other issues related to taking, being under dispute, should be solely decided by the courts of the expropriating country, and that they should have right (limited only by local jurisdiction) to take foreign property, which is actually based on the Calvo Doctrine. On the other hand, they willingly sign bilateral investment treaties, in which these countries accept international legal standards as exemplified in the Hull doctrine which basically contradicts to the above said international claims.[597] The reason for this contradiction might be the huge competition for luring in foreign capital and, at the same time, the need to correspond to domestic political expectations related to the protection of national interests. However, Sornarajah explains this phenomenon, or better to say contradiction, with the following: there is uncertain protection of foreign investment in international law, so the above-mentioned countries entered to these treaties to clarify the rules of the game for the case of expropriation.[598] There is another argument that is not only supported by Sornarajah, but also by Dolzer, namely that developing countries accept the *full* compensation principle, or basically the Hull doctrine, in bilateral investment treaties, because of special benefits they enjoy under such treaties.[599] We would not agree with this, as under these treaties, the host country usually, does not enjoy many benefits. The reason must be that host countries are forced to accept stricter conditions; otherwise investors would not bring their capital. At the same time, governments are frequently exposed to domestic pressure that requires stronger protection of domestic interests.

---

597 *See* Kishoiyian, Bernard, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*. 14 Northwestern Journal of International Law and Business 30 (1993); Guzman, Andrew T., *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Virginia Journal of International Law 642 (1998).

598 *See id.* 668. [Primary source not available.]

599 *See id.*

On the whole, it can be said that proper and adequate legal protection of foreign investors, especially in the case of taking of foreign investment, has positive impact on foreign direct investment inflows. At the same time, it has been concluded that sovereign states have the right to take foreign property, respecting certain principles of international law: the taking has to serve public purpose, has to be non-discriminatory and accompanied by appropriate compensation. Of course, all this should be done with the guarantee of due process. It is also a fact that investment protection standards are changing very fast in our globalizing world, and, with this process, the standard of foreign investment protection is constantly getting higher and higher. In a well functioning economy, guaranteeing full protection of foreign investment cannot be a burden for the state. Thus, generally it should not be a problem in case of taking to offer correct protection to any foreign investor who enters the country.

Bibliography

BOOKS:

ALTERMAN, Rachelle (ed.): Takings International. ABA, 2010.

BÁN, Tamás: A Tulajdonjog Védelme az Emberi Jogok Európai Egyezményében [The Protection of Right to Property in the European Human Rights Convention]. In Család, Tulajdon és Emberi Jogok [Family, Property and Human Rights], Budapest: INDOK, 1999.

BEDERMAN, David J.: The Spirit of International Law [Chapters 1, 2]. Athens and London: The University of Georgia Press, 2002.

BERGMANN, Heidi: Die völkerrechtliche Entschädigung im Falle der Enteignung vertragsrechtlicher Positionen [Compensaton under the Public Law in the Case of Taking of Contractual Positions]. Baden-Baden: Nomos Verl. Ges., 1997.

BROWNLIE, Ian: Principles of Public International Law. Oxford: Oxford University Press, 1998 (5th ed).

BROWNLIE, Ian: System of the Law of Nations: state Responsibility 1983.

CARON, David D. & Crook, John R., eds.: The Iran-United States Claims Tribunal and the Process of International Claims Resolution. Ardsley, New York: Transnational Publisher, Inc., 2000.

DIXON, Martin: Textbook on International Law. Blackstone, 1993.

DOLZER, Rudolf: Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht [Property, Expropriation and Compensation in Current International Law]. Berlin, Heidelberg, New York, Tokyo: Springer Verlag, 1985.

DUNNING, John H., Lundan, Sarianna M.: Multinational Enterprises and the Global Economy. Edward Elgar Publishing, 2008.

EPSTEIN, Richard A.: Takings - Private Property and the Power of Eminent Domain. Cambridge, Massachusetts, and London, England: Harvard University Press, 1985.

FOIGHEL, Isi: Nationalization. London: Stevens & Sons Limited; Copenhagen: NYT Nordisk Forlag Arnold Busck, 1957.

FOIGHEL, Isi: Nationalization and Compensation. London: Stevens, 1964.

VAN HOUTTE, Hans: The Law of International Trade, London: Sweet & Maxwell, 2002 (2nd ed.).

JIMÉNEZ PIERNAS, Carlos (ed.): The Legal Practice in International Law and European Community Law. Leiden: Martinus Nijhoff Publishers, 2007.

KIRÁLY, M., & Mádl, F. A külföldi beruházások jogi védelme [Legal protection of Foreign Investments]. Budapest: ELTE, 1989.

KOMESAR, Neil K.: Law's Limits. Cambridge: Cambridge University Press, 2001.

KRONFOL, Zouhair A.: Protection of Foreign Investment. Leiden: A.W. Sijthoff, 1972.

LILLICH, Richard B. ed.: The Valuation of Nationalized Property. In International Law I. Charlottesville: The University Press of Virginia, 1972.

LILLICH, Richard B. ed.: The Valuation of Nationalized Property. In International Law II. Charlottesville: The University Press of Virginia, 1973.

LILLICH, Richard B. ed.: The Valuation of Nationalized Property. In International Law IV. Charlottesville: The University Press of Virginia, 1987.

LILLICH, Richard B., Magraw, Daniel Barstow, eds.: The Iran-United States Claims Tribunal: its contribution to the law of state responsibility. Irvington-on-Hudson, N.Y.: Transnational Publishers, c1998.

PARADELL, Lluís, Andrew Newcombe: Law and Practice of Investment Treaties: Standards of Treatment. Austin: Kluwer Law International, 2009.

LÓPEZ, Escarcena, Sebastián: Indirect Expropriation in International Law. Cheltenham, Northampton: Edward Elgar, 2014.

MALENCZUK, Peter: Ahehurst's Modern Introduction to International Law. New York, London: Routledge, 1997 (7th ed.).

MESSMANN, Stefan and Tibor Tajti: Investing in South Eastern Europe. Bochum: European University Press, 2005.

MOURI, Allahyar: The International Law of Expropriation as Reflected in the Work of the Iran – U. S. Claims Tribunal. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1994.

PERKAMS, Markus: The concept of indirect expropriation in comparative public law – searching for light in the dark. In International investment law and comparative public law (Ed. Stephan W. Schill), Oxford: Oxford University Press, 2010, at 107-150.

PIRRIE, S. R. ed.: Iran – United States Claims Tribunal Reports. Vol. 1, 4 and 17. Cambridge: Grotius Publications Limited, 1985.

POLTER, D. M.: Auslandenteignungen und Investitionschutz [Foreign Expropriations and Protection of Investment]. Berlin: Duncher & Humblot, 1975.

RATMATULLAH, Khan: The Iran-United States Claims Tribunal: controversies, cases, and contribution. Dordrecht, Boston: M. Nijhoff, 1990.

SACHMAN, Julius L.: Nichols' The Law of Eminent Domain. New York: Matthew Bender, 1988 (3rd ed).

SACERDOTI, Giorgio: Bilateral Treaties and Multilateral Instruments on Investment Protection. In Recueil des Cours - Collected Courses of the Hague Academy of International Law, 1997, Vol. 269.

SALACUSE, Jeswald W.: The Law of Investment Treaties. Oxford: Oxford University Press, 2009.

SEXENA, Achintya Nath: Expropriation Under International Investment Law: An Overview. Lambert Academic Publishing, 2013.

SHAN, Wenhua: The Legal Protection of Foreign Investment. Hart Publishing, Oxford, 2012.

SHANKS, R. B.: Protecting Against Political Risk, Including Currency Convertibility and Repatriation of Profits in Eastern Europe. Practicing Law Institute, 1992.

SHIHATA, I. F. I.: Legal Treatment of Foreign Investment: "The World Bank Guidelines". Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1993.

SORNARAJAH, M.: The Pursuit of Nationalised Property. Dordrecht, Boston: M. Nijhoff, 1986.

SORNARAJAH, M: The International Law on Foreign Investment, Cambridge University Press 1994.

SORNARAJAH, M: The International Law on Foreign Investment, Cambridge University Press 2004.

SACERDOTI, Giorgio: Bilateral Treaties and Multilateral Instruments on Investment Protection. Hague: Hague Academy of International Law, 1997.

STUDWELL, Joe: How Asia Works. Profile Books, 2013.

VÍG, Zoltan, Hajdu, Gábor: CETA and Regulatory Chill. In Görög, Márta, Mezei, Péter (eds), A szellemi tulajdonvédelem aktuális kérdései. Szeged: Pólay Elemér Alapítvány, 2018, 44-54.

VÖRÖS, Imre: A nemzetközi gazdasági kapcsolatok joga I. Budapest: Krim Bt., 2015.

WEILER, Todd: International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law. Cameron May, 2005.

WESTBERG, John A.: International transactions and claims involving government parties: case law of the Iran-United States Claims Tribunal. Washington, D.C.: ILI, 1991.

WORTLEY, Ben Atkinson: Expropriation in Public International Law. Cambridge: Cambridge University Press, 1959.

YANG, Xiaodong: State Immunity in International Law. Cambridge University Press, Cambridge, 2012.

PERIODICAL MATERIALS:

ABEDE, O. A.: The Doctrine of Sovereign Immunity Under International Commercial Law: An Observation On Recent Trends. The Indian Journal of International Law, Vol. 17, 1977, p. 245-260.

AKINSANYA, Adeoye: International Protection of Direct Foreign Investment in the Third World. International & Comparative Law Quarterly, Vol. 36, 1987, p. 58-74.

ANDING, Gregory & Dille, Robert: “Just Compensation” or Just a Windfall? Do Sales of Pipeline Servitudes Provide Valid, Reliable Comparables for Determination of Just Compensation in Pipeline Expropriation? Loyola Law Review, Fall, 1999, p. 381-393.

BANKS, Kevin: NAFTA's Article 1110 – Can Regulation Be Expropriation?, 5 NAFTA L. & Bus. Rev. Am., Vol. 5, 1999, p. 499-522.

BARRERA, L. C. A.: Lack of Definition of Compensation in International Investment Disputes for Non-Expropriation Claims: Is There an Appropriate Mechanism to Determine It. Revista E-Mercatoria, Vol. 10, 2011, p. 75-122.

BEAUVAIS, Joel C.: Regulatory Expropriation Under NAFTA: Emerging Principles and Lingering Doubts. N.Y.U. Envtl. L.J., Vol. 10, 2002, p. 245.

BROWER, C. J. Tepe: The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?, The International Lawyer, Vol. 9, 1975, p. 295-318.

BROWER, Ch. N.: Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal. The International Lawyer, Vol. 21, 1987, p. 639 MP Rvgl. 72/180.

BROWER, Charles II H.: Beware the Jabberwock: A Reply to Mr. Thomas. Columbia Journal of Transnational Law, Vol. 40, 2002, p. 465.

BRUNETTI, Maurizio: The Iran – United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation. Chi. J. Int'l L., Vol. 2, 2001, p. 203.

CHRISTIE, G. C.: What Constitutes a Taking of Property under International Law? British Yearbook of International Law (BYIL), Vol. 38, 1962, p. 307-338.

CLEVELAND, G. F.: "Just Compensation" or "Just" Compensation: A Comparative Analysis. Anglo-American Law Review, Vol. 21, 1992, pp. 498-505.

CHOHARIS, P. C.: U.S. Courts and the International Law of Expropriation: Toward a New Model for Breach of Contract. S. Cal. L. Rev, Vol. 80, 2006-2007, pp. 1-88.

COMEAUX, Paul E. and Kinsella, Stephan N.: Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabalization Clauses, and Miga & Opic Investment Insurance. New York Law School Journal of International & Comparative Law, Vol. 15, 1994, p.1-22.

DEL DUCA, Patrick: The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization, UCLA Law Review, Vol. 51, 2003, p. 35-141.
DOLZER, Rudolf: New Foundations of the Law of Expropriation of Alien Property. The American Journal International Law, July, 1981, p. 553-589.
DOLZER, Rudolf: Indirect Expropriation of Alien Property. ICSID Review, Vol. 1, 1986, p. 41-65.
ĐUNDIĆ, Petar: Posledice razlikovanja zakonite i nezakonite eksproprijacije stranog ulaganja. Zbornik Radova, Vol. 45, 2011, p. 599-612.
EISENBER, Andra: "Public purpose" and Expropriation: Some Comparative Insights and the South African Bill of Rights. South African Journal on Human Rights, Vol. 11, 1995, p. 207-221.
ENRIQUEZ, Raymundo E.: Expropriation Under Mexican Law and Its Insertion Into a Global Context Under NAFTA. Hastings Int'l & Comp. L. Rev., Vol. 23, 2000, p. 385.
FERGUSON, Julian: California Concerned About Contaminated Water: Canadian Corporation Files NAFTA Expropriation Claim Against U.S. Colo. J. Int'l Envtl. L. & Pol'y, Vol. 65, 2000, p. 199.
FRANCIONI, Francesco: Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity. International and Comparative Law Quarterly (ICLQ), Vol. 24, 1975, p. 255-283.
FREEMAN, Elyse M., Regulatory Expropriation Under NAFTA Chapter 11: Some Lessons From the European Court of Human Rights, Colum. J. Transnat'l L., Vol. 42, 2003, p. 177.
GANTZ, David A., Protection of Foreign Investment under the NAFTA Chapter 11—UNCITRAL Arbitration Rules—National Treatment—Performance Requirements—Fair and Equitable Treatment—Expropriation—Damages—Allocation of Costs, American Journal of Int'l L., Vol. 97, 2003, p. 937-51.
GESS, Karol N.: Permanent Sovereignty Over Natural Resources. International and Comparative Law Quarterly (ICLQ), Vol. 13, 1964, p. 398-449.

GRAY, Cheryl W. & William W. Jarosz: "Law And The Regulation Of Foreign Direct Investment: The Experience From Central And Eastern Europe." Columbia Journal of Transnational Law, Vol. 1, 1995.
GUDOFSKY, Jason L.: Shedding Light on Article 1110 of the North American Free Trade Agreement (NAFTA) Concerning Expropriations: an Environmental Case Study. Nw. J. Int'l L. & Bus., Vol. 21, 2000, p. 243.
GUTBROT, Max, Hindelang, Steffen: Externalization of Effective Legal Protection against Indirect Expropriation. J. World Investment & Trade, Vol. 7, 2006, p. 59-83.
GUTBROT, Max, Hindelang, Steffen, Kim, Yun-I: Protection against Indirect Expropriation under National and International Legal Systems. Goettingen J. Int'l L. Vol. 1, 2009, p. 291-327.
GUZMAN, Andrew T.: 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties'. Virginia Journal of International Law, Vol. 38, 1998, p. 639-688.
GUZMAN, T. Andrew: A Compliance-Based Theory of International Law. California Law Review, Vol. 90, 2002, p. 1823.
HAIGHT, G. W.: The New International Economic Order and the Charter of Economic Rights and Duties of States. The International Lawyer, Vol. 9, 1975, p. 591.
HAMROCK, Kurt J. The ELSI Case: Toward an International Definition of "Arbitrary" Conduct. Tex. Int'l L. J., Vol. 27, 1992, p. 837.
HEISKANEN, V.: Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal. Journal of World Investment & Trade, Vol. 8, Issue 2 (April 2007), pp. 215-232.
HERZ, John H.: Expropriation of Foreign Property. The American Journal of International Law, Vol. 35, 1941, p. 243-262.
HORVÁTHY, Balázs: Az Észak-amerikai Szabadkereskedelmi Egyezmény környezetvédelmi összefüggései [Environmental Aspects of the North American Free Trade Agreement]. Külgazdaság Jogi Melléklet, Vol. 56, 2013, p. 71-90.
KADERJÁK, Péter: A hazai közvetlen külföldi befektetéseket maghatározó tényezőkről – egy kvantitatív elemzés [On Factors Determining Domestic Foreign Direct Investments – A Quantitive Analysis]. Közgazdasági Szemle, Vol. 12, 1996, p. 1072-1087.

KANNER, G.: When is “Property” not “Property itself”; A critical Examination of the Basis of Denial of Compensation for Loss of Goodwill in Eminent Domain, California Western Law Review Vol. 6, 1969, p. 57.

KARL, Joachim: Neue Entwicklungen beim internationalen Investitionsschutz [New Developments in International Investmentprotection]. Recht der Internationalen Wirtschaft (RIW), Vol. 40, 1994, p. 809-817.

KARL, Joachim: The Promotion and Protection of German Foreign Investment Abroad. ICSID Review, Spring 1996.

KAUFMANN, Johan: United Nations Decision Making. Sijthoff & Noordhoff, Alphen aan den Rijn, The Netherlands, 1980.

KHALIL, Mohamed: Treatment of Foreign Investment in Bilateral Investment Treaties. ICSID Review - Foreign International Law Journal, Fall 1992, p. 339.

KISHOIYIAN, Bernard: The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law. Northwestern Journal of International Law and Business, Vol 14, No. 1, Fall 1993.

KUNZER, Kathleen: Recent Development – Developing a Model Bilateral Investment Treaty, Law and Policy in International Business, Vol. 15, No. 1, 1983, p. 273-301.

LAPRES, Daniel A.: Principles of Compensation for Nationalized Property. The International and Comparative Law Quarterly. Vol. 26, 1977, p. 97.

LEIGH, Monroe: Act of state Doctrine – Valuation Standard in Cases of Expropriation – Reduction of Compensation of Reflect Lack of “Going Concern Value”. The American Journal International Law, October, 1982, p. 847.

LEIGH, Monroe: Decision of the Iran-United States Claims Tribunal: Expropriation – Standard Under International Law, The American Journal International Law, October, 1986, p. 969.

LEIGH, Monroe: Decision of the European Court of Human Rights: European Human Rights Convention – Compensation to Nationals Following Expropriation of Property. The American Journal of International Law, April, 1987, p. 425.

LEVY, Tali: NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective" Standard, Stanford Journal of International Law, Vol. 31, No. 1, Winter 1995, p. 423-448.

LOUCAIDES, Loukis G.: The protection of the right to property in occupied territories 53 ICLQ, 2004, p. 677.

MANIRUZZAMAN, A. F. M.: state Contracts with Aliens: The Question of Unilateral Change by the state in Contemporary International Law, J. INT'L ARB., Vol. 9, 1992, p. 141.

MANIRUZZAMAN, A. F. M.: Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview. Journal of Transnational Law and Policy, Fall, 1998, p. 57-77.

MARLLES, Justin R.: Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law. J. Transnat'l L. & Pol'y Vol. 16, 2006-2007, p. 275-336.

MERX, Katie: Go figure: Better bottom line? Crain's Detroit Business, 4/29/2002, Vol. 18 Issue 17, p1, 2p.

MULLER, Maarten H.: Compensation for Nationalization: A North-South Dialogue. Columbia Journal of Transnational Law. Vol. 19, 1981, p. 35-78.

MURPHY, Sean D.: NAFTA Waste Management Tribunal Finds No Arbitrary Treatment, No Expropriation, Am. J. Int'l L., Vol. 98, 2004, p. 838.

MUTINELLI, Marco & Piscitello, Lucia: Strategic Motivations Leading Firms to Invest in Central and Eastern Europe. Trends in World Economy No. 78., p. 160-184.

NAGY, Csongor, 'Editorial: Missed and New Opportunities in World Trade'. Acta Juridical Hungarica, 2017/58, p. 379-383.

NORTON, Patrick M.: A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation. The American Journal International Law, July, 1991, p. 474-505.

O'KEEFE, P.: UN Permanent Sovereignty over Natural Resources. Journal of World Trade Law. Vol. 8, 1974, p. 239-282.

STEPHAN, P. B.: Taxation and Expropriation - The Destruction of the Yukos Oil Empire. Houston Journal of International Law. Vol. 35, Issue 1, Winter 2013, pp. 1-52.

PAUL, Peter: Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties. Netherlands International Law Review, Vol. XLIV, 1997, p. 233-244.

PELLONPAA, M., Fitzmaurice M., Taking of Property in the Practice of the Iran-United States Claims Tribunal in Netherlands Yearbook of International Law, Vol. 19, 1988, p. 53-178.

POIRIER, Marc R.: The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist. Envtl. L., Vol 33, 2003, p. 851.

POSIN, Daniel Q.: Cases Brought under the NAFTA Investment Arbitration Rules, World Arbitration and Mediation Report, Vol. 13, 2002, p. 67-70.

ROBINSON, Davis R.: Note and Comment: Expropriation in the Restatement The American Journal International Law. A.J.I.L., Vol. 78, 1984, p. 176-178.

SALACUSE, Jeswald W.: BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, The International Lawyer, Vol. 24, No. 3, Fall 1990, 655-675.

SALAZAR V., Alberto R.: NAFTA Chapter 11, Regulatory Expropriation, and Domestic Counter-Advertising Law. Ariz. J. Int’l & Comp. L. Vol. 27, 2010, p. 31-82.

SCHACHTER, Oscar: Comment: Compensation for Expropriation. The American Journal International Law. A.J.I.L., Vol. 78, 1984, p. 121-130.

SCHACHTER, Oscar: What Price Expropriation?: Compensation Cases – Leading and Misleading The American Journal International Law. A.J.I.L., Vol. 79, 1985, p. 420-422.

SHANKS, R. B.. Protecting Against Political Risk, Including Currency Convertibilit and Repatriation of Profits in Eastern Europe. Practicing Law Institute, 1992.

SHELTON, Dinah: Righting Wrongs: Reparations in the Articles on state Responsibility The American Journal International Law,October, 2002 Vol. 96, p. 833.

SIQUEIROS, Jose Luis: Bilateral Treaties on the Reciprocal Protection of Foreign Investment, California Western International Law Journal, Vol. 24, No. 1, Fall 1993, p. 255-271.

SMITH, Patrick J.: Determining the Standard Compensation for the Expropriation of Nationalised Assets: Themes for the Future, Monash University Law Review, Vol. 23, No. 1, 1997, 159-170.

SORNARAJAH, M.: Compensation for Expropriation: The Emergence of New Standards. Journal of World Trade Law. Vol. 13, 1979, p. 108-132.

STANLEY, Jon A.: Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence. Emory International Law Review, Spring 2001 p. 349-389.

STANSBURY, Philip R.: Planning Against Expropriation. International Lawyer Vol. 30, 1990, p. 677.

STARNER, Gregory M.: Taking a Constitutional Look: Nafta Chapter 11 as an Extension of Member States' Constitutional Protection of Property, Law and Policy in International Business, Vol. 33, 2002, p. 405-437.

STEVANOVIĆ, Vlastimir: 'Okrugli Sto: Strane Direktne Investicije – Defektno Efektne'. 2001/12, Ekonomist, p. 25-28.

STRAZZERI, Joseph A.: A Lucas Anallysis of Regulatory Expropriation Under NAFTA Chapter Eleven, Geo. Int'l Envtl. L. Rev., Vol. 14, 2002, p. 837.

TAYLOR, J. Michael: The United States' Prohibition On Foreign Direct Investment In Cuba-Enough Already?!? SPG L. & Bus. Rev. Am., Vol. 8, 2002, p. 111.

TSCHEN, Ana: The Efforts to Define Expropriation. International Trade Law Journal, Winter, 1999, p. 50-59.

VANDEVELDE, Kenneth J.: The Economics of Bilateral Investment Treaties. Harvard International Law Journal, Spring 2000, p. 469-501.

DE WAART, P. J. I. M.: Permanent Sovereignty over Natural Resources As a Cornerstone for International Economic Rights and Duties. Netherlands International Law Review. Vol. 24, 1977, p. 304-321.

WALLACE-BRUCE, Nii Lante: Global Investments and Environmental Protection: the Battle Lines are Yet to Emerge! Netherlands International Law Review. Vol. 49, 2002, p. 195-224.

WILSON, Timothy Ross: Trade Rules: Ethyl Corporation V. Canada (Nafta Chapter 11) Part II: Are Fears Founded? NAFTA: L. & Bus. Rev. Am., Vol. 6, 2000, p. 205.
WILTSE, Jessica S.: An Investor-state Dispute Mechanism in the Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven, Buffalo Law Review, Vol. 51, 2003, p. 1146-1196.
YACKEE, Jason Webb: Political Risk and International Investment Law. Duke Journal of Comparative and International Law, Vol. 24, Issue 3, Spring 2014, p. 477-500.
YEE, Marisa: The Future of Environmental Regulation After Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases, Hastings West-Northwest Journal of Environmental Law and Policy, Vol. 9, p. 85-108.

INTERNET SOURCES:

Energy Charter Treaty (2018) <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> accessed 23 November 2018
Ernst and Young (2018) <www.ey.com/gl/en/issues/business-environment/ey-attractiveness-surveys> accessed 14 October 2018
European Commission (2018) <http://ec.europa.eu/trade/policy/in-focus/ceta/> accessed 18 November 2018
European Parliament, Benefits of EU international trade agreements <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603269/EPRS_BRI(2017)603269_EN.pdf> accessed 21 December 2018
General Assembly resolution 1803 (XVII) of 14 December 1962 <http://www.hri.ca/uninfo/treaties/8.shtml>.
Gray, Cheryl W.: Reforming Legal Systems in Developing and Transition Countries; Info page of the World Bank <http://www.worldbank.org/fandd/english/0997/articles/0140997.htm>.
ICSID (2018) <https://icsid.worldbank.org> accessed 26 November 2018
Info Curia (2018) <http://curia.europa.eu/juris/liste.jsf?num=C-284/16> accessed 20 November 2018
International Centre for the Settlement of Investment Disputes (ICSID), Info Page <http://www.icsid.org/>.

International Law Commission (2018) <http://www.un.org/law/ilc/texts/treaties.htm> accessed 25 November 2018

Investment Policy Hub of UNCTAD (2018) <http://investmentpolicyhub.unctad.org/IIA> accessed 12 October 2018

Multilateral Investment Guarantee Agency (MIGA) (2018) <http://www.miga.org> accessed 17 November 2018

Multilateral Investment Guarantee Agency (MIGA), Info Page <http://www.miga.org/welcome.htm>.

NAFTA Claims.com (2018) <www.naftalaw.org> accessed 18 November 2018

Nippon Export and Investment Insurance (2018) <http://nexi.go.jp/e/> accessed 22 November 2018

OECD MAI (2018) <www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> accessed 12 November 2018

Overseas Private Investment Corporation (OPIC) (2018) <http://www.opic.gov> accessed 25 November 2018

Smith, Kevin: The Law of Compensation for Expropriated Companies and the Valuation Methods Used to Achieve That Compensation. Law & Valuation. Spring 2001, <www.law.wfu.edu/courses/Law&value-Palmiter/Papers/2001/Smith.htm>.

United Nations Conference on Trade and Development (2005) <http://unctc.unctad.org/aspx/index.aspx> accessed 04.06.2005.

US Department of State NAFTA cases <http://www.state.gov/s/l/c3742.htm> accessed November 2018

US Model Bilateral Treaty (2018) <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 22 November 2018

World Bank Open Data (2018) https://data.worldbank.org/ accessed 12 October 2018

CASES:

American Int'l Group, Inc. and Islamic Republic of Iran
Amoco Int'l Fin. v. Islamic Republic of Iran
Case Concerning The Factory at Chorzow
Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica
Dames and Moore v. Iran
Eastman Kodak Company v. Iran
Eudoro Armando Olguin v. Republic of Paraguay
Frederica Lincoln Riahi v. The Government of the Islamic Republic of Ira
Government of the state of Kuwait v. American Independent Oil Company
INA Corporation v. Iran
James and Others v. the United Kingdom
Metalclad Corporation v. The United Mexican States
Mobil Oil Iran Inc. v. Islamic Republic of Iran
Norwegian Shipowners' Claims (Norway v. U.S.A.)
Oil Field of Texas, Inc. v. Iran
Payne v. Iran
Phelps Dodge Corp. v. Iran
Phillips Petroleum Co. Iran v. Islamic Republic of Iran
Pope and Talbot interim award
S.D. Myers, Inc. and Government of Canada
Sola Tiles, Inc. v. Iran
Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States
Tradex Hellas S.A. v. Republic of Albania

OTHER SOURCES:

Detlev Vagts: Minimum Standard in Encyclopedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1997, Vol. 3, 408-410, p. 408.

Dictionary of International & Comparative Law, Fox, James R., Oceana Publications, Inc., 1992.

Dolzer, Rudolf: Norwegian Shipowners' Claims Arbitration in Encyclopaedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1997, Vol. 3, 691-694.

Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) <http://www.un.org/law/ilc/texts/state_responsibility/responsibilityfra.htm>.

Encyclopedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1995, Vol. 1, 561-566 p. 562 (Ernst-Ulrich Petersmann: Charter of Economic Rights and Duties of States).

Encyclopedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1995, Vol. 2.

Encyclopaedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1992, Vol. 1, 521-523 p. 522 F.V. Garcia-Amador Calvo Doctrine, Calvo Clause).

Fitzmaurice, Gerald: The Law and Procedure of the International Court of Justice 12-13, Vol. 1 (1986).

Garner, Bryan A. ed.: Black's Law Dictionary. St. Paul, Minn.: West Group, 1999, 7th ed.

Ignaz Seidl-Hohenveldern: German Interests in Polish Upper Silesia Cases in Encyclopedia of Public International Law, ed.: Rudolf Bernhardt, Elsevier Science B.V.: Amsterdam, The Netherlands, 1995, Vol. 2, p. 550-553.

Lauterpacht H. ed., Oppenheim's International Law II: Disputes, War and Neutrality (7th(ed)) London Longmans 234-5 (1952).

Redden, Kenneth Robert ed.: Modern Legal Systems Cyclopedia. North America. Vol. 1A. Buffalo, New York, USA: William S. Hein & Co. Law Publisher, 1988.

Redden, R. K.. Modern Legal Systems Cyclopedia. Vol. 8: Eastern Europe. Buffalo, New York, U.S.A: William S. Hein & Co. Law Publisher, 1991.

Summary of Records of Meetings of 3d Committee, U.N. GAOR, 3d Comm., 17th Sess., at 358, U.N. Doc. A/C.3/SR.1206 (1962).

UN Centre on Transnational Corporations, Bilateral Investment Treaties, UN, Graham and Trotman, London, 1988.

United Nations, Bilateral Investment Treaties in the Mid-1990s, United Nations, New York and Geneva, 1998.
UN 3201 Declaration on the Establishment of a New International Economic Order – General Assembly, May 1, 1974.
Yearbook Commercial Arbitration Vol. XXVII – 2002, International Council for Commercial Arbitration, Gen. ed. Albert Jan van den Berg, The Hague, 2002.

THE AUTHOR

ZOLTÁN VÍG obtained his degree in law (masters equivalent) at the Szeged University Faculty of Law, and holds LLM and SJD in International Business Law from Central European University in Budapest. He teaches subjects related to international economic relations at the Faculty of Law, University of Szeged and business law at the Faculty of Economics, Finance and Administration (FEFA) in Belgrade.During his career he has taught corporate law, EU law and environmental protection law. Currently,he works as a research fellow at the Hungarian Academy of Sciences, and during his earlier career he conducted research at Max Planck and Asser Institutes, as well as at Humboldt, Hamburg, Emory and Yale Universities. He has published several books and articles inEnglish, Hungarian, Serbia and German languages. Dr Víg also gained additional practical work experience by working for Freshfields Bruckhaus Deringer international law firm.