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Investment Law, Justice, and Sustainable Development

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INVESTMENT LAW, JUSTICE, AND SUSTAINABLE DEVELOPMENT

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PREFACE

This book is focused on international investment law, justice, and sustainable development. It is intended as a study and research resource for anyone interested in investment law and investor-state dispute settlement (ISDS).

It is widely recognized that states receiving foreign direct investment (FDI) often greatly benefit from it, as FDI is one of the driving forces of economic development. Nevertheless, FDI can also cause environmental harm, social unrest, a 'race-to-the-bottom' in regulatory standards as well as other negative consequences, if not properly regulated. As FDI may have a double-edged impact, both positive and negative, it is important for states not only to attract and protect investors and investments, but also to ensure that they obtain the economic and technological benefits without excessive and avoidable social, economic, and environmental harm that can outweigh the benefits derived from the investment. One important way of attaining this goal is to have a proper legal framework for the regulation of foreign direct investment and to ensure its systematic and consistent enforcement. Even though there is a myriad of extra-legal factors that affect investment projects, the legal regime and its implementation play a central role in controlling how investments are protected and the way investors conduct their operations.

In recent years, the legal framework developed in the aftermath of World War II has come under increasing criticism. It was largely developed by the Western industrialized countries for the protection of the interests of investors based in these Western industrialized countries. The substantive rules often seem to relegate the interests of the host countries, many of which are located in the Global South, to a lower priority. Furthermore, on the procedural side, the established investor-state dispute settlement mechanisms have become more and more complex and require a high-level of experience and sophistication for effective legal representation. Unfortunately, while multinationals and other Western investors are usually well-represented by law firms from financial and legal hubs like London, New York, or Paris, the host countries may need to rely on local counsel or in-house advisers from their own government agencies, with palpable resource constraints.

Accordingly, one of the most significant and pressing challenges facing the international community in the 21st century is to advance a new generation legal framework of FDI that better balances investor and investment protection on the one side, and the promotion of host states' sustainable development, and the social, economic, and human rights of their citizens, on the other. Our book aims to provide or at least contribute to the development of such a new legal framework. To achieve this ambitious goal, we have called upon a new generation of investment lawyers, academics, mediators, and arbitrators, representing all major legal systems and cultures. Forty-six authors from Asia, North America, Latin America, Europe, Africa, and Australia have written chapters on issues related to investment law and investment dispute settlement. The inclusion of voices from the Global South was an important goal in this regard. We have placed a particular emphasis on voices from Asia and Africa that have not been heard enough in the investment law

debates of the past. It is also important to underscore that this book is being made available free of charge online. This contrasts with much of the existing and well-crafted literature, which is expensive, and often out of reach for the lawyers trying to argue the case of the host countries.

The present volume consists of six parts. Part 1 covers the foundations of investment law, including the history of investment law and the transition of a system that used to be focused on near-absolute protection of investor rights to a more sustainable and equitable investment law that at least acknowledges the objectives of protection of human rights and promotion of sustainable development goals. Part 2 addresses treaty-based substantive investment protection standards, including guarantees against direct and indirect expropriation, fair and equitable treatment, full protection and security, and non-discrimination. In Part 3, our contributors discuss cross-cutting issues, including investment law and indigenous peoples' rights, environmental protection and climate change, corruption in investment arbitration, and other issues. Part 4 focuses on regional developments, including a rather dramatic shift in the approach taken by the European Union as well as recent developments in Asia and Africa. Part 5 is concentrated on the Investor-State Dispute Settlement (ISDS). This part not only provides a detailed analysis of the strengths and weaknesses of established investor-state arbitration procedures but also addresses state-state arbitration and investor-state mediation. Part 6 provides a future outlook with calls for meaningful reform in the area of international investment law so as to better align it with justice and sustainable development goals.

With thousands of international investment agreements in force as well as hundreds of free trade and related agreements also providing some form of investor protection and/or investor-state dispute settlement, international investment law, sustainable development, and human rights expertise is needed around the world every day. We have included the contributions of experts on investment law, justice, and sustainable developing who work as university teachers, arbitrators, counsel, practicing lawyers, and other experts in this field. Our authors represent various universities and colleges, including but not limited to Bard College Berlin, Central European University, Indiana University, American University of Central Asia, Columbia University, Princeton University, Monash University, Maharashtra National Law University Mumbai, University of Galway, International University of Sarajevo, University of Szeged, University of Aberdeen, European Humanities University, George Washington University Law School, Chinese University of Hong Kong, and others. They also represent key research institutes in the field of investment law, among which are Columbia Center on Sustainable Investment (a joint center of Columbia Law School and Columbia Climate School, USA) and International Investment Law Centre Cologne (University of Cologne, Germany). In addition, we have contributions from authors working in leading law firms specializing on investment disputes from around the world, international arbitration centers, and international and national organizations involved in issues related to investment law, justice, and sustainable development.

We hope to make a meaningful contribution to the dissemination of this expertise and to the conversations about overdue reforms of the legal framework. We welcome feedback from our readers, in particular suggestions on how we may further improve our work and better achieve our goals with future editions of the book.

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Author Biographies

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Afolabi Adekemi is a distinguished legal professional with a doctorate from Saarland University, Germany, focused on international investment law. Throughout his academic career, Afolabi has significantly contributed to his field of specialization through multiple scientific publications and lectures, enriching the academic discourse and global understanding of international investment law and its emerging reforms. Recognized with prestigious awards like the AKSO Stiftung Europa-Preis and the European Prize of the Villa Lessing, he exemplifies excellence in legal scholarship. Afolabi has served in various capacities, including as a Research Associate at Saarland University, as a Visiting Scholar at the Max Planck Institute of Procedural Law in Luxembourg, and as a Visiting Lecturer at Tashkent State University of Law in Uzbekistan.

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Chapter 2.2
Guarantees Against Expropriation

By Csongor Istvàn Nagy

A. INTRODUCTION

The legal protection afforded by BITs to foreign investors and investments is made up of the rules on expropriation and various "treatment" standards (such as fair and equitable treatment, full protection and security, national treatment, most-favored nation treatment, prohibition of arbitrary or discriminatory measures). Expropriation implies the complete (or nearly complete) deprivation of the investment, while the treatment standards, as a matter of principle, apply to state measures which usually but not always fall short of expropriation. This implies that the two sets of rules overlap considerably. For instance, an expropriatory act may also breach the fair and equitable treatment and the national treatment principles. On the other hand, there is an important difference between expropriation and "treatment" standards: expropriation is a sovereign right that is conditioned and calibrated by certain mild criteria of lawfulness, while "treatment" standards prohibit wrongful acts.

The protection of foreign investments against expropriation plays out in two ways. First, BITs pre-condition expropriation. Although states enjoy a very significant deference, they are subject to legal limits and cannot make arbitrary decisions. Second, and most importantly, BITs conceive expropriation as a "forced sale", that is, states are required to fully compensate the investors for the expropriated investment and the compensation shall be equal to the fair market value (that is, the real market price).

This chapter provides a concise overview of BITs' legal protection against expropriation in light of the arbitral practice and international scholarship. Part B addresses the definition of expropriation, in particular, indirect expropriation. It also provides a definition of key concepts, such as expropriation, nationalization, direct and indirect expropriation, regulatory expropriation and creeping expropriation. Part C sets out the pre-requisites of lawful expropriation and distinguishes lawful from unlawful expropriation. Part D presents the compensation standard applicable to lawful taking (fair market value plus interests), while Part E describes the compensation standard governing unlawful taking (*restitutio in integrum*). Finally, Part F contains the chapter's conclusions and some critical remarks.

B. EXPROPRIATION

BITs regulate the expropriation (taking) and nationalization of foreign investments.

Expropriation signifies the taking of a specific investment (property) by the state, while *nationalization* is a large-scale form of expropriation and generally covers an entire industry or a geographic region. In terms of legal assessment, there is no difference between the two, they are subject to the same legal requirements and rules. As a matter of practice, nationalizations are rare, and most cases involving the taking of foreign property are simple expropriations.

Expropriation does not presuppose that the investment taken accrues to the state or a state entity, and it is not a requirement that any benefit be transferred from the investor. A state measure may amount to expropriation, if it "destroys" the value of the property without transferring it to the state or any other beneficiary. In *Metalclad v. Mexico*, the tribunal stressed that an expropriation takes place, even if it is "not necessarily to the obvious benefit of the host State".[1]

BITs apply to both direct and indirect expropriations.

Direct expropriation refers to the straightforward taking of foreign property and is explicit and normally involves the formal transfer of ownership, for instance, over plots, utilities or factories. According to the 2016 Comprehensive Economic and Trade Agreement concluded between Canada and the EU, "direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure."[2] A similar definition was provided by the tribunal in *Myers v. Canada*: "In general, the term 'expropriation' carries with it the connotation of a 'taking' by a governmental-type authority of a person's 'property' with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the 'taking.'"[3] In this sense, direct expropriation raises no major problems of definition and is not a fact-intensive issue.

Indirect expropriation refers to state actions that aim to achieve the same result as direct expropriation indirectly, without a formal transfer of ownership. It covers measures that are not explicitly expropriatory but have the same or very similar effects. The purpose of the concept of indirect expropriation is to filter out state policies that are not explicit in taking private property but result in a plight that is virtually the same or highly similar. As noted by the tribunal in *Metalclad v. Mexico*, "expropriation […] includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State".[4]

I. Indirect Expropriation

The requirement of compensation makes expropriation costly, while non-expropriatory measures entail no claim to compensation notwithstanding their eventual impairment of the profitability of the investment (unless they breach one of the treatment standards). Hence, states have clear financial interests in refraining from explicit expropriation and in trying to achieve their goals through alternative means. Most of the investment disputes concerning expropriation deal with claims of indirect expropriation, direct expropriation being rare, though not completely extinct.

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

2 Annex 8(A)(1) of the 2016 Comprehensive Economic and Trade Agreement.

3 *SD Myers v. Canada*, Partial Award of 13 November 2000, 40 ILM 1408 (2001), para 280.

4 *Metalclad Corporation v. The United Mexican States,* supra, note 1.

Indirect expropriation is a catch-all phrase that covers state measures that impair the investment to such an extent that they ought to be considered "equivalent"[5] or "tantamount"[6] to expropriation or nationalization. This occurs if the investor is *substantially deprived* either of the investment's economic value or its control over the investment (or both).

In *Telenor v. Hungary*, the tribunal held that for indirect expropriation to occur the "interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use or enjoyment of its investment."[7] It also held that "[i]n considering whether measures taken by the government constitute expropriation the determinative factors are the intensity and duration of the economic deprivation suffered by the investor as a result of them."[7]

This approach also finds reflection in the 2016 Comprehensive Economic and Trade Agreement concluded between Canada and the EU: "indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure."[8]

While expropriatory acts usually aim to appropriate the *economic value* of the investment, *loss of control* may equally amount to indirect expropriation. For instance, in *Starrett Housing*,[9] Iran took over the management of an American housing business by appointing managers. The Iran-United States Claims Tribunal considered that this was tantamount to expropriation. It held that "a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner".

II. Regulatory Expropriation

Regulatory expropriation is a form of indirect expropriation and refers to cases where the regulation is so burdensome that it suppresses the value of the investment or the investor's control over it.

The concept of indirect expropriation has featured two conflicting approaches.[10]

Under the "sole effects" doctrine the characterization as indirectly expropriatory turns solely on the measure's impact on the investor's property rights. This notion implies that regulation is distinguished from expropriation by the degree of interference with the investor's property rights. While

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5 Article 16(1) of the 2015 Japan-Uruguay BIT.

6 Article 3 of the 1993 Kyrgyzstan-US BIT.

7 *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, at para 70.

8 Annex 8(A)(1) of the 2016 Comprehensive Economic and Trade Agreement.

9 *Starret Housing Corp. v. Iran*, 4 Iran-United States Cl. Trib. Rep. 122, 154 (1983).

10 Ben Mostafa, *The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law*, Australian International Law Journal 2008, Vol. 15, p. 267; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford Univ. Press 2008, pp. 101-104.

"expropriations tend to involve the deprivation of ownership rights", regulations are "a lesser interference."[11]

This approach features, for instance, in the arbitral award in *Metalclad v. Mexico*, where the tribunal found that it "need[s] not decide or consider the motivation, nor intent of the [measure]".[12] This implies that a perfectly legitimate regulation may, without anything further, amount to indirect expropriation, if it substantially deprives the investor of the economic value, use or enjoyment of the investment.

On the other hand, the "police power" doctrine relies on the measure's object to reveal its nature and to identify indirect expropriation. It is based on the notion that the legitimate use of regulatory powers may not amount to indirect expropriation, irrespective of the impact on property rights, and requires the tribunal to look into the purpose, context and nature of the measure to ascertain, if it qualifies as legitimate regulation. Under this doctrine, indirect expropriation may be established only if the state uses regulatory measures so as to virtually expropriate the investment or the restriction of the investor's property rights are disproportionate in light of the regulatory purpose.

In *Methanex v. United States*, the tribunal held that "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment, is not deemed expropriatory and compensable, unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."[13]

The tribunal in *Tecmed v. Mexico* provided a good formulation of the approach imminent in the "police power" doctrine: "the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. […] There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."[14]

The arbitral practice features a blend of the "sole effects" and the "police power" doctrines, with a preponderance of the former.

Arbitral tribunals have been predominantly following the "sole effects" doctrine. However, in border-line cases, where it is difficult to ascertain if the regulatory burden reached the level of substantial deprivation, the tribunals have the tendency to take into consideration, explicitly or implicitly, whether the act was a legitimate exercise of the state's regulatory power, or arbitrary. Indeed, the radical conception that legitimate regulation can never amount to expropriation would make BITs'

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11 *S.D. Myers, Inc. v. Canada*, Partial Award of 13 November 2000, p. 232. International Legal Materials 408.

12 *Metalclad Corporation v. The United Mexican States*, supra, note 1, at para 111.

13 *Methanex v. United States*, Final Award of 7 August 2002, Part IV - Chapter D - p. 4.

14 *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/02, Award of 29 May 2003, para 122.

protection against expropriation quite ineffective. As noted by the tribunal in *Pope & Talbot v. Canada*, "much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protection against expropriation."[15]

In *Tippetts v. Iran*, the Iran-United States Claims Tribunal held that "the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."[16]

In *El Paso v. Argentina*, the tribunal adopted a complex approach and "subscribe[d] to the decisions which have refused to hold that a general regulation issued by a State and interfering with the rights of foreign investors can never be considered expropriatory because it should be analysed as an exercise of the State's sovereign power or of its police powers."[17]

This blended approach finds reflection, for instance, also in *Tecmed v. Mexico*, where the tribunal established "that regulatory administrative actions are [not] *per se* excluded from the scope of the Agreement, even if they are beneficial to society as a whole – such as environmental protection – particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever."[18]

A similar attitude may be sensed in *Metalclad v. Mexico*,[19] where not only the impact on the investor's property rights and the measure as such were taken into consideration, but also "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." The tribunal concluded that it was the totality of these factors that "amount[ed] to an indirect expropriation."[20]

This mingled approach also finds reflection in the recent treaty practice.

The 2012 US Model BIT defines indirect expropriation as "an action or series of actions […] [that] has an effect equivalent to direct expropriation without formal transfer of title or outright seizure" and provides for the consideration of the following factors:[21]

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15 *Pope & Talbot, Inc v. Canada*, Interim Award of 26 June 2000, para 99.

16 *Tippetts v. Iran*, Iran-US Claims Tribunal, Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, 6 IRAN-U.S. C.T.R., at 219 et seq. (https://www.trans-lex.org/231000/_/iran-us-claims-tribunal-tippetts-abbett-mccarthy-stratton-v-tams-affa-6-iran-us-ctr-at-219-et-seq/), p. 225.

17 *Id*., para 234.

18 *Tecmed v. Mexico*, Award of 29 May 2003, para 121.

19 *Metalclad Corporation v. The United Mexican States*, supra, note. 1.

20 *Id*., para 107.

21 Annex B(4)(a).

> *(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;*
>
> *(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and*
>
> *(iii) the character of the government action.*
>
> *(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.*

A similar approach is reflected in the new generation free trade agreements, such as the 2016 Comprehensive Economic and Trade Agreement concluded by Canada and the EU:

> *2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors:*
>
> *(a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;*
>
> *(b) the duration of the measure or series of measures of a Party;*
>
> *(c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and*
>
> *(d) the character of the measure or series of measures, notably their object, context and intent.*
>
> *3. For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.*[22]

[22] Annex 8(A) of the 2016 Comprehensive Economic and Trade Agreement.

III. Creeping Expropriation

Creeping expropriation refers to piecemeal taking: it is "a slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment."[23]

In *Generation v. Ukraine*, the tribunal defined creeping expropriation "as a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property."[24]

This implies that creeping expropriation is made up of a series of acts, which individually do not qualify as expropriation but jointly entail an effect tantamount to expropriation.

In *Siemens v. Argentina*, the tribunal illustrated creeping expropriation by means of an expressive metaphor: "The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break."[25]

IV. The Requirement of Substantial Deprivation

The key issue in identifying indirect expropriation is the measure's effect in terms of interference with the widely conceived property rights in the investment. This involves a fact-intensive, case-by-case analysis. As explained by the tribunal in *Myers v. Canada*, indirect expropriation "require[s] a tribunal to look at the substance of what has occurred and not only at form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure."[26]

There is no clear-cut rule about what "substantial" means in this regard. As demonstrated above, tribunals take into account the regulatory context and the requirement of proportionality.

It is clear, however, that some impairment or reduction of profitability will not constitute expropriation. In *Tokios Tokeles v. Ukraine*, the tribunal held that "a diminution of 5% of the investment's value will not be enough for a finding of expropriation, while a diminution of 95% would likely be sufficient."[27]

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23 UNCTAD Series on Issues in International Investment Agreements, New York & Geneva, 2000, http://unctad.org/en/docs/psiteiitd15.en.pdf. See also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford Univ. Press 2008, pp. 114-118.

24 *Generation Ukraine, Inc. v. Ukraine,* ICSID Case No. ARB/00/9, Award of 16 September 2002, para 20.22.

25 *Siemens A.G. v. The Argentine Republic,* ICSID Case No. ARB/02/8, Award of 17 January 2007, para 263.

26 *SD Myers v Canada*, Partial Award of 13 November 2000, 40 ILM 1408 (2001).

27 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award of 26 July 2007, para 120.

In *Pope & Talbot v. Canada*, the tribunal found export quotas not to be expropriatory. Although the value of the investment was impaired (the company's profitability was reduced), it was not suppressed: exports were not completely ruled out and the investor could still make profits. The tribunal held that "mere interference is not expropriation; rather, a significant degree of deprivation of funda- mental rights of ownership is required."[28]

In *Telenor v. Hungary*,[29] the tribunal held that "the mere exercise by government of regulatory powers that create impediments to business or entail the payment of taxes or other levies does not of itself constitute expropriation."[30] Telenor complained of a set of regulatory measures: electronic communications operators had to contribute to the financing of universal telecommunications services provided by fixed-line operators; regulated interconnection (call termination) prices were introduced for mobile service providers with significant market power (SMP); the competition authority fined the complainant for abuse of dominant position. The tribunal found that these circumstances did not work out even a *prima facie* case.[31]

BITs provide legal protection against the deprivation of the investment as such and not against the *individual benefits* that form part of the investment.

In *AES Summit v. Hungary*,[32] the claimants sued, among others, for the reintroduction of regulated prices. The tribunal grasped the investment as one unit and refused to treat each element of the investment as an independently protectable investment. As a corollary, it held that Hungary did not take control over the investment and, although the regulated prices decreased profitability, they did not deprive the investment of its value.[33]

A similar approach was adopted by the tribunal in *Electrabel v. Hungary*.[34] The tribunal held that the termination of a benefit does not in itself amount to expropriation, as long as the investment's core value is not destroyed. The complainant operated a power plant and Hungary terminated, through a legislative act, its long-term power purchase agreement (PPA) with the electricity company. Although the PPA was concluded simultaneously with the acquisition of the power plant, the

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28 *Pope & Talbot, Inc v. Canada*, Interim Award of 26 June 2000, para 88.

29 *Telenor Mobile Communications A.S. v. The Republic of Hungary*, supra, note 7.

30 *Id*., paras 64-67.

31 *Id*., paras 79-80.

32 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award of 23 September 2010. It is worthy of note that this was not the first investment dispute between the claimant and Hungary. AES Summit Generation Limited sued Hungary also in 2001 in Case ARB/01/4. However, this controversy ended in a settlement. See Zoltán Víg, *The Fair and Equitable Treatment in the Energy Charter Treaty,* Pólay 2021, at p. 24.

33 Paras 14.3.1.-14.3.4.

34 *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Award of 25 November 2015. For a detailed overview, see Csongor István Nagy, *Hungarian Cases Before ICSID Tribunals: the Hungarian Experience with Investment Arbitration*, 53(3) Hungarian Journal of Legal Studies 2017, Vol. 53, No. 3, pp. 291, 301-306.

tribunal rejected the claim and found that the complainant's investment was made up of its interests in the power plant (which was not taken), and the contractual right to sell electricity. The latter was, in itself, not an investment. Although the complainant was, indeed, deprived of its right to sell the power at a relatively high price as guaranteed in the contract, the protected investment was conceived as a bundle of rights. This also implied that the nullification of one element did not necessarily imply that the claimant's investment was deprived of its value.

> *"[T]he test for expropriation is applied to the relevant investment as a whole (…). Here the investment held by Electrabel as a whole was its aggregate collection of interests in (…) [the power plant]; it was thus one integral investment; and in the context of expropriation it was not a series of separate, individual investments with (…) [the power plant's] PPA as an autonomous investment set apart from (…) other interests in (…) in [the power plant]. The investment "was manifestly not confined to the PPA; and the PPA formed an intrinsic and inseparable part of (…) the investment as a whole."*[35]

Not only final deprivations but also *temporary interferences* may be considered expropriation, provided they result in a substantial deprivation.[36] The extent of deprivation and the required duration are inversely proportional. For instance, in *Myers v. Canada* a 15-month export ban was insufficient to establish expropriation. Nonetheless, in *Wena Hotels v. Egypt*, the seizing of a hotel for nearly a year constituted expropriation.

V. Breach of a Private Law Contract as Expropriation

"The taking away or destruction of rights acquired, transmitted, and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property."[37] It is questionable, however, if a state's exercise of its contractual rights, which it acquired as a private contracting party, may come under the scope of BITs.

In *Nykomb v. Latvia*,[38] the controversy centered around attributing a public enterprise's (Latvenergo) breach of contract to the Latvian state and the tribunal established the vicarious liability of Latvia for Latvenergo's conduct.

In *Vigotop v. Hungary*,[39] the pivotal legal question was whether Hungary's termination of a concession agreement qualified as an expropriatory state measure. Hungary's termination of the concession agreement was a private act (*actum jure gestionis*), and arguably the legal

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35 Id., para 6.58.

36 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford Univ. Press 2008, pp. 112-114.

37 American-Venezuelan Mixed Claims Commission, *Rudloff Case*, Decision on the Merits, 9 Reports of International Arbitral Awards / Recueil des Sentences Arbitrales 244, 250 (1903-1905).

38 *Nykomb v. Latvia*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitral Award of 16 December 2003.

39 *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award of 1 October 2014.

dispute between the parties did not qualify as a controversy between an investor and a sovereign, but as a purely contractual dispute. The tribunal conceived the "expropriatory act" widely, and went into the intricacies of the commercial dispute, establishing the following three-prong test. First, it has to be analyzed whether Hungary had public policy reasons to terminate the concession agreement – or whether the decision to terminate the agreement was based on purely contractual considerations. Second, in case of public policy reasons, it has to be ascertained whether the termination has a contractual ground. Third, in case of a contractual ground, it has to be examined whether the termination was legitimate, that is, whether Hungary acted in good faith.[40]

The tribunal held that the termination of the concession agreement had to be examined, independent of any national court decision, since it was, in part, based on public policy reasons (new public policies regarding environmental protection and tourism). Furthermore, "concerns about corruption […], although such concerns ultimately proved unfounded, may also have played a role in the Government's decision to terminate the Concession Contract". However, Hungary had a solid contractual ground to terminate the concession agreement and exercised its right in good faith.[41]

C. LAWFUL AND UNLAWFUL EXPROPRIATION

BITs do not prohibit the expropriation of foreign investments, merely condition it. Although the requirements set out by BITs are vague, and tribunals traditionally afford a wide margin of appreciation to the states when exercising their prerogative to expropriate,[42] this implies that this prerogative is not unfettered, and the expropriation may qualify as illegal. BITs normally erect four requirements against expropriation: it has to be in the public interest (justified by a public purpose), non-discriminatory, in accordance with due process of law, and occur "on payment of prompt, adequate, and effective compensation."[43]

In *Rusoro v. Venezuela*, the tribunal held that the requirement of due process of law "does not specifically refer to […] [the domestic law of the host state], but to due process in general, a generic concept to be construed in accordance with international law. In essence, due process requires (i)

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40 *Id.*, paras 328-331.

41 *Id.*, para 634.

42 See *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, para 712: "States are afforded a wide margin of appreciation in determining whether an expropriation serves a public purpose". As to the standard of review employed by arbitral tribunals and deference enjoyed by states, see Caroline Henckels, *Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration*, Journal of Int'l Dispute Settlement 2013, Vol. 4, No. 1, pp 197-215; Giovanni Zarra, *Right to Regulate*, *Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v. Uruguay*, 14(2) Revista de Direito Internacional 2017, Vol. 14, No. 2, pp. 94-120.

43 Article 6(1) of the 2012 US Model BIT. Some BITs may establish further conditions. For instance, Article 5(c) of the 1992 Netherlands-Poland BIT prohibits expropriations that are "contrary to any undertaking" given by the host state.

that the decision to nationalize be properly adopted, and that (ii) the expropriated investor have an opportunity to challenge such decision before an independent and impartial body."[44]

It is generally accepted that, to qualify as lawful, the expropriation has to be in the public interest (justified by a legitimate purpose),[45] non-discriminatory and in accordance with due process of law. It is questionable, however, if the lack of voluntary and prompt payment of compensation may turn an otherwise lawful taking into illegal expropriation. Although the arbitral practice has been diverging in this regard, resulting in various conceptualizations, tribunals have consistently refused to apply the legal consequences of unlawful expropriation (the *restitutio in integrum* standard) in cases where the state refused to pay compensation, but the rest of the requirements of lawful taking were met.

Probably the most reasonable construction is not to treat the payment of compensation as a pre-condition of lawful expropriation. First, contrary to the rest of the pre-conditions (public purpose, non-discrimination, due process), which are, by nature, *ex ante*, the payment of compensation is, by nature, *ex post*. Second, the lack of payment may not show the state's lack of willingness to pay, but a controversy about the amount to be paid and a need for the arbitral tribunal to determine it. Third, treating the payment of compensation as a pre-condition of legality would lead to a vicious circle. If the state's refusal to pay turns the taking into unlawful expropriation, the performance of the arbitral award on compensation turns this illegal taking into lawful expropriation, making it senseless to treat it as unlawful in the first place. The lack of payment is not an irreversible shortcoming, quite the contrary, the provision that the compensation carries an interest implies that BITs count on non-payment. This is well-illustrated by the partial dissent of Arbitrator Stern in *Quiborax v. Bolivia*: "An expropriation, which only lacks fair compensation to be lawful has to be treated as a potentially lawful expropriation (or a provisionally unlawful expropriation until the tribunal has awarded the compensation due for the expropriation to be legal): this is so, because, as soon as the fair compensation needed for a lawful expropriation is granted, the situation has been re-established and that condition for a lawful expropriation has been fulfilled."[46]

D. COMPENSATION FOR LAWFUL EXPROPRIATION

The core message of the rules on expropriation is that states do have the right to expropriate but need to compensate. Although BITs condition expropriation by introducing legal requirements (as noted above, the expropriation is lawful only if it is in the public interest,[47] non-discriminatory and is in accordance with the requirement of due process), they certainly do not rule it out. Quite the contrary, states have a very wide playing field and enjoy a wide margin of appreciation when it comes to the definition of the public interest. In this sense, the edge of the BITs is that they make

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44 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016, para 389.

45 *Valeri Belokon v. Kyrgyz Republic*, Award of 24 October 2014.

46 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Partially Dissenting Opinion of 7 September 2015, para 17.

47 See Zoltán Víg, *Taking in International Law*, Patrocinium 2019, pp. 72-76.

full compensation the rule. As a rule of thumb, BITs permit states to expropriate but they have to pay, if they decide to do so. In this sense, expropriation is a "forced sale."

According to BITs' compensation standard, the investor is entitled to full, effective and prompt compensation for the expropriated investment. This means that the state is obliged to pay a compensation equal to the normal market price ("fair market value") of the expropriated investment. The compensation has to be effective, that is real, freely transferable and unconditional. Furthermore, the payment becomes due immediately and has to be provided promptly. The requirement of prompt compensation implies that, in the event the state fails to provide it right away, the compensation carries interests under a commercially reasonable rate.

This is a major advantage of BITs in comparison to the compensation standard under customary international law.[48] While it is generally accepted that customary international law obliges states to compensate foreign investors if they expropriate the latter's assets, there is no general understanding as to whether this compensation needs to be full or merely "appropriate."[49]

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48 See Csongor István Nagy, *There Is Nothing in a Caterpillar That Tells You it Is Going to Be a Butterfly: the Doctrinal Foundations of International Investment Protection Law*, Georgetown Journal of Int'l Law 2020, Vol. 51, No. 4, pp. 897, 899-905.

49 See John H. Currie, *Public International Law*, Irwin Law, 2nd ed. 2008, p. 360; Gideon Boas, *Public International Law: Contemporary Principles and Perspectives*, Edward Elgar 2012, p. 300 ("Where a state expropriates the property of a foreign national, there is no general customary rule of 'prompt, adequate and effective' compensation (the so-called 'Hull formula'), as developing states have long considered that expropriation during non-discriminatory largescale nationalizations for a public purpose do not oblige states to pay full compensation. Appropriate compensation must take into account the state's right to permanent sovereignty over its resources."); General Assembly Resolution 1803 (XVII) of 14 December 1962, "Permanent Sovereignty over Natural Resources", para 4 (Providing that „the owner shall be paid *appropriate* compensation.") (emphasis added); United Nations General Assembly Resolution 3281 (XXIX): "Charter of Economic Rights and Duties of States", 12 December 1974, Article 2(2)(c) ("Each State has the right (…) [t]o nationalize, expropriate or transfer ownership of foreign property, in which case *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 pertinent. 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.") (emphasis added); Guidelines on the Treatment of Foreign Direct Investment, in World Bank, *Legal Framework for the Treatment of Foreign Investment: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, Vol. II (Washington, D.C.: World Bank, 1992), Section IV(1) (Expropriation is acceptable, if it is done "against the payment of appropriate compensation." Compensation is appropriate if it is "adequate", that is, "based on the fair market value of the taken asset."); Lee A. O'Connor, *The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State*, Loyola of Los Angeles Int'l & Comp. Law Rev. 1983, Vol. 6, p. 355; M. Sornarajah, *The International Law on Foreign Investment,* Cambridge Univ. Press, 3rd ed. 2010, pp. 183-184; Zoltán Víg, *Taking in International Law*, Patrocinium 2019, pp. 121-128; Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, Northwestern Journal of Int'l Law & Bus. 1993, Vol. 14, pp. 327, 329 ("[T]he frenetic conclusion of BITs is occasioned by the uncertainty that pervades international investment law since the advent of the developing countries on the international scene, and secondly, that international law has not kept pace with the developments that have

Although capital-exporting developed countries, for obvious economic reasons, tend to advocate the right to full compensation, capital-importing developing countries reject this notion and tend to be of the view that international law requires merely "appropriate" compensation and this is a matter for domestic law.[50] The legal situation may be described at best with the existence of "two conflicting norms."[51] Although one may argue for the right of full compensation as being part of international law (in the same way as one may argue for its non-existence), the high level of uncertainty that surrounds this results in the lack of a meaningful legal guarantee.

E. COMPENSATION FOR UNLAWFUL EXPROPRIATION

While lawful expropriation is conceived as a "forced sale" and, hence, governed by the "fair-price-plus-interest" compensation standard, unlawful taking is conceived as a tort and is governed by the compensation standard of tort law *(restitutio in integrum).*[52] In case of illegally caused damage, tort law aims to put the injured party in the position as if the wrong had not occurred. The restitution to the original position can be accomplished either by restoring the initial status or, if this is no longer possible or were unreasonable, by providing compensation in a value that puts the injured party in the position as if the illegal act had not occurred.

Tort law's standard of *restitutio in integrum* conceptually differs from the "fair-price-plus-interest" standard and in some cases may result in a different compensation sum. *ADC v. Hungary (Budapest Airport)*[53] demonstrates this very well. In this case, Hungary terminated, through a legislative act, the claimants' right to operate the two terminals of the Budapest Airport. The tribunal found the expropriation unlawful, because Hungary failed to offer any legitimate (and credible) public interest goal, the taking was discriminatory and due process was not observed, as well as just compen-

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taken place in the last thirty years in foreign direct investment.").

50 See Malcolm N. Shaw, *International Law,* Cambridge Univ. Press, 6th ed. 2008, pp. 834-835; Alina Kaczorowska, *Public International Law*, Routledge, 4th ed. 2010, pp. 451-453 ("Although it is generally agreed that expropriation may occur, the wide divergence of political and economic beliefs among States has resulted in little agreement as to the rules to be applied in cases of expropriation. Communist States believe that States may expropriate the means of production, distribution and exchange without paying any compensation, i.e. confiscation. Developing States believe the matter should be left to the expropriating State to regulate at its discretion and in accordance with its national law. Western capital-exporting States have, however, advocated an international minimum standard based on three principles.").

51 M. Sornarajah, *The International Law on Foreign Investment*, Cambridge Univ. Press, 3rd ed. 2010, pp. 451-452 ("In light of the controversy relating to the standard of compensation, the best solution that could be hoped for in the present state of international law is for states to settle the issue of compensation through bilateral investment treaties and agree upon the standard of compensation between themselves.").

52 *Chorzów Factory (Claim for Indemnity) (Merits), Germany v. Poland, P.C.I.J. Series A., No. 17 (1928)*, paras. 480 & 499.

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

sation was not provided.[54] As a result, it set the quantum in accordance with *restitutio in integrum*[55] as "the default standard contained in customary international law."[56] According to the tribunal, under this standard, the "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[57] The application of the *restitutio in integrum* standard led to a higher quantum as compared to the "fair-price-plus-interest." The relevant point of time (as regards the market value) was not the moment of expropriation but the time when the award was rendered. Hungary had to compensate the claimants for "all unpaid dividends and management fees from the date of expropriation until the date of the award."[58] As the value of the Budapest Airport (more precisely that of the right to operate it) increased considerable, the difference in the calculation standard entailed a significantly higher quantum.

F. Conclusions and Outlook

International investment law has encountered significant criticism in the last couple of decades. It has been argued that arbitral tribunals do not have the legitimacy to decide the genuine constitutional disputes that are referred to them. It has also been argued that the secrecy, non-transparency and *ad-hoc* nature of arbitral proceedings is irreconcilable with the nature of investment disputes.[59] Critics have claimed that arbitrators have an imminently pro-investor attitude and a tendency to turn a blind eye to the legitimate regulatory and societal considerations behind state measures and to suppress states' right to regulate in the public interest. This criticism implies the claim that arbitrators tend to give precedence to the selfish financial interest of investors to the detriment of the society as a whole. Although the main target of this criticism has been the arbitral practice under the "treatment" provisions of BITs, it also extended to arbitrators' grasp of indirect expropriation.

Recent treaty practice reacts to this criticism by stressing states' unquestionable right to regulate and by setting out legal guarantees against interference with the legitimate exercise of national regulatory powers. The difficulty is that the central consideration behind taking (both in BITs and

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54 Id., paras 426-444.

55 On the conditions of lawful taking and compensation theories in international investment protection law see Vig and Gajinov, *the Development of Compensation Theories in International Expropriation Law*, Hungarian Journal of Legal Studies 2016, Vol. 57, No. 4, pp. 447-461.

56 *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, supra, note 53, para 483.

57 Id., para 484, citing *Chorzów Factory (Claim for Indemnity) (Merits), Germany v. Poland*, P.C.I.J. Series A., No. 17 (1928).

58 Id., para 518.

59 Cf. Joseph H.H. Weiler, *European Hypocrisy: TTIP and ISDS*, European Journal of Int'l Law 2014, Vol. 25, No. 4, p. 963 ('[T]he Bar that adjudicates them [investment disputes] is of a limited range (…), and dominated by arbitrators from private practice rather than public interest backgrounds (…); and most damning of all, the substantive provisions of the investment treaties, when it comes to protecting societal interests, are woefully defective and inferior when compared with similar public interest provisions in trade agreements such as the WTO itself.').

national laws) is that states are, within some limits, free to expropriate but they have to pay. The idea is that if there is a striking allocative asymmetry of the burdens and benefits of the regulation, the state has to reimburse the investor from the benefits the regulation entails. The duty to compensate involves no moral or constitutional condemnation. This implies that the state is free to regulate in the public interest irrespective of the impairment of the various economic stakes, but if the burdens of the regulation are allocated so asymmetrically that they virtually suppress the investment, the state has to buy it. In this sense, expropriation law is not about legitimacy but about redistribution.

The genesis of investment treaties can be grasped as an endeavor to project some minimum standards of economic constitutionalism to the level of international obligations so that they are guaranteed by international law and are not unilaterally rescindable. In this conception, the regime did not aim to afford any excessive and above-average protection to foreign investors that goes well beyond the constitutional traditions of developed democracies but to upgrade certain constitutional requirements to the level of international disciplines and to convert the relevant standards of economic constitutionalism into international law guarantees, so they could not be nullified unilaterally.[60]

This rationale implies that national rules on taking serve as an important benchmark, given that the pristine rationale of BITs arguably was to reproduce the protection afforded by national constitutions and, in this conception, BITs' rules on expropriation draw on the taking clauses of national constitutions.[61]

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60 Csongor István Nagy, *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*, Czech Yearbook of Int'l Law 2018, Vol. 9, pp. 197, 206; Csongor István Nagy, *There Is Nothing in a Caterpillar That Tells You it Is Going to Be a Butterfly: the Doctrinal Foundations of International Investment Protection Law*, Georgetown Journal of Int'l Law 2020, Vol. 51, No. 4, pp. 897-917.

61 According to the Takings Clause of the Fifth Amendment to the US Constitution, "[private property] shall [not] […] be taken for public use, without just compensation." See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). According to Article 51(xxxi) of the Australian Constitution, the Parliament has the power to make laws for the acquisition of property" but only "on just terms." According to Article 1 of Protocol No. 1 to the European Convention on Human Rights, "[n]o 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." According to Article 14(3) of the German Constitution (*Grundgesetz*): "[e]xpropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts." According to Article XIII(2) of the Hungarian Constitution (Fundamental Law), "[p]roperty may only be expropriated exceptionally, in the public interest and in those cases and ways provided for by an Act, subject to full, unconditional and immediate compensation." According to Article 44(3) of the Romanian Constitution, "[n]o one shall be expropriated, except on grounds of public utility, established according to the law, against just compensation paid in advance."

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