

**Part 1 - Rapport: The Concept of Expropriation under the ECT
and other Investment Protection Treaties**

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Summary

Expropriations, in order to be legal, must be in the public interest, non-discriminatory, must take place under due process of law and against prompt adequate and effective compensation.

Direct and overt expropriations have become rare. The typical form in which expropriations take place nowadays is indirect expropriations or measures having an equivalent effect. The

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concept of indirect expropriation has been known for some time and is reflected in contemporary treaties for the protection of investments. The concept of indirect expropriation is also well established in international judicial practice.

Creeping expropriation takes place step by step through a series of actions. It is widely recognized in international practice. It has its counterpart in the law of State responsibility in the concept of a breach consisting of a composite act.

Intangible property, including rights arising from a contract are susceptible of an expropriation in the same way as tangible property. This principle is reflected in the definitions of the term "investment" in the treaties for the protection of investments. Judicial practice supports a wide concept of "property," that includes intangible rights especially rights under contracts, for purposes of expropriation.

Not every breach of contract by a State that results in economic loss to the investor is an expropriation. The most important criterion for distinguishing between the simple breach of a contract and the expropriation of contract rights is whether the State acts in its commercial role as a party to the contract or in its sovereign capacity.

A legitimate public purpose underlying a regulatory measure does not exclude the existence of an expropriation. The distinction between normal regulatory action and a regulatory expropriation requiring compensation depends on the extent, severity and duration of the deprivation. The government's intention to expropriate is not relevant in this context.

1. General Remarks

Expropriation is not illegal *per se* under international law. It has always been beyond doubt that a State has the power and the right to expropriate the property of nationals and of foreigners, in principle. But a legal expropriation of foreign owned property is subject to certain conditions. These conditions are commonly referred to as a public interest, absence of discrimination, due

process of law and compensation that is prompt, adequate and effective.

The Energy Charter Treaty (“ECT”) is in line with most contemporary treaties for the protection of investments, especially BITs, in following these accepted principles. Article 13(1) of the ECT provides:

“(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “Expropriation”) except where such Expropriation is:

- (a) for a purpose which is in the public interest;
- (b) not discriminatory;
- (c) carried out under due process of law; and
- (d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the “Valuation Date”).⁴

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.”

It follows from provisions such as this one that the fact that a measure is in the public interest and non-discriminatory cannot be the answer to the question whether an expropriation has occurred.

⁴ 34 International Legal Materials (ILM) 381, 391 (1995). Paragraphs. 2 and 3 of Article 13 address the right to prompt review and shareholders’ rights.

An expropriation may take place under perfectly legitimate circumstances. Arbitrariness, bad faith, lack of proportionality and other improprieties are not constitutive elements of expropriation. Their absence does not mean that an expropriation could not have taken place.

2. Indirect Expropriation

Direct expropriations or nationalizations have become relatively rare. The unfavorable publicity engendered by such a drastic step and the negative effect on the host State's investment climate make it unwise to seize foreign owned property openly. At the same time, the significance of indirect forms of expropriation or measures having an equivalent effect has increased dramatically. The UNCTAD study on Taking of Property has described this development in the following words:

"It is not the physical invasion of property that characterizes nationalizations or expropriations that has assumed importance, but the erosion of rights associated with ownership by State interferences. So, methods have been developed to address this issue."⁵

Today the most difficult question for a tribunal faced with an allegation of expropriation is not so much whether the requirements for a legal expropriation have been met but whether there has been an expropriation in the first place. If there has been an expropriation there will be an obligation, in principle, to pay compensation. If there has not been an expropriation the investor will bear the economic consequences of the action unless another title for compensation can be established.

International documents dealing with the protection of foreign investment invariably include provisions on indirect expropriations and measures equivalent or tantamount to expropriation. This includes private codification attempts such as

⁵ UNCTAD Series on issues in international investment agreements, Taking of Property 20 (2000).

the Abs-Shawcross Draft Convention,⁶ the Draft Convention on the International Responsibility of States for Injuries to Aliens by Professors Sohn and Baxter⁷ and the Restatement (Third) of the Foreign Relations Law of the United States.⁸ It also includes documents prepared by international organizations such as the OECD Draft Convention on the Protection of Foreign Property of 1967,⁹ the draft for a United Nations Code of Conduct on Transnational Corporations,¹⁰ the World Bank Guidelines on the

⁶ The Abs-Shawcross Draft Convention on Investment Abroad of 1959 contained the following language in its Article III: "No Party shall take any measures against nationals of another Party to deprive them directly or indirectly of their property except ..." See UNCTAD, *International Investment Instruments: A Compendium*, Volume V, p. 396 (2001).

⁷ L. B. Sohn/R. R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AJIL 545, 553 (1961). Article 10 of the Draft Convention contains the following language: "3. (a) A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference. (b) A "taking of the use of property" includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time."

⁸ *Restatement (Third) of the Foreign Relations Law of the United States*, American Law Institute, Vol 2, pp. 196, 200 (1986): "§ 712 A State is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state ..." Comment (g.) on this provision explains: "Subsection (1) applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation")."

⁹ The OECD *Draft Convention on the Protection of Foreign Property* of 1967 contained the following provision in its Article 3 entitled "Taking of Property": "No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with ..." See UNCTAD, *International Investment Instruments: A Compendium*, Volume II, p. 114 (1996).

¹⁰ The United Nations *Code of Conduct on Transnational Corporations* in its 1983 version contained the following language: "In the exercise of their sovereignty, States have the right to nationalize or expropriate foreign-owned property in their territory. Any such taking of property whether direct or indirect, consistent

Treatment of Foreign Direct Investment¹¹ and the OECD Draft Negotiating Text for a Multilateral Agreement on Investment.¹²

In addition to the ECT, which has been quoted above, treaties in force that deal with the protection of investments typically address also indirect expropriations or measures having equivalent effect.¹³ The Convention Establishing the Multilateral Investment Guarantee Agency of 1985 contains the following provision in its Article 11 on Covered Risks:

“(ii) Expropriation and Similar Measures

any 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 governments normally take for the purpose of regulating economic activity in their territories.”¹⁴

with international law, must be ... See UNCTAD, *International Investment Instruments: A Compendium*, Volume I, p. 161, 174 (1996).

¹¹ *The Guidelines on the Treatment of Foreign Direct Investment*, adopted by the Development Committee of the Board of Governors of the International Monetary Fund and the World Bank in 1992, provide as follows in their Section IV dealing with “Expropriation and Unilateral Alterations or Termination of Contracts”: “1. A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except... See UNCTAD, *International Investment Instruments: A Compendium*, Volume I, p. 247, 252 (1996).

¹² The OECD *Draft Negotiating Text for a Multilateral Agreement on Investment* of 1998 contained the following text in its section on investment protection: “2.1. 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...” See UNCTAD, *International Investment Instruments: A Compendium*, Volume IV, p. 107, 148 (2001).

¹³ See also UNCTAD *Series on issues in international investment agreements*, Taking of Property 41 (2000).

¹⁴ 24 ILM 1605, 1611 (1985).

In the North American Free Trade Agreement of 1992 the issue is addressed in Article 1110 entitled "Expropriation and Compensation." The Article is introduced by the following words:

"1. 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: ..."15

Most bilateral investment treaties also contain provision on indirect expropriation or measures having an equivalent effect. Dolzer and Stevens, after explaining that a host State can take a number of measures which have an effect similar to expropriation, write:

"The expropriation clause in most BITs therefore commonly includes expropriation and nationalization as well as a reference to indirect measures, and accords them all the same legal treatment."16

These examples demonstrate that provisions on indirect expropriation, equivalent measures or measures with tantamount effect are a standard feature of documents dealing with the protection of investments.

Most treaties do not go beyond a broad generic reference to indirect expropriation or measures equivalent or tantamount to dispossession. The reason is the great variety of possible measures, amounting to a *de facto* taking of foreign owned property, which defies a more specific description. In the words of Dolzer and Stevens:

"Such apparent reluctance to attempt a definition of "expropriation" in the BITs may be explained by the fact that a host State, as is well known, can take a number of measures which have a similar effect to expropriation or nationalization, although they do not *de jure* constitute an act of expropriation;

¹⁵ 32 ILM 641 (1993).

¹⁶ R. Dolzer/M. Stevens, *Bilateral Investment Treaties*, p. 99 (1995).

such measures are generally termed “indirect,” “creeping,” or “de facto” expropriation.”¹⁷

The decisive element in an indirect expropriation is the substantial loss of control or economic value of a foreign investment without a physical taking.¹⁸ This may take place through a large variety of forms of indirect interference with the investors’ economic interests.¹⁹

The recognition of the concepts of indirect expropriation, *de facto* expropriation, measures equivalent to expropriations or acts tantamount to expropriation is well established in judicial practice. Even before the introduction of pertinent treaty provisions, international courts and tribunals have treated indirect takings and equivalent measures in the same way as direct expropriations. For instance, in the *Certain German Interests in Polish Upper Silesia*

¹⁷ *Op. cit.*, p. 99. Footnote omitted.

¹⁸ I. Brownlie, *Principles of Public International Law* 534 (5th ed., 1998); R. Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 *Recueil des Cours* 263, 351 (1982-III); W. Kühn/U. Wiegel, *The Application of International Law and Treaty Provisions by Arbitrators*, 4 *The Journal of World Investment* 451, 464 (2003); UNCTAD *Series on issues in international investment agreements, Taking of Property* 4, 41 (2000).

¹⁹ For descriptions and examples see G. C. Christie, *What Constitutes a Taking of Property under International Law?*, 38 *British Year Book of International Law* 305, 309, 310 (1962); B. H. Weston, “Constructive Takings” under International Law: A Modest Foray into the Problem of “Creeping Expropriation”, 16 *Virginia Journal of International Law* 103-175 (1975); R. Dolzer, *Indirect Expropriation of Alien Property*, 1 *ICSID Review-Foreign Investment Law Journal* 41-65 (1986); G. Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 *Recueil des Cours* 251, 382 *et seq.* (1997); P. E. Comeaux/N. S. Kinsella, *Protecting Foreign Investment Under International Law, Legal Aspects of Political Risk* 12-15 (1997); R. Dolzer, *Indirect Expropriations : New Developments?* 11 *N.Y.U. Environmental Law Journal* 64-93 (2002); B. M. Cremades/D. J. A. Cairns, *The Brave New World of Global Arbitration*, 3 *The Journal of World Investment* 173, 194 *et seq.* (2002); W. M. Reisman/R. D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 *The British Year Book of International Law* 115-150 (2003); G. H. Sampliner, *Arbitration of Expropriation Cases Under U.S. Investment Treaties – A Threat to Democracy or the Dog That Didn’t Bark?*, 18 *ICSID Review-Foreign Investment Law Journal* 1, 5-11 (2003); K. Hobér, *Investment Arbitration in Eastern Europe: Recent cases on Expropriation*, 14 *The American Review of International Arbitration* 377, 381 *et seq.* (2003).

(*Chorzów Factory*) Case,²⁰ the Permanent Court of International Justice held that the expropriation of the Chorzów Factory also constituted an indirect expropriation of the patents and contracts of a different company "Bayerische." The latter company merely had rights of management in the expropriated factory and the Polish authorities never purported to expropriate it.

In *Revere Copper v. OPIC*,²¹ the Claimant, through its subsidiary RJA, had entered into an agreement with the Government of Jamaica containing a stabilization clause with respect to taxes and other financial burdens. In 1974, the Government, in violation of that agreement, drastically increased the taxes and royalties. The Claimant claimed under an insurance contract providing cover for "expropriatory action." OPIC, the insurer, argued that there was no deprivation of effective control. The Tribunal rejected this contention and said:

"In our view the effects of the Jamaican Government's actions in repudiating its long term commitments to RJA have substantially the same impact on effective control over use and operation as if the properties were themselves conceded by a concession contract that was repudiated ... OPIC argues that RJA still has all the rights and property that it had before the events of 1974: it is in possession of the plant and other facilities; it has its Mining Lease; it can operate as it did before. This may be true in a formal sense but ... we do not regard RJA's 'control' of the use and operation of its properties as any longer 'effective' in view of the destruction by Government actions of its contract rights."²²

*Biloune v. Ghana*²³ concerned a hotel project through a local subsidiary ("MDCL"), on the basis of an investment agreement.

²⁰ *Factory at Chorzów (Germany v. Poland)*, Judgment, 15 May 1926, PCIJ Ser. A, No. 7 (1927).

²¹ *In the Matter of Revere Copper and Brass Inc. v. Overseas Private Investment Corporation*, Award, 24 August 1978, 56 ILR 268.

²² At pp. 291/92.

²³ *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184.

The project had proceeded substantially when the authorities issued a stop work order, demolished part of the project, arrested and expelled the investor. The Tribunal said:

“Given the central role of Mr. Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL’s contractual rights in the project and, accordingly, the expropriation of the value of Mr. Biloune’s interest in MDCL...”²⁴

The Iran-United States Claims Tribunal has also held consistently that for purposes of interpreting the phrase “expropriations or other measures affecting property rights” in the Algiers Declaration²⁵ the decisive element was not any formal transfer of title but loss of effective use and benefit of the investment.

In *Starrett Housing v. Iran*²⁶ the foreign investor had not been expropriated formally but a local “temporary manager” had been put in charge of the project. The Tribunal found that this amounted to an expropriation:

“... it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.”²⁷

²⁴ At p. 209.

²⁵ 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, reproduced in 1 Iran-US CTR 9.

²⁶ *Starrett Housing Corp. v. Iran*, 19 Dec. 1983, 4 Iran-US CTR 122.

²⁷ At p. 154.

The *Tippetts* case²⁸ also concerned the imposition of a temporary manager. In this case too, the Tribunal found that a taking of property had taken place. It said:

“A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.”²⁹

Recent awards in investment arbitration cases are unanimous on the wide reach of provisions in BITs and other treaties dealing with expropriation and measures having equivalent or similar effect. In *Goetz v. Burundi*³⁰ the host State had revoked the investor’s free zone status without any formal taking of property. The Tribunal held that the government’s action fell under the concept of measures having an effect similar to expropriation. It said:

“Since ... the revocation of the Minister for Industry and Commerce of the free zone certificate forced them to halt all activities ..., which deprived their investments of all utility and deprived the claimant investors of the benefit which they could have expected from their investments, the disputed decision can be regarded as a “measure having similar effect” to a measure depriving of or restricting property within the meaning of Article 4 of the Investment Treaty.”³¹

In *Metalclad v. Mexico*³² the Claimant had been assured by the federal government that his project for a landfill facility had

²⁸ *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 22 June 1984, 6 Iran-US CTR 219.

²⁹ At p. 225. This passage was quoted in *Compañía del Desarrollo de Santa Elena, S. A. v. Republic of Costa Rica*, Award, 17 February 2000, 5 ICSID Reports 153, at para. 77; *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Reports 68, para. 98 and *CME v. The Czech Republic*, Partial Award, 13 September 2001, para. 608.

³⁰ *Goetz and Others v. Republic of Burundi*, Award, 2 September 1998, 6 ICSID Reports 5.

³¹ At para. 124.

³² *Metalclad Corp. v. United Mexican States*, Award, 30 August 2000, 5 ICSID Reports 209.

complied with all relevant environmental and planning regulations. Subsequently, the local municipal authorities denied a construction permit. In addition, the regional government declared the land in question a national area for the protection of rare cactus. The Tribunal upheld the investor's claim under the NAFTA's provision on expropriation. It said:

"103. Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in 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."³³

*S.D. Myers v. Canada*³⁴ concerned an export ban by Canada of PCB waste to the United States for remediation. One of the claims was that this amounted to a measure tantamount to expropriation under Article 1110 of the NAFTA. The Tribunal said:

"The primary meaning of the word "tantamount" given by the Oxford English Dictionary is "equivalent." Both words require a tribunal to look at the substance of what has occurred and not only at form. A tribunal 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."³⁵

In the particular case, the Tribunal found that, while there was a breach of the fair and equitable standard under Article 1105 of the NAFTA (see paras. 303, 304 below), there was no measure

³³ At para. 103. This passage was quoted in *CME v. The Czech Republic*, Partial Award, 13 September 2001, at para. 606.

³⁴ *S. D. Myers Inc. v. Government of Canada*, Partial Award, 12 November 2000, 40 ILM 1408 (2001).

³⁵ At para. 285.

tantamount to expropriation since the measure had only been temporary.³⁶

In *CME v. Czech Republic*³⁷ the Claimant complained about interference in its contract rights by a regulatory authority, the Media Council. This had led to a situation that made it possible for the investor's local partner to cancel the contract on which the investment depended. The Tribunal found that the regulatory authority had reversed its earlier position and had forced the investor into accepting amendments to the contract which resulted in a loss of legal security.³⁸ Therefore, a violation of the relevant BIT provision on expropriation had occurred. The relevant provision in Article 5 of the Czech-Netherlands BIT provided:

“Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless ...”

The Tribunal said:

“The Respondent's view that the Media Council's actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State or because the original License ... always has been held by the original Licensee and kept untouched, is irrelevant. What was touched and indeed destroyed was the Claimant's and its predecessor's investment as protected by the Treaty. What was destroyed was the commercial value of the investment ... by reason of coercion exerted by the Media Council ...”³⁹

More generally, with respect to *de facto* or indirect expropriations the Tribunal said:

³⁶ At para 287.

³⁷ *CME v. The Czech Republic*, Partial Award, 13 September 2001.

³⁸ At paras. 591-609.

³⁹ At para. 591.

“The expropriation claim is sustained despite the fact that the Media Council did not expropriate CME by express measures of expropriation. *De facto* expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims. This is undisputed under international law ...”⁴⁰

In *Lauder v. The Czech Republic*⁴¹ the Tribunal also accepted the concept of an indirect expropriation. It said:

“Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralizes the enjoyment of the property. It is generally accepted that a wide variety of measures are susceptible to lead to indirect expropriation, and each case is therefore to be decided on the basis of its attending circumstances.”⁴²

*Middle East Cement v. Egypt*⁴³ concerned the revocation of a free zone license through the prohibition of import of cement. The Tribunal found that the investor had been deprived of the use and benefit of its investment even though it retained the nominal ownership of its rights. Therefore, Article 4 of the Egypt-Greece BIT protecting the investor from expropriation or other measures the effects of which would be tantamount to expropriation had been violated. The Tribunal said:

“When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as

⁴⁰ At para. 604, citing *Sacerdoti, the German Interests in Polish Upper Silesia case and SPP v. Egypt*.

⁴¹ *Ronald S. Lauder v. The Czech Republic*, Award, 3 September 2001.

⁴² At para. 200. For an extensive discussion of the *CME* and *Lauder* cases see K. Hobér, *Investment Arbitration in Eastern Europe: Recent cases on Expropriation*, 14 *The American Review of International Arbitration* 426 *et seq.* (2003).

⁴³ *Middle East Cement Shipping and Handling Co. S. A. v. Arab Republic of Egypt*, Award, 12 April 2002, 7 *ICSID Reports* 178.

a “creeping” or “indirect” expropriation or, as in the BIT, as measures “the effect of which is tantamount to expropriation.” As a matter of fact, the investor is deprived by such measures of parts of the value of his investment. This is the case here, and, therefore, it is the Tribunal’s view that such a taking amounted to an expropriation within the meaning of Art. 4 of the BIT and that, accordingly, Respondent is liable to pay compensation therefor.”⁴⁴

Tecmed v. Mexico,⁴⁵ concerned the revocation of a license for the operation of a landfill. The Tribunal found that the failure to renew the operating permit had violated Article 5 of the Mexico-Spain BIT protecting investors from expropriation or equivalent measures. The Tribunal said:

“114. Generally, it is understood that the term “...equivalent to expropriation...” or “tantamount to expropriation” included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called “indirect expropriation” or “creeping expropriation”, as well as to the above-mentioned *de facto* expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect.”⁴⁶

*Tokios Tokelès v. Ukraine*⁴⁷ concerns allegedly wrongful acts by Ukrainian governmental authorities including unwarranted and unreasonable investigations of the Claimant’s business, unfounded judicial actions to invalidate the Claimant’s contracts and false public accusations of illegal conduct by the Claimant. After stating that obligations with respect to investments relate

⁴⁴ At para. 107.

⁴⁵ *Técnicas Medioambientales Tecmed S. A. v. The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004).

⁴⁶ At para. 114.

⁴⁷ *Tokios Tokelès v. Ukraine*, Decision on Jurisdiction, 29 April 2004.

not only to physical property but also to business operations, the Tribunal said in its Decision on Jurisdiction:

“States’ obligations with respect to ‘property’ and ‘the use of property’ are well established in international law. For example, the *Draft Convention on the International Responsibility of States for Injuries to Aliens*, defines a ‘taking of property’ to include ‘not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference.’ Further, the Iran-U.S. Claims Tribunal found that ‘[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits.’”⁴⁸

*Waste Management v. Mexico*⁴⁹ concerned the failure of the City of Acapulco to pay amounts due under a concession contract. The Tribunal held that this did not amount to an indirect expropriation or a measure tantamount to an expropriation.⁵⁰ But the Tribunal made the following general statement:

“143. It may be noted that Article 1110(1) distinguishes between direct or indirect expropriation on the one hand and measures tantamount to an expropriation on the other. An indirect expropriation is still a taking of property. By contrast where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant.”⁵¹

⁴⁸ At para. 92, citing *Sohn and Baxter* and the *Tippetts* case. Footnotes omitted.

⁴⁹ *Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004.

⁵⁰ At para. 175.

⁵¹ At para. 143.

In *Occidental v. Ecuador*⁵² the claim was directed at the inconsistent practice of the Respondent's authorities in reimbursing value added tax paid on purchases in connection with the Claimant's exploration and exploitation activities and the ultimate exportation of the oil produced. The Claimant relied on the provision in the Ecuador - United States BIT granting protection against indirect expropriation or measures tantamount to expropriation. The Tribunal said:

"85. The Tribunal agrees with the Claimant in that expropriation need not involve the transfer of title to a given property, which was the distinctive feature of traditional expropriation under international law. It may of course affect the economic value of an agreement. Taxes can result in expropriation as can other types of regulatory measures."⁵³

The Tribunal found that in the case before it, although there had been a violation of the fair and equitable treatment standard, there was no indirect expropriation since there had been no deprivation of the use or reasonably expected economic benefit of the investment or a substantial deprivation.

The European Court of Human Rights has applied similar standards when applying Article 1 of Additional Protocol No. 1 to the European Convention on Human Rights guaranteeing the peaceful enjoyment of possessions and granting protection against deprivation of possessions. In the leading case *Sporrong and Lönnroth v. Sweden*⁵⁴ it held:

"In the absence of formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of ... Since the Convention is intended to guarantee

⁵² *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004.

⁵³ At para. 85, citing Higgins, the *Feldman* case, and *Wälde/Kolo*. Footnotes omitted.

⁵⁴ *Sporrong and Lönnroth v. Sweden*, ECHR judgment of 23 September 1982, Series A no. 52.

rights that are “practical and effective” ..., it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants.”⁵⁵

The practice, as outlined above, is well summarized by Reisman and Sloane:

“In short, international tribunals, jurists, and scholars have consistently appreciated that states may accomplish expropriation in ways other than by formal decree; indeed, often in ways that may seek to cloak expropriatory conduct with a veneer of legitimacy. For this reason, tribunals have increasingly accepted that expropriation must be analyzed in consequential rather than formal terms. What matters is the effect of governmental conduct—whether malfeasance, misfeasance or nonfeasance, or some combination of the three—on foreign property rights or control over an investment, not whether the state promulgates a formal decree or otherwise expressly proclaims its intent to expropriate. For purposes of state responsibility and the obligation to make adequate reparation, international law does not distinguish indirect from direct expropriations.”⁵⁶

The above survey demonstrates that a wide variety of steps affecting or destroying the investment’s commercial value, taken by the host States’ authorities, have been held to constitute

⁵⁵ At para. 63. See also *Papamichalopoulos and Others v. Greece*, ECHR judgment of 24 June 1993, Series A no. 260-B, para. 42: “Since the Convention is intended to safeguard rights that are “practical and effective”, it has to be ascertained whether the situation complained of amounted nevertheless to a de facto expropriation, [...]”; *Brumărescu v. Romania* [GC], 28 October 1999, no. 28342/95, ECHR 1999-VII, para. 76: “it is necessary not only to consider whether there has been a formal taking or expropriation of property but to look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are ‘practical and effective’, it has to be ascertained whether the situation amounted to a de facto expropriation [...]”; *Fredin v. Sweden*, ECHR judgment of 18 February 1991, Series A no. 192, p. 14, para. 42.

⁵⁶ W. M. Reisman/R. D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 *The British Year Book of International Law* 115, 121 (2003).

indirect expropriations or equivalent measures. These measures include:

- the taking of a third Party's property which renders worthless the patents and contracts of a managing company (*Chorzów Factory*).
- an increase in taxes to an extent that the investment becomes economically unsustainable (*Revere Copper*).
- the expulsion of a person who plays a key role in the investment (*Biloune*).
- the replacement of the owner's management by government imposed managers (*Starrett, Tippetts*).
- revocation of a free zone permit (*Goetz, Middle East Cement*).
- denial of a construction permit contrary to prior assurances (*Metalclad*).
- interference with contract rights leading to a breach or termination of the contract by the investor's business partner (*CME*).
- revocation of an operating license (*Tecmed*).

3. Creeping Expropriation

Creeping expropriation is a form of indirect expropriation that takes place incrementally or step by step. Like indirect expropriation, it is not a new concept but has been recognized in international practice for some time. Several international documents refer to creeping expropriation. These include the OECD Draft Convention on the Protection of Foreign Property⁵⁷

⁵⁷ The OECD Draft Convention on the Protection of Foreign Property of 1967 contains a provision in its Article 3 entitled "Taking of Property". The Notes and Comments on that provision contain the following language: "... Article 3 is meant to cover 'creeping nationalisation', recently practised by certain States. Under it, measures otherwise lawful are applied in such a way as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation." 7 ILM 125/126 (1968).

and the Restatement (Third) of the Foreign Relations Law of the United States.⁵⁸

Creeping expropriation takes place through a series of actions, none of which might qualify as an expropriation by itself, but the aggregate effect of which is to destroy the value of the investment.⁵⁹ UNCTAD's 2003 World Investment Report describes this phenomenon in the following terms:

"Indirect takings include creeping expropriations, involving an incremental but cumulative encroachment on one or more of the range of recognized ownership rights until the measures involved lead to the effective negation of the owner's interest in the property."⁶⁰

Professor Reisman and R. D. Sloane, in their article on indirect expropriation,⁶¹ devote an entire chapter to the issue of creeping expropriation.⁶² They write:

"Discrete acts, analyzed in isolation rather than in the context of the overall flow of events, may, whether legal or not in

⁵⁸ Restatement (Third) of the Foreign Relations Law of the United States, American Law Institute Vol. 2, pp. 196, 200 (1986). Comment g. on § 712, dealing with a State's responsibility for a taking of the property of another State, provides: "Subsection (1) applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation")."

⁵⁹ See especially B. H. Weston, "Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation", 16 Virginia Journal of International Law 103, 109, 148-151 (1975); R. Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 Recueil des Cours 261, 353 (1982-III). P. E. Comeaux/N. S. Kinsella, *Protecting Foreign Investment Under International Law, Legal Aspects of Political Risk* 8-9 (1997).

⁶⁰ World Investment Report, United Nations Conference on Trade and Development 110 (2003). See also UNCTAD Series on issues in international investment agreements, *Taking of Property* 11/12 (2000).

⁶¹ W. M. Reisman/R. D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation* 74 *The British Year Book of International Law* 115-150 (2003).

⁶² At pp. 122-128.

themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights.⁶³ ... Because of their gradual and cumulative nature, creeping expropriations also render it problematic, perhaps even arbitrary, to identify a single interference (or failure to act where a duty requires it) as the 'moment of expropriation'.⁶⁴

Arbitral practice confirms that incremental steps leading to a *de facto* dispossession are to be treated as measures equivalent to expropriation.⁶⁵ In *Biloune v. Ghana*,⁶⁶ the authorities had issued a stop work order, had subjected the investment to intrusive financial scrutiny, had demolished part of the project and had arrested and expelled the investor. The Tribunal said:

"What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr. Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project.⁶⁷ ... The Tribunal therefore holds that the Government of Ghana, by its acts and omissions culminating with Mr. Biloune's deportation, constructively expropriated MDCL's assets, and Mr. Biloune's interest therein."⁶⁸

⁶³ At pp. 123/124. Footnote omitted.

⁶⁴ At p. 125.

⁶⁵ See also *Bervenuti & Bonfant v. Congo*, Award, 8 August 1980, 1 ICSID Reports 330; *Liberian Eastern Timber Corporation v. Republic of Liberia*, Award, 31 March 1986, 2 ICSID Reports 343, 367 and the analysis by Reisman and Sloane, *op. cit.* at pp. 125/126. *Pope & Talbot v. Canada*, Award, 26 June 2000, 7 ICSID Reports 69, at para. 99.

⁶⁶ *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184.

⁶⁷ At p. 209.

⁶⁸ At p. 210.

In *Tradex v. Albania*⁶⁹ the Claimant had alleged an expropriation of its agricultural investment mainly through announcements by politicians concerning a future land reform as well as by the destruction of crops and the occupation of its land by villagers. The Tribunal first looked at the various damaging acts one by one. Then it said:

“191. While the above examination ... has come to the conclusion that none of the single decisions and events alleged by Tradex to constitute an expropriation can indeed be qualified by the Tribunal as expropriation, it might still be possible that, and the Tribunal, therefore, has to examine and evaluate hereafter whether the combination of the decisions and events can be qualified as expropriation of Tradex’ foreign investment in a long, step-by-step process by Albania.”⁷⁰

On the specific facts of the case, the Tribunal came to the conclusion that even the combined evaluation of events in this case did not qualify as an expropriation primarily because the acts of the villagers could not be attributed to the Albanian government.⁷¹

In the *Santa Elena* case,⁷² the fact that there had been an expropriation was not in dispute. In the course of its decision on valuation, the Tribunal made the following statement about the deprivation of property:

“... the period of time involved in the process may vary – from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership. It is clear, however, that a measure or series of

⁶⁹ *Tradex Hellas SA v. Republic of Albania*, Award, 29 April 1999, 5 ICSID Reports 70.

⁷⁰ Para. 191.

⁷¹ At paras. 197, 203.

⁷² *Compañía del Desarrollo de Santa Elena, S. A. v. Republic of Costa Rica*, Award, 17 February 2000, 5 ICSID Reports 153.

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."⁷³

In his dissenting opinion in *Waste Management*⁷⁴ arbitrator Keith Hight described a creeping expropriation in the following words:

"... a 'creeping' expropriation is comprised of a number of elements, none of which can - separately - constitute the international wrong. These constituent elements include non-payment, non-reimbursement, cancellation, denial of judicial access, actual practice to exclude, non-conforming treatment, inconsistent legal blocks, and so forth. ...

8. A nationalization or expropriation - in particular a "creeping expropriation" comprised of numerous components - must logically be more than the mere sum of its parts ..."⁷⁵

In *Tecmed v. Mexico*,⁷⁶ the Tribunal found that the revocation of a license for the operation of a landfill had violated Article 5 of the Mexico-Spain BIT protecting investors from expropriation or equivalent measures. After explaining the concept of an action "equivalent to expropriation" it said:

"This type of expropriation does not necessarily take place gradually or stealthily - the term "creeping" refers only to a type of indirect expropriation - and may be carried out through a single action, through a series of actions in a short period of time or through simultaneous actions. Therefore, a difference should be made between creeping expropriation and *de facto* expropriation, although they are usually included within the broader concept of "indirect expropriation" and although both expropriation methods may take place by means of a broad

⁷³ At para. 76.

⁷⁴ *Waste Management, Inc. v. United Mexican States*, Award, 2 June 2000, 5 ICSID Reports 443 (Keith Hight, dissenting at 462).

⁷⁵ At paras. 17, 18.

⁷⁶ *Técnicas Medioambientales Tecmed S. A. v. The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004).

number of actions that have to be examined on a case-by-case basis to conclude if one of such expropriation methods has taken place.”⁷⁷

The Iran-US Claims Tribunal has also recognized the significance of expropriatory measures that take place step by step. In *Phillips Petroleum v. Iran*,⁷⁸ the authorities of Iran had taken a number of steps against the Claimant. These included announcements of a forthcoming nationalization of the oil industry, a significant reduction of production rates, replacement of the management by directors appointed by the Iranian authorities and nullification of the joint venture agreement.⁷⁹ The Tribunal said:

“100. The conclusion that the Claimant was deprived of its property by conduct attributable to the Government of Iran, including NIOC, rests on a series of concrete actions rather than any particular formal decree, as the formal acts merely ratified and legitimized the existing state of affairs. ... in circumstances where the taking is through a chain of events, the taking will not necessarily be found to have occurred at the time of either the first or the last such event, but rather when the interference has deprived the Claimant of fundamental rights of ownership and such deprivation is “not merely ephemeral,” or when it becomes an irreversible deprivation”.”⁸⁰

*Generation Ukraine v. Ukraine*⁸¹ confirms the relevance of creeping expropriation although it denies its application to the facts of the particular case. The case concerned a construction project for an office building. The main complaint was the failure by the Kyiv City State Administration to issue the necessary lease agreements. The Claimant contended that this refusal was the

⁷⁷ At para. 114.

⁷⁸ *Phillips Petroleum Co. v. Iran*, 29 June 1989, 21 Iran-US CTR 79.

⁷⁹ At paras. 90-96.

⁸⁰ At paras. 100, 101.

⁸¹ *Generation Ukraine Inc. v. Ukraine*, Award, 16 September 2003.

culmination of a series of other prejudicial acts amounting to a creeping expropriation.⁸² The Tribunal said:

“20.22. Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State *over a period of time* culminate in the expropriatory taking of such property.”⁸³

The Tribunal in *Generation Ukraine* rejected the claim of a creeping expropriation because the investment did not yet exist at the relevant time and hence could not be expropriated. In addition, the Tribunal came to the conclusion that the conduct of the administration did not come close to creating a “persistent or irreparable obstacle to the Claimant’s use enjoyment or disposal of its investment.”⁸⁴

The concept of creeping expropriation has its counterpart in the law of State responsibility. The Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session in 2001 state in Article 15:

ARTICLE 15

Breach consisting of a composite act

- (1) The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.⁸⁵

⁸² At para. 20.21.

⁸³ At para. 20.22. Emphasis original.

⁸⁴ At para. 20.32.

⁸⁵ J. Crawford, *The International Law Commission’s Draft Articles on State Responsibility* 141 (2002).

The ILC's Commentary on this provision states that:

"Paragraph 1 of article 15 defines the time at which a composite act 'occurs' as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last of the series."⁸⁶

It follows from the above authorities that the concept of creeping expropriation is well established in international law.

4. Expropriation of Intangible Property

Protection from expropriation relates not only to tangible property or physical assets but to a broad range of rights that are economically significant to the investor.⁸⁷ In the words of Professor Giorgio Sacerdoti:

"All rights and interests having an economic content come into play, including immaterial and contractual rights."⁸⁸

⁸⁶ *Op. cit.* at p. 143.

⁸⁷ See e.g. G. C. Christie, *What Constitutes a Taking of Property under International Law?*, 38 *British Year Book of International Law* 305, 311 (1962); B. H. Weston, "Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation", 16 *Virginia Journal of International Law* 103, 112/13 (1975), who uses the term "wealth deprivation" in this context; R. Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 *Recueil des Cours* 263, 271 (1982-III); T. Waelde/A. Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 *International and Comparative Law Quarterly* 811, 835 (2001); G. H. Sampliner, *Arbitration of Expropriation Cases Under U.S. Investment Treaties - A Threat to Democracy or the Dog That Didn't Bark?*, 18 *ICSID Review-Foreign Investment Law Journal* 1, 14 (2003); J. Paulsson/Z. Douglas, *Indirect Expropriation in Investment Treaty Arbitrations, Arbitrating Foreign Investment Disputes* (N. Horn, S. Kröll eds.) 145, 152 (2004); S. Alexandrov, *Breaches of Contract and Breaches of Treaty, The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, 5 *The Journal of World Investment & Trade* 555, 559 (2004).

⁸⁸ G. Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 *Recueil des Cours* 251, 381 (1997).

This principle is reflected in the definitions of the term “investment” in the treaties for the protection of investments. The ECT in Article 1(6) refers not only to tangible but also to intangible property. In addition it lists, among others, claims to money and claims to performance pursuant to contract, intellectual property and generally any right conferred by law or contract among protected investments. The NAFTA⁸⁹ and BITs⁹⁰ contain similarly comprehensive definitions.

UNCTAD in its study on Taking of Property has described the situation in the following terms:

“In the past, the concern was only with the physical property of a foreign investor. In modern times, the concern is not so much with the physical property but with the antecedent rights that are necessary for the enjoyment of these property rights as well as with incorporeal property ... Most recent BITs include intellectual property within the definition of investment so that, if there are infringements of intellectual property rights by State interference, there would be a taking. So too, contractual rights and regulatory rights associated with the making of an investment are included within the definition of foreign investment in treaties.”⁹¹

Judicial practice unanimously supports a wide concept of “property,” that includes intangible rights, especially rights under contracts, for purposes of expropriation and equivalent measures. Already in 1903 in the *Rudloff* case, before the US-Venezuela Mixed Claims Commission, Commissioner Bainbridge said:

“[T]he 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;”⁹²

⁸⁹ Article 1139 NAFTA.

⁹⁰ See R. Dolzer/M. Stevens, *Bilateral Investment Treaties*, pp. 26-30 (1995).

⁹¹ UNCTAD Series on issues in international investment agreements, *Taking of Property* 36 (2000).

⁹² *Rudloff Case*, Interlocutory Decision, 1903, 9 Reports of International Arbitral Awards (RIAA) 244, 250 (1959).

In the case of the *Norwegian Shipowners' Claims*,⁹³ decided by the Permanent Court of Arbitration, the United States, during World War I, had requisitioned ships being built by US shipyards for use and operation by the government in its war effort. The requisition order included contracts by private US shipyards with Norwegian subjects for ships yet to be built. The Arbitral Tribunal deciding the case found:

"The order contained in the letter of August 3rd expressly requisitioned not only the ships and the material, but also the contracts, the plans, detailed specifications and payments made,..."⁹⁴

The Tribunal entertained no doubt that the violation of intangible property rights arising from a contract amounted to an expropriation. It said:

"... 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 construed."⁹⁵

In the *Certain German Interests in Polish Upper Silesia (Chorzów Factory) Case*⁹⁶ the Permanent Court of International Justice held that the expropriation of the Chorzów Factory also constituted an indirect expropriation of the patents and contract belonging to the managing company "Bayerische" which had contractual rights for the management and operation of the factory. The Court held that not only the owner of the factory, but also the company holding contractual rights had been expropriated:

"... it is clear that the rights of the Bayerische to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents,

⁹³ *Norwegian Shipowners' Claims (Norway v. United States)*, Award, 13 October 1922, 1 RIAA 307.

⁹⁴ At p. 318.

⁹⁵ At p. 325.

⁹⁶ *Factory at Chorzów (Germany v. Poland)*, Judgment, 15 May 1926, PCIJ Ser. A, No. 7 (1927).

licenses, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland. As these rights related to the Chorzów factory and were, so to speak, concentrated in that factory, the prohibition contained in the last sentence of Article 6 of the Geneva Convention applies in all respect to them."⁹⁷

The Iran-US Claims Tribunal has also recognized that intangible property, such as contractual rights, can be expropriated.⁹⁸ In *Starrett Housing*,⁹⁹ the Tribunal noted with approval that the Claimants

"...rely on precedents in international law in which cases measures of expropriation or taking, primarily aimed at physical property, have been deemed to comprise also rights of a contractual nature closely related to the physical property."¹⁰⁰

In the *Amoco* case¹⁰¹ the Iran-US Claims Tribunal said with respect to rights arising from a concession agreement:

"Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction ..."¹⁰²

In the *Phillips Case*¹⁰³ the Iran-US Claims Tribunal also dealt with rights arising from a concession agreement. It held that expropriation of the property of an alien gives rise under international law to liability for compensation:

"... whether the expropriation is formal or *de facto* and whether the property is tangible, such as real estate or a factory, or

⁹⁷ At p. 44.

⁹⁸ See also G. H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AJIL 585, 598 (1994).

⁹⁹ *Starrett Housing Corp. v. Iran*, 19 Dec. 1983, 4 Iran-US CTR 122.

¹⁰⁰ At p. 156.

¹⁰¹ *Amoco International Finance Corp. v. Iran*, 14 July 1987, 15 Iran-US C.T.R.189.

¹⁰² At para. 108.

¹⁰³ *Phillips Petroleum Co. v. Iran*, 29 June 1989, 21 Iran-US CTR 79.

intangible, such as the contractual rights involved in the present Case.”¹⁰⁴

ICSID and NAFTA Chapter Eleven tribunals have held similarly. The Tribunal in *SPP v. Egypt*¹⁰⁵ examined whether the measures by Egypt affecting rights under a contract to build hotels may amount to an expropriation. The Tribunal said:

“164. Nor can the Tribunal accept the argument that the term “expropriation” applies only to *jus in rem*. The Respondent’s cancellation of the project had the effect of taking certain important rights and interests of the Claimants. ... Clearly, those rights and interests were of a contractual rather than *in rem* nature. However, there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefor.

165. Moreover, it has long been recognized that contractual rights may be indirectly expropriated. In the judgment of the Permanent Court of International Justice concerning *Certain German Interests in Polish Upper Silesia*, the Court ruled that, by taking possession of a factory, Poland had also “expropriated the contractual rights” of the operating company. (PCIJ, Series A, No. 7, 1926, at p. 44.)

166. Decisions of international claims tribunals have been to the same effect. Thus, in the *Amoco Int’l Finance Corp v Iran* case (15 Iran-US CTR, p. 189), the Iran-US Claims Tribunal said:

Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction... (para. 108.)

167. And in the *Phillips Petroleum Co Iran v Iran* case (21 Iran-US CTR, p. 79) the Iran-US Claims Tribunal held that

¹⁰⁴ At para. 76.

¹⁰⁵ *SPP v. Egypt*, Award, 20 May 1992, 3 ICSID Reports 189.

expropriation gives rise to liability for compensation whether the expropriation is formal or *de facto* and whether the property is tangible, such as real estate or a factory, or intangible, such as the contractual rights involved in the present Case. (para. 76.)”¹⁰⁶

In *Wena Hotels v. Egypt*¹⁰⁷ the contractual right of which the investor had been deprived was the operation of a hotel. The Tribunal said:

“98. It is also well established that an expropriation is not limited to tangible property rights. As the panel in *SPP v. Egypt* explained, “there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore.”¹⁰⁸

In *Tokios Tokelès v. Ukraine*¹⁰⁹ the Respondent had argued that that the dispute did not “arise directly out of an investment” because the allegedly wrongful acts by Ukrainian governmental authorities (including unwarranted and unreasonable investigations of the Claimant’s business, unfounded judicial actions to invalidate the Claimant’s contracts, and false, public accusations of illegal conduct by the Claimant) were not directed against the physical assets owned by the Claimant, *i.e.*, its facilities and equipment.¹¹⁰ The Tribunal rejected this argument and said:

“... the Respondent’s obligations with respect to “investment” relate not only to the physical property of Lithuanian investors but also to the business operations associated with that physical property.”¹¹¹

¹⁰⁶ At pp. 228/229.

¹⁰⁷ *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Reports 68.

¹⁰⁸ At para. 98. Footnote omitted.

¹⁰⁹ *Tokios Tokelès v. Ukraine*, Decision on Jurisdiction, 29 April 2004.

¹¹⁰ At para. 90.

¹¹¹ At para. 92.

In *CME v. Czech Republic*¹¹² the Claimant successfully claimed that its contract rights had been expropriated through the interference by a regulatory authority, the Media Council. The interference by the Media Council had enabled the investor's local partner to cancel the contract. The Tribunal found that the loss of legal security caused by the regulatory authority constituted a violation of the relevant BIT provision on expropriation.¹¹³ The Tribunal held that the investor's rights based on the contract had been expropriated. It said:

"The Respondent's view that the Media Council's actions did not deprive the Claimant of its worth, as there has been no physical taking of the property by the State or because the original License ... always has been held by the original Licensee and kept untouched, is irrelevant. What was touched and indeed destroyed was the Claimant's and its predecessor's investment as protected by the Treaty. What was destroyed was the commercial value of the investment ... by reason of coercion exerted by the Media Council ..."¹¹⁴

This survey of practice demonstrates clearly that "it is well established under international law that the taking of a foreign investor's contractual rights constitutes expropriation or a measure having an equivalent effect."¹¹⁵ The law of expropriation proceeds not from a traditional concept of tangible property but from a broad concept of economic rights that are necessary for the investor to pursue its business successfully. In the words of Wälde and Kolo:

"In modern understanding, the key function of property is less the tangibility of 'things', but rather the capability of a combination of rights in a commercial and corporate setting and

¹¹² *CME v. The Czech Republic*, Partial Award, 13 September 2001.

¹¹³ At paras. 591-609.

¹¹⁴ At para. 591.

¹¹⁵ S. Alexandrov, *Breaches of Contract and Breaches of Treaty, The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, 5 *The Journal of World Investment & Trade* 555, 559 (2004).

under a regulatory regime to earn a commercial rate of return.”¹¹⁶

5. Breach of Contract and Expropriation

A breach of contract by a State may result in severe wealth deprivations on the part of the investor. As set out above, expropriation may be indirect and the object of an expropriation may be a contract. Does it follow that every violation of a contract by a government amounts to an expropriation? The answer is clearly no.

The most important criterion for distinguishing between the simple breach of a contract and the expropriation of contract rights is whether the State acts in its commercial role as a party to the contract or in its sovereign capacity.¹¹⁷

In the *Shufeldt Claim*¹¹⁸ the arbitrator found that the abrogation of a concession contract through the exercise of public authority gave rise to an international claim.¹¹⁹

In the *Jalapa Railroad case*¹²⁰ the legislature of Veracruz had issued a decree declaring a vital clause in a contract between the State and the investor to be void. The American Mexican Claims Commission said:

“In the circumstances, the issue for determination is whether the breach of contract alleged to have resulted from the nullification of clause twelfth of the contract was an ordinary one involving no international responsibility or whether said breach was

¹¹⁶ T. Waelde/A. Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 *International and Comparative Law Quarterly* 811, 835 (2001).

¹¹⁷ See also T.W. Wälde & K. Hobér, *The First Energy Charter Treaty Arbitral Award*, 22 *Journal of International Arbitration* 98 (2005).

¹¹⁸ *Shufeldt Claim*, Award, 24 July 1930, 2 RIAA 1079.

¹¹⁹ At pp. 1094-1096.

¹²⁰ *Jalapa Railroad and Power Co.*, American Mexican Claims Commission, 1948, 8 *Whiteman, Digest of International Law* 908-909 (1976).

effected arbitrarily by means of a governmental power illegal under international law ... the 1931 decree of the same Legislature, ... was clearly not an ordinary breach of contract. Here the Government of Veracruz stepped out of the role of contracting party and sought to escape vital obligations under its contract by exercising its superior governmental power. Such action under international law has been held to be a confiscatory breach of contract..."¹²¹

In *Phillips Petroleum Co. v. Iran*¹²² the Iran-US Claims Tribunal dealt with a claim that the termination of contract rights under a concession agreement constituted an expropriation of contract rights. The Claimant had asserted that the expropriation had resulted from concerted actions of the Government of Iran which effectively deprived the Claimant of its property.¹²³ The Tribunal said:

"The Tribunal considers that the acts complained of appear more closely suited to assessment of liability for the taking of foreign-owned property under international law than to assessment of the contractual aspects of the relationship, and so decided to consider the claim in this light."¹²⁴

Consortium RFCC c/ Royaume du Maroc arose from a contract for the construction of a road. A penalty for late performance, provided for in the contract, had been imposed and a performance bond had been retained. The Tribunal held that, while it was perfectly possible to expropriate rights under a contract,¹²⁵ this had not occurred in the case before it. The Moroccan partner of the investor had merely exercised rights under the contract and had not acted in a public capacity. This, the Tribunal pointed out, was evidenced by the fact that there was no passage of a law, government decree or execution of a judgment.¹²⁶

¹²¹ Loc. cit.

¹²² *Phillips Petroleum Co. v. Iran*, Iran-US Claims Tribunal, 29 June 1989, 21 Iran-US CTR 79.

¹²³ At paras. 89 *et seq.*

¹²⁴ At para. 75

¹²⁵ Paras. 60-62.

¹²⁶ Paras. 65-66, 69, 85-89.

*Waste Management v. Mexico*¹²⁷ arose from a failed concession for the disposal of waste that involved a number of grievances, including the municipality's failure to pay its bills, exclusivity of services, difficulties with a line of credit agreement and proceedings before Mexican courts. The Tribunal found that there had not been an expropriation. The Tribunal pointed out that, although the investor had lost some of its benefits, it had at all times retained the control and use of its property.¹²⁸ In the Tribunal's view, the business failed essentially as a consequence of over-optimistic business assumptions.¹²⁹ The Tribunal said:

"160. In the Tribunal's view, an enterprise is not expropriated just because its debts are not paid or other contractual obligations towards it are breached. There was no outright repudiation of the transaction ..."

In *Waste Management*, the nearest the Claimant came to showing a repudiation of the concession contract was a political statement by the mayor that the exclusivity of the investor's services ought to be abolished. The Tribunal found that this was not an exercise of legislative public authority and therefore not tantamount to expropriation.¹³⁰ The City of Acapulco at no stage purported to terminate the contract.¹³¹

The Tribunal in *Waste Management* adopted a number of criteria to distinguish mere contractual non-performance from expropriation. It identified the following three groups of cases in which an expropriation would be present:

"First and perhaps best known are the cases where a whole enterprise is terminated or frustrated because its functioning is simply halted by decree or executive act, usually accompanied by other conduct."¹³²

¹²⁷ *Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004.

¹²⁸ At para. 159.

¹²⁹ At para. 160.

¹³⁰ At para. 161.

¹³¹ At para. 165.

¹³² At para. 172. Footnotes omitted.

The second category, according to the *Waste Management Tribunal's* analysis, "are cases where there has been an acknowledged taking of property, and associated contractual rights are affected in consequence."¹³³

The third category would be cases "where the only right affected is incorporeal." The decisive criterion would be as follows:

"The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts"¹³⁴

The *Waste Management Tribunal* added that "one could envisage conduct tantamount to an expropriation which consisted of acts and omissions not specifically or exclusively governmental."¹³⁵

In *SGS v. Philippines*¹³⁶ the investor claims for outstanding payments under a contract for pre-shipment inspections. The Tribunal said:

"161. In the Tribunal's view, on the material presented by the Claimant no case of expropriation has been raised. Whatever debt the Philippines may owe to SGS still exists; whatever right to interest for late payment SGS had it still has. There has been no law or decree enacted by the Philippines attempting to expropriate or annul the debt, nor any action tantamount to an expropriation. The Tribunal is assured that the limitation period for proceedings to recover the debt before the Philippine courts under Article 12 has not expired. A mere refusal to pay a debt is not an expropriation of property, at least

¹³³ At para. 173.

¹³⁴ At para. 174.

¹³⁵ *Loc. cit.*

¹³⁶ *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004.

where remedies exist in respect of such a refusal. *A fortiori* a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable."¹³⁷

6. Regulatory Measures and Expropriation

Regulatory measures that are taken by State authorities in the exercise of their public order function frequently have negative effects on private property rights including those of foreign investors. It is impossible to compensate a foreign investor for every measure taken by the host State that has some adverse effect, however minimal, on its business operation. Such a requirement would severely impair the State in its sovereign functions. On the other hand, the fact that a regulatory measure serves some legitimate public purpose cannot automatically lead to the conclusion that no expropriation has occurred and that, therefore, no compensation is due.

Under most treaty provisions dealing with expropriation, including the ECT, the existence of a public purpose is a requirement for the legality of an expropriation. It follows that a legitimate public purpose cannot be the basis of an argument that no expropriation has occurred. Rather, the existence of a public purpose is a requirement for the expropriation's legality in addition to compensation. Therefore, the task is to identify the line between normal regulation, the economic consequences of which have to be borne by the investor, and regulatory expropriation which may be perfectly legal but carries an obligation to compensate.

Two criteria lend themselves for establishing the threshold between simple regulation and regulatory expropriation: one is a quantitative test that looks at the severity of the measure's effect on the investment. The other is a motive or purpose oriented test that would look for the existence of an intention to expropriate.

Judicial practice indicates that the severity of the economic impact is the decisive criterion when it comes to deciding whether an indirect expropriation or a measure tantamount to

¹³⁷ Para. 161. Footnote omitted.

expropriation has taken place. An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment.¹³⁸ The deprivation would have to be permanent or for a substantial period of time.¹³⁹

There is broad consensus in academic writings that the intensity and duration of the economic deprivation is the crucial factor in identifying an indirect expropriation or equivalent measure.¹⁴⁰ Professor Dolzer writes:

“No one will seriously doubt that the severity of the impact upon the legal status, and the practical impact on the owner’s ability to use and enjoy his property, will be a central factor in determining whether a regulatory measure effects a taking.”¹⁴¹

¹³⁸ See also of the Restatement (Third) of the Foreign Relations Law of the United States, Vol. 2, pp. 196, 200 (1986). Section 712 dealing with expropriation, is accompanied by the following Comment g.: “Subsection (1) applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of ‘taking’ the property, *in whole or in large part ...*” (emphasis added). See also Annex B para. 4 (a)(i) to the United States 2004 Model BIT which explains that whether action constitutes an indirect expropriation is determined, among other factors, by “the economic impact of the government action”.

¹³⁹ For comment on the duration of the deprivation see K. Hobér, *Investment Arbitration in Eastern Europe: Recent cases on Expropriation*, 14 *The American Review of International Arbitration* 399 (2003).

¹⁴⁰ G. H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 *AJIL* 585, 588, 593, 609 (1994); R. Dolzer, *Indirect Expropriation of Alien Property*, 1 *ICSID Review-Foreign Investment Law Journal* 48/49 (1986); G. H. Sampliner, *Arbitration of Expropriation Cases Under U.S. Investment Treaties - A Threat to Democracy or the Dog That Didn’t Bark?*, 18 *ICSID Review-Foreign Investment Law Journal* 1, 11-13 (2003); T. Waelde/A. Kolo, *Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law*, 50 *International and Comparative Law Quarterly* 811, 837/38 (2001); B. H. Weston, “Constructive Takings” under *International Law: A Modest Foray into the Problem of “Creeping Expropriation”*, 16 *Virginia Journal of International Law* 103, 119/20 (1975); R. Dolzer/M. Stevens, *Bilateral Investment Treaties*, p. 100 (1995); K. Hobér, *Investment Arbitration in Eastern Europe*, *op. cit.* at p. 418

¹⁴¹ R. Dolzer, *Indirect Expropriations: New Developments?* 11 *N.Y.U. Environmental Law Journal* 64, 79 (2002).

Arbitral Tribunals have consistently looked at the degree and duration of deprivations to determine whether an expropriation has occurred.¹⁴²

In *Metalclad v. Mexico*¹⁴³ the refusal of a construction permit by the municipality had completely destroyed the investor's ability to pursue its previously approved project. The Tribunal found that there had been an indirect expropriation. It said:

"... expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in 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 ..."¹⁴⁴

In *Wena Hotels v. Egypt*,¹⁴⁵ the Tribunal found that the seizure of the investor's hotel lasting for nearly a year was not "ephemeral" but amounted to an expropriation.¹⁴⁶

In *CME v. Czech Republic*¹⁴⁷ the Tribunal, citing *Metalclad*, referred to indirect expropriation as

¹⁴² See also the *First ECT Arbitral Award*, 16 December 2003. It is reported that "[t]he tribunal stated that the decisive factor in drawing the line between expropriation and legitimate government measures must primarily be the degree of possession-taking or control over the enterprise that the disputed measures give rise to." See K. Hobér, *Investment Arbitration in Eastern Europe: Recent cases on Expropriation*, 14 *The American Review of International Arbitration* 377, 438, 441 (2003). See also T.W. Wälde & K. Hobér, *The First Energy Charter Treaty Arbitral Award*, 22 *Journal of International Arbitration* 83, 89 (2005).

¹⁴³ *Metalclad Corp. v. United Mexican States*, Award, 30 August 2000, 5 ICSID Reports 226.

¹⁴⁴ At para. 103. Emphasis added.

¹⁴⁵ *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Reports 68.

¹⁴⁶ At para. 99.

¹⁴⁷ *CME v. The Czech Republic*, Partial Award, 13 September 2001.

“... covert or incidental interference with 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 ...”¹⁴⁸

Tecmed v. Mexico,¹⁴⁹ concerned the revocation of a license for the operation of a landfill. The Tribunal found that the failure to renew the operating permit had violated Article 5 of the Mexico-Spain BIT protecting investors from expropriation or equivalent measures. The Tribunal said:

“115. To establish whether the Resolution is a measure equivalent to an expropriation under the terms of section 5(1) of the Agreement, it must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto—such as the income or benefits related to the Landfill or to its exploitation—had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss. This determination is important because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure, which is an ordinary expression of the exercise of the state’s police power that entails a decrease in assets or rights, and a *de facto* expropriation that deprives those assets and rights of any real substance.”¹⁵⁰

Therefore, the Tribunal distinguished between a radical or total deprivation of the investment and a mere decrease of rights as a consequence of regulatory action. Regulatory measures would amount to *de facto* expropriation if their effects are permanent and total:

¹⁴⁸ At para. 606. Emphasis added.

¹⁴⁹ *Tecnicas Medioambientales Tecmed S. A. v. The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004).

¹⁵⁰ At para. 115 citing *Pope & Talbot*. Footnote omitted.

“... the 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. 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.”¹⁵¹

*Consortium RFCC c/ Royaume du Maroc*¹⁵² arose from a contract for the construction of a road. A penalty for late performance, provided for in the contract, had been imposed and a performance bond had been retained. In discussing the existence of an indirect expropriation, the Tribunal emphasized that the measures needed to have a certain intensity to qualify as measures equivalent to an expropriation:

« Les effets des mesures prises doivent avoir une certaine intensité pour que celles-ci puissent être qualifiées de mesures équivalentes à l’expropriation. »¹⁵³

The measures would have to show substantial effects and an intensity that reduces or removes the benefits of the investment to a point that renders them useless:

« ... effets substantiels d’une intensité certaine qui réduisent et/ou font disparaître les bénéfices légitimement attendus de l’exploitation des droits objets de ladite mesure à un point tel qu’ils rendent la détention de ces droits inutile. »¹⁵⁴

¹⁵¹ At para. 116 citing decisions of the Iran-US Claims Tribunal in *Tippetts and Phelps Dodge*. Footnote omitted.

¹⁵² *Consortium RFCC c/ Royaume du Maroc*, Award, 22 December 2003.

¹⁵³ At para. 67.

¹⁵⁴ At para. 69.

The Iran-US Claims Tribunal has also adopted the approach of looking at the severity of the deprivation in order to determine whether an indirect expropriation has occurred. In *Starrett Housing v. Iran*¹⁵⁵ the Tribunal found that the appointment of a “temporary manager” by the authorities of Iran amounted to an expropriation. The decisive criterion was whether the State did

“... interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated.”¹⁵⁶

In the *Tippetts* case¹⁵⁷ it was not the appointment by the government of an Iranian manager that was seen as an expropriation, but the degree of interference by the manager with the owners’ property rights that constituted a taking of property:

“While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government ... such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.”¹⁵⁸

The European Court of Human Rights has developed a similar doctrine which adopts the degree of interference with property rights as the decisive criterion for deciding whether an individual has been “deprived of his possessions”. In *Papamichalopoulos and Others v. Greece*¹⁵⁹ the Applicant’s land had been taken over by the Navy which had set up facilities on it. Although there was never any formal expropriation, the Court found that the previous

¹⁵⁵ *Starrett Housing Corp. v. Iran*, 19 Dec. 1983, 4 Iran-US CTR 122.

¹⁵⁶ At p. 154. See also G. H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AJIL 585, 588 (1994).

¹⁵⁷ *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Iran-US Claims Tribunal, 22 June 1984, 6 Iran-US CTR 219.

¹⁵⁸ At p. 225.

¹⁵⁹ *Papamichalopoulos and Others v. Greece*, Eur.Ct.H.R., 24 June 1993, A/260-B.

owners had become entirely unable to make any use of their property. The Court said:

“45. The Court considers that the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants de facto to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions.”¹⁶⁰

This approach of looking at the severity of the economic consequences of a measure is reinforced by cases in which the tribunals determined that the effect of adverse government action was not sufficiently serious or sufficiently permanent to amount to an expropriation.

In *Pope & Talbot v. Canada*¹⁶¹ the investor had complained about an export control regime that reduced its ability to export a product. The Tribunal found that the regulatory measures did not constitute an expropriation since they were not sufficiently substantial.¹⁶² The Tribunal said:

“102. Even accepting (for the purpose of this analysis) the allegations of the Investor concerning diminished profits, the Tribunal concludes that the degree of interference with the Investment’s operations due to the Export Control regime does not rise to an expropriation (creeping or otherwise) within the meaning of Article 1110. While it may sometimes be uncertain 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. ... under international law, expropriation requires a “substantial deprivation.””¹⁶³

¹⁶⁰ Para. 45.

¹⁶¹ *Pope & Talbot v. Canada*, Award, 26 June 2000, 7 ICSID Reports 69.

¹⁶² At para. 96.

¹⁶³ At para. 102. Footnote omitted.

In *S.D. Myers v. Canada*¹⁶⁴ the investor's ability to export hazardous waste for disposal was affected by an export ban that lasted for eighteen months. The Tribunal said:

"283. An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary."¹⁶⁵

In view of the temporary nature of the measure, the Tribunal found that there had not been an expropriation.

*Generation Ukraine v. Ukraine*¹⁶⁶ concerned a construction project for an office building. The main complaint was the failure by the Kyiv City State Administration to provide lease agreements. The Tribunal said:

"20.32 The Tribunal finds that the conduct of the Kyiv City State Administration ... does not come close to creating a persistent or irreparable obstacle to the Claimant's use, enjoyment or disposal of its investment."¹⁶⁷

The standard of a "persistent or irreparable obstacle to the investor's use, enjoyment or disposal of its investment" appears to be a useful standard for the question of whether a deprivation rises to the level of an expropriation or equivalent measure.

In *Occidental v. Ecuador*¹⁶⁸ the claim was directed at the inconsistent practice of the Respondent's authorities in reimbursing value added tax. The Tribunal denied that this amounted to an expropriation. After quoting from the *Metalclad* and *CME* cases, the Tribunal said:

¹⁶⁴ *S. D. Myers, Inc. v. Government of Canada*, Partial Award, 13 November 2000, 40 ILM (2001) 1408.

¹⁶⁵ Para. 283.

¹⁶⁶ *Generation Ukraine Inc. v. Ukraine*, Award, 16 September 2003.

¹⁶⁷ At para. 20.32.

¹⁶⁸ *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004.

“... there has been no deprivation of the use or reasonably expected economic benefit of the investment, let alone measures affecting a significant part of the investment. The criterion of “substantial deprivation” under international law identified in *Pope & Talbot* is not present in the instant case.”¹⁶⁹

In *GAMI v. Mexico*¹⁷⁰ a number of sugar mills had been expropriated temporarily by the government. The Tribunal said:

“With knowledge of the magnitude of diminution one might be in a position to consider whether a line is to be drawn beyond which the loss is so great as to constitute a taking. But GAMI has staked its case on the proposition that the wrong done to it did in fact destroy the whole value of its investment. ... This posture is untenable. The Tribunal cannot be indifferent to the true effect on the value of the investment of the allegedly wrongful act. ... GAMI has not proved that its investment was expropriated for the purposes of Article 1110.”¹⁷¹

In *CMS v. Argentina*¹⁷² the claim concerned the suspension by Argentina of a tariff adjustment formula for gas transportation applicable to an enterprise in which the claimant had an investment. The Tribunal denied the existence of an expropriation even though it admitted that the measures under dispute had an important effect on the Claimant’s business.¹⁷³ The Tribunal found that

“[t]he essential question is [...] to establish whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation.”¹⁷⁴

¹⁶⁹ At para. 89. Footnote omitted.

¹⁷⁰ *Gami v. The Government of the United Mexican States*, 15 November 2004.

¹⁷¹ At para. 133.

¹⁷² *CMS Gas Transmission Company v. Argentine Republic*, Award, 12 May 2005.

¹⁷³ At para. 260.

¹⁷⁴ At para. 262.

After citing *Lauder, Metalclad, Tippetts, CME* and *Pope & Talbot*, the Tribunal accepted Argentina's argument that the investor was in control of the investment, that the Government did not manage the day-to-day operations of the company and that the investor had full ownership and control of the investment.¹⁷⁵

In *Sporrong and Lönnroth v. Sweden*¹⁷⁶ the authorities had announced plans for the expropriation of the Applicants' properties and had imposed a construction ban. The European Court of Human Rights held that the effect of these measures was not sufficiently severe to amount to an expropriation. The Court said:

"In the Court's opinion, all the effects complained of (...) stemmed from the reduction of the possibility of disposing of the properties concerned. Those effects were occasioned by limitations imposed on the right of property, which right had become precarious, and from the consequences of those limitations on the value of the premises. However, although the right in question lost some of its substance, it did not disappear. The effects of the measures involved are not such that they can be assimilated to a deprivation of possessions. ..." ¹⁷⁷

Another approach would be to look at the intention of a government to expropriate. Such an approach has not found general acceptance. For one thing, intent to expropriate would be difficult to prove. A government's protestation that it never meant to expropriate cannot be decisive. As Professor Dolzer wrote:

"... the mere post-event statement of a government that a taking was not intended cannot, in itself, carry in the weight in the relevant analysis." ¹⁷⁸

¹⁷⁵ At paras. 261-264.

¹⁷⁶ *Sporrong and Lönnroth v. Sweden*, Eur.Ct.H.R., 23 September 1982, A 52 (1982).

¹⁷⁷ At para. 63.

¹⁷⁸ R. Dolzer, *Indirect Expropriations: New Developments?* 11 N.Y.U. Environmental Law Journal 90 (2002).

One solution might be to infer intent from the facts. Thus, if all the circumstances point towards a plan to deprive the investor of its investment, an underlying motive to expropriate can be construed. In the words of K.A. Byrne:

“In the case of a *de jure* nationalization, there is express intent to expropriate; in the case of a *de facto* nationalization, the intent is latent, yet can be determined from an examination of all the circumstances, in particular, the result of government measures.”¹⁷⁹

Another approach is to deny the relevance of an intention to expropriate, whether that intention is explicit or implicit. This latter approach is prevalent in international practice. It is termed the “sole effect doctrine.”¹⁸⁰ Under this approach, an expropriation may take place without or regardless of any intention to expropriate on the part of the host State. Professor Reisman and R.D. Sloane call this form of taking a “consequential expropriation.” They write:

“In consequential expropriations, states do not form an express intent to expropriate; indeed, they may not have such an intent at all. Even though a state’s responsibility to pay compensation for expropriation does not, in any event, ‘depend on proof that the expropriation was intentional’, the manifestation of that intent at some level of the state’s government generally furnishes a tribunal with a useful demarcation.”¹⁸¹

International judicial practice is almost unanimous in holding that an intention of the host State to expropriate is not essential. Professor Christie in his seminal study on expropriation¹⁸²

¹⁷⁹ K. A. Byrne, *Regulatory Expropriation and State Intent*, 38 Canadian YBIL 89, 96 (2000).

¹⁸⁰ R. Dolzer, *Indirect Expropriations* pp. 64, 79/80.

¹⁸¹ W. M. Reisman/R. D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation* 74 *The British Year Book of International Law* 130/31(2003). Footnote omitted.

¹⁸² G. C. Christie, *What Constitutes a Taking of Property under International Law?*, 38 *British Year Book of International Law* 305, 310 (1962).

summarized the issue of intent to expropriate in the *Certain German Interests in Polish Upper Silesia (Chorzów Factory) Case*¹⁸³ and in the *Norwegian Shipowners' Claims Case*¹⁸⁴ in the following terms:

“The *Norwegian Claims* and the *German Interests in Polish Upper Silesia* cases show that a State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention. More important, the two cases taken together illustrate that even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them.”¹⁸⁵

In *Biloune v. Ghana*¹⁸⁶ the authorities had issued a stop work order, demolished part of the project and arrested and expelled the investor. The Tribunal said:

“The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in this case.”¹⁸⁷

The Tribunal held that the effect of these actions in causing an irreparable cessation of work on the project was enough for a holding that there had been a constructive expropriation.¹⁸⁸

¹⁸³ *Factory at Chorzów (Germany v. Poland)*, Judgment, 15 May 1926, PCIJ Ser. A, No. 7 (1927).

¹⁸⁴ *Norwegian Shipowners' Claims (Norway v. United States)*, Award, 13 October 1922, 1 RIAA 307.

¹⁸⁵ Christie, *op.cit.* at p. 311. See also R. Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 *Recueil des Cours* 259, 322-323 (1982-III).

¹⁸⁶ *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184.

¹⁸⁷ At p. 209.

¹⁸⁸ *Loc. cit.*

In *Metalclad v. Mexico*¹⁸⁹ the Tribunal identified as an additional ground for its finding of expropriation an Ecological Decree that had the effect of barring forever the operation of the investor's landfill. The Tribunal said:

"111. The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree."¹⁹⁰

Tecmed v. Mexico,¹⁹¹ has been discussed above. The Tribunal found that there had been an indirect expropriation. After explaining the concept of indirect or *de facto* expropriation, the Tribunal said:

"The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects."¹⁹²

Important authority for the "sole effect doctrine" or "consequential expropriations" also comes from the practice of the Iran-US Claims Tribunal.¹⁹³ In *Starrett Housing v. Iran*¹⁹⁴ the Tribunal said:

¹⁸⁹ *Metalclad Corp. v. United Mexican States*, Award, 30 August 2000, 5 ICSID Reports 226.

¹⁹⁰ Para. 111. See also the discussion by W. M. Reisman/R. D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation 74 The British Year Book of International Law* 126-127 (2003).

¹⁹¹ *Tecnicas Medioambientales Tecmed S. A. v. The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004).

¹⁹² At para. 116 citing the decisions of the Iran-US Claims Tribunal in *Tippetts and Phelps Dodge*. Footnote omitted.

¹⁹³ A counterexample is sometimes perceived in *Sea-Land Service Inc. v. The Islamic Republic of Iran*, Iran-US Claims Tribunal, 20 June 1984, 6 Iran-US CTR 149. In that case the Tribunal said: "A finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was deliberate government interference with the conduct of Sea-Land's operation, the effect of which was to deprive Sea-Land of the use and benefit of its investment." At p. 166. See especially G. H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AJIL 585, 603 (1994). A closer reading of the passage would suggest that the Tribunal did not require intent to

“... it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, *even though the State does not purport to have expropriated them* and the legal title to the property formally remains with the original owner.”¹⁹⁵

In the *Tippetts* case¹⁹⁶ the Tribunal said in an often quoted passage:

“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.”¹⁹⁷

In *Phillips Petroleum Co. v. Iran*¹⁹⁸ the Tribunal, after summarizing the measures taken by the authorities of Iran against the Claimant, said:

“97. The effects of these events on the Claimant’s property are not in dispute.”¹⁹⁹

Then, after quoting the above passage in *Tippetts*, it said:

expropriate. It is the government interference as such that would have to be deliberate. For the deprivation of the use and benefit of the investment it is the effect that is decisive.

¹⁹⁴ *Starrett Housing Corp. v. Iran*, Iran-US Claims Tribunal, 19 Dec. 1983, 4 Iran-US CTR 122.

¹⁹⁵ At p. 154. Emphasis added.

¹⁹⁶ *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Iran-US Claims Tribunal, 22 June 1984, 6 Iran-US CTR 219.

¹⁹⁷ At pp. 225/26. The passage was quoted in *Phelps Dodge Corp. v. Iran*, Iran-US Claims Tribunal, 19 March 1986, 10 Iran-US CTR 121, 130, in *Payne v. Iran*, Iran-US Claims Tribunal, 8 August 1986, 12 Iran-US CTR 3, 11 and in *International Systems & Controls Corp. v. Iran*, Iran-US Claims Tribunal, 26 September 1986, 12 Iran-US CTR 239, 263.

¹⁹⁸ *Phillips Petroleum Co. v. Iran*, Iran-US Claims Tribunal, 29 June 1989, 21 Iran-US CTR 79.

¹⁹⁹ At para. 97.

"Therefore, the Tribunal need not determine the intent of the Government of Iran;²⁰⁰... a government's liability to compensate for expropriation of alien property does not depend on proof that the expropriation was intentional, ..." ²⁰¹

Professor Dolzer, after an examination of the relevant practice, concludes as follows:

"... the more recent jurisprudence of arbitral tribunals reveals a remarkable tendency to shift the focus of the analysis away from the context and the purpose and focus more heavily on the effects on the owner."²⁰²

A rare exception that seems to point to the relevance of intent is *Olguín v. Republic of Paraguay*.²⁰³ In that case the Claimant had purchased "investment bonds" upon which the State had defaulted. The Tribunal found that there had not been an expropriation but merely a business loss due to a financial crisis. It added in an *obiter dictum*: "Expropriation therefore requires a teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place."²⁰⁴ The context suggests that the Tribunal's point was that mere non-payment of a debt did not constitute an expropriation. The words "teleologically driven action" may suggest the requirement of an intention to expropriate. But it is also possible that what the Tribunal meant was simply that there had to be some positive action rather than a mere omission.

It follows from the above analysis that for the determination of whether an expropriation has occurred, the decisive standard is the effect of the measures on the investor's property. An intention to expropriate is not necessary. The purpose or motive, including a purpose that serves the public interest, is not decisive. This is not

²⁰⁰ *Loc. cit.*

²⁰¹ At para. 98.

²⁰² R. Dolzer, *Indirect Expropriations: New Developments?* 11 N.Y.U. Environmental Law Journal 64, 91 (2002).

²⁰³ Award, 26 July 2001, 6 ICSID Reports 192.

²⁰⁴ At para. 84.

to say that the existence of a legitimate public purpose for an expropriation is irrelevant. Absence of legitimate purpose would inject an element of illegality that should lead to an award of damages which would be conceptually different from and possibly higher than compensation.