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The Concept of “Indirect Expropriation”, its appearance in the international system and its effects in the regulatory activity of governments*

El Concepto de “Expropiación Indirecta”, su aparición en el sistema internacional y sus efectos en la actividad regulatoria de los gobiernos.

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Abstract

The protection of an alien's property in a host country against direct expropriation has long existed in the international arena. Examples of direct expropriation include nationalization, physical seizure of assets or legislated transfer of assets to the state. However such physical takings are no longer common practice. Nowadays, expropriation comes mainly in the form of “indirect expropriation”: acts and steps taken by governments which interfere with the right to the property or diminish the value of the property.

This paper explores the most relevant antecedents of the concept of indirect expropriation, its appearance in the international system, the inclusion in BITs and Investment Chapters of FTAs, and the effect that the concept is having on the regulatory activity of governments

Key words

Expropriation, indirect expropriation, Bilateral Investment Treaty, Free Trade Agreement, Foreign Investment, NAFTA.

Resumen

La protección de la propiedad en contra de medidas de expropiación directa ha existido en el ámbito internacional, ejemplos de expropiación directa incluyen nacionalización, apropiación física de activos y la transferencia forzada de bienes.

En la actualidad la práctica de la expropiación directa dejó de ser común, la expropiación se presenta bajo la forma de “expropiación indirecta”: medidas adoptadas por un gobierno que interfieren con el derecho de propiedad o el valor de la misma.

El presente escrito explora los antecedentes más relevantes del concepto de expropiación indirecta, su aparición en el sistema internacional, su inclusión en Acuerdos Bilaterales de Protección y Promoción de la Inversión Extranjera y en tratados de Libre Comercio, y los efectos que ha tenido el concepto en la actividad reguladora de gobiernos.

Palabras clave

Expropiación, expropiación indirecta, APPRI, Tratado de Libre Comercio, Inversión Extranjera, NAFTA.

* This article presents original research results.

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Introduction

Over the last 40 years, states have experienced an increase of foreign investment¹. In order to regulate and protect such investment, countries have established networks of Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTA) with Investment Protection Chapters which contain BIT-like provisions.

The protection of an alien's property in a host country against direct expropriation has long existed in the international arena. Examples of direct expropriation include nationalization, physical seizure of assets by the state and forced or legislated transfer of assets to the state. However such physical takings are no longer common practice. Nowadays, expropriation comes mainly in the form of "indirect expropriation": the measures taken by governments which interfere with the right to the property or diminish the value of the property².

The phenomenon of indirect expropriation earned notoriety in the international context with the BIT-like provisions of the North American Free Trade Agreement (NAFTA) of 1993. Foreign investors began to rely on these provisions to file high-profile lawsuits against the governments on grounds of indirect expropriation³.

However, indirect expropriation has a heritage that pre-dates NAFTA. This paper explores the most relevant antecedents of the concept, its appearance in the international system and the effect that the interpretation of the term by lawyers and arbitral tribunals is having on the regulatory activity of governments in regulating matters of public interest.

The paper does an overview about the concept of indirect expropriation. Next it reviews the key predecessors that influenced the development of today's concept of "indirect expropriation". We then move on to review the inclusion of the concept in chapter 11 of NAFTA.

Finally, the paper sets out some recent arbitral awards in which arbitral tribunals have ruled on claims of indirect expropriation which highlight the limitations that this concept now imposes on states' ability to regulate.

1. Overview of indirect expropriation

Clauses protecting investors against expropriation have evolved to encompass indirect expropriation. In general terms, indirect expropriation "occurs when there is an interference by the state in the use, enjoyment, or benefits derived from a property even when the property is not seized and the legal title of the property is not affected"⁴. (It should be noted that this overarching definition is merely illustrative and too wide for practical application. The general rule for identifying an indirect expropriation is still on a case by case basis)⁵.

In practice, protection against indirect appropriation means a foreign investor is entitled to file a claim against a host state on the grounds that the state when exercising its regulatory powers (e.g. a law, decree, decision or other interference) is depriving him, wholly or partially, of his property, even if the state has not physically seized the asset. Under such protection, an investor can sue for economic loss caused by a state's action which affects his property.

NAFTA, which is not a BIT as such but contains an investment protection chapter written in a similar way as a BIT, marked an important stage for the protection of foreign investments. Under this treaty foreign investors were able to impinge on governments' ability to regulate and also because it brought to the attention of the public the side effects of the protection to foreign investors against expropriation⁶.

Legal scholars as well as several international arbitrators have pointed out that the clauses contained in BITs or the foreign investment chapters of FTAs are too wide and vague

which leaves the interpretation of the scope of protection to the discretion of arbitrators⁷.

The concept of indirect expropriation has given rise to new concerns about its scope of application and the uncertainty about what exactly constitutes an indirect expropriation. It has become difficult to define which governmental measures have a sufficiently severe adverse effect on someone's right to property or the profitability of their investment to result in an indirect expropriation⁸.

2. The origins of indirect expropriation

Although the concept of indirect expropriation gained particular importance and relevance after its inclusion in Chapter 11 of NAFTA, it was pre-dated by various antecedents: i) decisions taken by international tribunals, ii) attempts to codify it, iii) the inclusion of the term in previous treaties and iv) the underpinning provided by the theory of Richard Epstein.

2.1. Decisions of International Tribunals:

The following are the most relevant decisions of International Tribunals that have influenced the concept of indirect expropriation:

2.1.1. *Controversy of the United Kingdom and the Kingdom of the Two Sicilies (1838):*

In 1838, the Kingdom of the Two Sicilies granted a monopoly of extraction and exportation of Sicilian sulphur to a single company and to the exclusion of all other companies.

Some of those excluded companies belonged to United Kingdom nationals. Even though their companies owned sulphur deposits and reserves, they were prevented by law from trading their sulphur because of the terms of the monopoly.

In 1840, after strong pressure from the United Kingdom (which included the threat of force) the Sicilian authorities cancelled the monopoly agreement⁹. An international panel of 5 commissioners (two English, two Neapolitans and one French) was set up to resolve the claims of those English citizens adversely affected by the granting of the monopoly.

The commission granted compensation to the owners of sulphur mines, the suppliers of sulphur and those that before the monopoly contract came into force had bought sulphur in Sicily who had been prevented from exporting their product. The argument used by the Tribunal was that granting a monopoly to a single company had affected their property rights causing economic loss¹⁰.

In this case, compensation was awarded despite the fact that the Kingdom of the Two Sicilies had not physically taken over the sulphur mines or contracts of the British companies. Thus, in this very early case, an indirect interference was enough to entitle investors to request for economic compensation for economic loss.

2.1.2. *German Interests in Polish Upper Silesia. The Permanent Court of International Justice. (1919)*

This dispute concerned a nitrate factory located in the Polish city of Chorzów.

In 1915, the German Government concluded a contract with Bayrische Stickstoffwerke A.-G. ("the Contractor"), according to which the Contractor would construct a nitrate factory at Chorzów in Upper Silesia¹¹. The German Government would be the owner of the factory.

In addition, it was agreed that the Contractor would manage (operate the facto-

ry?) nitrate operations from 1915 to 1941. The Contractor, through a special corporate entity set up for this purpose, had the right to use all the patents, licenses and experience arising out of the nitrate operation at Chorzów¹².

In 1919 the German Government transferred the title of factory to a new German Corporation called Oberschlesische Stickstoffwerke A.-G. (“the Title Holder”)¹³. The Contractor’s contractual right to manage the factory and to use the patents, licenses, experiences and contracts were assigned to the new owner¹⁴.

In 1920, the Polish Government issued a law transferring the title of the factory and the land from the Title Holder to the Polish Treasury¹⁵.

In 1922, the Polish Government issued a ministerial decree authorizing a delegate of the Polish Government to take control of the activities of the nitrate factory and possession of the movable property, licenses, and patents¹⁶.

The Permanent Court of Justice ruled that by taking possession of the Chorzów factory, and operating it, the Polish Government had unlawfully expropriated the contractual rights of the Contractor, including the right of remuneration for the administration of the factory, and the right of use experiments, patents, and licenses¹⁷. This case is another example, pre-dating the first ever BIT, where unlawful expropriation encompassed more than physical seizure of assets.

2.1.3. *International Claims Commission-Foreign Claims Settlement Commission. (1949)*

The International Claims Commission was established in the USA by the In-

ternational Claims Act of 1949 and was intended to provide compensation to American nationals whose property was nationalized or subject to other “taking” by a foreign government¹⁸. In 1954, these responsibilities were assumed by the Foreign Claims Settlement Commission¹⁹.

During the 1950s, the Commission decided several cases regarding either direct expropriations or expropriation caused by measures adopted by governments which affected the right to property.

One relevant case regarding indirect expropriation was *Alberta Bela Reet*. In 1950, nine years before the first BIT, the Government of Hungary prohibited “the sale, the placing of liens upon or the occupancy of a dwelling house and its court yard”²⁰. The Commission ruled that the restriction on the free use of the property was an expropriation even though the title of the property was never transferred to the Hungarian government²¹.

The Commission has pointed out in several opinions that the transfer of title to the state was not a *sine qua non* requirement for an expropriation. Therefore restrictions on the right to use a certain property by regulations issued by the state hosting the investment and forced sales were also been deemed to be expropriations²².

2.1.4. *Poehlmann v Kulmbacher Spinneri United States Court of Restitution Appeals (1952)*²³.

In this case, a German citizen who was married to a Jewish woman, was the owner of a very popular Hotel in Kulmbach. When the Nazis came to power, it became socially unacceptable for party members to visit the hotel and restaurant. Instead, they began publicly criticising the venue²⁴.

The business started to decline and so the owner sold the hotel. The Court of Restitution²⁵ held that the hotel had been “confiscated” and ordered restitution in favour of the original hotel owner²⁶.

In this case, well before states started to execute BITs, the government’s conduct fell far short of direct expropriation. Indeed, its indirect expropriation did not even result from an exercise of formal government or regulatory power. Nevertheless, the state’s activities were held to be expropriations because its public criticism and disapproval resulted in economic loss to the claimant’s business.

The above-mentioned cases have been essential in the development of the concept of indirect expropriation which came to be included in BITs and FTAs.

2.2. Early attempts of codification

Since the 1950s, the principles referred to in the above mentioned cases were also starting to be codified. The key texts, drafted after the first BIT was signed, are as follows:

2.2.1. *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961)*

In 1953, the General Assembly of the United Nations requested The International Law Commission to codify the principles of International Law governing state responsibility, (the “Harvard Draft”)²⁷.

The Harvard Law School undertook this task and appointed Professors Sohn and Baxter and a distinguished advisory committee²⁸.

Although the purpose was not specifically focused on the protection of foreign investments, the Harvard Draft nevertheless

covered the issue. Article 10 paragraph 3 of the Draft defined a taking of property as follows:

*“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”*²⁹.

This wording clearly applies to indirect expropriation, since it uses the words “not only an outright taking...but also...unreasonable interference”. In essence, the Harvard Draft provided that a “taking” happens when, without reasonable justification, the right to use, enjoy or dispose of a property was restricted³⁰.

The concept of indirect expropriation also receives explicit recognition in paragraph 5 of the Harvard Draft, which defines lawful taking and in which direct and indirect expropriation as separate concepts.

Paragraph 5 of the Harvard Draft states that:

*“An uncompensated taking of an alien’s property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful”*³¹.

The differentiation between “a deprivation of the use or enjoyment of property”

and a “taking of an alien’s property” gives equal status to both indirect expropriation and direct takings..

The Harvard Draft was never adopted, as was also the way with later attempts at codification such as the OECD Draft or the Multilateral Agreement on Investments (MAI). Nevertheless, the proposed definition using the term “*unreasonable interference*” is an illustration of how the concept of indirect expropriation had come to the fore and how far its boundaries could be pushed in theory.

2.2.2. *The OECD Draft Convention on the Protection of Foreign Property (1967)*

The OECD Draft Convention on the Protection of Foreign Property 1967 (the “OECD Draft”) was developed upon the instructions of the Council of the Organization for European Co-operation in April, 1960. The aim was to strengthen international economic co-operation³².

Article 3 of the OECD Draft included a prohibition against indirect expropriation as follows:

“Article 3: TAKING OF PROPERTY: No Party shall take any measures, depriving, directly or indirectly, of his property a national of another Party unless the following are complied with:

- (i) *The measures are taken in the public interest and under due process of law;*
- (ii) *The measures are not discriminatory or contrary to any undertaking which the former Party may have given; and*
- (iii) *The measures are accompanied by provision for the payment of just compensations. Such compensations shall represent the genuine value of*

the property affected, shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the national entitled thereto”³³.

According to the explanatory commentary of this article that accompanied the OECD Draft, the state has a sovereign right to take over the property of nationals or aliens. However, this right is limited and must fulfil the following requirements: (i) the taking must be in public interest, (ii) must not be discriminatory, and (iii) there must be payment of a just and effective compensation³⁴.

The above-mentioned articles show that the OECD Draft further developed the concept of indirect expropriation by explicit use of the word “indirectly” and considered indirect expropriations on a par with direct takings.

Again, as in the case of the Harvard Draft, this draft did not reach fruition, but nevertheless is an indicator and a clear precedent of the developing BIT context at the time it was drafted in 1967.

These were the first two attempts to include the protection against indirect expropriation in international treaties³⁵.

2.3. Early Codifications

Following these forerunners, the concept of indirect expropriation was formally introduced into international treaties through the US BITs program and in the Free Trade Agreement between Canada and the United States.

2.3.1. *US Bilateral Investment Treaties Program (1980)*

The next important development of the concept of indirect expropriation was the

US Bilateral Investment Treaties Program of 1980. This plan was a response to the US and its investors' lack of confidence in judges, courts (in general the legal system) of developing countries³⁶.

Under this plan, the Reagan administration entered into a vast number of BITs with developing countries which included the concept of indirect expropriation. For example, article IV of the BIT between Panama and the USA signed in 1982 (which came into force in 1990) provides that:

"Investment of a national or a company of either Party shall not be expropriated, nationalized, or subjected to any other direct or indirect measure having an effect equivalent to expropriation of nationalization ("expropriation") in the territory of the other Party, except for a public or social purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process and the general principles of treatment laid down in Article II(2). Such compensation shall amount to the full value of the expropriated investment immediately before the expropriatory action became known; include interest at a commercially reasonable rate; be paid without delay; be effectively realizable; and be freely transferable³⁷."

The definition of expropriation in this clause includes *"indirect measure[s] having an effect equivalent to ... nationalization"*. It is likely that this formulation was replicated in many BITs in the 1980s under this US programme. As will be seen later in this paper, it is also a precursor to the very similarly drafted expropriation clause in NAFTA.

2.3.2. Free Trade Agreement of Canada and the United States of 1988 (FTACUS)

The most recent predecessor of NAFTA is the Free Trade Agreement of Canada

and the United States of 1988 (FTACUS). FTACUS was intended to eliminate barriers, facilitate favourable conditions for investment, and establish clear procedures for the settlement of disputes³⁸.

This treaty was pioneering in that it included an Investment Chapter (Chapter XVI), defining issues of expropriation, taxation, transfer (of any profit, royalty, fee, interests or other earning from an investment) and dispute resolution. Article 1605 of the treaty addresses the issue of indirect expropriation as follows:

"Neither Party shall directly or indirectly nationalize or expropriate an investment in its territory by an investor of the other Party or take any measure or series of measures tantamount to an expropriation of such an investment, except:
a) for a public purpose;
b) in accordance with due process of law;
c) on a non-discriminatory basis; and
d) upon payment of prompt, adequate and effective compensation at fair market value³⁹."

This treaty was the first international instruments to include the concept of "Indirect Expropriation". However, no high profile lawsuits arose from any of these treaties prior to NAFTA.

Notably, the expression "tantamount to an expropriation" as used in FTACUS is broader than "equivalent to an expropriation", as used in the US-Panama BIT under the US BITs programme. Thus, it suggests that FTACUS was a further development of the concept of indirect expropriation.

2.3.4. Richard Epstein's Work

The theory of Richard A Epstein represents one of the only attempts to present a coherent rationale for "partial" takings

which he presented in his 1985 book *Takings: Private Property and the Power of Eminent Domain*⁴⁰.

Richard A. Epstein has been a Professor at Law at the University of Chicago since 1972. He is a strong defender of the minimal regulation of the state, and is considered by some people as one of the “most influential legal thinkers in legal academia”⁴¹.

For Epstein, partial takings occur when any of the incidents of the right of property are deprived, e.g. (i) possession, (ii) use and/or (iii) disposition⁴². According to his theory, every part of the bundle of ownership is protected and cannot be adversely affected. According to Epstein:

*“The protection afforded by the eminent domain clause to each part of an endowment of private property is equal to the protection it affords the whole-no more and no less...Let the government remove any of the incidents of ownership, let diminish the rights of the owner in any fashion, then it has prima facie brought itself within the scope of the eminent domain clause...”*⁴³

In this regard, the state host of the investment cannot remove or diminish any of the incidents of the ownership, no matter how small is the alteration⁴⁴.

Epstein’s theory is based on the Lockean theory of representational government according to which government does not have *ipso facto* rights. It only has those rights derived from the group of people it represents and the rights acquired by the state can never be above the rights of the individuals⁴⁵. Considering that nobody has the right to destroy or take away the life or property of another, likewise the state does not have the right to take prop-

erty⁴⁶. For Locke, the status of property as a fundamental right was derived from the fact that whenever someone “*makes something with their own labour; he adds to the object a part of himself and acquires property rights over it*”⁴⁷. As Locke himself put it:

*“Every man has property in his own person...The labour of his body...[is] properly his. Whatsoever then he removes out of the state that nature has provided...he hath mixed his labour with and joined to it something that is his own, and thereby makes his property”*⁴⁸.

This principle was incorporated into the Fifth Amendment of the Constitution of the United States (no doubt influenced by King George III’s interference with settlers’ rights) preventing the government from depriving its citizens of “life, liberty and property without due process of law, nor shall property be taken for public use without just compensation”⁴⁹.

Epstein sets out the circumstances when the incidents of property, are diminished and therefore a partial taking happens:

- When a government regulation limits the owner’s right to sell his goods, even though his ownership rights are unaffected⁵⁰.
- When the government interferes with and affects the expectation of renewing a lease⁵¹.
- When contract rights are infringed by governmental regulation⁵². Contract rights are property interests and therefore protected.
- When government restricts the number of working hours and minimum wages. This regulation affects the right of disposition in voluntary transactions⁵³.

- When government regulates rates such as transport⁵⁴.
- When the government imposes taxes for reasons other than for a public purpose or permissible government regulatory activity⁵⁵. Taxes imposed on a specific community, or on particular goods and services require special analysis to determine if there is a taking⁵⁶.
- When a government imposes taxes designed to raise funds for welfare purposes⁵⁷.
- When the government regulates the use of land⁵⁸.
- When a government passes new insolvency and bankruptcy legislation.
- When a government issues environmental regulations (except when the state is acting under its police power and tries to prevent situations that threaten the community such as water pollution and discharge of toxic substances)⁵⁹.

According to Epstein, exceptions to the general rule (that there shall be no expropriation without compensation) are only applicable when the state uses its police power⁶⁰ to protect society from common threats⁶¹.

Epstein's theory of partial takings is radical. For him, any governmental action which could affect any of the incidents of property rights would amount to an indirect expropriation.

Thus, in the international context, his theory would mean that governments would and should have to pay compensation if their attempts to regulate their domestic affairs had an adverse affect on a foreign investor's ability to use, dispose or profit from his property. Epstein claimed in his book how critical his theory was, saying: 'It will be said that my position invalidates much of the twentieth century legislation, and so it does'⁶².

3. North American Free Trade Agreement (NAFTA)

NAFTA was the first multilateral Free Trade Agreement that used BITs- like clauses in a chapter of investment protection (Chapter 11), becoming an important international agreement model worldwide for the defenders of free trade and foreign investments⁶³.

Article 1110 of the Chapter 11 of NAFTA provides that:

"No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6."

As mentioned before, this formulation very much mirrors the provision in FTACUS. The development this time, is that it appears in a multilateral, rather than a bilateral treaty.

Article 1110 gained international importance when Methanex sued the government of the United States on the grounds of breaching NAFTA provision, specifically arguing indirect expropriation. It was at that moment when people started to become aware of the power given to multinationals under those agreements and as Daniel Price mentions: "The breadth of coverage and the strength of the disciplines [in Chapter 11] exceed those found in any bilateral or multilateral instrument to which the United States is a party"⁶⁴.

However, the phenomenon was not new or unexpected, even if public consciousness

was lagging behind. According to the Economist Edward Graham, before NAFTA was negotiated, there was a strong presumption that ‘whenever the government enacts a regulatory measure, it should compensate’⁶⁵.

Professor Robert Stumberg explains that the NAFTA investor protections “are based on a long-term strategy, carefully thought out by business, with many study groups and law firms involved in developing them. This is about limiting the authority of government”⁶⁶.

Epstein’s radical theory and the new scope of protection it advocated has been said to be a very well-known theory by legal practitioners in America at the time NAFTA was negotiated⁶⁷.

In a telephone interview with William Greider, Richard Epstein pointed out that “I am aware that what I have said has been very influential in the NAFTA debate and that, strangely enough, much of what I say seems to have more resonance in the international context than it did in the domestic context ... Nobody from any of those [business] organizations even thought to ask me to give an opinion, let alone hire me as a consultant. I think they should have asked me”⁶⁸.

In 1990, as NAFTA negotiation began, the investor protection scheme was already on the agenda as one of the main points for negotiation. Dan Price and Edwin Williamson were the designers of the Chapter 11 of NAFTA including the definition of regulatory expropriation⁶⁹. In an interview, Price said:

“Governments recognize that it would be unfair to force an investor to bear the entire cost of change in social policy. These costs, at least under certain circumstances, should be borne by a society as a whole. Simply designating a government measure as a conservation measure, or health and safety measure, does not an-

swer the basic question about who should bear its costs and should not be enough to remove that measure from international investment discipline”⁷⁰.

According to Williamson, the Epstein doctrine is the valid application in the international arena because the international community has to protect property rights and “extensive environmental regulation may still involve a taking”⁷¹.

4. Indirect expropriation and public policy.

The protection of property against indirect expropriation in BITs and FTAs with BIT-like provisions can pose a threat to the capacity of states to regulate, especially in those areas of public interest such as environmental law, human rights, labour and taxes.

The huge amounts of money that a government might be required to pay for an indirect expropriation of a foreign investment can affect a country’s domestic policy agenda.

There have been several incidents where foreign investors have prevented or deterred governments from taking action by threatening them with possible lawsuits for breach of investment treaties⁷².

These lawsuits are regularly conducted in arbitral tribunals. Although many of their features are advantageous for investors, there are some drawbacks for respondent governments.

Many such tribunals (e.g. those under UNCITRAL⁷³, NAFTA and Canadian/US investment agreement rules⁷⁴) largely operate in conditions of confidentiality⁷⁵ (or secrecy as critics would say)⁷⁶. Therefore, it is not possible for citizens of the host state who might be affected to know exactly how many claims are filed against governments, what the claims are and what the financial implications are.

In this sense, Guardiola-Rivera highlights that these tribunals are often located offshore and are adjudicated in front of privately appointed arbitrators. Therefore they may act as a means of bypassing national courts, again removing the oversight and participation of local populations⁷⁷. Peterson explains that often the waiting periods in disputes arising from investment treaties are minimal, and so disputes can be referred to arbitration much more quickly than to other international forums (e.g. UN human rights bodies) which require exhaustion of domestic remedies⁷⁸. He also mentions that the requirement to exhaust domestic remedies⁷⁹ is meant to respect state sovereignty, which suggests that international arbitration is a quick way of bypassing the system⁸⁰.

Arbitrators have sometimes been accused of relying too much on international investment law rather than applying other sources of law that might otherwise be applicable (e.g. international human rights, labour or environmental law)⁸¹. This is further compounded by the fact that, in arbitration, incorrect statements of law can survive subsequent legal challenge. Depending on the rules of the arbitration and the laws of the state where the arbitral award is to be enforced, legal incorrectness may not be a ground for appeal and the arbitral tribunal or the courts may not have the power to correct errors⁸².

The following are some relevant where the pressure of foreign investors challenge the internal policies of a state and its regulatory activity.

4.1. Ethyl Corporation v Canada.

In 1997, the Canadian government passed legislation which banned the internal transport and the import of the manganese-based compound MMT because of health concerns⁸³.

MMT was a gasoline additive produced by Ethyl Corporation ("Ethyl"). Ethyl was the

only producer of gasoline containing MMT. MMT is banned in all developed countries including several states of the United States⁸⁴.

One of the main concerns of the Canadian government was that research had found that the inhalation of airborne manganese could cause neurological impairments and symptoms similar to Parkinson's disease⁸⁵.

The company alleged breach of the obligation not to discriminate on ground of nationality, breach of the obligation not to require performance requirements and expropriation⁸⁶. Ethyl argued that the ban was an expropriation of its intellectual property rights and goodwill⁸⁷.

The government of Canada agreed to rescind the ban on the additive, to pay \$19million to the company and to issue a statement confirming that MMT does not affect health or environment⁸⁸.

4.2. Metalclad Corporation v Mexico

This case shows how environmental measures taken by governments can be challenged by investors and how governments can be required to pay for public policies.

Metalclad, a U.S. corporation operating through its Mexican subsidiary received a permit by the Federal Government of Mexico to construct hazardous waste landfill in Guadalcacae.

The place where the landfill was allocated had an unstable soil allowing for easy filtration and contamination of deep waters. The location was also an area of unique biological diversity⁸⁹.

Five months after the company started construction, it received a notification issued by the Municipality of Guadalcacazar informing that the company required an additional municipal permit⁹⁰.

The company applied for the permit and it was turned down by the municipality. Additionally the Governor issued a decree declaring that the area of construction was a protected natural area⁹¹.

Metalclad issued proceedings before the International centre for Settlement of Investments Disputes (ICSID) claiming violation of articles 1105 ("Minimum Standard of Treatment") and 1110 ("Expropriation") of NAFTA by the Mexican Government⁹².

The Tribunal held that the actions of local government and the ecological decree were to be considered as an indirect expropriation. As a result, the investment made by Metalclad was held to be totally lost⁹³. The compensation ordered by the tribunal, payable by Mexico, was US\$ 16.7 million⁹⁴.

4.3. Técnicas Medioambientales Tecmed, S.A. v. Mexico (BIT Spain-Mexico 1995).

Tecmed, a Spanish company with two Mexican subsidiaries, acquired a waste landfill in 1996. In 1998, Mexican Authorities did not renew the licence to operate the landfill due to breaches of environmental regulations⁹⁵.

The company argued that the measures adopted by the Mexican government constitute an indirect expropriation and violated the obligation to grant 'fair and equitable treatment' to all NAFTA nationals⁹⁶.

The ICSID tribunal held that, in fact, the measures undertaken by the Mexican government could be characterized as an indirect expropriation since the landfill was closed and could not be used for a different purpose⁹⁷. Mexico was ordered to pay to Tecmed US\$5.5 million.

4.4. Methanex v United States of America

Another good example of the potential interference of foreign companies in internal mat-

ters of state is the dispute between Methanex v United States of America which arose under NAFTA.

In this case, the government of California imposed a ban on the use or sale in California of the gasoline additive called "MTBE"⁹⁸ based on the fact that said additive could be a carcinogenic additive⁹⁹. Methanol is the main ingredient used to manufacture MTBE¹⁰⁰.

In 1999, Methanex Corporation, a Canadian company manufacturer of methanol, filed a lawsuit against the US government, claiming that the ban violated Chapter 11 of NAFTA, causing, among other breaches, indirect expropriation by the issuance of the abovementioned regulation¹⁰¹.

In 2005 the arbitral tribunal dismissed all of Methanex's claims and ordered the company to pay US\$ 2,989,423.7 to the US government¹⁰². Despite the company's claim not being successful, this is the type of argument is used by companies to challenge and the large sums claimed in damages¹⁰³ has a chilling effect on the ability of states to regulate.

4.5. Pope & Talbot Inc. v. Canada.

This is another case where a foreign company challenged the Government's capacity to regulate Macroeconomic Policies.

The conflict arose out of the 5-year Softwood Lumber Agreement ("SLA") concluded between the Government of Canada and the government of the United States of America. The SLA was part of common macroeconomic policy and imposed a limit on the export of softwood lumber from Canada to the USA¹⁰⁴.

In order to comply with the agreement, Canada allocated exports quotas among the softwood lumber producers adopting special procedures for the issuance of permits to export softwood lumber to the U.S. and describing the

method of quota allocation based on the exporters' recent export shipments, or on special criteria in the case of new exporters¹⁰⁵.

The Tribunal found that Canada was in violation of Article 1105 of NAFTA (minimum standard of treatment) because it treated the investor in an unfair way, namely not giving pertinent information when requested, making threats to impose economic sanctions and causing the investor to incur unnecessary expense and disruption. The Tribunal awarded US\$ 461,600 as compensation to the investor.

4.6. PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi vs Republic of Turkey (BIT Turkey-United States 1985).

Turkey opened the energy market allowing private companies to generate electricity and to sell it to the government and offered incentives to the companies, including Treasury Guarantees.

PSEG, a U.S. company, signed a Concession and Implementation Contract with the government of Turkey for a coal fired power plant and an adjacent coal mine.

The final agreement and key commercial terms were unclear. Turkey then enacted Law No. 4628 of 2001 which eliminated the issuance of Treasury Guarantees as incentive for those projects¹⁰⁶.

In 2001 PSEG initiated ICSID proceedings under the USA-Turkey BIT on the grounds that Turkey's "arbitrary" measures did not comply with the BIT obligations to provide fair and equitable treatment and full protection and security¹⁰⁷.

In 2007 the Tribunal held that Turkey had violated the fair and equitable treatment provision of the BIT but dismissed the other claims. The change in regulation was a matter of economic

policy and the Tribunal held that it was not in the breach of the agreement¹⁰⁸. Turkey was ordered to pay to PSEG the sum of US\$9,061,479.34 in respect of the amount invested in the project and 65% of the arbitration fees¹⁰⁹.

4.7. South Africa- Mineral and Petroleum Act (MRDA) of 2002

In South Africa, the Mineral and Petroleum Act (MRDA) of 2002 transferred all private rights in the country's mineral wealth to the State. The government would then fairly distribute licences for the exploitation. This Act was enacted under the Black Economic Empowerment (BEE) programme which is a race-based affirmative action measure¹¹⁰.

Various mineral and oil industry corporations warned the South African government that the measure could violate the BITs executed by and between UK and Belgium and Luxembourg¹¹¹. Italian investors, with the support of the Italian government, initiated an arbitration claim against South African under the terms of the investment protection treaty with Italy¹¹². The South African government after various consultations with the industry stopped any further such reforms¹¹³.

In a similar context in South Africa and as stated by the Report of the U.N. High Commissioner for Human Rights, the Act 36 of 1998 (National Water Act of the Republic of South Africa) was intended to create favourable treatment for national racial minorities (even over foreign investors) when applying for water licences. The aim of this law was to promote equality and diminish the negative effects of the discriminatory policies that were previously in place. However and despite its good intentions, the Act risks violating the national treatment provisions of BITs¹¹⁴.

The cases mentioned above are few examples among the huge number of known and unknown¹¹⁵ arbitration cases where foreign in-

vestors have challenged the capacity of regulation of states due to regulatory takings.

The compensation payable might discourage states from regulating, protecting and improving rights such as housing, education, cultural life, food, health, environment, and common cultural heritage (which are second and third generation human rights)¹¹⁶.

Developing states could be prevented from implementing important, large-scale programmes such as agrarian reform, land redistribution, and protection of indigenous land rights¹¹⁷.

Despite the number of different arbitrations, there are no definitive rules that provide total certainty to states as to when a measure will be a regulatory taking or not. The case by case approach which currently subsists will continue as the way to identify what is an indirect expropriation.

Conclusions

BITs and FTAs with investor protection chapters have become important tools for protecting foreign investments against government actions.

The scope of protection has shifted from direct to indirect expropriation, whether partial or total. Protection from indirect expropriation means that a foreign investor will be entitled to compensation for economic loss caused by a governmental action that interferes with his property rights so as to diminish the value of or the revenue from his investment. Such government measures need not be physical seizure of the investor's assets – that would be direct expropriation.

This “new” protection against indirect expropriation gained importance worldwide with the lawsuits filed by investors against governments under Chapter 11 of NAFTA.

However, the concept of indirect expropriation as set out in chapter 11 of NAFTA and the interpretation given to it by arbitral tribunals has developed through several important cases since 1838.

Since the 1950s, there have been abortive attempts to codify protections for foreign property and all these sought to include an explicit protection against indirect expropriation.

Indirect expropriation was expressly included in the *US Bilateral Investment Treaties Program* of 1980 and the Free Trade Agreement of Canada and the United States of 1988.

The radical theory of Richard A. Epstein of partial takings had important relevance in the introduction of the term in the chapter 11 of NAFTA and in the approach given by lawyers and by arbitration tribunals deciding lawsuits of investors against states.

Thus, NAFTA included protection against indirect expropriation which had a potentially wider scope. Although NAFTA could be said to be simply a logical progression in the evolution of indirect expropriation, it marked a new era where international corporations may be able to limit or deter the exercise of regulatory powers by states.

The protection against indirect expropriation allows investors to challenge the regulatory activity of states in areas of public interest such as macro-economic policies, human rights, environment, labour and law taxes

In recent cases, corporations have alleged indirect expropriation in relation to environmental regulations, the banning of harmful commercial substances, land redistribution under racial equality programmes, or denial by a local municipality of permission to build.

However, identifying which regulatory policies would or would not constitute an indi-

rect expropriation, where the state would have to pay compensation, is still not clear and the distinction can only be drawn on a case by case basis.

Bilateral Investment Treaties and Free Trade Agreements with BIT-Like provisions encroach on the sovereignty of states, especially of developing countries, in that they can challenge internal public policies.

States should negotiate BITs carefully, without being blinded by the promise of foreign investment, and give consideration to the unintended and possibly undesirable consequences that they could bring.

The international community should take steps to reform the current system for the protection of international investments. This might help to even up the unequal bargaining positions of developed and developing countries when negotiating BITs. It may also provide clarity on investment protection provisions and, most importantly, strike a better balance between compensable takings and legitimate governmental regulation in the public interest.

Notas

¹ Information and figures about the increase in Foreign Direct Investments can be found in the following articles:

World Investment Report 2011: Non-Equity Modes of International Production and Development. United Nations Conference on Trade and Development in: <http://www.unctad-docs.org/files/UNCTAD-WIR2011-Chapter-I-en.pdf>

Charlton, Andrew. *Foreign direct investment: Brief note prepared for IPD's Financial Markets Task Force*. 2006 in: http://policydialogue.org/files/events/Charlton_Foreign_direct_investment.pdf

Trends in Foreign Direct Investment in OECD Countries. Organisation for Economic Co-operation and Development. 2001. in: <http://www.oecd.org/dataoecd/24/37/2956446.pdf>

Shatz Howard J, *Expanding Foreign Direct Investment in the Andean Countries, working paper*, Centre for the International Development at Harvard University, 2001 in: http://www.cid.harvard.edu/archive/andes/documents/workingpapers/fdi/fdi_andesshatz.pdf

² Guzman Carrasco, Gonzalo, "Indirect Expropriation in Free Trade Agreements: The U.S. Trade Act of 2002 and Beyond", *Revista Colombiana de Derecho Internacional*, 2004, (004), p. 281 in http://www.javeriana.edu.co/Facultades/C_Juridicas/pub_rev/international_law/revista_4/8.pdf Accessed 2nd June 2011.

³ Peterson, Luke Erik, *Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration*, International Centre for Human Rights and Democracy Development, Montreal, 2009, p 20, in http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf Accessed 28th May 2011.

⁴ Yannaca-Small, Catherine, *Indirect Expropriation and the Right to Regulate in International Investment Law*, Organisation for Economic Co-operation and Development, 2004. p. 4 in: <http://www.oecd.org/dataoecd/22/54/33776546.pdf> Accessed March 23 2011.

⁵ Ibid. P. 4

⁶ Greider, William, "The Right and US Trade Law: Invalidating the 20th Century", *The Nation*, 2001, in <http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century> Accessed April 5, 2011.

⁷ Peterson Luke Erik-Gray Kevin R, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, International Institute for Sustainable Development (IISD), Canada, 2003, p 9, in http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf, Accessed January 22, 2011.

⁸ Peterson, *op. cit.*, p. 14.

⁹ Christie, *op. cit.*, p. 320.

¹⁰ Christie, *op. cit.*, p. 320.

¹¹ Permanent Court of International Justice, Eighth (Ordinary) Session, Judgement No. 6, 1925, judges: Lord Finlay, Nyholm, de Bustamante, Altamira, Oda, Anzilotti, Pessôa,

¹² Permanent Court of International Justice, Eighth (Ordinary) Session, Judgement No. 6, 1925, judges: Lord Finlay, Nyholm, de Bustamante, Altamira, Oda, Anzilotti, Pessôa.

¹³ Permanent Court of International Justice, Eighth (Ordinary) Session, Judgement No. 6, 1925, judges: Lord Finlay, Nyholm, de Bustamante, Altamira, Oda, Anzilotti, Pessôa,

¹⁴ Christie, *op. cit.*, p. 311.

¹⁵ Christie, *op. cit.*, p. 311.

¹⁶ Permanent Court of International Justice, Eighth (Ordinary) Session, Judgement No. 6, 1925, judges: Lord Finlay, Nyholm, de Bustamante, Altamira, Oda, Anzilotti, Pessôa, paragraph 136.

¹⁷ Permanent Court of International Justice, Tenth (Extraordinary) Session, Judgement No. 7, 1926, judges: Nyholm, Altamira, Anzilotti.

¹⁸ Christie, *op. cit.*, p. 310.

¹⁹ This Commission consisted of domestic tribunals based in USA which ruled on claims filed by US nationals, based on war damage and nationalization of property in Russia, Yugoslavia, Czechoslovakia, Romania, Hungary, Poland and Bulgaria. The United States had agreed treaties with these countries which provided for the payment of compensation for the claims. The funds used to compensate American individuals belonged to these countries (Christie,

op. cit., p. 310). As of today, the Commission is a quasi-judicial independent agency part of the Department of Justice, which adjudicates claims of US nationals against foreign governments. The funds to pay compensation come from congressional appropriations, international claims settlements, or liquidation of foreign assets in the United States by the Departments of Justice and the Treasury. United States of America, Department of Justice in <http://www.justice.gov/fcsc/about-comm.html>. Accessed on June 6, 2011.

²⁰ Christie, *op. cit.*, p. 314.

²¹ Christie, *op. cit.*, p. 314.

²² Christie, *op. cit.*, p. 315.

²³ The United States Court of Restitution Appeals was established by the Law No. 59 (Restitution of Identifiable Property). In August 1955 The Court was succeeded by the Supreme Constitution Court Third Division accordingly with the Paris Convention of October 23, 1954.

²⁴ Christie, *op. cit.*, p. 327.

²⁵ The United States Court of Restitution Appeals was established by Law No. 59 (Restitution of Identifiable Property). In August 1955 The Court was succeeded by the Supreme Constitution Court Third Division accordingly with the Paris Convention on October 23, 1954. (<http://www.law.harvard.edu/library/special/exhibits/digital/court-of-restitutions-appeals-reports.html>) Accessed July 25, 2011

²⁶ Christie, *op. cit.*, p. 326.

²⁷ Sohn, Louis B and Baxter, R. R., "The American Journal of International Law" Vol. 55, No. 3 (Jul., 1961), pp. 545-547 available in-<http://www.jstor.org.ezproxy.lib.bbk.ac.uk/stable/2195878?seq=1&Search=yes&searchText=Introduction&searchText=Injuries&searchText=Responsibility&searchText=I.&searchText=I>

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&returnArticleService=showFullText&resultsS
erviceName=null Accessed, July 29, 2011.

²⁸ Sohn, Louis B and Baxter, R. R, op. cit.

²⁹ Christie, op. cit., p. 330.

³⁰ Yannacal, Op cit, p. 7.

³¹ Yannaca, op. cit., p. 7.

³² Organisation for Economic Co-Opera-
tion and Development, Draft Convention on the
Protection of Foreign Property, 1967.

³³ Organisation for Economic Co-Opera-
tion and Development, Draft Convention on the
Protection of Foreign Property, 1967.

³⁴ Organisation for Economic Co-Opera-
tion and Development, Draft Convention on the
Protection of Foreign Property, 1967. Article 3.

³⁵ This paper does not include the failed
Multilateral Agreement on Investment (MAI),
negotiated within the members of the OECD
in 1999 and which failed under the pressure of a
large coalition of civil society organization be-
cause MAI negotiations occurred after NAFTA.

³⁶ Gantz, David A, “The evolution of
FTA investment provisions: From NAFTA to
the United States - Chile Free Trade Agree-
ment”, *American University International Law
Review*, 2003, 19 (4), p 697 in <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1171&context=auilr&ei-redir>

=1#search=%22EVOLUTION%20FTA%20
INVESTMENT%20PROVISIONS%3A%20
FROM%20NAFTA%20UNITED%20
STATES%20-%20CHILE%20FREE%20
TRADE%20AGREEMENT%22 Accessed May
24, 2011.

³⁷ Panama- United States of America, Bi-
lateral Investment Treaty, 1982.

³⁸ Canada –United States of America,
Free Trade Agreement, 1988, Preamble.

³⁹ Canada –United States of America,
Free Trade Agreement, 1988, Article. 1605.

⁴⁰ Greider, op. cit.

⁴¹ New York University. http://www.law.nyu.edu/news/ECM_PRO_059743 Accessed
24-05-2011

⁴² Epstein, Richard A, *Takings: Private
Property and the Power of Eminent Domain*,
Harvard University Press, 1985, p. 57-59.

⁴³ Ibid.

⁴⁴ Epstein, op,cit. p.57

⁴⁵ Epstein, op,cit. p.68

⁴⁶ Epstein, op,cit. p.68

⁴⁷ Costas Douzinas, *The end of human
rights*, Hart Publishing, (2000), p. 82

⁴⁸ Locke, John *Two Treatises of Govern-
ment* (P. Laslett (ed.), Cambridge University
Press, 1988, p. 331

⁴⁹ Dine, Janet *Companies, International
Trade and Human Rights*, Cambridge (2005) p. 251

⁵⁰ Epstein, op,cit. p.76

⁵¹ Epstein, op,cit. p.149

⁵² Epstein, op,cit. p.113

⁵³ Epstein, op,cit. p.280

⁵⁴ Epstein, op,cit. p.274

⁵⁵ Cooley, Thomas M, *Constitutional Limitations* (Iste d. 1868) cited in Epstein, op,cit. p.284.

⁵⁶ Epstein, op,cit. p.288, 289

⁵⁷ Epstein, op,cit. p.315

⁵⁸ Epstein, op,cit. p.126

⁵⁹ Epstein, op,cit. p.121

⁶⁰ The police power is the customary international law concept from which derives a state's right to regulate. Such right is an inherent aspect of state sovereignty, although states can limit this right by entering into binding treaties. Unfortunately there is no consensus as to the precise definition of the concept of the police power. Mann, Howard, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities*, International Institute for Sustainable Development, 2008, p. 18

⁶¹ Epstein, op,cit. p.109

⁶² Epstein, op,cit. p.281

⁶³ Guzmán, op. cit., p. 281.

⁶⁴ Daniel Price, lawyer and US lead negotiator on NAFTA, quoted in Greider, William *The Right and US Trade Law: Invalidating the 20th Century*, 17 November 2001, *The Nation*

⁶⁵ As quoted in Greider, op cit.

⁶⁶ As quoted Greider, op cit.

⁶⁷ Greider, op cit.

⁶⁸ Greider, op cit.

⁶⁹ Greider, op cit.

⁷⁰ Quoted in Greider, op cit.

⁷¹ Quoted in Greider, op cit.

⁷² Pucher Holmer, Magdalena, *Regulatory expropriation under international investment law – A case-law analysis*, (Thesis), Faculty of Law, University of Lund, 2006. P. 11 in <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1561357&fileId=1565610> accessed on July 5, 2011.

⁷³ Article 35(5) of UNCITRAL Arbitration Rules 2010 provide that “An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority”, see <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>, last accessed on 10 July 2011

⁷⁴ Mann, Howard, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities*, International Institute for Sustainable Development, 2008, p. 29.

⁷⁵ Peterson, Luke Eric, *Human Rights and Bilateral Investment Treaties*, Rights & Democracy, 2009, p.17. There are no uniform requirements for transparency in BITs. N.B. World Bank's ICSID arbitrations are all disclosed on a public register.

⁷⁶ For example Article 48-5 of the ICSID convention expressly mentions that: “The Centre shall not publish the award without the consent of the parties.”

⁷⁷ Guardiola-Rivera, Oscar, *Law In Other Contexts: Stand Bravely Brothers! A Report from The Law Wars* (Cambridge University Press 2008), p 114/115.

⁷⁸ Peterson, Luke Eric, *Human Rights and Bilateral Investment Treaties*, Rights & Democracy, 2009, p.17. Howard Mann also explains that this also may lay the government open to multiple attacks in different forums at the same time. The investor could issue proceedings in contract or tort in the domestic courts while at the same time pursuing arbitral proceedings. If this is combined with the investor operating through an undercapitalised shell company the state will have no security for costs but will be under severe pressure to settle. Further, some shell companies are being incorporated in states that have BITs with the host country solely so that the investor can benefit from the BIT protection, and not because the investor has any other link with the country of incorporation. See Mann, Howard, *International Investment Agreements, Business And Human Rights: Key Issues and Opportunities* (International Institute For Sustainable Development 2008) at p. 35

⁷⁹ Peterson, Op cit, p.18.

⁸⁰ Peterson, Op cit, p.17

⁸¹ For example, an arbitral tribunal rejected the notion that environmental concerns should affect the amount of compensation that should be paid to an investor, even if the expropriation was for a legitimate reason. This is despite the fact that the host country, Costa Rica, was legally bound by the Convention on Biological Diversity and the Western Hemisphere Convention to protect the environment. This seems to affirm the broad definition of an expropriation in the Metalclad case (see below at footnote 101), and show that the purpose of the government regulation is not relevant to the payment of compensation. Sands, Philippe, *Lawless World: Making And Breaking Global Rules* (Penguin Books 2006), p.132

⁸² See e.g. *CMS Gas Transmission Company v. Argentine Republic*, (ICSID Case No. ARB/01/8) (Annulment Proceeding), Decision

of The Ad Hoc Committee On The Application For Annulment Of The Argentine Republic, 25 September 2007 at para. 158 (Although the annulment committee found that the original award contained "errors and defects...manifest errors of law...lacunae and elisions" there was no power to overturn the award).

⁸³ Arbitral Tribunal Ethyl Corporation vs Government of Canada. Award of Jurisdiction 24 of June 1998. Arbitrators Charles N. Brower, Marc Lalonde and Karl-Heinz Böckstiegel.

⁸⁴ Arbitral Tribunal Ethyl Corporation vs Government of Canada. Op,cit..

⁸⁵ Arbitral Tribunal Ethyl Corporation vs Government of Canada. Op,cit.

⁸⁶ Arbitral Tribunal Ethyl Corporation vs Government of Canada. Op,cit..

⁸⁷ Arbitral Tribunal Ethyl Corporation vs Government of Canada Op cit.

⁸⁸ Information about Arbitral Tribunal Ethyl Corporation vs Government of Canada. in http://are.berkeley.edu/courses/EEP131/old_files/studentpresentations05/Ethyl%20v.%20Canada.pdf. Accessed: 24-05-2011.

⁸⁹ Arbitral Tribunal Metalclad Corporation v Mexico, op cit Award 30 August 2000. Arbitrators Sir Elihu Lauterpacht, Benjamin R. Civiletti and José Luis Siqueiros.

⁹⁰ Arbitral Tribunal Metalclad Corporation v Mexico, op cit.

⁹¹ Arbitral Tribunal Metalclad Corporation v Mexico, op cit.

⁹² Arbitral Tribunal Metalclad Corporation v Mexico, op cit.

⁹³ Arbitral Tribunal Metalclad Corporation v Mexico, op cit.

⁹⁴ Arbitral Tribunal Metalclad Corporation v Mexico, op cit.

⁹⁵ Arbitral Tribunal Técnicas Medioambientales Tecmed, S.A. v Mexico, Award 29 May 2003. Arbitrators Horacio Grigera Naón, José Carlos Fernández Rozas and Carlos Bernal.

⁹⁶ Arbitral Tribunal Técnicas Medioambientales Tecmed, S.A. v Mexico op cit.

⁹⁷ Arbitral Tribunal Técnicas Medioambientales Tecmed, S.A. v Mexico op cit.

⁹⁸ MTBE is a gasoline additive that helps to reduce air pollution making the process of burning fuel cleaner.

⁹⁹ Greider, op cit,

¹⁰⁰ United States Department of State <http://www.state.gov/s/l/c5818.htm> accessed 07 of July 2011.

¹⁰¹ Arbitral Tribunal Methanex Corporation v United States of America, Award 3 August 2005 . Arbitrators J. William F. Rowley, W. Michael Reisman and V.V. Veeder.

¹⁰² Arbitral Tribunal Methanex Corporation v United States of America op cit,

¹⁰³ In this case Methanex was claiming US\$ 970 million. See paragraph 32 of the final award.

¹⁰⁴ Arbitral Tribunal Pope & Talbot Inc. v Canada, Award 2000-2002 . Arbitrators The Hon. Lord Dervaird – President The Hon. Benjamin J. Greenberg Mr. Murray J. Belman http://www.biicl.org/files/3922_2002_pope_&_talbot_v_canada.pdf

¹⁰⁵ Arbitral Tribunal Pope & Talbot Inc. v Canada, Op,cit.

¹⁰⁶ Arbitral Tribunal PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi against Republic v Turkey. Op,cit.

¹⁰⁷ Arbitral Tribunal PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi against Republic v Turkey, Award 19 May 2007. Arbitrators Prof Francisco Orrego Vicuna, Mr L. Yves Fortier, Prof Gabrielle Kaufmann-Kohler in http://www.biicl.org/files/3907_2007_pseg_v_turkey.pdf accessed 23 of July 2011.

¹⁰⁸ This case is also relevant because it frames the definition of indirect expropriation stating that it happens in the following circumstances:

“some form of deprivation of the investor in the control of the investment, the management of day-to day-operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part”.

¹⁰⁹ Arbitral Tribunal PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi against Republic v Turkey, Award 19 May 2007. Op.cit.

¹¹⁰ Suda, Ryan, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization*, New York University, School of Law, 2005, p 60-62 in: http://www.law.nyu.edu/global/workingpapers/2005ECM_DLV_015787 accessed 03 of May 2011.

¹¹¹ Suda, Ryan op cit. , p 60-62.

¹¹² Luke Eric Peterson and Ross Garland, *Bilateral Investment Treaties and Land Reform in Southern Africa*, Rights & Democracy, June 2010, p.7

¹¹³ Suda, Ryan op cit. , p 59

¹¹⁴ Suda, Ryan op cit. , p 59

¹¹⁵ Not all arbitration proceedings are available to the public.

¹¹⁶ Suda, Ryan op cit. , p 59

¹¹⁷ Suda, Ryan op cit. , p 59

Reference

- Abia, V. (2000). *Contemporary Issues in International Relations*, Lagos: Concept Publications Ltd.
- Aja, A. (2007). *Basic Concepts, Issues and Strategies of Peace and Conflict Resolution*. Owerri: Keny and Brothers Ent. (Nig.)
- Alie, A. (1990). *Southern Sudan: Too Many Agreements Dishonoured*, Exeter: Ithaca Press
- Darfur in Flames: *Atrocities in Western Sudan*: consulted January-25-2011 in <http://www.hrw.org/reports/2004/sudan040>
- Darfur Monitoring Group 2005. Ethnic Cleansing in Darfur Region of Sudan. consulted March-12-2011 in www.d-a.org.Uk/pages/dmgl.htm
- Deng, F. M. (1995). *War of Visions: Conflicts of Identities in Sudan*. Washington DC: The Brookings Institute
- Egwu, S. (2007). *Beyond Revival of Old Hatred: The State and Conflict in Africa*, in Best, S. G. (ed), Introduction to Peace and Conflict Studies in West Africa. Ibadan: Spectrum Books.
- Francis, D. (2007). *Peace and Conflict Studies: An African Overview of Basic Concepts*, in best S. G. (ed) Introduction to Peace and Conflict Studies in West Africa. Ibadan: Spectrum Books
- Lual, M. A. (2001). *The Sudan: Prospects for a Peaceful Settlement of the Civil War* consulted January 12 -2011 in <http://perce.ca/PEN/1992-03/achull.html>
- Pol, M. (1998). *We have to sit down: Women, War and Peace in Southern Sudan*. Utrecht, the Netherlands: Pax Christi
- Ude, U. (2008). *Nigeria's Father-Figure Role in Africa: The OAU-AU Example*, Abakaliki: Smile Printing Press.

