



APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION

Presentations

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APEC-UNCTAD Regional Training Course
Expropriation

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Concept

- Not defined by treaty, but by customary international law
- Some treaties may even complicate things!
 - “Additional” categories
 - Measures “similar” to expropriation, instead of “equivalent”

Concept

Direct

- Formal transfer of title
- Outright seizure

Indirect

- Total or substantial deprivation, with an “equivalent effect”
- No formal transfer of title

Other notions

- Nationalization = full scale
- “Creeping” = progressive, a type of “indirect”

Conditions

- A sovereign right of States
- But subject to certain rules:
 - Due process
 - No discrimination
 - Compensation
 - Public purpose

Article 1101 of NAFTA

1 ¿how many categories?

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:
 - (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.

....

US Model BIT (2004)

Article 6: Expropriation and Compensation

1. Neither Party may expropriate or nationalize a covered investment either **directly** or **indirectly through measures equivalent to expropriation or nationalization** ("expropriation"), except:
- 2
- (a) for a **public purpose**;
 - (b) in a **non-discriminatory** manner;
 - (c) on payment of **prompt, adequate, and effective compensation**; and
 - (d) in accordance with **due process of law** and Article 5 [Minimum Standard of Treatment](1) through (3).

New Zealand-China FTA

Article 145

1. Neither Party shall **expropriate**, nationalize or take **other equivalent measures** ("expropriation") against investments of investors of the other Party in its territory, unless the expropriation is: (a) for a **public purpose**; (b) in accordance with **applicable domestic law**; (c) carried out in a **non-discriminatory manner**; (d) not **contrary to any undertaking** which the Party may have given; and (e) on **payment of compensation** in accordance with paragraphs 2, 3 and 4.
- 2-4...

World Bank Guidelines (1992)

IV 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 where this is done in accordance with **applicable legal procedures**, in pursuance in good faith of a **public purpose, without discrimination** on the basis of nationality and against the payment of **appropriate compensation**.
- ...



Attention!

Compensation standards

- **Customary international law**
 - Just compensation (Norwegian shipowners)
 - Full reparation (Chorzow Factory)
 - Prompt, adequate and effective compensation (Formula Hull)
 - Just compensation/full value (Iran-U.S. Mixed Tribunal)
 - Appropriate compensation (UN)
- **International investment agreements**
 - Fair market value (NAFTA, World Bank Guidelines, CAFTA, Korea-Singapore FTA, Japan-Malaysia EPA, China-Peru FTA, World Bank Guidelines)
 - Value or genuine value (Netherlands Model BIT, Indian Model BIT, UK Model BIT)
 - Market value (Australia-Uruguay BIT)

Compensation – the relevant factor

- Investment tribunals are essentially compensation tribunals
- However, international law may distinguish between:

- Expropriations "per se" 
- Expropriations "submodo" 

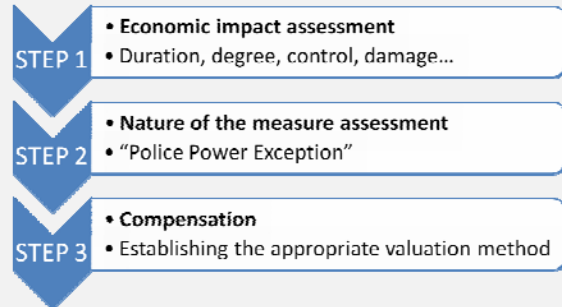
¿What may be expropriated?

- Under customary international law, only property rights
- However, under investment treaties other concepts defined as "investments" may also be expropriated
 - e.g. contracts
- Certain intangibles cannot (or should not) be expropriated
 - "Market share", "goodwill" or "expectations"

¿Which measures?

- Legally, any “measure”, but more often stemming from administrative or legislative action:
 - Decrees (direct)
 - » *Santa Elena v Costa Rica*; *ADC v Hungary*
 - Denial or revocations of permits, licenses or concessions
 - » *Metalclad v Mexico*; *Tecmed v Mexico*; *Middle East Cement v Egypt*
 - Taxation
 - » *Occidental v Ecuador*; *Revere Copper v OPIC*
 - Health
 - » *Vivendi II v Argentina*
 - Corporate interference
 - » *CME v Czech Republic*

Determining an indirect expropriation



Step 1: economic impact

- Total or substantial damage
 - » substantial = cuasitotal = “equivalent effect”
- Partial or temporary damages, mere interference or non control-depriving measures are insufficient

Step 1: economic impact

Beneficiality

“In this case, the Interim Order and the Final Order were designed to, and did, curb SDMI’s initiative, but only for a time. Conrado realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others. An opportunity was delayed. The Tribunal concludes that this is not an expropriation case.”

SD Myers v Canada

Control

“... the regulatory action has not deprived the Claimant of control of his company... interfered directly in the internal operations... or displaced the Claimant as the controlling shareholder”.

Feldman v Mexico

“...there must be 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”.

PSE v Turkey

Step 1: economic impact

Partial damage

“...mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required”.

Pope & Talbot v Canada

“...A finding of indirect expropriation would require more than adverse effects. It would require that the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated...”

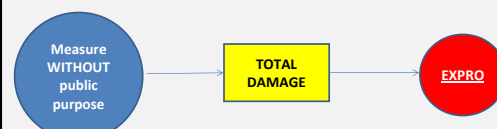
Sempra v Argentina

“In many arbitral decisions, the compensation has been denied when it has not affected all or almost all the investment’s economic value.

Interference with the investment’s ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for the expropriation”.

LG&E v Argentina

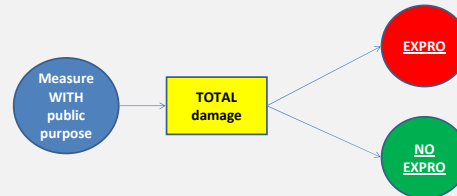
Step 2: nature of the measure



Step 2: nature of the measure

Legitimate expectations/ investor's risk	<ul style="list-style-type: none"> Waste Management II v Mexico Thunderbird v Mexico
"Bona fide" character of the measure	<ul style="list-style-type: none"> SD Myers v Canada
Due process; discrimination	<ul style="list-style-type: none"> Methanex v USA Eureko v Poland
Transparency	<ul style="list-style-type: none"> Metalclad v Mexico
Proportionality	<ul style="list-style-type: none"> Tecmed v Mexico

Step 2: nature of the measure



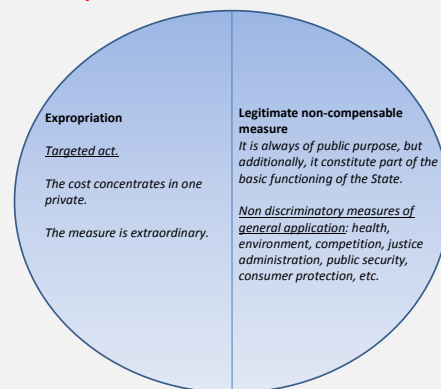
Step 2: nature of the measure

"While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking".

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

Santa Elena v Costa Rica

Step 2: how to draw the line?



Step 2: police powers

"...state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation".

Ian Brownlie, Principles of Public International Law

"...bona fide taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police powers of States".

Restatement (Third) of the Foreign Relations Law of the US

Step 2: police powers

"...regulatory conduct is unlikely to be subject of legitimate complaint".

SD Myers v Canada

"...as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation".

Methanex v USA

Step 2: police powers

"It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare".

Saluka v Czech Republic

US Model BIT (annex on expro)

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

MIGA Convention (1985)

The Agency may guarantee eligible investments against a loss resulting, inter alia, from:

"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 the governments normally take for the purpose of regulating economic activity in their territories".

Step 3: Compensation

- Depending the type of investment
- The "discounted cash flow" method should apply in limited cases
- The compensation for expropriation is different from the compensation for other breaches

Conclusions

1. There is no "magic formula" as to determine an indirect expropriation. A case-by-case analysis is mandatory, taking into account all relevant factors
1. However, jurisprudence has shown a solid pattern. As opposed other standards, the threshold remains high
2. International law has yet to draw the line between non-compensable and expropriatory regulations

Conclusions

4. Negotiators are advised to reflect customary international law in the treaty, in a very precise manner. No need to expand the concept!
5. Upon a claim, the main defense lays in showing a partial damage, or in evidencing a legitimate exercise of the State police powers

Thanks!

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