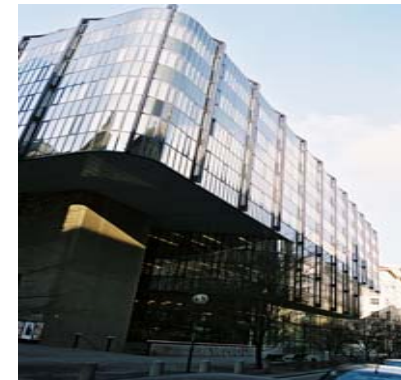


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# *Expropriation in International Investment Law*

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# Current Focus of Investment Law

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- Scope of protected investment
- Expropriation vs. breach of contract
- Regulatory expropriations vs. regulatory measures
- A return of the legality issues?



# Traditional Expropriation Law

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## A) Legality of expropriation

Property may not be expropriated except for

- a public purpose
- on a non-discriminatory basis
- in accordance with due process of law and
- against compensation.

## B) Level of compensation

Hull formula: “no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore” or

merely “appropriate” compensation UN GA Res 1803 (XVII) 1962 and 3171 (XXVIII) 1973



# UN GA Resolutions

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- **Permanent Sovereignty Over Natural Resources**, General Assembly Resolution 1803 (XVII) of 14 December 1962,
- **Charter of Economic Rights and Duties of States**, GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50.



# Permanent Sovereignty Over Natural Resources

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- 1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
- 2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
- 3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.



# Permanent Sovereignty Over Natural Resources

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- 4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.



# Charter of Economic Rights and Duties of States

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## Article 2

- 2. Each State has the right:
- (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
- (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph; ...



# Charter of Economic Rights and Duties of States

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## Article 2(2) ...

(c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.





# Texaco v Libya 1977

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- **On Res 1803**
- “On the basis of the circumstances of adoption mentioned above and by expressing an *opinio juris communis*, Resolution 1803 (XVII) seems to this Tribunal to reflect the state of customary law existing in this field. Indeed, on the occasion of the vote on a resolution finding the existence of a customary rule, the States concerned clearly express their views. The consensus by a majority of States belonging to the various representative groups indicates without the slightest doubt universal recognition of the rules therein incorporated, i.e., with respect to nationalization and compensation the use of the rules in force in the nationalizing State, but all this in conformity with international law.”



# Texaco v Libya 1977

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- **On CERDS**
- “The absence of any connection between the procedure of compensation and international law and the subjection of this procedure solely to municipal law cannot be regarded by this Tribunal except as a *de lege ferenda* formulation, which even appears *contra legem* in the eyes of many developed countries.”



# What may be expropriated?

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- Classic approach: Property and property rights
- In investment law: Investments



# Investment Definitions in BITs

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The term 'investments' comprises every kind of asset, in particular:

- (a) movable and immovable property as well as other rights *in rem*, such as mortgages, liens and pledges;
- (b) shares of companies and other kinds of interest in companies;
- (c) claims to money which has been used to create an economic value or claims to any performance having an economic value;
- (d) copyrights, industrial property rights, technical processes, trade-marks, trade-names, know-how, and good-will;
- (e) business concessions under public law, including concessions to search for, extract and exploit natural resources [...]

Germany-Guyana BIT 1989



# Arbitral Practice

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“It is also well established that an expropriation is not limited to tangible property rights.”

*Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Reports 68, para. 98

“[...] the restrictive notion of property as a material “thing” is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing.”

*Methanex v. United States of America*, NAFTA Arbitral Tribunal, Final Award on Jurisdiction and Merits, 3 August 2005, IV D para. 17.



# Arbitral Practice

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- “The fact that the Contract is subject to Argentine law does not mean that it cannot be expropriated from the perspective of public international law and under the Treaty. The two issues are unrelated. The Contract falls under the definition of ‘investments’ under the Treaty and Article 4(2) refers to expropriation or nationalization of investments.”
- *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, para. 267.



# Expropriation vs. breach of contract

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- How do we distinguish between an ordinary breach of contract and an expropriation of contract rights ?



# *Jalapa Railroad Case*

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- “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 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 [...].”
- *Jalapa Railroad and Power Co.*, American-Mexican Claims Commission, 1948.





# ILC Articles on State Responsibility

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- “[...] the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.”
- Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts (2001), 87.



# MIGA

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## Art. 11 iii) MIGA Convention (*Breach of Contract*):

“any repudiation or breach by the host government of a contract with the holder of a guarantee, when (a) the holder of a guarantee does not have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach, or (b) a decision by such forum is not rendered within such reasonable period of time as shall be prescribed in the contracts of guarantee pursuant to the Agency's regulations, or (c) such a decision cannot be enforced;”



# *Waste Management II*

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- “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.”
- *Waste Management, Inc. v. United Mexican States*, ARB(AF)/00/3, Award, 30 April 2004, para. 174.



# *Impregilo Case*

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- “[i]n order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (“*puissance publique*”), and not as a contracting party, may breach the obligations assumed under the BIT.”
- *Impregilo S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 260.



# *Bayindir 2009*

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- However, “governmental involvement is not necessarily equivalent to the exercise of sovereign power when it is grounded on legitimate contractual considerations.”
- Thus, the termination of a contract – justified by the poor performance of the investor – was not considered expropriatory.
- *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 461.



# What constitutes an expropriation?

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- One of the main issues in international investment law during the last 20 years has been the question of identifying and delimiting compensable expropriation from lesser interferences.



# Types of Expropriation

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- Expropriation = taking against compensation
- Nationalization = large-scale takings
- Confiscation – taking without compensation
- Creeping expropriation = constructive taking = indirect expropriation



# Indirect Expropriation

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- IIAs and other sources
- Arbitration practice





# Prohibition of Expropriation

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- “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 [...]”
- Article 1110 NAFTA



# Prohibition of Expropriation

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- “Investors of either Contracting Party shall not be deprived of their investments nor subjected to measures having, directly or indirectly, an effect equivalent to such deprivation in the area of the other Contracting Party except [...].”
- 1995 France/Hong Kong BIT



# Prohibition of Expropriation

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- 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment
- 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 ...”



# MIGA

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## 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 the governments normally take for the purpose of regulating economic activity in their territories;”

Article 11 MIGA Convention.



# Indirect Expropriation

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- 2004 Canadian Model BIT, Annex B 13(1) on the clarification of indirect expropriation:
- “The Parties confirm their shared understanding that:
- a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure; ...



# Indirect Expropriation

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- ... b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
- i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
- ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and
- iii) the character of the measure or series of measures;



# Indirect Expropriation

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- ... c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.”



# Indirect Expropriation

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- “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.”
- Annex B, Article 4(b) Draft US Model BIT (2004)





# Creeping expropriation

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- “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 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.”
- *Tecmed v. Mexico*, ICSID Add. Facility 2003, para 114.



# Creeping expropriation

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- “[...] this was a case of ‘creeping’ expropriation, instigated by the decision of the Investment Committee which was then collusively and improperly communicated to Telcom Invest and its shareholders before Claimants were made aware of it, and which proceeded via a series of court decisions, culminating in the final decision of the Presidium of the Supreme Court. The decision of the Investment Committee was moreover unfair and inequitable in itself, as the Tribunal has found.”
- *Rumeli Telekom A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 708.



# Sole effects doctrine

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- 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, thus requiring compensation under international law, 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. 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.
- *Tippetts v. TAMS-AFFA*, Iran-US Claims Trib. (1984)



# Intensity of interference

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- “... 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.”
- *PSEG v. Turkey*, ICSID 2007, para. 278.



# Irrelevance of purposes

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“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.”

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



# No enrichment of the State required

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- “[...] the fact that the expropriation was not directly for the benefit of the State but for the benefit of Telecom Invest does not affect this conclusion, since, as the parties agree, expropriation can exist despite there being no obvious benefit to the State concerned.”
- *Rumeli Telekom A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 707.



# Actual Findings of Expropriation

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- Disproportionate tax increases
  - *In the Matter of Revere Copper v. OPIC, Award 1978*
- Arrest and expulsion of an investor or other persons who play key roles in the investment
  - *Biloune and others v. Ghana, UNCITRAL ad hoc Tribunal, Award 1989*
  - *Benvenuti & Bonfant v. Congo, ICSID Case No. ARB/77/2, Award 1980*



# Actual Findings of Expropriation

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- Replacement of the owner's management by government imposed managers
  - *Starrett Housing Corp. v. Iran*, 4 Iran-US C.T.R. 122 (1983).
  - *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 Iran-US C.T.R. 219 (1984)
- Revocation of a free zone permit
  - *Goetz and Others v. Burundi*, ICSID Award, 1998
  - *Middle East Cement Shipping v. Egypt*, ICSID Award, 2002





# Actual Findings of Expropriation

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- Revocation of an operating license
  - *Tecmed S.A. v. Mexico*, ICSID Award, 2003
- Denial of a construction permit contrary to prior assurances
  - *Metalclad v. Mexico*, ICSID Award, 2000



# Legality of Expropriations – MAI

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- “A Contracting Party shall not expropriate or nationalise 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:
  - a) for a purpose which is in the public interest,
  - b) on a non-discriminatory basis,
  - c) in accordance with due process of law, and
  - d) accompanied by payment of prompt, adequate and effective compensation.”
- 1998 Draft MAI



# Legality of Expropriations - Custom

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- “In customary international law, there is authority for a number of limitations or conditions that relate to:
  - the requirement of a public purpose for the taking;
  - the requirement that there should be no discrimination;
  - the requirement that the taking should be accompanied by payment of compensation; and,
  - the requirement of due process.”
- UNCTAD, *Taking of Property* 12 (2000)



# Legality of Expropriations – BITs

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- “Investors of either Contracting Party shall not be deprived of their investments [...] except
  - lawfully and on a non discriminatory basis,
  - for a public purpose related to the internal needs of that Party,
  - and against appropriate compensation as provided for in this Article.”

Article 5(1) France/Hong Kong BIT 1995.



# Public Interest/Public Purpose

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“Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests.”

- Art 4 GA Resolution 1803 on Permanent Sovereignty over Natural Resources

Public purpose is not mentioned in the

- 1974 Charter of Economic Rights and Duties of States



# Arbitral Practice – Public Interest

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- The expropriation “was not for a *bona fide* public purpose, was discriminatory and was not accompanied by an offer of appropriate compensation.”
- *Liberian Eastern Timber Corporation v Liberia*, ICSID Case No ARB/83/2, Award 1986.



# Arbitral Practice – Public Interest

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“[...] the properties seized were turned over immediately to the defendant company, ostensibly for public purposes, but, in fact, to be used by the defendant for purposes of amusement and private profit, without any reference to public utility.”

- *Walter Fletcher Smith Claim (US v Cuba)*, Award, 2 May 1929, 2 RIAA 913.



# Arbitral Practice – Public Interest

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- “In the absence of an error of fact or law, of an abuse of power or of a clear misunderstanding of the issue, it is not the Tribunal’s role to substitute its own judgement for the discretion of the government of Burundi of what are ‘imperatives of public need ... or of national interest’.”
- *Goetz and Others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Decision on Liability, 2 September 1998, 6 ICSID Reports 5, 43, para. 126.





# Arbitral Practice – Public Interest

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- “In the Tribunal’s opinion, a treaty requirement for “*public interest*” requires some genuine interest of the public. If mere reference to “*public interest*” can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.”
- *ADC v. Hungary*, ICSID Award 2006, para. 432.



# Non-discrimination

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An expropriation “that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law.”

- The Restatement (Third) of the Foreign Relations Law of the United States, § 712, Comment f.



# Arbitral Practice – Non-discrimination

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In one of the Libyan oil concession arbitrations, the expropriation was held having been made “[...] for purely extraneous political reasons and [...] arbitrary and discriminatory in character.”

- *British Petroleum v Libya*, Award, 10 October 1973 und 1 August 1974



# Arbitral Practice – Non-discrimination

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- “The Tribunal finds it difficult, in the absence of any other evidence, to draw the conclusion that the expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was not expropriated. Reasons specific to the non-expropriated enterprise, or to the expropriated one, or to both, may justify such a difference in treatment.”
- *Amoco International Finance Corp. v. Iran*, 15 Iran-U.S. CTR 189, 232 (1987), para. 142.



# Due Process

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“Due process of law includes the right of an investor of a Contracting Party which claims to be affected by expropriation by the other Contracting Party to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this Article by a judicial authority or another competent and independent authority of the latter Contracting Party.”

- Article 5(3) Austria/Georgia BIT, 18 October 2001.



# Due Process

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- “The investor affected shall have a right, in accordance with the law of the Contracting Party making the deprivation, to prompt review by a judicial or other independent authority of that Party, of the investor’s case and of the valuation of the investment in accordance with the principles set out in this paragraph.”
- Article 5(1) France/Hong Kong BIT 1995.



# Arbitral Practice – Due Process

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- “Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that “*the actions are taken under due process of law*” rings hollow.”
- *ADC v. Hungary*, ICSID Case No. ARB/03/16, 2 October 2006, para. 435.



# Compensation

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- IIAs usually demand
- “prompt, adequate and effective compensation” or
- “full compensation” or
- “appropriate compensation” or
- “fair compensation”





# Compensation – BIT Standard

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- “Compensation shall amount to the real value of the investment immediately before the deprivation or before the impending deprivation became public knowledge whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely convertible.”
- Article 5(1) France/Hong Kong BIT 1995.



# Level of compensation required

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- “The Government of the United States merely adverts to a self-evident fact when it notes that the applicable and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore.”
- US Secretary of State *Cordell Hull* in a diplomatic note addressed to his Mexican counterpart 1938



# Meaning of “prompt, adequate and effective payment”

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- 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment
- IV EXPROPRIATION AND UNILATERAL ALTERATIONS OR TERMINATION OF CONTRACTS
- “3. Compensation will be deemed "adequate" if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known. [...]
- 7. Compensation will be deemed "effective" if it is paid in the currency brought in by the investor where it remains convertible, in another currency designated as freely usable by the International Monetary Fund or in any other currency accepted by the investor.”



# Meaning of “prompt, adequate and effective payment”

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- “8. Compensation will be deemed to be "prompt" in normal circumstances if paid without delay. In cases where the State faces exceptional circumstances, as reflected in an arrangement for the use of the resources of the International Monetary Fund or under similar objective circumstances of established foreign exchange stringencies, compensation in the currency designated under Section 7 above may be paid in installments within a period which will be as short as possible and which will not in any case exceed five years from the time of the taking, provided that reasonable, market-related interest applies to the deferred payments in the same currency.”



# “Prompt”

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- “Although the Italy-Egypt BIT does not expressly employ the word “prompt” (simply stating that compensation paid must be “adequate and fair”), the Tribunal considers that the absence [...] ought not to be seen to permit Egypt to refrain from paying compensation indefinitely.”
- *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award and Dissenting Opinion, 1 June 2009, para. 435.



# Level of compensation required

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- Merely appropriate or adequate compensation
- UN GA Resolution 1803 on Permanent Sovereignty over Natural Resources (1962)
- UN GA Resolution 3171 (1973)



# Fair Market Value

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- 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment
- “6. Without implying the exclusive validity of a single standard for the fairness by which compensation is to be determined and as an illustration of the reasonable determination by a State of the market value of the investment under Section 5 above, such determination will be deemed reasonable if conducted as follows:
  - (i) for a going concern with a proven record of profitability, on the basis of the discounted cash flow value;
  - (ii) for an enterprise which, not being a proven going concern, demonstrates lack of profitability, on the basis of the liquidation value;
  - (iii) for other assets, on the basis of (a) the replacement value or (b) the book value in case such value has been recently assessed or has been determined as of the date of the taking and can therefore be deemed to represent a reasonable replacement value.”



# Arbitral Practice on Compensation

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- “The Tribunal believes that, while international law undoubtedly sets forth an obligation to provide compensation for property taken, international law theory and practice do not support the conclusion that the ‘prompt adequate and effective’ standard represents the prevailing standard of compensation [...] Rather, customary international law favors an ‘appropriate’ compensation standard [...] The prevalence of the ‘appropriate’ compensation standard does not imply, however, that the compensation *quantum* should be always ‘less than full’ or always ‘partial.’”
- *Ebrahimi v. Iran*, 30 Iran-U.S. CTR 170 (1994), para. 88.





# Arbitral Practice on Compensation

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- “International law permits the Government of Costa Rica to expropriate foreign-owned property within its territory for a public purpose and against the prompt payment of adequate and effective compensation.”

*Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, 5 ICSID Reports 153, para. 71.



# Arbitral Practice on Compensation

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- “The Treaty requires an adequate and effective indemnity; unlike certain domestic rights as regards expropriation, it does not require prior compensation.”  
*Goetz and Others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Decision on Liability, 2 September 1998, 6 ICSID Reports 5, 44, para. 130.
- “It is abundantly obvious to the Tribunal that no just compensation was provided by the Respondent to the Claimants and feels no need to expand its discussion here.”
- *ADC v. Hungary*, ICSID Award, 2 October 2006, para. 444.



# Consequences of the Legal/Illegal Distinction

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A clear distinction between

- Compensation for legal expropriations
- Damages for illegal expropriations



# The Distinction Upheld

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- “The Claimants are seeking “compensation” for a lawful expropriation, and not “reparation” for an injury caused by an illegal act such as a breach of contract. The cardinal point [...] in determining the appropriate compensation is that [...] Claimants are entitled to receive fair compensation for what was expropriated rather than damages for breach of contract.”

*SPP v. Egypt*, Award, 20 May 1992, 3 ICSID Reports 189, at 233, para. 183.



# The Distinction Upheld

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- “The law applicable to the determination of compensation for a breach of such Treaty obligations is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty.”
- “The key difference between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account “all financially assessable damage” or “wipe out all the consequences of the illegal act” as opposed to compensation “equivalent to the value of the expropriated investment” under the Treaty.”
- *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, paras. 349/352.



# Regulation or Regulatory Expropriation

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- “[...] international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered “permissible” and “commonly accepted” as falling within the police or regulatory power of States and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.”
- *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL Partial Award, 2006, para. 263.



# *Methanex* and *Saluka* approach

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“[...] 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 alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.”

*Methanex v. USA*, NAFTA 2005, IV D para.7.



# *Methanex* and *Saluka* approach

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“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*, 2006, para. 255.





# *Methanex*

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“[...] the Californian ban was made for a

- public purpose, was
- non-discriminatory, and was accomplished by
- due process, [...]

from the standpoint of international law, it was a lawful regulation and not an expropriation.”

*Methanex*, IV D para. 15.



# Influences

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- Cf. 2004 US & Canada Model BITs:
- “[...] c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.”



# The consequence of the *Methanex* doctrine

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Does the new case-law provide a  
useful reaffirmation of regulatory  
powers

or

does it effectively terminate the  
protection against indirect  
expropriation?



# Return to intensity of interference

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- “If public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose.”
- *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.5.21.

