CASES OF INDIRECT EXPROPRIATION IN INTERNATIONAL ECONOMIC LAW

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Abstract
Unforeseen difficulties arise along with the government measures whose object is not to expropriate or to nationalize the foreign investment, but to deprive the foreign investors of the rights attached to their investments. These measures are generally known as measures of indirect expropriation or nationalization. When asked about what falls into the concept of indirect expropriation, a simple answer can not be given easily, but the circumstances in which these measures may occur can be described and discussed. These measures could be grouped as follows: forced sale of property; forced sales of shares of an investment through a corporate vehicle; indigenization measures; taking control of investment management; determination of others to take physical property; failure to provide protection when there is interference with the foreign ownership; administrative decisions that cancel licenses and permits required for foreign businesses to operate in the host state; exorbitant taxation; the expulsion of the foreign investor contrary to the international law; harassment (e.g. freezing of the bank accounts).
This paper therefore argues that in practice there are many situations which may be analysed as measures of indirect expropriation.

***Keywords**: indirect expropriation, host state, taking, dispossession, foreign investor.*

Introduction

This paper argues that in practice there are many situations which may be analysed as measures of indirect expropriation; however, the law can provide a basis to answer the above mentioned question, but the circumstances leading to the question can scarcely be determined.

As a general principle, a state may do whatever it wants on its territory. Modern assertion of sovereignty in the economic sphere is also carried by the principles of economic self-determination and permanent sovereignty over natural resources. The right to control the economic affairs of the state is one of the rights that European countries have supported and exercised regularly. This is an inherent aspect of state sovereignty: to control all people, incidents and objects found on its territory. Due to the principle of states equality, there is no reason why the same right should be exercised by all States[1].

It is interesting that in the international economical law the minimum standard of international existence is being used. The content of this standard is difficult to identify in a concrete manner. In addition to the rule on compensation for expropriation and settlement of disputes through a court which is outside the state host, it appears that there are no further guidance on the content of this standard. It is said that the assessment of compensation by a foreign court, and the requirements that expropriation is discriminatory and for a public purpose under all the international minimum

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[1] Sornarajah M., *The International Law on Foreign Investment, Third edition, Cambridge University Press, New York, 2010*, pag. 119, *apud* Shaw Compare M., *Title to Territory in Africa* (1986), p. 16;

standard. Besides the rules regarding to compensation for expropriation advanced by developed countries, it seems that there are no other rules associated with the international minimum standard[2].

The right to property is a human right and this right must be respected also for foreigners, so, if his property is taken, he must be compensated. Major conventional sources of human rights such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights do not contain references to the right to property. Instead, the Protocol. no. 1 to the European Convention of Human Rights proclaims this right. However, the case law generated under the provisions on property rights does not recognize a right to property without reservation. Other human rights conventions recognize this right, but also the right of the state to interfere with the right to property when there is a public interest.

The *treatment of foreign investment* is defined as the set of principles and rules of international and national law governing the international investment, since its creation until its liquidation. Principles and rules of international law can be derived either from non-conventional sources and, in particular, from the general principles of international law or conventional sources, treaties and agreements, both multilateral and bilateral.

The national principles and rules are developed not by the investor's home state, but by the host state. These laws and regulations translate the host state policy choices regarding the international investors. These political choices vary from state to state depending on a number of considerations, in this case there are three types of legislations or regulations - legislation and regulations aiming a policy of *incitement*, *control* or *deterrence*, as underlines the famous professor Carreau[3].

Paper content

The transfers from the private sector to the public sector are becoming rare. The priority became the transfer from public sector to the private sector. In the 1960s and 1970s, the states from the South used expropriation and nationalization very often for the investments made by the Northern states and in the 1980s and 1990s privatizations were imposed, in the Northern and in the Southern states, as well as in the Western and in the Eastern states[4]. These transfers do not rise the same problems in international economic law.

Thus, there are transfers *negotiated* between the private transferor and the public transferee (*there is no interest for them in the international economic law, because they are made through contractual operations, revealing at the same time microeconomics and micro-legal*[5]) and *forced* transfers from the private sector to the public sector, towards which we turn our attention.

The generic term is *taking*[6], which we encounter frequently in the protection clauses of bilateral instruments. This term is not great because it implies that the private investor not to be deprived only of the right of possession. The measure of taking is depriving the investor of the investment essential rights *for the benefit of the public authority*, irrespective of how the taking was made and whether or not it would be consistent with the international law.

But within the category of measures of taking, there are some specific differences. First, *expropriation* and *nationalization* are the most important forms of dispossession. Expropriation and nationalization are acts of public power which cause the transfer of ownership from the private sector to the public sector, with some differences between the two notions. Expropriation results from an

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[2] Ibidem, p. 128;

[3] Carreau Dominique, Juillard Patrick, *Droit international économique, 3e édition, (Dalloz, Paris, 2007)*, p. 461;

[4] Ibidem, p. 529;

[5] Ibidem, p. 531;

[6] In French, „*dépossession*";

administrative measure, while nationalization arises from a legislative measure. Expropriation is made under judicial control, while nationalization is beyond any control. Asymmetry of these procedures is translated into economic and legal realities. Expropriation concerns individual property while nationalization concerns a collection of goods which are not necessarily individualized. Expropriation is to satisfy a need of general interest, but for a local scope, nationalization is to satisfy a need of general interest, but for a national scope.

Expropriation and nationalization should respect the principle of compensation. If this principle is respected, they are considered legitimate under international law, if not respected, they are considered illegal under international law. In other words, expropriation or nationalization which does not respect the principle of compensation would be distorted in relation to the qualification attached to it by its author. Thus, the respective measure of expropriation or nationalization would obtain the character of a *spoliation*[7].

Thirdly, *seizure*, within the meaning of many Western countries, has a special place in the category of generic measures of takings. Expropriation and nationalization are two different forms of public transfers, while the seizure is a *penalty*, it punishes individual behavior, considered reprehensible by the law. Thus, it can be stated that seizure punishes economic crimes. By definition, it excludes granting of any compensation.

Unforeseen difficulties arise with the *governmental measures whose purpose is not to expropriate or to nationalize the foreign investment, but to deprive investors of rights attached to their investments*. Some international instruments mention in different terms these measures (sometimes these differences are significant) in order to subjugate them to the same principles and rules of expropriation or nationalization measures.

These measures generally known as *indirect measures of expropriation or nationalization* are not new. The Permanent Court of International Justice (PCJI) and the International Court of Justice (ICJ) have ruled on the government interference threshold that would have been taken as indirect expropriation or nationalization - PCJI: the case concerning the *Factory at Chorzów* (1926), the case of *Oscar Chinnor* (1934) and ICJ: *the Barcelona Traction* case (1970). The same guidelines are found in Starrett[8] and Tippetts[9] cases of the famous Iran-U.S. Claims Tribunal.

Therefore, we can state that the concept of *indirect measures* is not new. But what is new is the context in which these indirect measures are taken. If in the past, it was about individual actions, in the present it is about non discriminatory general measures taken for a public interest, such as environmental protection.

Defining *indirect takings* becomes difficult because there are diverse ways of affecting property interests. These types of taking have been identified as "disguised expropriation", to indicate that they are not visibly recognisable as expropriations or as "creeping expropriations"[10], to indicate that they bring about the slow and insidious strangulation of the interests of the foreign investor. In Middle East Cement Shipping and Handling Co. v. Egypt[11], indirect expropriation was described as "measures taken by a state the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights".

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[7] Carreau Dominique, Juillard Patrick, *op. cit.*, p. 532;

[8] Starrett Housing Corp vs. Iran, Iran-U.S. Claims Tribunal Report no. 4, 1983, p. 122;

[9] Tippetts vs. TANS – AFFA Consulting Engineers of Iran, Iran-U.S. Claims Tribunal Report no., 1984, p. 219;

[10] Dolzer R., *Indirect Expropriation of Alien Property* (1986) 1 ICSID Rev 41; B. Weston, *Constructive Takings under International Law* (1975) 16 Virginia JIL 103. Creeping expropriation may be more appropriate to denote the slow and progressive measures adopted to initiate attrition of ownership and control rights. See Tecmed v. Mexico (2006) 10 ICSID Reports 54, para. 114, which emphasises that such expropriation takes place "gradually and stealthily";

[11] ICSID Case No. ARB/99/6 (2002), para. 107. The sentence goes on to equate creeping expropriation with the phrase "tantamount to a taking", in investment treaties;

Moreover, the awards of the Iran–US Claims Tribunal have been a fruitful source for identifying such types of taking. The Tribunal dealt with types of taking that took place in the context of a revolutionary upheaval following the overthrow of the Shah of Iran, and the propositions the Tribunal formulated may not have relevance outside the context of the events that attended that upheaval.

The assimilation of indirect expropriation to direct expropriation is seen as crucial, as it builds a platform for an analysis of the remedies that are to be provided[12].

As mentioned above, the types of indirect taking that could amount to expropriation (involving also conduct by the state) have been identified in the doctrine[13] and in arbitral awards. Unless the conduct of those committing the acts is directly attributable to the state, the taking cannot involve state responsibility.

Professor Sornarajah has done an impresive work by grouping these different types of taking as follows:

1) forced sales of property;
2) forced sales of shares in an investment through a corporate vehicle;
3) indigenisation measures;
4) taking over management control of the investment;
5) inducing others to take over the property physically;
6) failure to provide protection when there is interference with the property of the foreign investor;
7) administrative decisions which cancel licences and permits necessary for the foreign business to function within the state;
8) exorbitant taxation;
9) expulsion of the foreign investor contrary to international law; and
10) acts of harassment such as the freezing of bank accounts.

Using the information obtained from professor Sornarajah, we will discuss point by point the above mentioned types of indirect takings.

1) Forced sales of property

From the beginning, we should cross a line between forced sales of the foreign investment which are brought about by civil unrest or economic downturns and those brought about by a state policy such as the indigenisation of the economy. A state cannot be held responsible for such conduct on the part of the foreign investor, unless it has taken measures that affect the investment. But, if the unrest is engineered by the host state and the violence is directed at the foreign investors for the specific purpose of ensuring that they leave the host state, clearly there is a situation that involves a taking. Where the foreign investor abandons the property or makes a quick sale of the property in these circumstances, there is no voluntary conduct on his part. The conduct is induced by the state. State responsibility could therefore arise in such a situation[14].

Moreover, where there is racial discrimination that motivates conduct, this gives rise to a separate head of liability.

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[12] In Biloune v. Ghana Investment Board (1993) 95 ILR 184, para. 75, the tribunal held that no distinction should be drawn between direct and creeping expropriation. The decision was followed in Metalclad v. Mexico (2000) 5 ICSID Reports 209; (2001) 40;

[13] Sornarajah M., *The International Law on Foreign Investment*, Third edition, Cambridge University Press, New York, 2010, pag. 375;

[14] There could also be an argument that the duty to give full protection and security to the investment is violated;

Also, some modern investment treaties protect the foreign investor against abuse of the process of liquidation[15]. The protection usually appears in the treatment provision of the treaty. There must be a demonstration that the ordinary process of justice attended the liquidation process and that there was nothing that could be seen as a denial of justice. The mere fact that there is a court-ordered liquidation may not provide legitimacy to the taking. The court may be used as an instrument to effect the taking, in which case, clearly, the liquidation could amount to a taking depending on the circumstances[16].

2) Forced sales of shares in an investment through a corporate vehicle

The question whether there could be diplomatic protection and state responsibility where wholly foreign-owned companies incorporated in the host state are taken over has been debated in international law. Such companies, incorporated in the host state, have personality only under the law of the host state and are corporate nationals of the host state. Many bilateral treaties now contain provisions which contemplate the protection of shareholders. Shareholder protection becomes important because of the requirement found in host state laws that entry by the foreign investor be made through an incorporated joint venture company formed in association with a local entrepreneur or state company. The foreign partner will usually be only a shareholder of such a company, and the protection of his investment in the company would be on the basis that he is a shareholder. The foreign investor or his home state will ordinarily have no standing to protect the company or its assets. The only way in which the investment could be protected through international law mechanisms is to confer treaty protection upon the shareholding of the foreign investor. The effect of this would be that, even where the management of the company is taken over as a result of state interference but shareholdings are kept intact, there will be no taking in respect of which the foreign shareholder can invoke protection. This will not be an acceptable result from the point of view of the foreign investor for the profits of the company may diminish considerably in the absence of a vigorous management. It is quite possible that the treaty is widely worded so as to include the right to management and control within the definition of an investment, provided the shareholdings were such as to create management rights in the foreign investor. In any event, investment treaties usually cover contractual rights. This would be so where the foreign investor had made entry through a corporate joint venture. The joint venture contract should have provided for such management and control rights, in which case they will become protected. Another factor to note is that the shareholder protection that has evolved through treaties should not be taken to include portfolio investments. However, there are treaties which provide for the protection of portfolio investments.

On the other hand, since many privatisation measures do not restrict shareholdings by foreigners, there are likely to be many foreign investors who have bought shares in foreign privatised public companies. Thus, *renationalisations* can be expected to be effected through forced sales on the local stock markets on which the real value of the shares cannot be raised for the obvious reason that the sales will be confined to the local investors and there will be a flood of the shares on the stock exchange. The question will arise as to whether such forced sales amount to takings or whether the situation is akin to one of interference with portfolio investments, in which case the shareholders will have to bear the risk of loss or seek remedies provided by the local law. The buying of shares during privatisation is more akin to the making of a portfolio investment and the answer, resulting

[15] Thus, the ASEAN Investment Treaty (1987) states that: „Each contracting party shall, within its territory, ensure full protection of the investments made in accordance with its legislation by investors of the other Contracting Parties and shall not impair by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, disposition or liquidation of such investments" (Article IV(1));

[16] In Yaung Chi Oo Ltd v. Myanmar (2003) 42 ILM 540; (2003) 8 ICSID Reports 463, the claimant argued that the liquidation proceedings before the Myanmar courts were themselves an act of taking. But, the tribunal did not find on this;

from the analogy, may be that there would be no taking by the state in these circumstances. But, the Argentinian cases suggest that, even if there may be expropriation involved, there could be liability for violation of treatment standards.

3) Indigenisation measures

What do indigenisation measures involve? Well, they involve a progressive transfer of ownership from foreign interests into the hands of local citizenry (*therefore, there is no vesting of any property in the hands of the state or a state organ, there is no direct or even indirect enrichment of the government as a result of such measures*). This kind of measures were undertaken in many Asian and African countries after independence in order to ensure that the termination of political control also meant the termination of economic control and the passing of such control into the hands of local entrepreneurs. Another possibility is that the foreign investor may remain in control of his venture and his control because the local entrepreneurs may lack the skill to run the business as efficiently at least in the initial stages. When, eventually, the local shareholders displace the foreign managers, the displacement will take place in accordance with the corporate laws of the host state and not through any government fiat. Yet, the transfer of the ownership is involuntary and the timing of the transfer of the shares in the venture owned by the foreigner is not left to him. As a result, he may not be able to secure the optimumprice for his shares. There is no doubt that there is a resemblance to forced sales in indigenisation measures. However, foreign investors were content to accept it rather than face a protracted dispute with the host state. They reckoned that they would come out losers in the dispute and prejudice their continued business prospects in the host state. The maintenance of links with the host state was a much prized asset which multinational corporations did not want to lose.

Ethnicity has a role to play in government measures which seek to restructure companies on the basis of their racial compositions so as to achieve a measure of economic equity. In Malaysia, the bumiputra policy was intended to ensure this, and companies had to restructure in accordance with specified ethnic quotas as to shareholdings by each of the races in Malaysia, and foreigners were restricted to a percentage of the shareholdings.

Divestment measures which do not benefit the state directly will not amount to an expropriation.

4) The exercise of management control over the investment

Interference by the state to take over management and control of the foreign investor's affairs is *prima facie* a taking by the state which should be compensated. The foreign shareholder is entitled to such control and management of his investment or property as he pleases, subject to the general laws of the host state. The extent of this exception that the regulatory laws of the host state have a role to play in the determination of the rights of the foreign investor generates considerable problems. The exception may be wide enough, if some views are accepted, to undermine the general rule altogether. The exception flows from the fact that the host state has interests to safeguard as far as the operation of the investment is concerned.

In the ELSI Case, when the foreign company contemplated the dismissal of a part of its workforce, there was widespread industrial action. The state had an obvious interest in ensuring that the dismissals did not lead to unemployment in an already economically depressed part of the country. Bankruptcy proceedings that were later instituted prevented the management from conducting an orderly liquidation of the company, which may have enabled the foreign company to realise a greater value for its assets. Interference in these circumstances in the management and control of the company by the host state was held to be justifiable. The state had a compelling interest in ensuring that the impact on its economy of the failure of the company was reduced or

eliminated. The steps it takes to achieve this objective cannot be considered to be such an interference with the foreign investor's management rights as to amount to a compensable taking. Again, a regulatory interference was involved, and the approach of the International Court of Justice was not to second-guess whether the interference was necessary.

5) Takings by agents and mobs

The rule is that, where there is destruction of property during civil strife or an insurgency, the state is liable for the destruction if it failed in its duty to protect the property of the foreign investor. It follows that, if there is active participation or instigation of the persons causing the damage by the state or its agents, then responsibility for the damage will arise. It is also clear that there must be a definite link between the perpetrators of the damage and the state or some attributability of the damage to the state through a theory of negligence. These rules have been established through many arbitral awards. They have also been stated in the Draft *Code of the International Law Commission on State Responsibility*. The Iran–US Claims Tribunal dealt on several occasions with the situation where property was taken or destroyed by mobs. In all these situations, the essential element was the establishment of the link between the revolutionary gangs and the new government which emerged. In the early stages of the revolution, there were several gangs with which the emerging government did not have any links whatever. The Tribunal refused to hold Iran liable for the activities of these gangs. But, when the revolution took hold, groups emerged with links to and authority from the state. Iran was held liable for the acts of these groups.

Where the *armed forces of a state are involved in a taking of property*, the attribution of the act to the state is clear. In Amco v. Indonesia, the taking was effected by the army, but the tribunal held that there was no attributability, as the army was acting in order to further the interests of its own pension fund. In AAPL v. Sri Lanka, there was destruction of property by the army during hostilities. Liability was based on the state's failure to protect the property. In Wena Hotels v. Egypt, there was interference by the army.

Therefore, where the army is involved, the attributability of the act of taking to the state is easier to establish.

6) Interference with property rights

There has been a general tendency in the international protection of alien property to transfer domestic norms of property protection into the international sphere. The view that only an outright takeover of physical assets amounts to expropriation by a state no longer holds.

Whereas stress on the physical nature of property was sufficient to protect ownership in times when there was a *laissez-faire* philosophy, the coming of the welfare state meant an increase in the nature and frequency of state interference with the ownership of property by individuals. Interference with the exercise of property or ownership rights by the host state could amount to takings which require compensation. Once the jurisprudential fact that ownership itself involves a bundle of intangible rights in relation to property is acknowledged, then it follows that it is not only the outright taking of the whole bundle of rights but also the restriction of the use of any part of the bundle that amounts to a taking under the law. It is necessary to understand the course of developments relating to the concept of property in the municipal systems, in particular of the United States, as the leading capital-exporting states will contend for the transference of the system of property protection in their domestic sphere into the international sphere. There is evidence of such transference in the past.

7) Cancellation of permits and licences

The cancellation of permits and licences involves a regulatory taking, and has been dealt with above in that context. But, where such cancellations are made *without due process*, are *discriminatory and violate commitments made regarding their issuance and validity*, their subsequent withdrawal could amount to a compensable taking. Where licences and permits are necessary to operate in certain sectors of the economy and these licences are withdrawn, the foreign investor's ability to conduct his business will be adversely affected. It could be argued that such measures involve a taking even if they do not affect the ability of the foreign investor to continue with the business or in any way affect the ownership of the property of the foreign investor. In modern investment treaties, such licences are protected, as they fall within the definition of investments.

Where the privilege is revoked, the state is not benefited in any sense. Hence, it would be difficult to say that there had been a taking by the state in situations where there is a revocation of a licence. However, the foreign investor may have to relinquish his business as a result of such a termination and the assets of the business may then vest in some state entity. This will be so where the state entity is a partner in the venture with the foreign investor. In the alternative, it may have to be sold for a lower price than would otherwise have been the case. In the administrative law systems in the common law world, there is generally no review permitted for the revocation of licences, as they are privileges the conferment of which is entirely at the discretion of the state. There are many awards of arbitral tribunals and claims commissions which have asserted that the withdrawal of licences or the imposition of controls do not amount to the taking of property.

But, the law stated in these older cases must be reviewed in light of new developments. The law is increasingly coming to accept that such a withdrawal must not be lightly done without warnings to the licensee to desist from the offending behaviour or to fulfil conditions attached to the licence. It must be preceded by an opportunity for the licensee to explain why the licence should not be withdrawn. The withdrawal of a licence may be considered a regulatory act, particularly where the conditions attached to the licence have not been satisfied. But, the substantive right is subject to procedural regularity. The proper exercise of the substantive right of revocation for non-satisfaction of the condition is not compensable, as it is a regulatory act. But, if it is done without procedural regularity, that irregularity gives rise to the duty to pay compensation. Cancellation of licences on environmental grounds will become more frequent with the increasing concern for the protection of the environment. Such cancellations will often put an end to the foreign investment. They will usually not amount to compensable takings.

In Murphyores Ltd v. The Commonwealth, a concession had been given to two US companies for sand-mining on Fraser Island, close to the Great Barrier Reef. The minerals did not have a local market. They had to be exported. An environmental study found that the sand-mining was harmful to the Great Barrier Reef. The Australian government refused to grant export licences for the export of the minerals. This effectively terminated the operations of the companies. The Australian High Court rejected the claims of the two companies for compensation on the basis that no compensable taking was involved. The Australian government also resisted efforts on the part of the home state of the foreign investor to ensure that compensation be paid to the foreign investor.

Recent awards have emphasised the *need for due process safeguards* prior to the cancellation of licences and have deemed cancellations without due process as violations of treatment standards as well as of the expropriation provisions[17].

[17] In addition to Biloune v. Ghana Investment Board (1993) 95 ILR 184; and Metalclad v. Mexico (2000) 5 ICSID Reports 209 (2001) 40 ILM 55, see Middle East Cement Shipping and Handling Co. v. Egypt, ICSID Case No. ARB/99/6 (12 April 2002), para. 143; Lauder v. Czech Republic, UNCITRAL Arbitration Proceedings (Final Award, 3 September 2001); CME v. Czech Republic, UNCITRAL Arbitration Proceedings (Award, 14 March 2003) (both decisions are available on the website of the Department of Finance of the Czech government); and Goetz v. Burundi (1999) 15 ICSID Rev 457; (2001) 26 YCA 24. The creeping of administrative law theory into the area is evidenced by these awards. From such awards, it is possible to launch into the whole array of administrative law notions such as legitimate expectations, which has been done in cases like ADF v. United;

8) Excessive taxation

As indicated earlier, taxation is within the sovereign power of a state. There is no rule in international law limiting the power of a state to impose taxes within its territory. But, "excessive and repetitive tax" measures have a confiscatory effect and could amount to indirect expropriation[18]. A uniform increase in taxation cannot by itself have such an effect. But, where a foreign investment is singled out and subjected to heavy taxation, a clear situation of expropriation can be made out. Such a result may not follow where sufficient justification for such taxation exists. The taxing of windfall profits (i.e. profits which arise without any act on the part of the investor) cannot amount to a taking. Thus, taxation of the oil industry for windfall profits due to price hikes cannot amount to a taking[19]. Where the situation of excessive taxation is dealt with in investment treaties, the mechanism used is *joint consultation* between the parties to determine whether the excessive tax should be imposed. Except in certain obvious circumstances, it is unlikely that a charge of unfair taxation would succeed. Many investment treaties deal with taxation separately, requiring that allegations of unfair taxation be dealt with through consultation between the two treaty partners. This removes the area from the scope of the taking provision in the treaty.

9) Expulsion of the foreign investor

The expulsion of the foreign investor *will amount to a taking if the purpose of the expulsion is the taking of his property*. But, where national security or other sufficient grounds exist for the expulsion, this will be different. Objectively reasonable factors for the expulsion must exist if it were to be justifiable on national security grounds. A tribunal which has jurisdiction over the taking on the basis that it is a violation of a foreign investment agreement does not have jurisdiction to pronounce on the human rights issues involved in the taking. This is a sensible idea, for a tribunal which deals with commercial matters is not justified in pronouncing upon disputes that are not commercial in nature.

10) Freezing of bank accounts

The freezing of the bank accounts of a foreign investor could amount to a taking of property in certain circumstances. Where bank accounts are frozen on the ground that it is necessary to do so in order to investigate a crime or a violation of banking regulations, the interference could be justified. But, where it is done in the process of an expropriation of the property of the foreign investor and as a part of a plan to deny him all his property rights, there is a strong case for the view that the freezing of the accounts amounts to a taking.

Having all that in mind, we underline that the taking of foreign property by a state is *prima facie* lawful. Such legality is, however, subject to conditions. The taking of foreign property *will be lawful only if such taking was for a public purpose and is not discriminatory* (a racially discriminatory taking is unlawful in international law). The principle against racial discrimination is an *ius cogens* principle of international law. It is odious to international law that nationalisation or any act of state should be based on considerations of race. But, please note that a *postcolonial nationalisation* which is designed to end the economic domination of the nationals of the former colonial power is exempted from this general rule. Here, nationalisation would be directed at the

[18] World Bank, *Report and Guidelines* (1992) 31 ILM 1375;

[19] See, for the US, Crude Oil Windfall Tax (United States Crude Oil ProfitWindfall Tax Act, 1980, PL 96–223), upheld in United States v. Ptasynki, 462 US 74 (1983);

citizens of a distinct state identifiable by race for the obvious reason that they alone are in control of the economic sectors of the nationalising state. A German court accepted the existence of this exception when considering the legality of the Indonesian nationalisations. It rejected the argument that the nationalisation measures were illegal as they were directed only against Dutch nationals. The court emphasised the fact that the Dutch were the colonial rulers of Indonesia and that they had control over the Indonesian economy.

We should bare in mind that there is a duty in international law to *pay compensation* for the taking of alien property. Non-payment affects legality. Moreover, where a taking is done in violation of a treaty, the taking will be considered illegal. The Chorzow Factory case concerned a taking in violation of a treaty. The view of the Permanent Court of International Justice was that, in circumstances of takings in violation of treaties, restitution was the proper remedy for the international wrong.

Conclusions

Though the law recognised that there could be takings of alien property other than through direct means, the indirect methods of taking have not been identified with any certainty either in arbitral decisions or in the literature. It is unlikely that this deficiency of the law will be cured. The law on alien takings, especially the law on state responsibility arising from such takings, was developed at a time when the state rarely interfered with the marketplace, and interference was effected for rather crude purposes such as the self-aggrandisement of ruling elites. It was easy to identify and stigmatise such takings as unlawful. Investment protection was facilitated by the uniform application of this rule to all types of taking. But, with increasing state intervention in the economy, the maintenance of this rule became unacceptable.

The increasing tendency among both developed and developing countries to control foreign investments, albeit through different types of regulatory structures, will keep this issue in the forefront of the law in this area. As indicated, this issue has replaced the theory of internationalisation of foreign investment contracts and the debate on compensation as the central issue in the area of expropriation of foreign investments. But, it is an issue that involves interests that are so inconsistent that the challenge of reconciling them would prove difficult.

So we must ask what the foreign investor who wishes to understand the law on protection against expropriation should do? How can a foreign investor know if the host's state conduct affecting the investment is compensated? How can a foreign investor know whether the host's state conduct affecting the investment is compensable? Since the law is indeed in a state of flux, the best answer to the question *when, how or at what point the valid regulation becomes, in fact and effectively an expropriation?* should be *we will recognize it when we will see it*. However, the law may provide a basis to answer the question, but the circumstances which determine the question remain crucial for the determination. It is obvious that some governmental actions, in some cases, almost always, will give rise to indirect expropriation finding cases, and therefore to compensation. Other measures, will not. Between the two categories will be the "very brief and hard" are about which the famous professor Dolzer was speaking, still full of gaps.

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