INDIRECT EXPROPRIATION IN ROMANIAN BITs

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Abstract

Direct expropriations and nationalizations are rare nowadays, but the problem of indirect expropriation is far from being resolved. International legal texts provide very general and brief provisions regarding this issue. Usually, bilateral investment treaties contain general and brief provisions on indirect expropriation. The line between the concept of indirect expropriation and non-compensable regulatory governmental measures has not been systematically articulated.

In the last years, the expropriation claims arising out of regulatory measures have attracted the public attention like no other issue in international investment law. However, not all state measures which interfere with properties amount to expropriation. Moreover, it was suggested in the doctrine that the focus of debate in this area of law has shifted from the standard of compensation to the definition of expropriation. The delimitation is so delicate that the problem is not anymore if the compensation awarded was appropriate, but if there was an expropriation at all.

Since foreign investors' protection from uncompensated expropriations traditionally has been one of the main guarantees found in international investment agreements, the purpose of this paper is to analyse the indirect expropriation provisions in the most representative BITs concluded by Romania.

***Key words**: expropriation, investment, foreign investor, BIT, creeping*

Introduction

In practice the line between the concept of indirect expropriation and non-compensable regulatory governmental measures has not been systematically articulated.

Although we all know the general principle providing that a state may do whatever it wants on its territory, there are specific clear rules on compensation for expropriation and settlement of disputes through a court which is outside the state host. A well-known human right is the right to property which must be respected also for foreigners, therefore, if his property is taken, he must be compensated.

As mentioned in a previous paper[1], 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.

Since foreign investors' protection from uncompensated expropriations traditionally has been one of the main guarantees found in international investment agreements, the purpose of this paper is to analyse the *indirect expropriation* provisions in the most representative BITs concluded by Romania.

For this matter, we have selected 20 representative BITs concluded by Romania[2] (*out of the 82 BITs concluded by Romania as of mid-June 2012*[3] *- besides the 63 other IIAs*), in order to observe the legal provisions concerning this issue. Please have in mind that the order of the BITs is strictly alphabetical.

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[1] Spătaru-Negură Laura-Cristiana, Spătaru-Negură Mihai, *Cases of Indirect Expropriation in International Economic Law*, CKS E-book, 2012, ISSN 2068-7796, p. 821.

[2] Available at http://unctad.org/Sections/dite_pcbb/docs/bits_romania.pdf.

[3] UNCTAD, World Investment Report…, p. 201.

Paper content

I. The World of Bilateral Investment Treaties

Bilateral investment treaties (BITs) constitute the most important instrument for the international protection of foreign investment. Since the *adoption of the first BIT in 1959*, the number of such treaties has grown steadily and, by the end of 2011, reached a total of 2,833 BITs. The most *dramatic increase* took place during the 1990s, when their number quintupled. Initially, the BITs were concluded between a developed country and a developing country, usually at the initiative of the developed country. The developed country (i.e. a capital exporting country) entered into a BIT with a developing country (i.e. a capital importing country) in order to secure additional and higher standards of legal protection and guarantees for the investments of its firms than those offered under national laws. The developing country, on the other hand, would sign a BIT as one of the elements of a favourable climate to attract foreign investors[4].

The main provisions dealt within the BITs over the time are:

- the scope and definition of foreign investment;
- admission of investments;
- national and most-favoured-nation treatment;
- fair and equitable treatment;
- guarantees and compensation in respect of ***expropriation*** and compensation for war and civil disturbances;
- guarantees of free transfer of funds and repatriation of capital and profits; and
- subrogation on insurance claims; and dispute-settlement provisions, both State-to-State and investor-to-State[5].

In addition, some BITs include provisions regarding:

- transparency of national laws;
- performance requirements;
- entry and sojourn of foreign personnel;
- general exceptions; and
- extension of national and most-favoured-nation-treatment to the entry and establishment of investments.

Within these broad themes, the exact content of BIT provisions varies considerably, even between BITs signed by the same country, reflecting different approaches as well as bargaining positions. Over the years, as practice develops, some provisions in BITs have tended to become more elaborated.

From the information provided by UNCTAD, it appears that "*FDI inflows rose 16 per cent in 2011, surpassing the 2005–2007 pre-crisis level for the first time, despite the continuing effects of the global financial and economic crisis of 2008–2009 and the on-going sovereign debt crises. (…) A resurgence in economic uncertainty and the possibility of lower growth rates in major emerging markets risks undercutting this favourable trend in 2012. UNCTAD predicts the growth rate of FDI will slow in 2012, with flows levelling off at about $1.6 trillion, the midpoint of a range. Leading indicators are suggestive of this trend, with the value of both cross-border mergers and acquisitions (M&As) and greenfield investments retreating in the first five months of 2012. Weak levels of M&A announcements also suggest sluggish FDI flows in the later part of the year*"[6].

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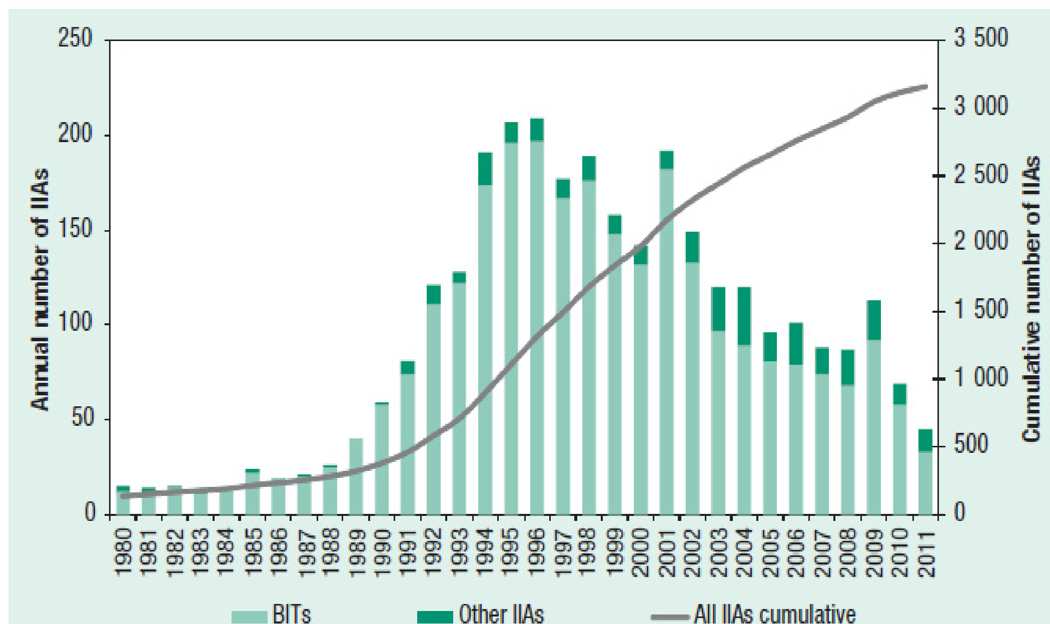
[4] UNCTAD, Bilateral Investment Treaties 1959-1999, United Nations New York and Geneva, 2000, p. 1, available at http://unctad.org/en/Docs/poiteiiad2.en.pdf.

[5] Idem, p. 20.

[6] UNCTAD, World Investment Report 2012, Towards a New Generation of Investment Policies, United Nations New York and Geneva, 2012, p. xiii, available at http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf (hereinafter "UNCTAD, World Investment Report…").

As UNCTAD statistics provide, by the end of 2011, there were overall 3,164 agreements international investments agreements (IIAs), which include ***2,833 bilateral investment treaties*** (BITs) and 331 "other IIAs", including, principally, free trade agreements (FTAs) with investment provisions, economic partnership agreements and regional agreements[7]. It appears however that the number of IIAs decreased in 2011 than in 2010 (in 2011 there were signed 47 IIAs - 33 BITs and 14 other IIAs, while in 2010 there were signed 69 IIAs). What can be the cause of this decrease? There may be several causes, like for instance, the tendency to conclude regional treaties or the controversies and sensitivities of IIAS.



Source: UNCTAD[8]

Although, in quantitative terms, BITs still dominate in terms of economic significance, *regionalism* becomes more important. "*The increasing economic weight and impact of regional treaty making is evidenced by investment negotiations under way for the Trans-Pacific Partnership (TPP) Agreement; the conclusion of the 2012 trilateral investment agreement between China, Japan and the Republic of Korea; the Mexico-Central America FTA, which includes an investment chapter; the fact that at the EU level the European Commission now negotiates investment agreements on behalf of all EU member States; and developments in ASEAN*"[9].

In most cases, these regional treaties are FTAs. What is the big advantage of these FTAs? They bring *consolidation and harmonization* of the investment rules, representing a step towards multilateralism.

We should keep in mind the fact that at the EU level, the European Commission is now negotiating not only regarding the liberalization of trade and investment, but also on conditions

[7] Idem, p. xx.
[8] Idem, p. 84.
[9] Idem, p. xx.

related to protection of investment on behalf of all member States. Taken together, EU member States account for about *half of the world's BITs*. Even though FTAs are pursued by the EU, at the same time, individual EU member states continue to conclude BITs with third States: since the EU Lisbon Treaty's entry into force, 45 such agreements have been signed, including 10 in 2011[10]. But what will happen to this BITs signed by the member states? They will remain in force until replaced by EU agreements, but they will have to be amended if they are not accordingly with the EU legislation.

Therefore, until FTAs are concluded, the BITs concluded by member states are very important and remain the relevant agreements providing investment protection and promotion.

II. Expropriation Legal Provisions from Selected BITs

Since foreign investors' protection from uncompensated expropriations traditionally has been one of the main guarantees found in international investment agreements, the purpose of this paper is to analyse the *indirect expropriation* provisions in the most representative BITs concluded by Romania.

As mentioned before, we have selected 20 representative BITs concluded by Romania[11] (*out of the 82 BITs concluded by Romania as of mid-June 2012*[12] *- besides the 63 other IIAs*), in order to observe the legal provisions concerning this issue.

The respective BITs were concluded with the following states (*please have in mind that the order of the BITs is strictly alphabetical*): Republic of Albania[13], Republic of Argentina[14], Australia[15], Bulgaria[16], Canada[17], People's Republic of China[18], Czech Republic[19], Finland[20], Federal Republic of Germany (*concluded with the Socialist Republic of Romania*)[21], Hellenic Republic[22], Hungary[23], Republic of Korea[24], the Lebanese Republic[25], Mongolia[26], Slovak Republic[27], Kingdom of Sweden[28], Republic of Turkey[29], United Kingdom of Great Britain and Northern Ireland[30], United Arab Emirates[31], United States of America[32].

We noticed that a typical provision on expropriation of these BITs would be:

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[10] Idem, p. 86.
[11] Available at http://unctad.org/Sections/dite_pcbb/docs/bits_romania.pdf.
[12] UNCTAD, World Investment Report…, p. 201.
[13] Signed on 11 May 1995, entered into force on 2 September 1995.
[14] Signed on 29 July 1993, entered into force on 1 May 1995.
[15] Signed on 21 June 1993, entered into force on 22 April 1994.
[16] Signed on 1 June 1994, entered into force on 23 May 1995.
[17] Signed on 8 May 2009, entered into force on 23 November 2011.
[18] Signed on 16 April 2007, entered into force on 1 September 2009.
[19] Signed on 22 January 2008, entered into force on 30 July 2009.
[20] Signed on 26 March 1992, entered into force on 6 January 1993.
[21] Signed on 12 October 1979, entered into force on 7 August 1981, available at http://unctad.org/sections/dite/iia/docs/bits/germany_romania.pdf (this text is the only text provided by UNCTAD, although in a list of BITs concluded by Romania it appears that a BIT concluded between Romania and Germany has been signed on 25 June 1996 and entered into force on 12 December 1998 http://unctad.org/Sections/dite_pcbb/docs/bits_romania.pdf).
[22] Signed on 23 May 1997, entered into force on 11 June 1998.
[23] Signed on 16 September 1993, entered into force on 6 May 1996.
[24] Signed on 23 January 1998, entered into force on 31 March 2001.
[25] Signed on 15 April 2009, no date of entry into force appears on www.unctad.org.
[26] Signed on 6 November 1995, entered into force on 15 August 1996.
[27] Signed on 3 March 1994, entered into force on 7 March 1996.
[28] Signed on 29 May 2002, entered into force on 1 April 2003.
[29] Signed on 3 March 2008, entered into force on 8 July 2010.
[30] Signed on 13 July 1995, entered into force on 10 January 1996.
[31] Signed on 11 April 1993, entered into force on 7 April 1996.
[32] Signed on 28 May 1992, entered into force on 15 January 1994.

Investments by investors of either Contracting Party shall not be expropriated, nationalized or ***subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party*** *except under the following conditions:*

a) the measures are taken in the ***public interest*** *and* ***under due process of law****.*

b) the measures are ***clear and not discriminatory****, and*

c) the measures are accompanied by provisions for the payment of ***prompt, adequate and effective compensation****. Such compensation shall amount to the* ***market value*** *of the investments affected immediately before the measures referred to above in this paragraph occurred or became public knowledge and it shall be freely transferable in convertible currencies from the Contracting Party, at the official rate of exchange prevailing on the date used for the determination of value. The compensation shall be transferable without delay in a* ***freely convertible currency****. The compensation shall include interest until the date of payment at an* ***appropriate commercial rate*** *as determined by the* ***Central Bank*** *of the Contracting Party, and its amount shall be subject to* ***review by due process of law****, within the framework of the legislation of the Contracting Party in the territory of which the investment has been made.*

III. General Remarks on Indirect Expropriation

From the beginning, we have to emphasize that under public international law, the states have a sovereign right to take property held by nationals or aliens through nationalization or expropriation for economic, political, social or other reasons. In order that this taking to be lawful, the exercise of this right requires the accomplishment of some conditions that can be seen in all the above mentioned BITs:

(a) Property has to be taken for a **public purpose**;
(b) On a **non-discriminatory** basis;
(c) In accordance with **due process of law**;
(d) Accompanied by **compensation**.

Through these BITs, states have established a guarantee for foreign investors against the expropriation of their investments without compensation, and we must underline that "*today virtually all bilateral investment treaties contain an expropriation provision*"[33]. As regards the indirect expropriation, we realize that the indirect acts of takings are quite the same defined in the BITs analysed, although the doctrine and the arbitral tribunals' case law have still problems in defining this situation.

Well, indirect expropriation supposes ***total or near-total deprivation of an investment*** but without a ***formal transfer of title or outright seizure***[34]. UNCTAD states however that it can be argued that even when an IIA "*does not specifically mention indirect takings, the notion of expropriation is broad enough to cover relevant measures of both direct and indirect kind*"[35]. In our BITs, there are explicit references to indirect expropriation in one way or another.

As a general remark, we note that the articles on expropriation are placed quite at the beginning at the BITs, usually in article 3, 4 or 5. This fact is due to the high importance of this provision in the foreign investment protection.

However, the terminology is not fully uniform, although the idea is quite the same (e.g. "*tantamount to expropriation or nationalization", "any other measure having the same effect [to expropriation]", "effect equivalent to nationalisation or expropriation", "tantamount to expropriation or nationalization", "or indirectly, measures of expropriation, nationalization or any*

[33] UNCTAD, Expropriation, UNCTAD Series on Issues in International Investment Agreements II, p. 5, available at http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (hereinafter "UNCTAD, Expropriation …").

[34] Idem, p. 7.

[35] Idem, p. 8.

other measures having the same nature or the same effect", "measures of expropriation or nationalization, requisition or any other measures of like effects such as freezing compulsory sale of all or part of an investment").

We are surprised to observe that no subcategories of indirect expropriations are used, for instance *creeping, de facto, constructive, disguised, consequential, regulatory or virtual* expropriation. Of course that out of these, the subcategory most important is the so-called *creeping* expropriation that results in a deprivation of property or a loss of control, but which occurs gradually or in stages. The arbitral tribunal in *Generation Ukraine v Ukraine*[36] *qualified this special form of expropriation as coming "with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property"*[37].

We note also that these BITs do not include special exceptions regarding certain types of measures, for instance, compulsory licenses for intellectual property rights. Such an example could be the Article 13.5 of the Canadian BIT model (2004) which provides that: "*The provisions of this Article [Expropriation] shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the WTO Agreement*"[38]. Of course, this exception ensures coherence between WTO law and international investment law.

For instance, in the UNCITRAL Partial Award *Lauder v Czech Republic*, dated 13 September 2001, the arbitral tribunal stated that an indirect expropriation "*does not involve an overtaking but effectively neutralises the enjoyment of property*". In the award dated 12 April 2002 on the ICSID case No. ARB/99/6, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, 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*".

Another problem is that the expropriation provisions refer to the expropriation of "*investments*", but no definition of an investment can be found in the BITs, therefore the expropriation challenged under an investment treaty depends on how *narrow* or *broad* is the interpretation of such a term. Some recent treaties include however a clarification that "*an action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment*" (2004 US model BIT)[39]. The expression "*property interest in an investment*" can be however subject to interpretation, especially in light of the host state domestic law.

In 4 BITs analysed (i.e. the BITs concluded with Czech Republic, Hungary, Slovak Republic and with United Arab Emirates) we have discovered a special provision on the issue of taking of assets from a domestic company in which a foreign investor holds shares, for instance the article 5 paragraph 3 of the Czech Republic-Romania BIT: "*The provisions of paragraph 1 of this Article shall also apply where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares*". Article 6 paragraph (1) iv) of the BIT concluded with the United Arab Emirates is going even far: "*iv) When a Contracting nationalizes or expropriates the investment of a legal person which is established or licenced under the law in force in its territory and in which the other Contracting Party or any of its investors owns shares, stocks,*

[36] ICSID Case No. ARB/00/9.
[37] UNCTAD, Expropriation …, p. 11.
[38] Available at http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf.
[39] UNCTAD, Expropriation …, p. 5.

debentures or other rights of interest, it shall ensure that prompt, adequate and effective compensation is received and allowed to be repatriated.

Such compensation shall be determined and paid in accordance with the provisions of Paragraph (1) (iii) of this Article".

Why would the above mentioned provision be important? It would be important because this type of provision would result in compensation paid to the foreign shareholders, even in the situations when just some assets are expropriated from the domestic company – situation when it would not result in the loss of full value of the shareholding. Several tribunals have chosen however to consider the whole business enterprise as an investment, and not the constituent parts.

As regards the requirements for a *lawful* expropriation, we noticed that the four crystallized criteria appear in every BIT - *public purpose, non-discriminatory manner, due process of law and payment of compensation* – even though the BITs display some difference in formulations.

However, there are some other BITs which add further conditions to assess the legality of an expropriation - for instance, the United Arab Emirates-Romanian BIT (1996) which provides that the expropriation "*does not violate any specific provision or contractual stability or expropriation contains in an investment agreement between the natural and legal persons concerned and the party making the expropriation*" (Article 6 paragraph (1) letter (d)). Another example would be the Netherlands-Oman BIT (2009) which sets forth that the expropriatory measures shall not be "*discriminatory or contrary to any specific undertaking which the former Contracting Party* ***may have given***" (Article 4 letter (b) of the Belgium/Luxembourg-Colombia BIT (2009) which provides that the "*measures shall be taken in a non-discriminatory manner, in good faith …*" (Article IX paragraph (1) letter (b)).

The criterion which has the bigger variation is the payment of compensation. The most used solution is the *Hull standard* - the standard of *prompt, adequate and effective compensation*. The compensation is considered to be *prompt* if it is paid without any delay, *adequate*, if it has a reasonable relationship with the market value of the investment concerned, and *effective*, if paid in convertible or freely useable currency.

In spelling out what constitutes an adequate compensation, several of the analyzed BITs refer to an investment's fair market value. The Australia-Romania BIT provide a back-up solution: "*Where that value* ***cannot be readily ascertained****, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors*".

But Canada-Romania BIT opts for another type of calculating the adequate compensation:*"the* ***genuine value of the investment or returns expropriated*** *immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier".*

However, no references to *just compensation* (Chile-Tunisia BIT 1998) or *real value* (Slovenia-Turkey BIT 2004) are made in the analysed BITs.

Many older IIAs do not address the issue of *applicable interest*. The trend in recent treaty practice has been to explicitly provide for the payment of interest from the date of the taking until the date of payment, fact that we discover in our BITs. Most recent treaties contain guidelines on the applicable rate of interest and do so in a variety of ways, some of which are rather vague (e.g. "appropriate", "fair", "commercially reasonable" interest, "normal market rate", "usual commercial rate"), while others are quite precise (e.g. LIBOR rate).

Some BITs lay down the obligation to pay interest only in those situations when the payment of the principal amount of compensation is delayed, for instance, article 4 paragraph (2) of the Romania-Turkey BIT provides that "*in the event that payment of compensation is delayed, the investor shall receive interest for the period of any* ***undue delay*** *in making payment*" (emphasis added).

No reference to the *type of interest* – simple or compound – is made. As regards the *currency*, we noticed that many of the BITs analyzed provide that compensation must be paid in a "freely convertible currency" (e.g. the BITs concluded with the Republic of Czech Republic, Greece and Slovakia). The Australia-Romania BIT (1993) provides *that the "compensation shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in any other freely convertible currency*".

Even though there are things that are not provided under this expropriation articles, all of the above mentioned provisions could be considered to be a "high protection model", instead of an "increased predictability" model and a "qualified" model. Under this high protection model, Romania and the other states seek to maximize the protective effect of the treaty. Therefore, such a typical clause contains "*a prohibition against direct and indirect expropriation of investments unless for a public purpose, on a non-discriminatory basis, under due process of law and upon payment of compensation, which shall be prompt (without delay), adequate (fair market value) and effective (freely convertible and transferable currency)*"[40].

Several BITs analyzed provide the possibility for a prompt review: "*The investor affected by a judicial or other shall have a right to prompt review, independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this Article*" (the Czech Republic-Romanian BIT). There is one interesting provision on this aspect which deserves to be remembered here – article 3 paragraph (2) of the Germany-Romania BIT – but there are historic considerations to be had in mind: "***The legality** of any expropriation measure within the meaning of paragraph 2 (b) of the protocol to this Treaty **shall be reviewed at the request of the investor** in a legal proceeding of the respective Contracting Party:*

*(a) In the Federal Republic of Germany: **in all cases**;*

*(b) In the Socialist Republic of Romania: **only in those cases in which expropriation has not been ordered by law or by a decree of the State Council or by presidential decree***".

We consider that much more things could be said regarding the provisions of the above mentioned BITs, but for sure the decision whether a taking constitutes an indirect expropriation measure is taken on a case by case basis. There is not a magical solution, therefore the arbitral tribunals have to decide each time if the state has violated its obligations towards the foreign investor.

Conclusions

We noticed earlier that the balance is gradually shifting from bilateral to regional treaty making, thereby increasing the impact of regions in IIA rulemaking. In most cases, regional treaties are at the same time FTAs. As UNCTAD underlines, "*by comprehensively addressing the trade and investment elements of international economic activities, such broader agreements can better respond to the needs of today's economic realities, where international trade and investment are increasingly interconnected. It is also notable that investment chapters in new regional agreements typically contain more refined and precise provisions than in earlier treaties. This shift can bring about the consolidation and harmonization of investment rules and represent a step towards multilateralism. However, where new treaties do not entail the phase-out of old ones, the result can be the opposite: instead of simplification and growing consistency, regionalization may lead to a multiplication of treaty layers, making the IIA network even more complex and prone to overlaps and inconsistencies*"[41].

In a future research it would be interesting to analyse the provisions regarding expropriation in FTAs.

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[40] UNCTAD, Expropriation …, p. 125.

[41] UNCTAD, World Investment Report …, p. 84.

The right to expropriate is an undisputed prerogative of sovereign States, and, as mentioned before, although 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.

So we must ask ourselves what the foreign investor 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? The law may provide a basis to answer those questions, 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*" area about which the famous professor Dolzer was speaking, still full of gaps.

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