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The Notion of *Time* in ICSID's Case Law on Indirect Expropriation

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I. INTRODUCTION

The epistemic disarray of the legal features of indirect expropriation finds its origin in various factors, such as the different legal instruments serving as the basis for ICSID jurisdiction and the heterogeneous typologies of the concept of indirect expropriations. These elements have the effect of preventing the establishment of autonomous *stare decisis*[1] in the indirect expropriation case law. Moreover, ICSID arbitration is not subject to the application of the Anglo-Saxon principle of "binding precedent"[2] and, in accordance with Article 53(1) of the Convention on the Settlement of Investments Disputes between States and Nationals of Other States (the "Washington Convention" or "ICSID Convention"),[3] the awards it renders are only "binding on the parties." In addition, reliance on previous findings in indirect expropriations could be inappropriate, as it is a difficult task for the adjudicator to determine when an impugned measure crosses over from being a valid regulatory measure to an indirect expropriation.[4]

There is ample jurisprudence on what constitutes an expropriation *stricto sensu*. There is, however, a quasi absence of doctrinal basis[5] and lack of a coherent adjudicative basis for determining what constitutes an indirect expropriation. The adjudicative basis for this determination has in fact been characterized as being "very much in flux"[6] and the doctrinal debate on the legal features of indirect expropriation could be considered to be "still in its infancy."[7] In spite of the many inconsistencies in the case law relating to indirect expropriations, it is generally held that there need not be a *mens rea* — to borrow

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[1] The *stare decisis* doctrine finds its origin in the Latin maxim *stare decisis et non quita movera* (to stand firmly by things decided and not to disturb settled points). BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).

[2] C. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1082 (2001). In SGS Société Générale de Surveillance S.A. v. République des Philippines, the ICSID tribunal held that: "In the Tribunal's view although different Tribunals constituted under the ICSID system should in general seek to act in consistently with each other … there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of one single decision." SGS Société Générale de Surveillance S.A. v. République des Philippines, ICSID Case No. ARB/02/06, Decision on Objections to Jurisdiction, January 29, 2004, 8 ICSID Rep. 518 (2005), para. 97.

[3] Convention on the Settlement of Investments Disputes between States and Nationals of Other States, Washington, March 18, 1965, T.I.A.S. No. 6090, 575 U.N.T.S.159 [hereinafter "Washington Convention"].

[4] Y. Fortier, *Caveat Investor: The meaning of expropriation and the protection afforded investors under NAFTA*, 20 ICSID NEWS 1 (No. 1, 2003), *available at* <http://www.worldbank.org>.

[5] J.A. Soloway, *NAFTA's Chapter 11 — The Challenge of Private Party Participation*, 16 J. INT'L ARB. 7 (No. 1, 1999).

[6] Fortier, *supra* note 4, at 1.

[7] M. Brunetti, *The Iran-United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation*, 2 CHI. J. INT'L L. 212 (No. 1, 2001).

a term from criminal law — because indirect expropriation, by its very nature, arises out of its effects.

Issues such as whether interference with the legal title of a foreign investor's property rights is a prerequisite for determining that an investor has been indirectly expropriated is dealt with extensively in the realm of doctrine.[8] ICSID case law, however, is consistent in finding that it is enough to establish that significant injury was done to the investor's property rights.[9] Nevertheless, it remains the task of the adjudicator to establish the precise moment when indirect expropriation occurred. This temporal aspect is very important because it has bearing on questions of valuation. It is not a simple matter, however. The significance and complexity of this issue are even further augmented when the investor alleges several or varied indirect expropriation measures having a cumulative effect. Having established that the investor has been deprived of property rights in the investment, another question that arises is whether the impugned measure was sufficient to alter the host state's responsibility vis-à-vis the investor. The object of this article is to analyze the approach taken by ICSID tribunals on temporal issues related to indirect expropriation.

II. Alterations to the Prevailing Regime

In the early days of ICSID, the applicable law in ICSID arbitration was subject to much doctrinal debate, particularly with regard to the role and scope of international law in ICSID proceedings.[10] The applicability of international law is, however, in the BIT era, considered something of "a given" and is no longer critically debated.[11] However, having determined the applicable law, ICSID adjudicators must then determine whether temporal alterations or modifications of legislative or administrative measures affect the right of the investor.

A. Evolutive clauses

Legal stability in the investment regimes of host states is the most important element taken into account by private investors before entering into international investments.[12]

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[8] For an empirical analysis on this issue in the Iran-US Claims Tribunal, see G.H. Aldrich, *What Constitutes a Compensable Taking of Property — the Decisions of the Iran-US Claims Tribunal*, 88 Am. J. Int'l L. 585–610 (1994).

[9] *See* Antoine Goetz and Others v. Burundi, ICSID Case No. ARB/65/3, February 10, 1999, 15 ICSID Rev. 512 (2000), para. 124. Excerpts of *Antoine Goetz* translated from the original French into English are reprinted in 21 Y.B. Com. Arb. 24–46 (2001). *See also* Middle East Cement Shipping v. Egypt, ICSID Case No. ARB/99/6, April 12, 2002, 18 ICSID Rev. 628 (2003), para. 107.

[10] *See* A. Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 136 Recueil des Cours 331–410 (1972–II); Yas Banifatemi & Emanuel Gaillard, *The meaning of "and" in Article 42 (1), Second Sentence, of the Washington Convention: The role of International Law in the ICSID Choice of Law Process*, 18 ICSID Rev. 375–411 (2003); W. Michael Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold*, 15 ICSID Rev. 362–81 (2000); I.F.I. Shihata & A.R. Parra, *Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention*, 9 ICSID Rev. 183–213 (1994).

[11] Emanuel Gaillard, *Centre International pour le Règlement des Différends Relatifs aux Investissements: Chronique des sentences arbitrales*, 132 J. Droit Int'l 214 (2004).

[12] P. Juillard, *L'évolution des sources du droit des investissements*, 245 Recueil des Cours 54 (1994-I).

This is why foreign investors traditionally urge for the inclusion of stabilization clauses in contracts with states. The validity of stabilization clauses was once a subject of heated debate. However, in contemporary international law circles, scholarly debate and international jurisprudence are reconciled as to the legal validity of stabilization clauses.[13] In *Texas Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic* ("*Texaco v. Libya*"), for instance, the adjudicator confirmed, albeit in negative terms, the legal value of stabilization clauses by holding that, if such a clause did not figure into the state contract, it could be presumed that the host state had reserved its rights and prerogatives vis-à-vis the contracting party and that the investor could not legitimately maintain that legislative or administrative modifications amounted to a breach of its legitimate expectations.[14]

The ICSID tribunal in *AGIP S.p.A. v. People's Republic of the Congo* ("*AGIP v. Congo*") expressly clarified this point when holding that stabilization clauses

> do not affect the principle of [the host state's] legislative and regulatory sovereignty since it retains both with respect to those, whether nationals or foreigners, with whom the Government has not entered into such undertakings, and that, in the present case, they are limited to rendering the modifications to the legislative and regulatory provisions provided for in the Agreement, unopposable to the other contracting party.[15]

The ICSID Secretariat has even drafted a model clause with the aim of avoiding possible ambiguities in the interpretation of such agreements.[16] Where employed, it entails that the host state may not interfere with the commercial, economic and financial benefits conferred on the foreign investor without running the risk of incurring international accountability should a tribunal ultimately find indirect expropriation.

Although stabilization clauses might seem irrelevant considering that recent ICSID tribunals tend to find their jurisdictional basis in BITs (which tend to be broadly protective with regard to indirect expropriations), some cases demonstrate the continued relevance of stabilization clauses. In *Tradex Hellas S.A. v. Albania* ("*Tradex v. Albania*"),[17] the tribunal was constituted under Albania's national investment code. The Greek investor did not enjoy protective rights by virtue of a stabilization clause, but rather by an "updating clause." Unlike a stabilization clause, an updating clause is intended to deprive the investor of any rights to which he might otherwise legitimately be entitled. Essentially, the host state expressly reserves the right to modify its legislation or administrative acts, even if doing so could amount to indirect expropriation. Taking, in other words, is thus "legitimized."

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[13] C.I. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT'L L.J. 346 (1988); Schreuer, *supra* note 2, at 593; Juillard, *supra* note 13, at 56; Rosalyn Higgins, *The taking of property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 259 (1982-III).

[14] Texas Overseas Petroleum Company ("Texaco") and California Asiatic Oil Company v. Government of the Libyan Arab Republic, 17 I.L.M. 3 (1978), 104 J. DROIT INT'L 365 (1977), para. 56.

[15] AGIP S.p.A. v. People's Republic of the Congo, ICSID Case No. ARB/77/1, April 30, 1979, 1 ICSID Rep. 324 (1993).

[16] *See* 4 ICSID Rep. 364 (1997).

[17] Tradex Hellas S.A. v. Albania, ICSID Case No. ARB/94/2, April 29, 1999, 14 ICSID REV. 197–249 (1999).

The updating clause became part of the joint venture agreement between Tradex, a Greek company, and Torovitsa, an Albanian state-owned entity. Torovitsa conferred land on the joint venture, whose aims were related primarily to agricultural development. The land, however, was subsequently privatized, prompting the private investor to initiate ICSID proceedings against Albania alleging indirect expropriation. The tribunal determined that in order to establish whether indirect expropriation had occurred, it would have to examine, on a preliminary basis, whether the investor had obtained a vested right to maintain the land.[18] The tribunal held that

> [t]he legal significance could only be that the parties to the Agreement, including Tradex, accepted future applications of the Land Law and that the investment was subject to future applications of the Land Law, in other words: subject to future privatizations. If this was a legal limitation on Tradex's investment from the very beginning, then it could be argued that the actual application of the Land Law at a later stage did not infringe the investment and thus did not constitute an expropriation.[19]

The tribunal's approach is significant. To deprive the investor of the possibility of continuing with the joint venture on the piece of land originally agreed upon is a radical deprivation. The *Tradex* award demonstrates the potential legal implications an updating clause can have for an indirect expropriation dispute.

B. Marginalization of evolutive clauses

The once hot debate on the legal validity of these clauses has been marginalized by the proliferation of BITs. *Antoine Goetz and others v. Burundi* is of particularly significance in this regard. One of the claimants, Affimet, was an enterprise incorporated in Burundi but whose shareholders were Belgian citizens. On August 31, 1992, Burundi adopted a law establishing a "free-zone" region providing fiscal and tax benefits for certain companies engaged in "non-traditional" activities. Affimet had achieved status as a free-zone corporation on February 3, 1993,[20] but the license was subsequently withdrawn in May 1995. The Belgian investors contested this measure, but the Burundian authorities claimed that Affimet had no vested right to the maintenance of this status. The private investors in turn initiated ICSID proceedings claiming that indirect expropriation had taken place.

The tribunal first determined that the Belgian shareholders had no vested right to the enterprise's continued status as a free-zone corporation under Burundian law. The tribunal further held that the withdrawal of the license was a strictly unilateral measure because *"[r]ien ne permet dans la présente affaire d'avoir le moindre doute sur le caractère strictement unilatérale de la relation juridique née tant dans l'octroi à AFFIMET du certificat d'entreprise*

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[18] *Id.* at 231, para. 131.
[19] *Id.* at 231, para. 130.
[20] Antoine Goetz and Others v. Burundi, ICSID Case No. ARB/65/3, February 10, 1999, 15 ICSID Rev. 461 (2000), para. 5.

franche que de sa révocation."[21] The tribunal then examined whether free-zone status could be interpreted as relying on a *sui generis* contractual relationship[22] which accordingly would have limited the powers of Burundi to withdraw that status without incurring international liability.[23] The tribunal held, however, that "it would be contrary to reason that a licence which grants various advantages, particularly tax and customs, benefits, should be irrevocable and untouchable."[24] Having examined the contractual relationship between the host state and the investors under the law of the host state, the tribunal considered this question in an international law context, which, according to the terms of the BIT between Burundi and the Union of Belgium and Luxemburg, was the applicable law in the dispute.[25] According to article 4 of the BIT, the contracting parties undertake to "*[n]e prendre aucune mesure privative ou restrictive de propriété, ni aucune autre mesure ayant un effet similaire.…*" The tribunal held that, despite the fact that the shareholders had no vested right to the continuance of the free-zone status under Burundian law, the withdrawal of that status without compensation was a violation of the BIT.[26] Accordingly, the usual approach was adopted on the basis of a very broad interpretation of measures that are tantamount to indirect expropriation. It is evident that this interpretative approach, read in conjunction with the emergence of the BIT era, contributed to the denouement of the debate that had previously characterized the legality of stabilization clauses. On this basis, the temporal freezing provisions that used to be inserted in state contracts are now of limited relevance in contemporary investor-state arbitration.

III. The Temporal Determination

Despite the sheer number of indirect expropriation cases to date, no clear distinction has been established between what can be regarded as normative regulatory measures and measures that could be considered likely to result in indirect expropriation. Terms such as "disguised expropriation,"[27] "taking,"[28] measures that are "tantamount to expropriation or nationalization,"[29] or "any direct or indirect measure … having the same effect against

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[21] *Id.* at 492, para. 75.

[22] The ICSID tribunal in Amco v. Indonesia held that where central authorities reply by the confirmative to a request to exercise a foreign investment the legal relationship between the host state and foreign investor could be interpreted as a *sui generis*, comparable to a contract: "The foregoing are the specific features which would allow consideration of the notion that the relationship established between foreign enterprise and a State by an investment application on the one hand and the approval of the same on the other is not identical to a private law contract, so that such relationship should not be characterized as a contract as such, but rather as a *sui generis* legal relationship, comparable to a contract." 1 ICSID Rep. 467 (1993).

[23] *Antoine Goetz*, 15 ICSID Rev. 491 (2000), para. 75.

[24] *Id.* 21 Y.B. Com. Arb. 39 (2001); 15 ICSID Rev. 507 (2000), para. 112.

[25] *Id.* 15 ICSID Rev. 505 (2000), para. 110.

[26] *Id.* at 519, para. 119.

[27] Elettronica Sicula, S.p.A. (U.S. v. Italy), 1989 I.C.J. 15, 71 (July 20), para. 119.

[28] In the Second Restatement *"taking"* was defined as a "conduct attributable to a state that is intended to and does, effectively deprive an alien of substantially all the benefit of his interest in property even though the state does not deprive him of his entire legal interest in the property." American Law Institute, Second Restatement on Foreign Relations Law of the United States, 1962, sec. 192.

[29] *See* United Kingdom-Ukraine BIT, February 10, 1993, T.S. (24) 1993 Cm. 2192, art. 6(1).

investments"[30] should therefore be regarded as indirect expropriations.[31] The common thread running through this nomenclature is that, in each case, the investor is not deprived of its property interest by means of any formal measure. Therefore the temporal determination of the indirect expropriation, for purposes of valuation, is indeed very difficult. Determining "when governmental action that interferes with broadly-defined property rights … crosses the line from valid regulation to a compensable taking"[32] is not without complexity.

A. Direct liability to the host state

The legal regime established by a BIT protects the investor against any measure that is tantamount to expropriation. ICSID tribunals have established definite criteria that must be met before holding that a foreign investor has been indirectly expropriated. It must be shown that the investment was spoiled, i.e., that any economic activity of the investment was rendered useless.[33] It can also be difficult to determine whether a measure or omission of a host state was the sole cause of the loss of an investment's economic value, or whether the impugned measure contributed solely to that loss. It cannot be excluded that external factors, independent of the actions of the host state, may exacerbate the prejudicial effect of an action or inaction by the host state. The adjudicator's examination of this element becomes even more delicate when it is necessary to determine whether the foreign investor's conduct contributed to misjudgments of the investment's economic viability. The consideration of when a measure has indirectly expropriated the investor of its investment is more difficult still when the impugned measure is a creeping expropriation, i.e., one that by its progressive and cumulative effects has resulted in the dispossession of the patrimonial attributes of the foreign investor.[34]

When, on the other hand, the measure or omission of the host state is the principal reason for the loss of the investment, there is of course relatively little difficulty in determining the moment when indirect expropriation occurred. However, the host state cannot be held liable for external factors that have a prejudicial effect on the foreign investor's investment. When, however, a measure or omission of the host state only partially contributed to the loss of the investment, but the host state's liability cannot be determined by a single action or inaction having the effect of rendering the investment void, the host state is directly responsible.

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[30] *See* Argentina-Sweden BIT, November 22, 1991, *entered into force* September 28, 1992, Law No. 24,117 art. 4(1) (Arg.).

[31] For commentary on the scope and implications of the different typologies of indirect expropriations, see Bjørn Kunoy, *Developments in Indirect Expropriation Case Law in ICSID Transnational Arbitration*, 6 J. World Investment & Trade 474–76 (2005).

[32] Marvin Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, December 16, 2002, 18 ICSID Rev. 523–24 (2003), para. 100.

[33] *See* Kunoy, *supra* note 32, at 480–485.

[34] For a definition of creeping expropriation, see G. Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 279 Recueil des Cours 283 (1997-II); *see also Tradex*, 14 ICSID Rev. 246 (1999), para. 197.

The requirement of a direct and substantial link to the impugned measure was explicit in the *Oscar Chinn* case, in which the United Kingdom alleged that the concentration of transport business after the Great Depression in the hands of the Belgian limited liability company *"Union nationale des Transports fluviaux"* (commonly known as "Unatra") had the direct effect of rendering it commercially impossible for a British citizen, Oscar Chinn, to continue his enterprise.[35] The Permanent Court of International Justice agreed to examine the United Kingdom's claim that the alleged monopoly was incompatible with free trade. The court rejected the United Kingdom's arguments and was unwilling to accept the contention that Belgium's conduct had resulted in a de facto monopoly,[36] and it further held that "no enterprise can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits … of an alteration in customs duties; but they are exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State."[37]

It is a well-established principle of international law that state responsibility only arises if there is a direct liability on the part of the state.[38] On that basis, it can be reasonably concluded that events that arise after the impugned measure cannot be taken into account in determining a host state's international obligation to compensate a foreign investor's loss of its investment.

B. The practice of ICSID tribunals

In expropriations *stricto sensu*, seizure of property qualifies as an act of expropriation.[39] In indirect expropriations, this determination is more complex, because the impugned measures may only deprive the investor of one attribute of its property interest, and still qualify as an indirect expropriation.[40] If the taking relates to a creeping expropriation, determining the moment of indirect expropriation becomes especially difficult for the adjudicator. Establishing a specific moment remains crucial, however, because of the bearing it has on the host state's potential obligation to compensate the foreign investor. In *Santa Elena v. Costa Rica*, determining the moment of expropriation for the purpose of valuation was a key issue. The host state, Costa Rica, had expropriated the U.S. investors' investment, and acknowledged that it was bound by international law

[35] Oscar Chinn (U.K. v. Belgium), 1934 P.C.I.J. (ser. A/B) No. 63, at 85 (February 5).
[36] *Id.*
[37] *Id.* at 88.
[38] Phospathes in Morocco (Italy v. France), Preliminary Exceptions, 1938 P.C.I.J. (ser. A/B) No. 74, at 28; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 26 (June 24), para. 56; Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 117 (June 27), para. 226; Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 54 (September 25), para. 78.
[39] G.C. Christie, *What Constitutes a Taking Under International Law*, 38 Brit. Y.B. Int'l L. 323 (1962).
[40] In Middle East v. Egypt the tribunal stated that the economic deprivation of one of the patrimonial attributes was sufficient for characterizing that measure as an indirect expropriation. The tribunal held that when measures adopted by a state have the "effect of which is to deprive the investor of the use and benefit of the investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation.…" Middle East v. Egypt, 18 ICSID Rev. 628 (2003), para. 107.

to pay compensation.[41] The dispute thus related only to the determination of the date on which the investor's property had been expropriated.[42]

The American investors were expropriated by a governmental decree dated May 5, 1978, but they still owned the land that had been purchased for the purpose of building hotels. The host state asserted that the decree of May 5, 1978 was only the first step of the expropriation and did no more than announce its intentions, and that the expropriation was only finally accomplished by the adoption of a decree on July 25, 1987. The tribunal, however, took into account the subjective intentions of the investors and held that a decree

> which heralds a process of administrative and judicial considerations of the issue in a manner that effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property, can, if the process thus triggered is not carried out within a reasonable time, properly be identified as the actual act of taking.[43]

The tribunal further stated that, although the decree of May 5, 1978 was only the first step in the process, it could not be maintained that the decree expressed no more than an "intention" and that in the "circumstances of [the] case, the taking of the Property occurred as of 5 May 1978, the date of the 1978 Decree."[44]

The tribunal's approach is justified considering that the initial decree discouraged the investors from implementing their initial plans with the investment. The first decree deprived the investors of their property interest in the investment, because its effects restricted their ability to exploit the economic utility of the investment and, as a result, they irretrievably lost the value of their investment. Although this was a case concerning direct expropriation, the tribunal's conceptual approach could be interpreted as determining and accepting the first impugned measure where the deprivation of the economic use of the property was the result of several measures — as would be necessary when considering a case of creeping expropriation. One could therefore argue that profitability is an element relevant to the determination of the moment of expropriation.

When a measure does not have the immediate effect of rendering an investment useless, the question arises as to when the indirect expropriation occurred. Is it the date when the initial expropriatory measures took place, or the date when economic activity ceased? The question is important, as its answer provides a basis for determining compensation. In *Antoine Goetz v. Burundi*, the investor was stripped of its free-zone status on May 29, 1995, and consequently lost tax benefits that it otherwise would have enjoyed. However, the investor was free to continue its commercial and economic activity and did so, albeit under different circumstances. It continued its export activities until August 13, 1996, almost fifteen months after the withdrawal of the license.[45] Even though the

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[41] Compania es Desarrollo de Santa Elena S.A. v. Costa Rica, ICSID Case No. ARB/96/1, February 17, 2000, 15 ICSID REV. 191 (2000), para. 68.
[42] *Id.* at 193, para. 74.
[43] *Id.* at 194, para. 76.
[44] *Id.* at 195, para. 80.
[45] *Antoine Goetz*, 15 ICSID REV. 513 (2000), para. 124.

withdrawal of its status had no consequent and immediate effects, the tribunal held that the measure

> *a privé de toute utilité les investissements réalisés et dépouillé les investisseurs requérants du bénéfice qu'ils pouvaient attendre de leurs investissements, la mesure litigieuse peut être regardée comme une "mesure ayant un effet similaire" à une mesure privative ou restrictive de propriété au sens de l'article 4 de la Convention d'investissement.*[46]

Although Affimet continued its business after the withdrawal, the tribunal found that the investor was indirectly expropriated on the day of the withdrawal of its free-zone status, almost fifteen months before its economic activities ceased. In determining the moment from which the investor is subject to an indirect expropriation, it is clear that the ICSID tribunal gave consideration to the enterprise's profitability. This approach might be in conflict with liability principles in international law, as it cannot be excluded that external factors could also have interfered with Affimet's business. This should be seen in the light of the fundamental principle of international law that a state cannot be held responsible if the impugned measure is not directly attributable to the state concerned. Interestingly, the tribunal did not discuss whether the expropriation should be considered as having occurred in May 1995 or August 1996, and found that the date of the indirect expropriation was the date when the license was withdrawn.

As in *Santa Elena v. Costa Rica*, the tribunal was preoccupied with the promotion and security of transnational investments and, as investments are made with the objective of making profits, this could conceptually justify the tribunal's approach. However, it can hardly be considered legitimate to modify general principles of international law to secure the foreign investor's expectations of profitability.

IV. Non-ephemeral Dispossession

To establish that the impugned measure was an indirect expropriation, the dispossession of the property interest in an investment must be non-ephemeral. If the duration and the effects of the deprivation measures *are* ephemeral, however, the host state may be exonerated from responsibility.[47]

A. Duration of the deprivation

In accordance with classical international law, an ephemeral interference with the asset of a third state's legal or natural person cannot be considered as indirect expropriation, if the property is not prejudiced once the interference has ceased. Christie dealt with the issue of the required duration of a taking in order for it to be characterized as

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[46] *Id*. The following is the author's translation: "has deprived the realized investments of all utility and stripped the applicant investors of the benefits that they could have expected from their investments, the disputed measure must be viewed as a measure having a similar effect to a deprivation or restrictive measure of property in the sense of article 4 of the investment treaty."

[47] Christie, *supra* note 40, at 322.

indirect expropriation, and held that the deprivation of property would need to be non-ephemeral.[48]

In this context, it is useful to note that Article 3(a) of the Harvard Project provided that the taking of property can be definitively determined if the unreasonable interference with the property prevents the use, enjoyment or disposal "of the property within a *reasonable period of time* after the inception of such interference."[49] In *Elettronica Sicula*, the International Court of Justice was invited to examine this issue, and found that the requisition of the American plant by the Italian authorities "independently of the motives which allegedly inspired it, *being by its terms for a limited period*, and liable to be overturned by administrative appeal, could not … amount to a 'taking'."[50] The Iran-United States Claims Tribunal established in *Tippetts* that the deprivation of the fundamental property rights of an investor for a "*non-ephemeral*" period could constitute an expropriation.[51]

It is clear from legal doctrine and international jurisprudence that the temporal aspect is considered thoroughly when dealing with allegations of indirect expropriations. The issue is of major importance because if the foreign investor does not prove that the deprivation was non-ephemeral, the interference with the property rights of his investment fails, *ipse jure*, to be characterized as an indirect expropriation.

It would be difficult for ICSID tribunals to deviate from the established principle in international law that a taking can only be determined if it is non-ephemeral. In *Tecmed*, a Spanish investor had invested in a landfill of hazardous waste and was refused renewal of its license after having operated the landfill for two years. The ICSID tribunal held that in accordance with international law, the investment could be considered as having been indirectly expropriated if the deprivation of the foreign investor's property is "not temporary."[52] In *Wena v. Egypt*, an ICSID tribunal was invited to determine whether or not the occupation of a hotel for more than one year was an ephemeral deprivation of the foreign investor's property, and then to establish whether the impugned measure constituted indirect expropriation. The respondent state argued that the one year occupation was an ephemeral occupation and consequently the contested measure could not be legally qualified as an indirect expropriation. The tribunal held that it had no "difficulty finding that the actions previously described constitute such an expropriation. … Putting aside various other improper actions, allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the hotels for nearly a year is more than a ephemeral interference."[53] The ICSID tribunal was ambiguous as to whether the deprivation of a

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[48] *Id.* at 331. *See also* B.H. Weston, *Constructive Takings Under International Law: A Modest Foray into Problem of Creeping Expropriation*, 16 VA. J. INT'L L. 170–73 (1975).

[49] L.B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 549 (1961) (emphasis added).

[50] Elettronica Sicula S.p.A. (U.S. v. Italy), 1989 I.C.J. 15, para. 119 (emphasis added).

[51] Tippetts, Abbett, McCarthy, Stratton (TAMS), Award No. 141-7-2, 6 Iran-U.S.C.T.R. 219 (1984).

[52] Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, May 29, 2003, 19 ICSID REV. 158 (2004), 43 I.L.M. 133 (2004), para. 114. *See* <www.worldbank.org> for unofficial English translation from the original Spanish.

[53] Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, December 8, 2000, 41 I.L.M. 896, 915 (2002), para. 99.

property for one year could be subject to discussion in order to establish whether it was ephemeral and consequently a taking.

In *Middle East v. Egypt*, one of the disputed measures was the withdrawal of an import license from a Greek investor. The respondent state argued that the withdrawal of the license was not permanent and the investor was free to reactivate its imports when it recovered the license. The ephemeral or non-ephemeral nature of the withdrawal was not broached by the host state, rather it relied solely on the non-permanent character of the deprivation. In response to the state's argument that the investor could have resumed its activities after the lifting of the ban, the tribunal stated that it did not

> consider this to be persuasive. An investor who has been subjected to a revocation of the essential license for its investment activity, three years earlier, has good reason to decide that, after that experience, it shall not continue with the investment activity, after the activity is again permitted.[54]

In this case, the tribunal held that the investor had been indirectly expropriated.

In *CMS v. Argentina*, the claimant alleged that the breach of the two stabilization clauses, for duration of thirty-five years in the license conferred to it,[55] was an indirect expropriation of its assets. In granting the license, the host state assured the licensee that (i) it would not freeze the tariff regime or subject it to price controls;[56] and (ii) it would not modify the basic rules governing the license without the company's written consent.[57] Furthermore, Section 9.2 of the license provided that the tariffs should be calculated in U.S. dollars and expressed in pesos,[58] and that the tariffs should be adjusted every six months in accordance with the U.S. Producer Price Index ("PPI").[59] As a result of the enactment of the Emergency Law, the revenues of TGN were frozen at the January 2000 rate and an adjustment to the PPI index was refused. Subsequently, the investor's acquired right of price calculation in U.S. dollars was abandoned. The tribunal rejected the investor's allegation that it had been subject to an indirect expropriation.[60] What is of greater relevance to this study, however, is whether the potential non-permanent breach of the BIT standards could have resulted in a violation of the host state's obligations. The respondent argued that the measures were temporary.[61] The temporary character of the measures were allegedly based on the fact that they were subject to future negotiations,

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[54] Middle East v. Egypt, 18 ICSID REV. 543 (2003), para. 169.

[55] TGN's license was granted by Decree No. 2457/92, December 18, 1992.

[56] Section 9.8 of the License provides *inter alia* that in the event that a price control mechanism compelled the licensee to adjust to a lower level of tariff. It reads: "the Licensee shall be entitled to an equivalent amount in compensation to be paid by the Grantor."

[57] CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, May 12, 2005, 44 I.L.M. 1205 (2005), para. 146.

[58] "Rates have been calculated in U.S. dollars. Adjustments … *shall* be calculated in Unites States dollars." License, *supra* note 57, sec. 9.2 (emphasis added).

[59] "Transportation rates shall be adjusted semiannually pursuant to PPI's variation." License, *supra* note 57, sec. 9.4.1.1.

[60] CMS v. Argentina, 44 I.L.M. 1205 (2005), para. 232. By contrast, the tribunal ruled that the adoption of the measures was a breach of the fair and equitable standard provided for U.S. investors as provided for in Article II(2)(a) of the BIT. *Id.* para. 276.

[61] *Id.* para. 105.

as regulation of the measures was to be completed in 2007.[62] The tribunal refused to accept the arguments of Argentina and stressed that

> more than five years [had elapsed] since the adoption of the first measures in 2000. Delays can be explained with reference to the above-mentioned crisis. However, if delays exceed a reasonable period of time the assumption that they might become permanent features of the governing regime gains in likelihood.[63]

Thus, it is clear that an ephemeral dispossession of the patrimonial attributes of a foreign investment cannot be characterized as an indirect expropriation. The definition of what qualifies as an ephemeral dispossession is in no way standard, but must instead be looked at casuistically.

B. Obligation to mitigate damages

Even after having proved that the impugned measure was non-ephemeral, the investor's claim can be reduced if the host state demonstrates that the investor did nothing to mitigate damages.

In international law, it is generally accepted that a party injured by the non-performance of an obligation of the other party must attempt to mitigate any damage he has sustained. This issue is of major importance in the domain of indirect expropriation case law, because any other allegations as to non-compliance of the obligation to limit the damage sustained would deprive the injured party of its claim for compensation. In the field of indirect expropriation claims, where the expropriation is "disguised," the application of this principle is difficult. This task is rendered even more complicated if the alleged expropriation is a creeping one. In the absence of an ICSID decision that confirms an investor's claim as having been subject to creeping expropriation, this particular point cannot be analyzed.

In *Middle East v. Egypt*, the host state relied, as a subsidiary argument, on the principle of the obligation to mitigate loss in order to exonerate its international responsibility vis-à-vis the investor, or alternatively to reduce the compensation claims of the investor. The host state raised the argument that the investor could have substituted its commercial activity, which consisted of importing Grey Portland cement, with Thermal and White Portland cement, as the import license withdrawal affected only Grey Portland cement. The tribunal held that the obligation to mitigate damages was a general principle of international law and, by virtue of Article 42(1) of the Washington Convention, was applicable to the dispute in question. The tribunal, however, refused to accept the host state's argument that the claimant could have continued to supply cement insofar as it was not prohibited by the decree in question. Though the tribunal

> accepts the Claimants explanation that both the supplying of Thermal and White Portland cement in Egypt and the exportation for other countries, for both of which no evidence has been presented

[62] *Id.*
[63] *Id.* para. 107.

> by the Respondent or can be found in the file were not economically feasible alternatives to the supply of Grey Portland cement barred by the Decree.[64]

The tribunal did recognize that the obligation to mitigate damages was incumbent on the investor. It can therefore be concluded that, had the state provided proof that substitution of the commercial activity was economically viable, the tribunal would have reduced the investor's legal title for compensation — whether or not the deprivation was intended to be temporary.

V. Conclusion

When dealing with allegations of indirect expropriation, ICSID tribunals have broadened the protection conferred on foreign investors, compared with earlier transnational arbitrations in which ICSID jurisdiction was based on a *compromis* or state contract. The temporal issues related to indirect expropriations that have been dealt with in this article clarify this point, as is clearly demonstrated in *Santa Elena v. Costa Rica* and *Goetz v. Burundi*, where profitability has become an important element in determining the moment of the expropriation for the purpose of valuation. The manner in which this element has been applied by ICSID tribunals raises the question of whether this approach is consistent with fundamental principles of international law. This raises yet another question, that is, whether this approach is consistent with the objective of the ICSID Convention, namely to protect the investor as well as the host state.[65] This point was expressly made by the tribunal in *Amco v. Indonesia* when it stated that the Convention is "aimed to protect, to the same extent and with the same vigor the investor and the host state, not forgetting that to protect investments is to protect the general interest of development and of developing countries."[66] Future arbitral decisions may render us wiser as to these questions.

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[64] Middle East v. Egypt, 18 ICSID Rev. 642 (2003), para. 168.

[65] On the Convention's objective, see A. Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 136 Recueil des Cours 394–95 (1972-II).

[66] Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, September 25, 1983, Decision on Jurisdiction, 1 ICSID Rep. 400 (1993), para. 23.