1. Introduction

It is a truism that foreign investment creates a long-term relationship between aliens and host-states, which exposes the former to eventual shifts in the public policies of the latter. To encourage foreign investment within its borders, many states offer foreigners treaty-protections against potential interferences with their property. Because the main interference risked by the alien is the expropriation of his/hers/its property, it is not surprising that the protection against takings is at the centre of what is now called international investment law. Foreign investors require clarity in this regard, but not only them: treaty-protections may constrain the exercise of regulatory powers by the host-state. Foreign investors are highly sensitive concerning any interference against their property, just like host-states are concerning any restriction on their sovereignty. How to protect aliens without unduly limiting the exercise of state powers is today the prime challenge of international investment law.

Two cases illustrate the difficulties of achieving this result, and the consequences of failing in the attempt. On 3 August 2005, an international arbitral tribunal concluded that the USA had not expropriated a substantial portion of Methanex’s investment, as claimed by the Canadian investor who started this arbitration under Chapter 11 of the North American Free Trade Agreement (NAFTA). According to Methanex, a regulation which affects a foreign investor is not expropriatory, and therefore not compensable, if it had been adopted for a public purpose, in a non-discriminatory manner, in accordance with due process, and no specific commitments had been given to the investor by the host-state. The claimant in this case argued for a different approach, then followed recently by Metalclad, another NAFTA Chapter 11 arbitration. On 30 August 2000, this award had stated that the term expropriation includes any interference with property which has the effect of depriving the owner of it, in whole or in significant part, even if not necessarily to the obvious benefit of the host-state. From this viewpoint, the tribunal deemed the measure adopted by Mexico to be expropriatory against the US investor and, as a consequence, compensable. Had the arbitral panel in Methanex followed the approach of Metalclad, the measure adopted by
the USA might have also been considered an expropriation, and compensation would have been awarded to the Canadian investor.

Two opposite rulings, then, for cases involving the application of the same treaty provision to not so dissimilar situations. Can international law provide legal certainty to someone investing abroad, or to the state where that investment is being made, if an essential article guiding their future conduct may be construed in such contradictory ways? This is only an example of a problem that is not exclusive to NAFTA, but is common to all the expropriation provisions included in other investment chapters of economic integration agreements (EIA), or in bilateral investment treaties (BIT).

That aliens should be protected is an old principle of the law of nations. Known to the Romans since Cicero’s time, it was only developed in the 19th century as a consequence of the evolution of world economy. This protective principle offers a minimum standard of treatment to foreigners, which provides essentially for two things: security of the person from injury or restraint, and the preservation of property from political risk in the host-state. That is to say, it provides for the protection of property from potential interferences based on ideological hostility towards foreign investment, nationalism, and changes in industry patterns and domestic state policy considerations. These interferences have generally adopted the form of the taking of foreign property, whether as an outright deprivation or a major infringement of it. The articulation of an area of international law aimed at reducing political risk is a relatively recent development. Known as international investment law, it largely contains today an older and smaller area of the law of nations – the international law of expropriation. The latter is founded on three distinct but closely related concepts: property, taking and compensation.

Rosalyn Higgins observes that the right to hold property reflects a social instinct. As a consequence, it has a very long history. It is not uncommon to find a reference to property in the sources of international law; a definition, however, is hardly ever seen. A certain consensus among lawyers and scholars has evolved over its content, comprising a positive and negative aspect. On its positive side, property is a generally unlimited right of disposal. On its negative side, it is an exclusive right, conferring upon its holder the power to forbid any other to perform an act of disposal. This notion of property is not restricted to tangibles: rights have been accepted as an integral part of the concept of property in international law by tribunals and scholars. Not only the right to hold property, but also its social function have been commonly recognised by conservative and liberal authors as well as Marxist ones. Such a notion,
which can be traced back to medieval times, is found today in virtually all nations. There is an inherent tension in the coexistence of private property and its social function, as the requirements of society sometimes come into conflict with individual property rights. This tension between personal and community interests is at the core of the notion of takings.

There is no unanimously agreed-upon definition of expropriation. The term is generally equated to the taking of property by the state: i.e., to its actual or effective deprivation, either by ousting the owner and claiming the title, or by destroying the property or severely impairing its utility. Exceptionally, taking and expropriation have been distinguished in international case-law. In the *ELSI* case, for instance, the International Court of Justice (ICJ) had to interpret the terms taking and *espropriati*, used in the English and Italian versions – respectively – of a friendship, commerce and navigation treaty (FCN) concluded between Italy and the USA. In that opportunity, the ICJ considered the former to be ‘wider and looser’ than the latter. Some authors have also perceived taking and expropriation to be different. For example, Jan Paulsson and Zachary Douglas distinguish them on their effects. While a taking is non-compensable, they argue, an expropriation requires compensation.

Expropriations have received other names too. In the 1970s, Burns Weston called them wealth deprivations, in a rather unsuccessful attempt to introduce a ‘normatively neutral statement’ that would replace wealth for ‘the more popular “property”’. The other notions of expropriation normally used in doctrine, and sometimes in treaties and judicial decisions, refer to specific forms of takings. Nationalisations are the expropriation of one or more major industries or resources within a general programme of social and economic reform. Rudolf Dolzer and Margrete Stevens call the transfer of property, to nationals of the host-state, indigenisation. Requisition refers to the power of an occupant state to use the resources and services in an occupied state for the maintenance of its military forces, in return for compensation. Takings or expropriation, however, should not be confused with sequestration, defined in comparative law as the action ordered by national authorities under its domestic law, by which the state assumes temporary control over private property belonging to someone subject to its jurisdiction, without transfer of title and without the payment of compensation. An example of this form of measure is the seizure of property as a result of a sanction imposed by the state in the exercise of its police-powers. In all, there is an extensive literature on the terminology and classification of expropriations, a topic that remains not fully clear, consistent or established, probably because it originates in domestic law and practice, and is not easily translated to the international level.
International law traditionally recognises the state’s right to expropriate foreign property, under certain conditions. The state measure resulting in a deprivation will be considered lawful under international norms if it is for a public purpose, of a non-discriminatory nature and followed by the payment of compensation. More recently, treaty and international case-law have added a fourth requirement: due process of law in the execution of the respective measure.\(^{27}\) If the national authorities fail to comply with any of these requirements, the taking would constitute a confiscation.\(^{28}\) The state would incur international responsibility and would be liable for breaching the minimum standard governing the treatment of aliens. These norms only come into play where the property of foreigners is involved: international law does not generally provide a remedy to domestic claimants for the expropriation of their property by their own authorities.\(^{29}\) These apparently simple rules have lacked, however, clarity not only at the moment of establishing the time, form and amount of compensation that should be paid in case of a lawful or even an unlawful expropriation, but also at the moment of finding whether compensation is due at all.

According to the 2001 Articles on State Responsibility of the International Law Commission (ILC), a wrongful act entails two obligations for the responsible state under general international law: cessation and reparation.\(^{30}\) The latter was expressly recognised in 1928 by the Permanent Court of International Justice (PCIJ), in an often-quoted passage from the *Chorzow Factory* case:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.\(^{31}\)

In conformity with Article 34 of the ILC’s Articles, full reparation for the injury caused by an internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.\(^{32}\) Restitution is the re-establishment of the situation which existed before the wrongful act was committed, when it is materially possible and the burden derived from it is proportional to the benefit to be
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obtained. It might involve returning physical assets, or paying the replacement value for damaged assets or the costs for their repair, as long as the respective assets are replaceable and marketable in a used condition. Restitution should normally prevail over compensation in international law. This means that the obligation to compensate will come into play only when the injury is not made good by restitution, covering any financially assessable damage, including loss of profits. In many cases it is simply not possible to restore the situation that existed before the commission of the wrongful act. For this reason, states and other subjects of international law commonly seek compensation, which will normally consist of a monetary payment. Its determination is, therefore, an essential aspect of international law.

Compensation is also one of the requirements of a lawful taking. In doctrine, this term is distinguished from that of damages, which refers to the consequence of a breach of an international obligation. No such obligation is violated when a state lawfully expropriates foreign property. The ILC made no distinction between compensation and damages in its Articles, largely because it relied on the case-law of the PCIJ and the ICJ, and neither of these tribunals has distinguished them carefully in their judicial decisions. The issue is further confounded by the fact that international case-law generally recognises the same financial effect for both lawful and unlawful expropriations. The practical difference between the two types of takings is usually found elsewhere – in the obligation of restitution, which would only originate from the commission of a wrongful act, like an unlawful expropriation. However, as Irmgard Marboe points out:

Claimants in their written and oral submissions sometimes rely on the standard of compensation for a lawful expropriation, even if they are of the opinion that the expropriation was unlawful. This can be explained by the fact that restitution is often not regarded as the best or the most desirable remedy. Claimants and tribunals thus frequently turn immediately to the secondary remedy, the 'compensation'. Furthermore, the choice of this standard perhaps is considered to be helpful for the acceptability of their claim by the court or tribunal and by the respondent State because it does not ‘punish’ the State for having acted illegally.

The problem of compensation was highly debated by capital-importing and capital-exporting states, after the emergence of the notion of nationalisation in the first half of the 20th century, particularly in regard to the question of the amount of compensation required for an expropriation to be considered lawful. This issue has been largely settled by treaty practice in the last decades. Ironically, the same changes in
international economy and politics that brought the clarification of the problem of compensation have highlighted a long-present and, until not so long ago, dormant issue in the international law of expropriation: that of indirect takings.45

Expropriations may occur as an outright taking or as measures having an equivalent effect. Normally referred to as direct expropriation, the former may come as a nationalisation or an expropriation, depending on whether the actual taking is of a general kind or is property or enterprise specific.46 Direct expropriation has been defined in recent international case-law as ‘the forcible appropriation by the State, of the tangible and intangible property of individuals by means of administrative or legislative action’.47 Historically, these outright takings were the first and most common form of expropriation, but are nowadays rare.48 Only occasionally, modern cases relate to direct takings.49 It is generally easy to establish when a direct expropriation has occurred, for expropriations are normally adopted through legislative or administrative measures. If one does occur, compensation is due, no matter what the cause of the taking was.50 Indirect expropriation refers to those measures that, falling short of a direct taking, amount in their effects to one, thus requiring compensation. This type of taking, the form prevalent today, has received different names and definitions in international law. The terms *de facto*, disguised, creeping, consequential, or constructive expropriation, as well as regulatory takings, stress certain aspects of indirect expropriations in their definitions. The development of these notions has been progressive, which explains why some of them relate to behaviour that would not have provided a sound legal basis for an expropriation claim under an FCN, but would do so under a bilateral investment treaty (BIT).51

Contrary to a *de jure* or formal taking, a *de facto* or informal one involves no express legislative or administrative measure announcing the expropriation. The benefit of the property is, however, effectively neutralised by the corresponding governmental act.52 The name disguised expropriation indicates that it is not visibly recognisable as a taking.53 The notion of creeping expropriation emphasises the slow and incremental encroachment of the property rights of the alien by a group of measures that only retrospectively will become evident as a taking.54 Creeping expropriations are comprised of a number of elements, none of which can separately constitute the international wrong.55 Modern investment treaty case-law has defined them as:

"a form of indirect expropriation 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." 56
Consequential expropriations are closely related to the concept of good governance, the main objective of international investment law.\textsuperscript{57} According to Michael Reisman and Robert Sloane, they refer to the failure of the host-state to create, maintain and properly manage the legal and administrative regulatory framework established in an investment treaty.\textsuperscript{58} A constructive expropriation points to the fact that effects similar to a taking are produced, though externally the situation remains unchanged.\textsuperscript{59} Lately, regulatory takings have been added to the lexicon of international law to designate those measures that relate to the exercise of the host-state’s powers to govern the social and economic activity within its boundaries. This concept derives from the doctrine on the Fifth Amendment of the US Constitution, and although it has not yet been formally used in treaties, it can be recognised in modern forms of expropriation described as tantamount or equivalent to the latter.\textsuperscript{60} All these forms of indirect takings are subsumed in the following definition: state measures that are not openly expropriatory, but result in the deprivation of property.\textsuperscript{61} Or as the tribunal in Parkerings-Compagniet said, ‘the negative effect of government measures on the investor’s property rights, which does not involve a transfer of property but a deprivation of the enjoyment of the property’.\textsuperscript{62} This notion is already recognisable in the decisions of early arbitral tribunals and the PCIJ.\textsuperscript{63} Illegality is the general rule for indirect expropriation, since normally aliens receive no compensation from the host-states adopting the challenged measures.\textsuperscript{64}

The conceptual analysis of indirect takings only illustrates how they may appear in practice, but leaves its main question unanswered: when does a state measure become compensable, as an indirect expropriation, under international law? The problem is somehow shrouded by the fact that not all expropriations give rise to compensation. In this respect, the term police-powers is a source of significant confusion.\textsuperscript{65} Because in international law the state has a right to regulate society, it can interfere with property to the point of deprivation without paying compensation, but only in exceptional circumstances,\textsuperscript{66} for instance in those described under its criminal law, or in certain cases of imminent and grave danger to the public health. Notwithstanding exceptions of this kind, the answer to the main question lies in the degree of interference required to consider a regulatory measure as expropriatory.\textsuperscript{67} Two factors are relevant here: the severity of the impact of the interference on the affected property, and the duration of the measure.\textsuperscript{68} Besides degree, the respect of the foreign investor’s legitimate expectations also plays an important role in indirect takings.\textsuperscript{69} As Rudolf Dolzer and Christoph Schreuer remark on the issue:
Not surprisingly, significant lacunae and open issues remain in the law governing indirect expropriation. Domestic courts have grappled with the same issues much longer. Despite the benefit of constitutional texts and the homogeneity of their national legal systems, they have been unable to resolve all problems.70

The only possible definitive approach to the problem of indirect takings is case-by-case. This has been widely accepted in doctrine, and expressly recognised in recent treaties.71 It is obviously not a method that is specific to the issue of indirect expropriation, but one that will be used in most instances in which an adjudicator applies legal standards to a particular set of facts.72 In the words of Paulsson and Douglas:

[t]he only real guidance with respect to the threshold of interference for state measures affecting investments is the product of inductive generalizations from the findings of international tribunals and domestic courts as to the factual circumstances that give rise to a [...] taking.73

Decision-makers in international law normally refer to the statements of other tribunals. According to Article 38 of the Statute of the ICJ, judicial decisions are subsidiary means for the determination of the rules of law. Though not a proper source of international law, they will be generally treated as authoritative statements by other decision-makers. Judicial decisions will aid them to settle a dispute in two situations: when there is no applicable treaty or clear interpretation of an existing one, and when it is not easy to ascertain the existence or meaning of an international custom or general principle of law.74

The PCIJ and the ICJ have seldom referred to indirect expropriation in their judgments.75 The case-law on this issue derives mainly from the ever-growing number of arbitral awards in investor-to-state disputes, mostly based on BITs or investment chapters of EIAs.76 Outside international investment law, the protection of property from deprivation has been addressed by regional human-rights bodies, particularly in Europe.77 Important judicial decisions for the international law of expropriation also emerge from ad hoc dispute-settlement institutions, most notably the Iran–United States Claims Tribunal (Iran–US CT).78 The case-law of US domestic courts is highly instructive as well, and should not be overlooked in any study on the law of indirect expropriation.79 In this regard, Andrew Newcombe and Lluís Paradell rightly point out that:

The importance of the jurisprudence rests, however, not in short-hand definitions of what constitutes expropriation that can be applied as a template
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case-by-case. Rather, its importance lies in identifying a number of legally significant factors that must be assessed in deciding an expropriation claim.80

Two doctrines provide guidelines on the threshold problem, i.e. that of defining the boundaries between non-compensable state measures and compensable indirect takings.81 The first one is the effects doctrine. According to this position, the central factor for establishing whether an indirect taking has occurred is the result of the governmental measures on the affected property. The purpose of these measures is not essential to this determination, nor is the fact that the actual title of the asset remains with the owner.82 The effects approach goes back to the 1922 Norwegian Shipowners claim and the 1928 Chorzow Factory case.83 This view has received the express or tacit support of many scholars.84 Its constitutive elements are already found in the concept of indirect taking given by George Christie in the 1960s:

[an] interference with an alien’s property [that] amount[s] to expropriation even when no explicit attempt is made to affect the legal title to the property, and even though the respondent State may specifically disclaim any such intention.85

The second position is the so-called police-powers doctrine. Besides the effect on the alien’s property, it takes into account the purpose and context of the respective measures when establishing whether the regulatory action of the state amounts to an indirect expropriation. This doctrine maintains that non-discriminatory measures adopted for a legitimate public purpose are necessarily lawful under international norms, and do not give rise to compensation.86 The police-powers solution can be traced back to the 1934 Oscar Chinn case.87 It has been recently endorsed by last-generation US BITs and free trade agreements (FTAs).

Both positions offer useful guidance to any decision-maker addressing the threshold problem. Nonetheless, choosing one doctrine or the other is not a matter of indifference for the chief actors of international investment law. Dolzer and Stevens rightly explain that:

to the investor, the line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation (either from the host State or under an insurance contract). For the host State, the definition determines the scope of the State’s power to enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due.88
The effects doctrine clearly stresses the interests of the foreign investors; the police-powers position, those of the host-state. Until recently, an effects approach had been the general rule for the solution of the threshold problem in international law. However, not only the regulatory powers of developed states might be challenged at present, but also those of developed countries. The police-powers doctrine, once exceptional, has thus strongly re-emerged, particularly in North America.

The protection of property in international law has been traditionally based on one core principle: the international minimum standard. Without it, there is no international law of expropriation. This principle has historically received the full support of capital-exporting countries – until not so long ago, an exclusive club composed only of developed states. Other countries, capital-importing and mostly developing, defended another principle: the national standard of treatment. Because the content of this standard was provided by the domestic laws of the undeveloped states receiving foreign investment, capital-exporting countries staunchly refused to accept it as the sole basis for the protection of aliens in international law. Nevertheless, the current flow of foreign investment is not unilateral, as it was before. Some developing states have become capital-exporting countries, while several developed states have become capital-importing ones. This situation has prompted the latter to endorse the once-rejected standard, but with an important caveat: the only national treatment accepted must be similar to that given by its domestic law.

The USA, followed by Canada, have tried to avoid unwanted applications of their BITs, and of the investment chapters of their EIAs, through interpretative declarations aimed at decision-makers in eventual investment disputes. These pragmatic efforts have found a much-needed theoretical background in the doctrine of global administrative law (GAL), generally developed in the USA and Europe. A somewhat related approach advocates the application of the proportionality principle developed in European human rights law, as a possible solution to the threshold problem of indirect takings. The intent of the host-state and the fair balance test now threaten to replace the deprivation of the foreign investor’s property as the chief factor shaping indirect expropriations. But, are these solutions in conformity with international investment law, as it currently stands? And, do they provide more legal certainty to investors and states than the effects rule?

The present work is aimed at offering guidelines to identify non-compensable state measures and compensable indirect expropriations, according to international law. For this purpose, the next chapters analyse...
the international law of expropriation, focusing on the solutions to the problem of indirect takings adopted in the different fora of contemporary international law, in which property and its deprivation have been addressed. Chapter 2 outlines the evolution of the law of expropriation in the 19th, 20th and 21st centuries. Interferences with property under international human rights law are studied in Chapter 3, which traces the difficulties in incorporating property as a human right in multilateral instruments, and its progressive recognition in the regional systems of Europe, the Americas and Africa. This third chapter is centred on the case-law of the European Court of Human Rights, the most developed, complex and influential jurisprudence on the issue of the protection of property in this area of international law. The work of the Iran–US CT is addressed in Chapter 4. It deals with the judicial interpretation and application of the concepts on which the competence of this tribunal was based: expropriations and other measures affecting property rights. Even though most of the case-law of the Iran–US CT pre-dates the emergence of international investment law, arbitral panels in investor-to-state disputes have generally followed its views in aspects such as the requirements of a legal expropriation and the threshold problem of indirect takings.

Foreign investment and its expropriation, as regulated in bilateral treaties and construed in international arbitration, are examined in Chapter 5. This part analyses FCNs and BITs, centring on the latter. The problems of degree and intent, and the issue of legitimate expectations, are addressed here. Chapter 6 studies multilateral treaties currently protecting property from expropriation, and their case-law. This section surveys the failed attempts to establish a multilateral framework for the protection of foreign investment, as well as relevant soft-law instruments on the topic. Chapter 7 assesses, from a legal perspective, the new interpretation given to the national treatment standard by certain entities and individuals in mostly developed countries, and the purported application of the proportionality principle of European human rights law to the threshold problem in international investment law. This last part explains the rationale behind the rules and principles of the international law of expropriation, and the role of good governance in the reduction of political risk, relating the protection of property against takings with the rule of law – i.e. with the stable, predictable, consistent, transparent and coherent legal and administrative framework at present required from states by investment treaties and regional human rights conventions.
NOTES


3. *Metalclad Corporation v. United Mexican States*, NAFTA, ICSID case No. ARB(AF)/97/1, Award, 30 August 2000, para. 103.

4. Ibid., paras. 105–7 & 112.


6. Dunn (1928), at 176.


10. See ibid., 269.


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13.


14. For a comparative account of expropriation, from an historical point of view, see generally S Reynolds, Before Eminent Domain: Toward a History of Expropriation of Land for the Common Good (2010).


24. In comparative law, the term confiscation is sometimes used as sequestration. See e.g. Wortley (1959), 38–45 & 105; Newcombe and Paradell (2009), 324–5; and S Nikiéma, L’expropriation indirecte en droit international des investissements (2012), 99–100.

25. See e.g. the distinction between vertical and horizontal state-measures and its application to the law of expropriation, in Nikiéma (2012).


27. See Chapter 5 below.

28. Crawford (2012), 621. Some authors refer to confiscation as spoliation. See e.g. Wortley (1977), 242; Newcombe and Paradell (2009), 325; and Nikiéma (2012), 98–9.


Indirect expropriation in international law

32. See Art. 34 of the ILC Articles.
33. See Art. 35 of the ILC Articles.
35. The primacy of restitution can be traced back to the Chorzow Factory case. Arts. 35 and 36 of the ILC Articles refer to it too. See Crawford (2005), 213–14; and Marboe (2006), 744.
36. See Art. 36 of the ILC Articles.
40. This situation has been exceptionally and properly criticised by tribunals, judges and authors. See Marboe (2006), 726–8. See also D Bowett, ‘State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach’, (1988) 59 BYIL 49, at 61; G Sacerdoti, ‘The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties’, (2000) 1/1 JWIT 105, at 123; and Dolzer and Schreuer (2012), 100.
41. See Dolzer and Schreuer (2012), 100–1.
42. Marboe (2006), 728.
44. See Chapter 2 below.
45. The literature on the topic is illustrative of this. Even though there are numerous articles on indirect expropriation, monographs on the issue are scarce. See e.g. Robert-Cuendet (2010); and Nikiema (2012).
49. See e.g. Franz Sedelmayer v. The Russian Federation, SCC arbitration, Award 7 July 1998; Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID case No. ARB/96/1, Award, 17 February 2000; Swembalt AB, Sweden v. The Republic of Latvia, UNCITRAL arbitration, Award 23 October 2000; ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID case No. ARB/03/16, Award, 2 October 2006; Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, ICSID case No. ARB/05/6, Award 22 April 2009; Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt, ICSID case
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No. ARB/05/15, Award, 1 June 2009; and Ioannis Kardassopoulos v. Republic of Georgia, ECT, ICSID case No. ARB/05/18, Award, 3 March 2010.


See Waste Management, Inc. v. United Mexican States, NAFTA, ICSID case No. ARB(AF)/98/2, Award, 2 June 2000 (‘Waste Management 1’), Dissenting Opinion of Keith Hight, para. 17.


57. See e.g. Salacuse (2010), 6–9, 109–11 & 114; and Vandevelde (2010), 2–4; and Dolzer and Schreuer (2012), 24–5.


64. See e.g. A Newcombe, ‘The Boundaries of Regulatory Expropriation in International Law’, (2005) 20/1 ICSID Rev. 1, at 10. See also Newcombe and Paradell (2009), 323; Vandevelde (2010), 277–8; and Dolzer and Schreuer (2012), 101.


69. See e.g. Salacuse (2010), 311–13; and Yannaca-Small (2010), 474–6.
70. Dolzer and Schreuer (2012), 112.
73. Paulsson and Douglas (2004), 146.
75. See Chapter 7 below.
76. See Chapters 5 & 6 below.
77. See Chapter 3 below.
78. See Chapter 4 below.
79. See Chapters 5, 6 & 7 below.
82. This doctrine is better known as ‘sole-effect’, a name given by Rudolf Dolzer. Dolzer (2003), 79–90. See Hoffmann (2008), 156; and Nikièma (2012), 141. Such a name, however, is not used throughout the following pages because it can be misleading: the effect is a relevant factor in finding a compensable indirect expropriation, but not the only one. See Chapter 7 below.
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86. Heiskanen (2003), 177.

87. See Oscar Chinn (UK v. Belgium), PCIJ, Judgment, 12 December 1934, (1934) PCIJ Rep. Series A/B No 63, See also Dolzer and Bloch (2003), 159. An embryonic version of this view can be found in Dunn (1928), 180.


90. See e.g. the GAL Project at New York University School of Law, available at http://www.iilj.org/GAL/ (last visited 30 June 2013); or the project of the Max Planck Institute for Comparative Public Law and International Law, titled ‘Transnational Private–Public Arbitration as Global Regulatory Governance: Charting and Codifying the Lex Mercatoria Publica’, available at http://www.mpil.de/ww/en/pub/organization/lex_mp.cfm (last visited 30 June 2013). See Chapter 7 below.