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Editorial

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Quand les pères fondateurs ont pensé l'Europe de l'après-guerre et après le constat de l'échec politique de la Communauté européenne de défense, ils ont songé à l'économie qui a constitué le centre de la nouvelle intégration régionale qu'ils créaient sous la dénomination « Communauté économique européenne ». Ils pensaient que si les relations économiques étaient renforcées, les pays en cause hésiteraient beaucoup à se faire la guerre. L'économie était donc considérée comme un garant de la paix. Depuis ce temps, et même si certains des pères fondateurs ont ensuite affirmé que si c'était à refaire ils commenceraient par la culture, l'économie est demeurée l'axe essentiel du développement des relations internationales et de la mondialisation. De nombreuses autres intégrations régionales ont été créées, les traités bilatéraux et multilatéraux sur les investissements se sont multipliés, si bien que le droit international a profondément évolué pour prendre en considération des intérêts qui n'existaient pas encore il y a un demi siècle.

C'est pourquoi, le comité de rédaction de forum a choisi de consacrer le thème récurrent du présent numéro à la notion d'expropriation indirecte et de son traitement en droit international. Sous la direction éclairée de Maurizio Brunetti qui signe l'introduction, de nombreux auteurs ont participé à la réflexion autour d'un thème qui, plus que tout autre peut-être, montre à quel point le rôle de l'Etat est là encore mis à mal allant jusqu'à vouloir lui dénier ses pouvoirs normatifs. Dans ce contexte, il n'est peut-être pas fortuit que l'on soit à nouveau confronté à une opposition nord/sud dont on ne perçoit pas clairement tous les enjeux.

C'est cette même problématique qui est posée de manière très aiguë et préoccupante dans la gestion planétaire de l'eau. Forum tente de suivre aussi souvent que possible les débats organisés autour de ce thème. Nous sommes donc heureux de publier le compte rendu de Karen Franz sur le troisième forum mondial de l'eau qui s'est tenu au Japon en mars 2003. Espérons que les 100 nouveaux engagements, par lesquels le forum s'est conclu, ne resteront pas lettre morte comme tant d'autres engagements internationaux de ces dernières années, justifiant toujours et encore le fameux brocard : « les traités, ces chiffons de papier ». Mais Karen Franz nous donne des motifs d'espérer puisqu'elle indique que ce forum a permis une transition majeure en ne prenant plus l'eau comme un produit mais comme un bien commun mondial. Ce serait alors une pierre supplémentaire à poser pour la

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fondation de cette nouvelle notion dont nous avons tant besoin non seulement pour l'eau mais dans bien d'autres domaines, comme la culture par exemple.

Dans toutes ces réflexions, on ne peut que s'interroger de manière répétée sur la structure et la texture de la norme internationale la mieux à même pour réguler ces problèmes complexes. Or c'est ce à quoi la Société française pour le droit international a consacré son colloque annuel dont un bref aperçu nous est donné par Michel Cosnard. La pratique joue en effet un rôle constamment accru dans l'établissement du droit international aux côtés des modes de création plus classiques. Ce n'est pas Elihu Lauterpacht qui pourrait s'en plaindre, lui qui a consacré sa vie à cette pratique et lui en a donné, plus que tout autre peut-être, ses lettres de noblesse dans des rôles très divers. Son étonnante et attachante personnalité ressort à merveille de son profil écrit de manière inspirée par Frances Meadows. Enfin, l'actualité récente ayant été marquée par l'adoption par la Convention d'un projet de constitution européenne, Caspar Veldkamp, nous en énumère les points principaux ainsi que les enjeux et dresse un bilan du travail de la Convention

A l'heure où nous écrivons cet éditorial, Forum prépare déjà le numéro 4 qui sera consacré à l'état du droit international et de la gouvernance mondiale après la seconde guerre en Iraq. Les contributions de nos lecteurs sont les bienvenues sur ce sujet difficile.

In the News / Actualité

A Draft Constitution for Europe

CASPAR VELDKAMP*

At their late-June summit near Thessaloniki, Greece, European Union leaders were presented with the draft of a European Constitution by the president of the Convention on the Future of Europe – former French president Valéry Giscard d'Estaing.

The text is meant to be the draft of a new European Union treaty, but it aspires to be more than a mere successor to EU treaties such as the Single European Act and the treaties of Maastricht, Amsterdam or Nice. If the draft text succeeds in becoming law, it might become the most important text since the Treaty of Rome of 1957 and a real Constitution for Europe.

The draft text of the constitutional treaty clarifies the Union's powers, classified in part I and more precisely defined in part III of the draft, and reduces its means of using those powers from fifteen to six legal instruments. It incorporates the existing Charter of Fundamental Rights into European law as part II of the Constitution. It establishes a single legal personality to the Union, so that the EU will be able to sign international treaties in its own right. It enshrines the primacy of European law over the law of member states as a constitutional principle. It recognizes Ruud Lubbers' Maastricht doctrine of "subsidiarity" as a safeguard against expansion of unnecessary EU power towards member states. And it includes the first formal statement that a country can leave the EU – at two years' notice.

The text would mean several changes for the three main actors in EU decision-making – the European Commission, member states, and the European Parliament. The draft proposes a package of reforms with serious impact on the structure and character of the Union. For example, it proposes a new kind of presidency of the EU leaders' European Council summits meetings, elected by the EU's national prime ministers from their own ranks for a two-and-a-half-year term, to replace the current one of half-year rotations between the leaders of the individual member states. It combines the functions of the current High Representative for foreign affairs, Javier Solana and the Commissioner for external relations, Chris Patten, to

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one EU "foreign minister". It extends the proven *méthode communautaire* as well as decision-making by qualified majority voting (QMV). Particularly with respect to Justice and Home affairs, it would leave less for national governments to decide alone. This will greatly affect policies on refugees and asylum (and therefore some aspects of immigration policy) and will extend the EU's reach into criminal law.

The text simplifies the weighing of votes between member states by proposing a system whereby a majority will be constituted by a simple majority of states equaling at least 60% of the population of the EU, replacing the amazingly complicated formulas on voting weights of the Nice Treaty. It further strengthens the authority of the European Parliament and reforms the internal composition of the European Commission. Thus, it undertakes an effort in further restructuring of the EU's political mechanisms, which are so often still designed basically for a European integration process of its six initiators (Germany, France, Italy, the Netherlands, Belgium and Luxembourg), instead of an EU of soon-to-be twenty-five member states, ranging from Poland to Spain and from Greece to Estonia.

But the impact of the new text can be far bigger than merely creating a new institutional step on the road towards further European integration. The package was drafted by a 105-member "Convention" composed of members of national parliaments and the European Parliament, as well as government representatives. This was due to a willingness to change the way of EU treaty drafting after the Nice European Council meeting of December 2000, which had become a mess of power brokering and political deals between European leaders, lacking coherence and a common vision to go forward. The Convention was meant to do things differently, with more democratic legitimacy, constant interaction with citizens, generating debate on Europe's future and forging a common vision.

Did the Convention bring such "systemic change" to the way in which European treaties are drafted? Hardly, as its participants kept quarreling on various technocratic treaty aspects instead of working on a true democratic breakthrough, and not attracting much outside attention or public understanding. Moreover, member states will still undertake their "real" negotiations among each other in an Intergovernmental Conference (IGC) that might degenerate into the usual kind of EU negotiations such as at the IGCs that were set up to draft the treaties of Maastricht, Amsterdam and Nice. The IGC that is to discuss the new treaty will start this fall and probably result in a text to be signed in late May or the beginning of June 2004, right after the accession of the ten new member states and just before the European Parliament's June 2004 elections. Individual member states have already indicated some reservations on specific topics. Finally, after sixteen months of debate in the Convention, some key items, including the introduction of QMV

on foreign policy and taxation matters, were left largely unresolved since the Conventioneers were unable to find common ground.

On the other hand, the Convention did produce a quite coherent set of proposals, and it has introduced some important innovations and remained realistic in its goals. It has produced a text that member state governments cannot ignore. It heightens public scrutiny of whatever power broking the member states will undertake. In that sense, the Convention has succeeded. If the Convention's draft will lead to a coherent treaty text coming out of the IGC, the Union will have taken an important new step in its continuous quest for reform.

A new treaty text might indeed become a real Constitution for a European Union, which, although often dramatically lacking coherence in its external relations, reflects a unique extent of internal cooperation, nowhere else or ever seen among independent nation states, something completely *sui generis* in the fields of international law and international relations. One roadblock will remain, however: ratification by each of the then twenty-five EU member states. Some member states, such as Denmark and Ireland, have already announced a referendum on the new treaty; others, such as the Netherlands, are discussing it or, such as France, are outright fearing it. Will member state governments be able to convince their national parliaments or general publics to vote for ratification? "We the people" have often been absent in the elitist European decision-making of the past decades. That will not be possible any more. The real democratic test will definitely follow.

Recurring Themes / Thèmes récurrents

Indirect Expropriation in International Law / L'expropriation indirecte en droit international

Introduction

Investment-treaty litigation, so popular in recent years, has kindled the debate on indirect expropriation of property under international law. In the context of the North American Free Trade Agreement ("NAFTA") investor-state arbitration mechanism in particular, foreign investors have asserted claims that certain regulatory measures taken by NAFTA State Parties constituted indirect expropriations of their property. Some point to the NAFTA experience to argue that affording foreign investors access to investor-state arbitration mechanisms that allow them to challenge, as "expropriations" or "measures tantamount to expropriation," regulatory measures will lead to a wave of litigation and will result in states' unwillingness or unability to regulate areas of public concern, such as health and the environment. With respect to NAFTA itself, critics assert that the dispute-resolution mechanism available under its Chapter 11 has been hijacked by private corporations seeking to broaden the definition of expropriation under international law and force State Parties to settle claims for huge amounts. Others argue, by contrast, that the inclusion of takings clauses in investment treaties and the availability of investor-state arbitration mechanisms ensure a non-discriminatory and fair treatment of foreign investors and consequently are necessary to create a favorable investment environment that benefits everyone.

As the foregoing suggests, the debate on the definition of indirect expropriation revolves, to a great extent, around the need to strike the appropriate balance, in investment treaties, between the interests of foreign investors and the right of a state to regulate in the public interest. How much protection should be afforded the property rights of foreign investors? Some argue that the state – and, ultimately, the taxpayer – should not be required to act as the insurer of last resort of the value of foreign investments affected by governmental regulations pursuing a legitimate public purpose; the effects of regulations on the value of foreign property represent the materialization of a political risk, the consequences of which the foreign investor must bear. Others argue, in contrast, that it is not for the foreign investor to bear, in each and every case, the financial brunt of governmental regulations aimed at some public welfare purpose; if the effect of a regulation on an

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investment is that of an expropriation, the state must compensate the foreign property owner.

Against this background, two doctrines have emerged from the indirect expropriation jurisprudence – one that favors the interests of foreign investors – the "sole-effect" doctrine, as Rudolf Dolzer and Felix Bloch have termed it – and another that favors the right of the state to regulate – the "police-powers" doctrine, as Veijo Heiskanen calls it. Pursuant to the "sole-effect" doctrine, the crucial factor in determining whether an indirect expropriation has occurred is solely the effect of the governmental measure on the property owner; the purpose of the governmental measure is irrelevant in making that determination. In the oft-cited *Tippetts* case, the Iran-United States Claims Tribunal ably encapsulated the essence of the "sole-effect" doctrine: "The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."[1] The "police-powers" doctrine, on the other hand, also considers, in establishing whether a regulatory measure amounts to an expropriation, the purpose and context of the measure.

Rudolf Dolzer and Felix Bloch point out that, thus far, neither of the two doctrines can be characterized as dominant or as representing the mainstream of international thinking, though the more recent jurisprudence of arbitral tribunals seems inclined to shift the focus of the analysis "away from the context and the purpose to the effects on the owner." In connection with the latter, the recent award by a NAFTA Chapter 11 arbitral tribunal in *Metalclad Corp. v. United Mexican States* epitomizes, along with *Tippetts*, the "sole-effect" approach.

In 1993, Metalclad Corporation, a United States company, purchased the Mexican company Confinamiento Tecnico de Residuos Industriales, S.A. de C.V. ("COTERIN") in order to acquire, develop, and operate the latter's hazardous-waste transfer station and landfill in Guadalcazar, Mexico. Although the Mexican federal and state governments had authorized COTERIN to construct and operate the landfill, the Municipality of Guadalcazar denied the municipal construction permit; subsequently, the local Governor issued an ecological decree, declaring the area encompassing the landfill to be a "Natural Area for the protection of rare cactus." As a result, the operation of the landfill was precluded. The *Metalclad* Tribunal, among other things, held that the Municipality's conduct in denying the construction permit, "taken together with the representations of the Mexican fed-

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[1] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2 (29 Jun. 1984), *reprinted in* 6 Iran-U.S. C.T.R. 219, 225-26.

eral government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount[ed] to an indirect expropriation."[2] The *Metalclad* Tribunal further held that "the implementation of the Ecological Decree" by the local Governor "would, in and of itself, constitute an act tantamount to expropriation."[3] Notably, the *Metalclad* Tribunal considered the "motivation or intent of the adoption of the Ecological Decree" to be of no consequence to the finding of expropriation.[4]

In reaching these conclusions, the *Metalclad* Tribunal held that expropriation under NAFTA included not only open, deliberate, and acknowledged takings of property, "but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[5] Certain segments of the legal community find *Metalclad's* definition of indirect expropriation to be overly broad and, by legally ending the police-power rule, detrimental to the regulatory sovereignty of states, including their ability to regulate vital interests, such as the environment; in short, *Metalclad* is investor-friendly and environment-unfriendly. Alain Prujiner discusses this controversial award and its legal and political implications.

The Iran-United States Claims Tribunal to date has rendered approximately sixty expropriation awards. Relatively few of those cases have involved formal expropriations of property, so the bulk of the Tribunal's decisions on takings relates to indirect expropriation. Because the takings claims before the Tribunal presented many different factual situations, the Tribunal has had the opportunity to examine a wide variety of state actions alleged to be indirect expropriations. In addition to the fundamental question of what constitutes a compensable taking under inter-

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[2] *Metalclad Corp. v. United Mexican States*, Award (ICSID (Additional Facility) Case No. ARB (AF)/97/1), 30 Aug. 2000), para. 107, *reprinted in* 16 ICSID Rev.- Foreign Inv. L.J. 168, 196 (2001).

[3] *Id.* para. 111, 16 ICSID Rev.- Foreign Inv. L.J. at 197.

[4] *Id.*

[5] *Id.* para. 103, 16 ICSID Rev.- Foreign Inv. L.J. at 195.

Mexico challenged the *Metalclad* award in the Supreme Court of British Columbia. While holding, *inter alia*, that the award's finding of expropriation based on the pre-Ecological Decree conduct of the Municipality was beyond the scope of the submission to arbitration, the Court upheld the award with respect to the finding of expropriation based on the Ecological Decree. *See United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 664 (2 May 2001), *available at* <www.courts.gov.bc.ca>.

national law, the Tribunal has addressed other important questions, including those relating to the date of a taking, the attributability of expropriatory actions to the state, the standard of compensation, and the valuation of property. In its indirect-expropriation decisions, the Tribunal has largely followed the "sole-effect" approach. Veijo Heiskanen examines some of the Tribunal's significant contributions to the development of the doctrine of indirect expropriation.

To the extent regulatory purposes are relevant in determining whether an indirect expropriation has taken place, then the question arises as to which regulatory purposes should be considered and what role they should play. Allen Weiner highlights the need for a taxonomy of "legitimate" regulatory purposes – that is, "guidelines that elaborate which particular classes or categories of public welfare purposes are accepted, by both capital-exporting/developed countries and capital-importing/developing countries, as purposes in furtherance of which states may regulate without having to compensate property owners for resulting losses." Further, Francisco Orrego Vicuña suggests that, in establishing the limits of the regulatory powers of the state, international tribunals may draw on the concept of legitimate expectations of foreign investors.

Once the prickly question of whether an indirect expropriation has occurred has been decided, difficult questions of compensation must be addressed. There are no clear rules in international law on how to determine compensation in cases of regulatory expropriation, so the issue is the subject of much debate. What constitutes "just" compensation in such cases? Should the general-welfare purpose of a regulation be considered in assessing the amount of compensation? Can the level of compensation encompass less than the full market value of the property taken? What are the methods for assessing market value (which, after all, is a fiction in the context of takings)? In his contribution, Yves Nouvel discusses a number of useful valuation principles and methods.

To conclude these introductory remarks, what is required is a definition of indirect expropriation that takes into account, on the one hand, the legitimate right of the state to regulate in the public interest and, on the other, the need to protect foreign owners and investors from arbitrary state action. In drawing the line between regulation and expropriation, one will continue to consider factors such as whether there has been an interference with property rights; whether the owner has been deprived, in whole or in significant part, of the use of her property; the severity of the impact of the measure on the property owner; whether the measure is temporary or will be of long duration; and the relationship between the regulatory measure and the public purpose pursued by the state. In addition, one will have to scrutinize closely the public purpose purported by the state, not only to determine whether the regulation is, in effect, an *ad hoc* taking in disguise, but

also, where the state has acted in good faith, whether the public purpose advanced by the regulation is a legitimate one.

As always, FORUM welcomes any comments from its readers on this issue's *Recurring Theme*.

MAURIZIO BRUNETTI [6]

[6] Writing in a private capacity.

Indirect Expropriation: Conceptual Realignments?

RUDOLF DOLZER and FELIX BLOCH*

At a time when national policies concerning international economic relations are increasingly characterized by concepts aiming at structural adjustment, good governance and export-led growth, and when many countries find themselves in fierce competition for foreign direct investment, the era of straightforward formal expropriations of alien property seems to have come to an end. At the same time, however, the need for protecting certain public goods, be it in the areas of social cohesion or environmental protection, remains on the agenda of most, if not all, political actors. Against this backdrop, it does not seem unreasonable to assume that pressure on national governments – open or disguised – to protect domestic industries, the environment, or public health may encourage governments to regulate foreign investment, in itself or as part of the general economy, so drastically that foreign investors may be inclined to raise claims of indirect expropriation. The precise definition of what constitutes an expropriation is thus likely to continue to engender legal debates and disputes. This is even more so considering the growing number of bilateral investment treaties ("BITs").

Before turning to takings clauses in the modern treaty context and relevant customary law, it will be noted that modern BITs typically include general clauses such as "fair and equitable treatment", "full and constant protection" and "national treatment". While highly relevant and possibly overlapping in the context of indirect expropriation, the scope and precise substance of these broad rules in the very specific context of protection of foreign investments is rather difficult to clarify and is likely to evolve in a casuistic manner. During the mid-1980s, the relevant issues were said to be highly uncertain.[1] As a number of pronouncements by arbitral tribunals have since been added to the stock of relevant cases, one might have hoped for a greater sense of clarity.[2] Unfortunately, such clarity does not appear to have emerged.

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[1] Dolzer, Indirect Expropriation of Alien Property, 1 ICSID Review – Foreign Investment Law Journal (1986), 41 at 59.

[2] It is widely assumed, both in the business and legal community, that the international takings doctrine is in disarray, that the jurisprudence is inconsistent and that results are rarely predictable. The notion is notoriously underlined, for instance, by the impressive

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One prominent aspect of questions of indirect expropriation is the role, if any, that the purpose and circumstances of a particular governmental action can play in the legal assessment of whether expropriation has occurred.[3] At the outset, it is useful in this context to point to the various efforts that have been made in the past by prominent institutions and authors to modify or restate the rules of international law as they have evolved. These efforts can and should serve as a starting point in any discussion of whether or not an expropriation can be said to have occurred. As will be seen, however, these statements do not give a clear answer either. Some of the most representative of these attempts deserve to be quoted in full length inasmuch as they reflect past jurisprudence and scholarly opinion.

As early as 1961, the so-called Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, drafted by Professors Sohn and Baxter, assumed a taking to have occurred in the case of any "unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference."[4]

Prior to this Draft, the codification of the relevant principles in the First Protocol of the European Convention on Human Rights in 1952 was based upon three distinct broad principles:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[5]

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divergence of views in CME v. The Czech Republic, Partial Award of 13 Sept. 2001, para. 606, *and* Ronald S. Lauder v. The Czech Republic, Final Award, 3 Sept. 2001, para. 203 (*see* <http://www.mfcr.cz/index_en.php> visited 6 May 2003). Both cases addressed the same facts and reached very different conclusions.

[3] *See also* Dolzer, Indirect Expropriations: New Developments? 11 NYU Env. L. J. p. 64 (2002).

[4] Article 10, para. 3 (a); the Draft Convention is reproduced in 55 AJIL pp. 545, 553 (1961).

[5] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Mar. 20, 1952, art. 1, 213 U.N.T.S. 262, 262. The European Court of Human Rights has interpreted this text in a number of decisions. The basic approach was laid down by the Court in Sporrong and Lönnroth (Judgement of 23 Sept.

In the 1967 OECD Draft Convention, an expropriatory act was defined as a measure applied in such a way "as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation. As instances may be quoted excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusal of access to raw materials or of essential export or import licenses".[6]

In the 1980s, the Restatement (Third) of the Foreign Relations Law of the United States focused on the effect of taking, providing some illustrations and relying in part on the concepts of unreasonable interference, on undue delay and the effective enjoyment of property:

> "Subsection 1 applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation"). The state is responsible for foreign expropriation of property under subsection 1 when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory."

The next attempt at codification followed in the years 1995 to 1997, when the OECD attempted to set the rules for a multilateral investment treaty. This time, the draft included the following clause:

> "A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or

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1982). The Court held in general that it will assume a right to compensation when it finds that no "fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" (p. 18). The Court has since stuck to this approach and further developed it in various factual settings.

[6] OECD Draft Convention on the Protection of Foreign Property, 12 Oct. 1967, 7 I.L.M. 117, 126; for its history, *see* Schwarzenberger, Foreign Investments and International Law (1969), p. 153 *et seq*. In the same period, the American Convention on Human Rights required compensation according to its Article 21, para. 1, 2: "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

> take any measure or measures having equivalent effect (hereinafter referred to as 'expropriation') except: (a) for a purpose which is in the public interest, (b) on a non-discriminatory basis, (c) in accordance with due process of law, and (d) accompanied by payment of prompt, adequate and effective compensation …"[7]

With these broad clauses in mind, a next step in the identification of the law will be the search for precedents suitable for the legal analysis of specific issues and factual situations. In principle, this would be appropriate in cases governed by customary international law as well as in matters involving bilateral or multilateral treaties. For in order to establish the "ordinary meaning" (Article 31 of the Vienna Convention on the Law of Treaties) of a provision referring to "indirect expropriation" or a similar clause, it will be helpful to turn to this body of case law. Ignoring these cases would neither help to ensure an organic growth of foreign investment law nor enhance legal clarity based on jurisprudential consistency. Obviously, the option of substantive disagreement with a previously decided case always remains open, but an award which simply does not take note of these cases will inevitably raise questions as to the proper effort made by the deciding tribunal of placing a judgement in the given legal context.

Turning to the case law, it can be said that two schools of thought relating to this question have emerged. One line of argument, which shall hereinafter be called the "sole effect doctrine", principally restricts itself to focusing solely on the particular effect that a given measure has on the legal position of the investor. A second approach finds it inappropriate to stop the analysis there, tending instead to consider the wider context of a given case. In particular, this latter approach allows for taking into account the governmental interest involved and thereby paves the way for a more elaborate weighing and balancing exercise. In order further to illustrate the importance of deciding which route to follow and fully to understand the issues involved in the two approaches, one may ask: Is it of any relevance, for instance, whether a government restricts the right of an owner with a view to limiting the earning potential of property in general, or whether the government acts to counter a certain environmental threat and for this purpose deems itself compelled to limit rights of property owners? To put the question differently: Is there any specific point on the spectrum of the many diverse effects on property of governmental measures at which and beyond which compensation is required regardless of the objective and the nature of the governmental measure? Is a balancing of interests which weighs the effect on the property against the objective of the

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[7] OECD Doc. DAFFE/MAI(98)7/REV1, 22 April 1998, p. 56.

governmental measure always required? Indeed, is it conceivable that in certain settings the intention of the government must actually be given more weight than the effect on the owner? Whatever the basis and the justification of the "sole effect theory", it seems plain that a balancing concept may under certain circumstances lead to results different from those reached under an analysis which focuses only on the effect of the measure, for instance, in such areas as environmental regulation.

In light of the reasoning and results of some relevant cases, did past jurisprudence favor an approach which emphasized the effect on the owner as the sole criterion, or were other criteria used in a multifactor or balancing test? Cases supporting both lines of argument can be found.[8]

The Chinn – Sea Land – S.D. Myers Line

In the *Oscar Chinn* Judgement decided by the Permanent Court of International Justice,[9] the interests of some British shipping business on the Congo River were in question. This business had to close down operations due to the competitive consequences of the reduction of prices charged by the only competitor. The Belgian Government had ordered this lowering of prices by the competitor (Unatra) in order to keep the transport system on the river viable, and it had granted corresponding subsidies to Unatra, but not to the British Chinn company. The PCIJ concluded that there was no expropriation: "Favorable business conditions and good-will are transient circumstances, subject to inevitable changes".[10]

In 1984, the Iran-United States Claims Tribunal in *Sea-Land Service, Inc. v. Iran* found it important to highlight that there was no deliberate governmental interference on the part of the government and no intentional course of conduct directed against Sea-Land. It held:

> "A finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-Land's operation, the effect of which was to deprive Sea-Land of the use and benefit of its investment. Nothing has been demonstrated here which might have amounted to an intentional course of conduct directed against Sea-Land. A claim founded substantially on omissions in a situation where the evidence

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[8] For a more elaborate summary *see* Dolzer, Indirect Expropriations: New Developments? 11 NYU Env. L.J. p. 80 (2002).

[9] PCIJ, Series A/B, No. 63 (1934), p. 65.

[10] *See* p. 85 *et seq*.; *see similarly* the Goetz Case, 15 ICSID Review – Foreign Investment L. J. pp. 505, 407 (2000).

> suggests a widespread and indiscriminate deterioration in management, disrupting the functioning of the port of Bandar Abbas, can hardly justify a finding of expropriation. Thus the claim against the Government of Iran based on expropriation must be dismissed."[11]

In *S.D. Myers Inc. v. Canada*, a case dealt with under the NAFTA Investment Chapter,[12] the plaintiff was registered as a U.S. corporation and specialized in the disposal of polychlorinated biphenyl ("PCB"), a substance recognized as being highly toxic and harmful to both human and animal health. Plaintiff had a major share of the U.S. PCB disposal market and entered the Canadian market in 1993. In 1995, plaintiff was successful in its efforts vis-à-vis the relevant U.S. agencies to lift the ban against imports of PCB from Canada into the United States. Canadian PCB disposal industry subsequently objected to the competitive situation created by the U.S. decision. In November 1995, Canada in effect banned the export of PCBs from its territory, thus destroying the possibility for plaintiff to export PCB and to dispose of it in its U.S. plants. S.D. Myers claimed *inter alia* that the Canadian measures were "tantamount to an expropriation" and had violated Article 1110 of NAFTA, providing that "no party shall directly or indirectly … expropriate an investment … or take a measure tantamount to … expropriation …". The Tribunal disagreed, pointing out that Canada "realized no benefit from the measure", and that no "transfer of property or benefit directly to others" had occurred. Moreover, the initiative was only "valid for a time". Under the circumstance, "[a]n opportunity was delayed", but no creeping expropriation could be found.[13] In principle, the Tribunal in *S.D. Myers* assumed that Article 1110 was to be interpreted "in light of the whole body of state practice, treaties and judicial interpretations of that term ['expropriation'] in international law cases." It emphasized that "[i]n general", a taking required a "transfer of ownership to another person …". The Tribunal concluded that "[t]he general body of precedent usually does not treat regulatory action as amounting to expropriation". Along the same lines, the Tribunal found:

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[11] 6 Iran-U.S. C.T.R., p. 149, 166 (footnotes omitted).

[12] S. D. Myers Inc. *v.* Canada, Partial Award, 121 I.L.R. 72.

[13] A similar approach was more recently adopted in the Lauder Case and in the Olguín Case. *See* Ronald S. Lauder *v.* The Czech Republic, Final Award, 3 Sept. 2001, (<http://www.mfcr.cz/index_en.php> visited 6 May 2003); Eudoro A. Olguín *v.* Republic of Paraguay, ICSID Case No. ARB/98/5, Award, 26 July 2001, (<http://www.worldbank.org/icsid/cases/paraguay-laudo.pdf> visited 6 May 2003).

> "Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulations screens out most potential cases of complaints concerning economic intervention by a State and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs."

Moreover, in considering the phrase "tantamount to expropriation", the Tribunal stressed that "tantamount" was to be equated with "equivalent", and that this required that "the real interests involved and the *purpose* and effect of the government measure" rather than "technical or facial considerations" be decisive in this context.[14]

The Tippetts – Biloune – Metalclad Line

In contrast to the cases above, several other cases decided by arbitral tribunals in the past two decades have explicitly focused on the effect on the investor as the dominant or exclusive criterion marking the threshold between an expropriation and a mere regulation.

In *Tippetts*, decided by the Iran-United States Claims Tribunal, the appointment of a manager by the Iranian government to a U.S. engineering and architectural consulting business was at issue. Claimant's arguments that the measures amounted to an expropriation were accepted. The Tribunal held:

> "The Claimant is entitled under international law and general principles of law to compensation for the full value of the property of which it was deprived. The Tribunal prefers the term 'deprivation' to the term 'taking', although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required. A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on

[14] S. D. Myers Inc. *v.* Canada, Partial Award, 121 I.L.R. 72, 123, para. 285 (emphasis added).

> the owner, and the form of the measures of control or interference is less important than the reality of their impact."[15]

An approach similar to the *Tippetts* rationale was followed in *Biloune v. Ghana Investment Centre*, decided in 1989:

> "The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry had the *effect* of causing the irreparable cessation of work on the project. Given the central role of Mr Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL pursuing its approved project would constitute a constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune's interest in MDCL, unless the Respondents can establish by persuasive evidence sufficient justification for these events."[16]

A third unequivocal pronouncement in favour of the effect doctrine can be found in *Metalclad v. Mexico*,[17] a decision rendered in 2000. The case concerned a dispute over the treatment of a U.S. company which had been granted a permit for the development and operation of a hazardous waste landfill by the Mexican Federal Government, and which subsequently ran into difficulties due to actions taken by Mexican local and state authorities. The Tribunal found a violation of Article 1110 of NAFTA. The Tribunal construed the clause broadly:

> "… expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert and incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic

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[15] Tippetts, Abbett, McCarthy, Stratton *v.* TAMS-AFFA *et al.*, 6 Iran-U.S. C.T.R. 219, 225 (1984) (footnotes omitted).

[16] 95 I.L.R. 183, 209 (emphasis added).

[17] Metalclad Corporation *v.* United Mexican States, 119 I.L.R. 615, 638.

benefit of property even if not necessarily to the obvious benefit of the host State".[18]

A Canadian court reviewing this decision found that the Metalclad Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110.[19]

While the *Tippetts – Biloune – Metalclad* line represents the most direct exposition of the "sole effect doctrine", it must be added that other decisions by the Iran-United States Claims Tribunal such as *Starrett Housing*[20] and *Phelps Dodge*[21] in one way or another seem to support this line of reasoning. Likewise, more recently, the *Santa Elena* Award held that "there is ample authority for the proposition that a property has been expropriated when the effect of the measure taken by the states has been to deprive the owner of title, possession, or access to the benefit and economic use of its property."[22]

The Case Law in Perspective

In attempting to sum up these cases, it is clear that a line of cases can be cited in support of the "sole effect doctrine". Nonetheless, as pointed out above, there is also a line of reasoning in other cases which cannot be said to be of lesser importance. This second strand is not identical to the "sole effect doctrine", giving weight to the purpose and the circumstances of the respective governmental action. While the important role of the effect is not questioned by these cases, it is placed into a broader framework which allows a weighing and balancing of other relevant factors. Thus far, it does not seem possible to characterize either of the two approaches as dominant or as representing the mainstream of international thinking. At the same time, it is perhaps fair to say that the more recent jurisprudence of arbitral tribunals seems to reveal a tendency of shifting the focus of the analysis away from the context and the purpose to the effects on the owner.

Two segments of the jurisprudence are today beyond doubt. Firstly, the language in a number of decisions clearly shows a general consensus on the view that the severity of the impact upon the legal status and the factual impact on the

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[18] Metalclad Corporation *v.* United Mexican States, 119 I.L.R. 615, 638, para. 103.

[19] The United Mexican States v. Metalclad Corporation, 2001 BCSC 664. [2001] B.C.J. No. 950 (Q.L.), para. 99.

[20] 4 Iran-U.S. C.T.R., pp. 122, 154 *et seq*.

[21] 10 Iran-U.S. C.T.R., pp. 121, 130.

[22] Compañía del Desarrollo de Santa Elena, S.A. *v.* Costa Rica, Final Award, 5 ICSID Reports p. 153, at para. 77.

ability of an investor to use and enjoy his property always constitutes a cardinal factor in determining whether or not an expropriation can be said to have occurred. Secondly, the mere statement, after the event, by a government that a taking was not intended cannot, in itself, carry much weight in the analysis.

A survey of some takings cases and the principles given therein for determining the difference between a regulation and a taking does not allow the conclusion that the "sole effect doctrine" is already the dominant approach. Having said this, a caveat must, of course, be added. The above observations have to be considered in the full circumstances of each case, and a broader study of all cases, their factual setting and the arguments presented by the parties will therefore undoubtedly be required if a firmer conclusion is to be reached. Presumably, however, the main thrust of such a broader analysis would in its conclusions not depart significantly from those submitted here.

In any event, the proponents of the "effect doctrine" may argue that the issue is not whether certain public goods should be protected. It is rather whether the affected owner or the public should pay for the protection of that value. Furthermore, in line with the "sole effect doctrine", those voices in favour of a balancing and weighing process must concede that, at a certain point on the spectrum of the impact on the property, the effect must be accorded priority lest the protection of property amount to a concern for an empty shell. However, short of such a severe degree of impact, whenever reasonable use and enjoyment of property is not barred by the governmental measure, a process of weighing and balancing may, in certain circumstances, allow regulatory measures without compensation where the effect doctrine would call for a different solution. Of course, the key issue then is at what point the threshold between regulation and expropriation is reached.

When attempting to draw this line in future cases, it may be useful to keep in mind that the general clauses intended to identify takings in international law are in fact similar to the broad principles developed by national courts in the interpretation of constitutional rules both protecting property and allowing the exercise of legislative sovereignty in economic affairs. In this respect, it was suggested previously that general principles of law, as referred to in Article 38 of the Statute of the International Court of Justice, can be seen as an appropriate source of law of relevance in the present context.[23] Depending on the specific issue, they can be

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[23] Dolzer, Indirect Expropriation of Alien Property, 1 ICSID Review – Foreign Inv. L. J. p. 53 (1986). In line with accepted doctrine, general principles will be identified on the basis of a comparison of the rules of major domestic legal orders governing property, legislative regulation and the law of expropriation.

helpful both in the context of applicable customary and treaty law. Having said this, it is also understood that the recognition and use of general principles in the context of expropriations cannot be seen as a panacea for all settings. First of all, on the practical level, the identification of these principles requires careful study of different domestic orders. Secondly, it will not be overlooked that even if the results of the relevant complex studies are on the table, the conclusions for purposes of international law may not always be entirely clear. In any event, changing notions of the common good and of the priority of social values as they may slowly shape national orders of property and the international environmental agenda will in due course also be reflected at the international level within the parameters of the takings doctrine. The logic inherent in the domestic orders as the basis for the general principles that are a source of international law forces a confluence of international law and the domestic legal orders.

Indirect Expropriations: The Need for a Taxonomy of "Legitimate" Regulatory Purposes

ALLEN S. WEINER*

Introduction

In recent years, a number of international investors, availing themselves of the binding dispute resolution provisions of the North American Free Trade Agreement ("NAFTA"), have brought claims alleging that regulatory measures of one kind or another taken by NAFTA State Parties have amounted to indirect expropriations of their property. Such claims before international tribunals are not novel. Indeed, over the past twenty years, the Iran-United States Claims Tribunal (the "Iran Claims Tribunal") has developed considerable jurisprudence on the question of what constitutes an "indirect" or "creeping" expropriation of property under international law. Nevertheless, the appearance of these new NAFTA cases challenging governmental regulations promulgated by developed states in normal day-to-day circumstances – rather than the dramatic conditions of the Iranian revolution that gave rise to the cases decided by the Iran Claims Tribunal – has created renewed interest in the difficult and unsettled issue of indirect expropriations of property.

Even a cursory review of the complex body of law governing indirect expropriations reveals a tension between the interest, on one hand, of protecting the rights of foreign property owners and investors and, on the other hand, the interest of protecting the sovereign authority of states to regulate in furtherance of public welfare. Some lines of authority claim that the key, or even sole, issue to examine in assessing an indirect expropriation claim is the effect of a governmental measure on the property owner. Such an approach fails to give adequate weight to the authority of states to regulate for public welfare purposes. More recent lines of authority suggesting that nondiscriminatory regulations aimed at public welfare objectives will rarely, if ever, constitute indirect expropriations of property, in contrast, tip the scales too far away from the protection of the interests of foreign property owners and investors. This essay suggests that a key factor in assessing

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regulatory measures is the specific public welfare purpose served by a challenged regulation. In this regard, it is not enough to consider whether a challenged regulation seeks, in general, to promote public welfare. What is needed, and has not been extensively developed, are guidelines that elaborate which particular classes or categories of public welfare purposes are accepted, by both capital-exporting/developed countries and capital-importing/developing countries, as purposes in furtherance of which states may regulate without having to compensate property owners for resulting losses.

The Doctrine: Indirect Expropriations and the Police Power

As a matter of black letter law, the customary international law rules governing expropriation – both direct and indirect – are deceptively clear. The doctrine, as formulated in section 712 of the Restatement (Third) of the Foreign Relations Law of the United States (1986), provides that a "state is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation." Equally unambiguous is the notion that international law prohibits not only formal expropriations or nationalizations of alien property – that is, acts involving a formal transfer of title – but also, in the words of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, "any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference."[1] The Restatement employs a similar formula, noting that a state is responsible for an expropriation of property "when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory."[2]

The apparent clarity of the doctrine blurs, however, when we consider the reality that a great deal of the activity of the modern state entails regulating social and economic activity in ways that interfere substantially with the enjoyment of prop-

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[1] Draft Convention on International Responsibility of States for Injuries to Aliens, Art. 10(3)(a), in Sohn & Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. In'tl L. 545, 553 (1961).

[2] Restatement (Third) of the Foreign Relations Law of the United States §712 comment g, at 200 (1986).

erty rights. Land use regulations, for instance, preclude owners of property zoned for residential purposes from operating businesses or factories, or impose size and setback limitations on the kinds of structures they may erect on their land. Building, fire and housing codes limit the kinds of materials and architectural designs property owners may employ. Income taxes deprive owners of enterprises of the enjoyment of a portion – often a very substantial portion – of the earnings generated by their property. Occupational health and safety standards, as well as minimum wage requirements, similarly interfere with the ability of owners of enterprises to fully exploit, and enjoy, their property. Environmental regulations, too, can impose substantial costs on businesses and can even require the closure of businesses engaged in environmentally hazardous activities. Requiring states to compensate foreign property owners for the costs of such regulatory acts, as customary international law "unreasonable interference" doctrine might seem to mandate, could make them prohibitively expensive. More fundamentally, such a rule would be inconsistent with basic notions of the rights of sovereign states to regulate matters within their territories in the public interest.

The protection accorded to foreign property under international law does not, however, require such a result. For as a corollary to the rules prohibiting "unreasonable interference" with an owner's enjoyment of her property, international law also recognizes that a state need not compensate foreign property owners for interference with property interests that results from "bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states."[3] Or, as the Iran Claims Tribunal in one case declared, it is "an accepted principle of international law that a State is not liable for economic injury which is a consequence of a bona fide 'regulation' within the accepted police power of states."[4]

Competing Interests, Competing Doctrines

Although the provisions of international law excluding bona fide exercises of the police power from the category of expropriatory acts may guard, as a conceptual matter, against unwarranted intrusions on the sovereign regulatory powers of the state, they do not eliminate the difficulties presented in applying the doctrine of indirect expropriations in practice. Indeed, even the brief survey of the inter-

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[3] Restatement (Third) of the Foreign Relations Law of the United States §712 comment g, at 201 (1986).

[4] Sedco, Inc. v. National Iranian Oil Co., 9 Iran-U.S. Claims Trib. Rep. 248, 275 (1985).

national law doctrine applicable to indirect takings outlined above reveals a basic tension between the interest of protecting property owners from state actions that interfere with their authority to enjoy their property and the competing interest of upholding the freedom of states to exercise regulatory powers in the public interest. Given this tension, it is not surprising that indirect expropriation jurisprudence and state practice reveal competing doctrinal strains, some that tend to favor the interests of foreign property owners, and others that favor the regulatory authority of states.

During much of the post-World War II era, developing or communist states adopted a wide range of legal and economic measures (many of which did not entail the formal transfer of title) designed to transfer economic value from foreign enterprises to the state or other domestic groups. In response to these trends, international expropriation law and state practice developed to protect property owners and, in many cases, to treat such measures as indirect takings. The United States Foreign Claims Settlement Commission ("FCSC"), for example, addressed various redistributive techniques employed by communist states of Eastern Europe, including placing the rental proceeds of real property under "state administration," even though legal title remained with the foreign owner.[5] It is during this post-war period that the prohibitions on indirect expropriations of property included in the Harvard Draft Convention on International Responsibility of States for Injuries to Aliens and in the Second Restatement of the Foreign Relations Law of the United States were articulated. In addition, during the 1980s and 1990s, the Iran Claims Tribunal developed an impressive body of jurisprudence finding expropriations (or other compensable measures against property) on the basis of such conduct as the appointment by the Iranian Government of managers or supervisors who exercised control over foreign-owned companies, the taking of *de facto* control by Iranian Government entities of petroleum industry operations in which foreign enterprises had substantial contractual rights, or the refusal of Iranian governmental entities to facilitate or permit the export or foreign-owned property.[6]

This strand of jurisprudence tends to discount the purpose of regulatory measures and to focus instead on the effects of such measures on property owners. In

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[5] *See, e.g.*, Claim of George L. Rosenblatt, Claim No. G-0030, Decision No. G-0100 (1978), *reprinted* in Foreign Claims Settlement Commission, 1981 Annual Report 127.

[6] *See* Aldrich, What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal, 88 Am. J. Int'l L. 585 (1994).

Phelps Dodge Corp. v. Islamic Republic of Iran, for instance, the Iran Claims Tribunal found Iran liable for an expropriation where the transfer of management of an enterprise was made pursuant to an Iranian law designed to prevent the closure of factories, ensure payments due to workers, and protect any debts owned to the Government – all plausible public welfare measures. The Tribunal observed that, although it "understands the financial, economic and social concerns that inspired the law" pursuant to which the transfer of management occurred, "those reasons and concerns cannot relieve [Iran] of the obligation to compensate" the claimant for losses incurred as a result.[7] Tribunal cases generally reflect the view that, in assessing expropriation claims, "[t]he intent of a government is less important than the effects of the measures on the owner."[8] More generally, Professor Dolzer, after reviewing international jurisprudence on indirect expropriations, has concluded that the effect of governmental action, rather than its purpose or intent, is "a major factor, or even the sole factor, in determining whether or not a taking has occurred."[9]

In contrast, a competing line of jurisprudence and practice – one that appears to be gaining predominance today – emphasizes the sovereign regulatory power of states. This perspective focuses heavily on the purpose or intent of the regulating state, not on the effects of such measures on property owners. Under this view, regulatory measures aimed at public welfare or taken in exercise of the police power will rarely, if ever, constitute indirect expropriations of property. Perhaps seeking to avoid repetition of its experience in having to defend environmental regulations from investor challenges under NAFTA, the United States, in the Free Trade Agreement signed with Singapore on 6 May 2003, negotiated a shared understanding on the customary international law governing expropriation of property. This understanding, memorialized in an exchange of letters between the U.S. Trade Representative Robert Zoellick and Singapore's Minister for Trade and Industry George Yeo, declared that, "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do

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[7] Phelps Dodge Corp. v. Islamic Republic of Iran, 10 Iran-U.S. Cl. Trib. Rep. 121, para 22, at 130 (1986).

[8] Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219, 225-26 (1984).

[9] R. Dolzer, Indirect Expropriations: New Developments?, 11 N.Y.U. Envtl. L. J. 64, 78 (2002).

not constitute indirect expropriations."[10] Similarly, a recent NAFTA investment dispute arbitral award stated, in even more general terms, that "[t]he general body of precedent usually does not treat regulatory action as amounting to expropriation."[11]

Needed: A Taxonomy of "Legitimate" Regulatory Purposes

Despite these bold recent endorsements of the police power as against expropriation claims, the reality is that governmental measures styled as "regulatory" and directed towards "public welfare objectives" have in the past given rise to compensable indirect expropriation claims. Consider the property claims of U.S. nationals against the German Democratic Republic ("GDR") evaluated by the FCSC, which were ultimately resolved by a lump-sum settlement agreement with the Federal Republic of Germany after German unification. Had those claims been litigated before an international tribunal, the GDR would no doubt have argued that because so many foreign property owners had fled the country, foreign-owned residential properties were not being adequately managed or maintained. The GDR would have contended that the use of rental proceeds from foreign-owned property to help maintain and administer such properties was necessary to advance the public welfare objective of maintaining a suitable housing supply. Nevertheless, those public welfare measures were rightly deemed to be expropriations. Similarly, the Iran Claims Tribunal found that a taking had occurred in the *Phelps Dodge* case notwithstanding Iran's contention, which the Tribunal evidently accepted, that the appointment of Iranian managers was a regulatory measure aimed at the public welfare goals of securing employment and payment of Iranian workers.

Today, as a result of the collapse of communist regimes and the expansion of economic liberalization in the developing world, investors and property owners abroad face a much less intrusive regulatory climate than they may have confronted in the past. The supremacy of today's neo-liberal model of political economy, however, is unlikely to remain permanent or universal. As such, the possibility that states will adopt regulatory measures genuinely aimed at promoting public welfare measures that infringe property interests in a way that should (at least in the view of capital exporting states) result in compensation remains a real one. For this

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[10] Paragraph 4(b) of exchange of letters on expropriation between United States Trade Representative Robert B. Zoellick and Singapore Minister for Trade and Industry George Yeo (construing Article 15(1) of the United States-Singapore Free Trade Agreement).

[11] S.D. Meyers, Inc. v. Government of Canada, Partial Award of 13 November 2000, para 281.

reason, the assertion in the Zoellick-Yeo side letter to the United States-Singapore Free Trade Agreement that, as a matter of customary international law, nondiscriminatory regulatory actions aimed at "legitimate public welfare" objectives constitute indirect expropriations only in "rare circumstances" overstates the case in favor of freedom of states to regulate without fear of assuming liability for indirect expropriations of property.

Although the matter does not appear to have been widely addressed in the literature, jurisprudence and state practice in the field of indirect expropriations in fact demonstrate that international law, in determining what constitutes an indirect expropriation, distinguishes between different ways in which the police power is exercised, and between different categories of public welfare purposes towards which regulatory conduct is directed. Some exercises of the police power that affect property rights will give rise to a duty to provide prompt, adequate, and effective compensation; others will not. Formal doctrinal statements seem to recognize that not all purported exercises of police power will relieve a state of the duty to compensate for resulting economic injury. Thus, the Restatement (Third) exempts states from liability for the economic consequences of regulations only for "action that is *commonly accepted* as within the police power of states."[12] The Zoellick-Yeo letter, in a similar vein, says that indirect expropriation claims generally cannot be based on actions aimed at protecting "*legitimate* public welfare objectives."

But what regulatory action is commonly accepted as falling within the police power of states? Which public welfare objectives are legitimate? More specifically, which regulatory measures require the economic consequences to be borne by affected property owners, and which require the burden to be shared by a society as a whole? These are questions that international tribunals and states negotiating property claims settlements – in deciding which measures constitute compensable indirect expropriations – have effectively answered, though they have rarely done so overtly or explicitly. For example, the lump sum settlement of property claims during the post-war period between the United States and communist states of Eastern Europe and elsewhere reflects a view that the purpose of systematic redistribution of wealth and property, though clearly aimed at one vision of public welfare, was not an exercise of police power that relieved those states of their obligations to compensate injured property owners – even where the injury resulted from a regulatory measure such as subjecting property to "state administration," rather than formal transfer of title. Similarly, in holding that Iran engaged in indi-

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[12] *See supra* note 3.

rect expropriations by appointing managers of private enterprises, the Iran Claims Tribunal effectively decided that efforts to establish centralized governmental control over major economic enterprises was not a legitimate exercise of the police power – at least not in the sense that it relieved the Government of Iran of responsibility for the resulting economic injury.

States and tribunals in the future will continue to confront situations in which states adopt regulatory measures that injure foreign property interests, and they will have to examine the purpose of the government action. To the extent tribunals expressly engage in such examinations, they have tended to limit their inquiry into an assessment of whether a regulation in fact serves a declared public welfare or police power purpose, as opposed to some other impermissible purpose such as protection of domestic industry. In *S.D. Meyers, Inc. v. Canada*, for instance, a NAFTA tribunal conducted such an examination and concluded that a purported environmental regulation was actually "intended primarily to protect [Canadian industry] from U.S. competition."[13] But arbitral tribunals will need to go beyond assessing whether a measure in fact is directed at some stated public welfare purpose. Evaluations of indirect expropriation claims will instead depend to a large degree on an assessment of the legitimacy of public welfare objectives – or at least the legitimacy of requiring property owners to bear the costs of measures taken in furtherance of those objectives – where it is not disputed that those measures have been adopted in good faith.

Some commentators have suggested that the question of what constitutes a legitimate public welfare purpose, for purposes of assessing whether a regulation constitutes an indirect expropriation, is determined "by reference to the society's current standard of reasonably acceptable behavior."[14] Given the international nature of the circumstances under which these claims arise, however, a better view is that the legitimacy of regulatory purposes will depend on *international* practice. Those regulatory purposes, such as protecting public health, that are recognized by both developed/capital-exporting states and developing/capital-importing states are likely to be accepted as legitimate. Those regulatory purposes accepted by only some states, such as the redistributive and collectivist goals that characterized the New International Economic Order of the 1970s, in comparison, are unlikely to be deemed legitimate for purposes of relieving a state of liability for economic

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[13] S.D. Meyers, Inc. v. Government of Canada, Partial Award of 13 November 2000, para 194.

[14] Waelde and Kolo, Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law, 50 Int'l & Comp. L.Q. 811, 827 (2001).

injury to foreign property owners and investors, even if they reflect the territorial state's current standard of behavior.

International conventional and customary law, in addition to state practice, will shed light on the legitimacy of regulatory purposes. For example, the widespread adherence of states to International Labor Organization treaties demonstrates general acceptance of the notion of workers' rights, which in turn suggests that regulatory measures aimed at protecting employee and worker safety and guaranteeing suitable working conditions are unlikely to constitute indirect expropriations. Similarly, in assessing the legitimacy of regulatory purposes, it is significant that both the developed and developing world have in recent decades accepted the importance of environmental protection as an important state interest. In this regard, the International Court of Justice, in the *Gabčíkovo-Nagymaros Project Case*, stressed the great significance of, and the obligations under international law of states to respect, the environment.[15] As a result, regulatory actions aimed at protecting the environment are among those most likely to fall within the view of customary international law reflected in the Zoellick-Yeo letter, and thus not to amount to indirect expropriations. Even in the realm of environmental regulation, however, one can imagine the development of distinctions between different kinds or classes of regulatory purposes. A measure intended to prevent or require an enterprise to internalize the harmful costs of pollution generated by its activities seems unlikely to be deemed an indirect expropriation. In contrast, another regulatory purpose, such as creating a public good of undeveloped natural land by preventing all use and exploitation of certain property, might constitute an indirect expropriation, notwithstanding the underlying environmental character of the measure.

Conclusion

The determination of when a regulatory measure constitutes an indirect expropriation of property can be an extremely vexing one, whether it arises under national or international law. No single formula can provide clear and definitive guidance as to which measures require compensation and which do not. As a matter of international law, states and arbitral tribunals will need to continue to look at a variety of factors that have been identified in past arbitral decisions and scholarly writings. Some of these factors include whether the affected interest is one that constitutes a cognizable property interest, whether a measure interferes with

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[15] Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. Rep. 7, para 53, at 41.

reasonable investment-backed expectations of the property owner, whether there has been physical interference with property, the temporal duration of an infringement on an owner's freedom to enjoy her property, the extent of the effect of the measure on an owner's property, and the closeness of the connection between a regulatory measure and the government's regulatory purpose.

Beyond this, however, cases will depend on a normative assessment of the public welfare purpose of a regulatory measure. As they have implicitly done in the past, states and tribunals will need to examine not merely whether a regulation is an exercise of the police power or is directed at a public welfare purpose, as opposed to a protectionist one. Rather, the question of whether a regulatory measure constitutes an indirect expropriation under international law will depend in part on the extent of international acceptance of the particular substantive public welfare purposes a measure seeks to advance. Future scholarship in the field of indirect expropriations should examine state practice and judicial decisions (both international and national) to develop clearer guidelines on the question of which classes or categories of regulatory purposes are accepted by both developed and developing states as requiring property owners to bear the resulting economic costs, and which require the state to provide compensation.

The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation

VEIJO HEISKANEN*

I. Introduction

A learned commentator has recently suggested that the focus of debate in international investment law has shifted from the standard of compensation and valuation methods to the definition of expropriation.[1] As a result of this shift, which has taken place in the context of the ongoing economic globalization and global adoption of neo-liberal policies, the key issue in the field is no longer whether full or only "appropriate" compensation should be paid, but rather whether any expropriation has occurred in the first place. In this new context, "the single most important development in state practice has become the issue of indirect expropriation."[2]

As during the preceding era, the definitional issues have created uncertainty about the applicable legal standard and have produced diametrically conflicting arbitral awards.[3] This has resulted in "[a] widespread assumption in both the business and legal communities … that the international takings doctrine is in disarray, the jurisprudence is inconsistent, and the results are often unpredictable."[4]

The present author's view is that the "disarray" of the takings doctrine not only reflects competing views about the substance of the applicable legal standard. The confusion also appears to stem from the fact that there are, in effect, two compet-

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[1] Rudolf Dolzer, *Indirect Expropriations: New Developments?* 11 N.Y.U. ENVT'L L. J. 64-65 (2002).

[2] *Id.* at 65.

[3] *Id.* at 68 (citing *CME Czech Rep. B.V. v. Czech Rep*. (Neth. v. Czech Rep.), Partial Award, para. 606 (Sept. 13, 2001), http://www.mfcr.cz/Arbitraz/en/PartialAward.pdf, with *Lauder v. Czech Rep*. (U.S. v. Czech Rep.), Final Award, para. 203 (Sept. 3, 2001), http://www.mfcr.cz/Arbitraz/en/FinalAward.pdf).

Similar conflicting arbitral awards were characteristic of the earlier era. *Cf.* outcomes of the classic Libyan nationalization arbitrations: BP Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic, 53 I.L.R. 297 (1979); Libyan Arabian Oil Company (Liamco) v. Government of the Libyan Arab Republic, 20 I.L.M. 1 (1981); Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic, 53 I.L.R. 422 (1979).

[4] Dolzer, *supra* note 1, at 68.

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ing legal standards but there is no agreement on the proper scope of their application. These two competing standards could be termed the "effects" doctrine and "police powers" doctrine, respectively.

There are two versions of the "effects" doctrine. Under the "sole effect" version of the doctrine, if a governmental measure effectively deprives the owner of control over his property or substantially affects its commercial value, compensation is required even if the State may purport to have adopted the measure in the exercise of its police powers. The principal merit of this doctrine is its flexibility and ability effectively to capture arbitrary or otherwise irregular (*ad hoc*) governmental measures. However, it remains problematic if the effect of the measures on the value of the investment is made the sole criterion in assessing the measure's legality and no attention is paid to the nature of the act. Thus, the "sole effect" version of the "effects" doctrine tends to blur the line between effects resulting from two different types of causes: the materialization of a political risk (which is what the investor has assumed and the consequences of which he therefore should bear) and the host State's failure to respect due process of law (which is attributable to the host State and for which it therefore should be held liable).[5] If, as is often done in practice, compliance with minimum requirements of due process is made part of the "effects" doctrine, the weakness of the "sole effects" version of the doctrine is eliminated.[6] The due process standard serves as a criterion that allows one to distinguish between irregular and regular governmental measures, *i.e.*, those that are directly or approximately attributable to the government and thus give rise to compensation, and those that are not so attributable and thus should be characterized rather as a materialization of a political risk.

Under the classic police powers doctrine, if the regulatory measure at issue is taken for a legitimate public purpose and is not discriminatory, the measure is lawful under international law and does not give rise to right to compensation.[7]

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[5] This is the consequence of the "sole effect" version of the doctrine, which views the effect of the measure as "the only and exclusive relevant criterion." *Id.* at 79.

[6] The due process requirement has traditionally been viewed as forming part of the law of takings at both international and national level. It is systematically included in international bilateral investment treaties; *see* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES at 106 (1995). For its application at national level *see, e.g.,* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 726-31 (2d ed. 1988).

The due process requirement is also reflected, *e.g.,* in Art. 1110 of the North American Free Trade Agreement ("NAFTA"), Dec. 17, 1992, 32 I.L.M. 605 (1993). *See also* Art. 1105 ("Minimum Standard of Treatment").

[7] Dolzer, *supra* note 1, at 79-80.

Regulatory measures that are taken for a *prima facie* legitimate public purpose amount to a compensable taking only if they are discriminatory, *i.e.*, if they discriminate between foreign and domestic investors.[8] In such instances compensation is justified because the measures are effectively takings disguised as regulatory measures. The principal merit of this doctrine is that it provides an objective and transparent standard for determining the compensability of governmental measures. Its main weakness – it provides little guidance in situations where the alleged taking is not based on a general regulatory measure, but rather on an irregular *ad hoc* act that is attributable to the host State – can be eliminated if its scope of application is confined to regulatory measures and if *ad hoc* takings are left to be resolved under the "effects" doctrine.

Apart from the confusion about the applicable legal standard, it also appears that there are important characterization issues that have not yet been properly analyzed at the doctrinal level. International lawyers seem to have assumed that a distinction can – indeed must – be made between formal and *de facto* expropriations, and that "indirect" expropriations can largely be equated with *de facto* expropriations. However, in light of recent developments, it is becoming clear that this approach is inadequate and that indirect expropriations need to be distinguished from *de facto* expropriations in order to be able accurately to identify and analyze the legal issues associated with the international takings doctrine.

Does the substantial practice of the Iran-United States Claims Tribunal on expropriation claims – which covers some sixty awards rendered over a period spanning close to twenty years[9] – shed any light on these issues? It would be surprising if it did not, given that only relatively few of the claims before the Tribunal were based on formal measures of nationalization or expropriation.

II. Indirect Expropriation in the Practice of the Iran-United States Claims Tribunal

The Tribunal's jurisdiction to deal with expropriation claims is established in Article II of the Claims Settlement Declaration, which provides that the Tribunal's

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[8] *I.e.*, if they violate the national treatment principle. Discrimination among investors from third countries also creates a cause of action if the host State and the investor's home country have agreed to most-favored nation treatment. *See* Conclusion, *infra.*

[9] *See* Maurizio Brunetti, *The Iran-United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation,* 2 CHICAGO J. INT'L L. 203, 205 (2001).

jurisdiction covers claims arising out of "debts, contracts …, expropriations or other measures affecting property rights …"[10]

The Tribunal's jurisdiction to resolve claims based not only on "expropriations" but also on "other measures affecting property rights" has been cited in support of the argument that the law applied by the Tribunal is *lex specialis* and thus has limited relevance outside the specific context of the Tribunal.[11] In practice, however, the Tribunal has resorted to the "other measures" concept sparingly, and only a handful of claims have been resolved solely on this basis.[12] The great bulk of the expropriation claims resolved by the Tribunal involve either *de facto* takings of property, which cover scenarios such as physical seizures or appropriations of property by Revolutionary Guards or other individuals whose actions were attributable to the Government of Iran, or deprivations of property rights through the governmental appointment of temporary managers and other similar measures, *i.e.*, property losses were found to be attributable to the Government of Iran but did not necessarily result in any economic benefit to it.

Relatively few Tribunal cases involved formal nationalizations or expropriations of property.[13] Takings of property based on formal nationalization or expropriation decrees undoubtedly classify as "direct" rather than "indirect" expropriations.

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[10] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration") (Jan. 19, 1981), *reprinted in* 1 IRAN-U.S. C.T.R. 9.

[11] *See, e.g., Pope & Talbot, Inc. v. Canada,* Interim Award (June 26, 2000), available at http://www.dfait-maeci.gc.ca/tna-nac/nafta_e.asp, para. 104.

[12] For discussion *see, e.g.,* GEORGE H. ALDRICH, JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1996) at 173; Brunetti, *supra* note 9, at 204-05, 210-11.

It is another matter whether the Tribunal should have classified "indirect" expropriations such as deprivations of property as "expropriations" or as "other measures affecting property rights." For argument supporting the latter *see* ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-U.S. CLAIMS TRIBUNAL 65-174 (1994). While in the case of the Tribunal it is in any event clear that it has jurisdiction over property deprivations, whether classified as (indirect) "expropriations" or "other measures affecting property rights," each arbitral tribunal will have to resolve its jurisdiction over deprivation measures on the basis of its constituting documents.

[13] These claims arose out of two Iranian laws enacted in 1979, which nationalized all insurance companies and banks operating in Iran. *See, e.g., American International Group, Inc., et al. v. Islamic Republic of Iran, et al.,* Award No. 93-2-3 (Dec. 19, 1983), *reprinted in* 4 IRAN-U.S. C.T.R. 96; *INA Corp. v. Government of the Islamic Republic of Iran,* Award No. 184-161-1 (Aug. 13, 1985), *reprinted in* 8 IRAN-U.S. C.T.R. 373.

The same can be said of a *de facto* nationalization or expropriation of property, *i.e.*, a nationalization or expropriation of property that takes place without a formal legislative decree but to the economic benefit of the host State,[14] and *a fortiori* of physical takings of property. There is nothing "indirect" about a physical seizure or appropriation of property. Taking is a direct and immediate object of such measures, and the informal nature of the act, or the mere absence of a statutory justification, is not an adequate reason to describe them as "indirect."[15]

The same reasoning does not necessarily apply to deprivation of a property right, *i.e.*, a loss of property that is directly or proximately attributable to the host State but is effected in a manner that does not economically benefit the host State. The beneficiary may be a third party or there may be no party that draws an economic benefit from the deprivation; the commercial value of the investment may evaporate without any tangible benefit either to the host State or to a third party as a result of measures attributable to the host State. The formal title to the property may or may not remain with the foreign investor, but as in the case of a *de facto* taking, the owner's control over the property or its value is lost or substantially diminished. To the extent that the loss of value is attributable to regulatory or other measures taken by, or attributable to, the host State, the term "indirect" expropriation is appropriately used to describe the loss sustained by a foreign investor.[16]

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[14] Iran's petroleum industry was nationalized *de facto* through a series of measures taken in 1979 and 1980. For discussion *see* ALDRICH, *supra* note 12, at 174, 188-96.

[15] *See* BLACK'S LAW DICTIONARY (6th ed.), at 196 (defining "indirect" as "[n]ot direct in relation or connection; not having an immediate bearing or application; not related in the natural way. Circuitous, not leading to aim or result by plainest course or method or obvious means, roundabout, not resulting directly from an act or cause but more or less remotely connected with or growing out of it.")

For cases involving physical seizure of property *see, e.g., William L. Pereira Associates, Iran v. Islamic Republic of Iran,* Award No. 116-1-3 (Mar. 19, 1984), *reprinted in* 5 IRAN-U.S. C.T.R. 198, 227; *Computer Sciences Corp. v. Government of the Islamic Republic of Iran, et al.,* Award No. 221-65-1 (Apr. 16, 1986), *reprinted in* 10 IRAN-U.S. C.T.R. 269, 302-03; *Sola Tiles, Inc. v. Government of the Islamic Republic of Iran,* Award No. 298-317-1 (Apr. 22, 1987), *reprinted in* 14 IRAN-U.S. C.T.R. 223, 33-34; *Kenneth P. Yeager v. Islamic Republic of Iran,* Award No. 324-10199-1 (Nov. 2, 1987), *reprinted in* 17 IRAN-U.S. C.T.R. 92, 102-04, 108.

[16] Such expropriation is "indirect" in the sense that, although the investor loses its property or the value of its investment, the host State does not obtain any corresponding economic benefit. On the other hand, for the host State to be liable for the effects of the measures, they have to be directly or proximately attributable to that State.

Given the absence of any economic benefit on the part of the host State, deprivations of property are in effect indistinguishable from international torts (or "wrongs") and thus give rise to right to compensation under international law.

This is also how the Tribunal defined the concept of deprivation in *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*:

> "The Tribunal prefers the term 'deprivation' to the term 'taking,' although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required. A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected."[17]

Accordingly, if deprivation of a property right was found to have occurred, the fact that the title might have remained with the owner was considered irrelevant. Thus, in *Starrett Housing Corp. v. Government of the Islamic Republic of Iran* the Tribunal held:

> "It is undisputed in this case that the Government of Iran did not issue any law or decree according to which the Zomorod Project or Shah Goli expressly was nationalized or expropriated. However, it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner."[18]

In cases involving deprivations of property that occurred in the turmoil of the Islamic Revolution, the Tribunal consistently applied the "sole effect" version of the effects doctrine.[19] In other words, the Tribunal did not require claimants to

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[17] *See Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran,* Award No. 141-7-2 (June 29, 1984), *reprinted in* 6 IRAN-U.S. C.T.R. 225-26.

[18] *Starrett Housing Corp. v. Government of the Islamic Republic of Iran,* Award No. ITL 32-24-1 (Dec. 19, 1983), *reprinted in* 4 IRAN-U.S. C.T.R. 122, 154.

[19] *See, e.g., Sedco, Inc., et al. v. National Iranian Oil Co., et al.,* Award No. ITL 55-129-3 (Oct. 28, 1985), *reprinted in* 9 IRAN-U.S. C.T.R. 248, 276-79; *Phelps Dodge Corp., et al. v. Islamic Republic of Iran,* Award No. 217-99-2 (Mar. 19, 1986), *reprinted in* 10 IRAN-U.S. C.T.R. 121, 129-30; *Foremost Tehran, Inc., et al. v. Government of the Islamic Republic of Iran, et al.,* Award No. 220-37/231-1 (Apr. 11, 1986), *reprinted in* 10 IRAN-U.S. C.T.R. 228, 249-52; *Thomas Earl Payne v. Government of the Islamic Republic of Iran,* Award No. 245-335-2 (Aug. 8, 1986), *reprinted in* 12 IRAN-U.S. C.T.R. 3, 11; *Harold Birnbaum v. Islamic Republic of Iran,* Award No. 549-967-2 (July 6, 1993), *reprinted in* 29 IRAN-U.S. C.T.R. 260, 267-68.

show that the measure at issue was arbitrary or otherwise irregular and thus failed to comply with due process of law. This approach was probably at least in part based on the fact that the Algiers Accords had removed the requirement that local remedies be exhausted.[20] Thus, the Algiers Accords "internationalized" the claims covered by the Accords and established the Tribunal's jurisdiction over indirect expropriation and other claims whether or not a post-deprivation remedy would have been available under Iranian law.[21]

The removal of the local remedies requirement and the internationalization of the claims would not have necessarily prevented the Tribunal from investigating whether the alleged indirect taking was inconsistent with minimum *international* standards of due process.[22] However, the Tribunal rarely engaged in such international due process analyses.[23] One of the reasons for this may have been that many of the expropriation claims involved a complex mix of *de facto* expropriations and deprivations of property rights and the Tribunal did not always make a clear distinction between these two types of loss. To the extent that the Government benefited directly from the takings, the measures amounted to direct *de facto* expropriations and there would have been no need to apply any due process standards.[24] To the extent that the claims involved deprivations of property in the proper sense of the term, *i.e.*, in the sense that the Government of Iran did not draw any economic benefit from the measures, there were likely several other reasons for the

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[20] *See* General Principle A of the Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration") (Jan. 19, 1981), *reprinted in* 1 IRAN-U.S. C.T.R. 3 (providing that one of the purposes of both Parties was "to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.") *See also* Art. II of the Claims Settlement Declaration, *supra* note 10.

[21] *See, e.g., Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, Interlocutory Award No. ITL 11-39-2 (Dec. 30, 1982), *reprinted in* 1 IRAN-U.S. C.T.R. 487; *Amoco International Finance Corp. v. Government of the Islamic Republic of Iran*, Partial Award No. ITL 310-56-3 (July 14, 1987), *reprinted in* 15 IRAN-U.S. C.T.R. 189, 196-97.

[22] *See* DOLZER & STEVENS, *supra* note 6, at 106.

[23] *See* Matti Pellonpää & Malgosia Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal,* 19 NETH. Y.B. INT'L L. 53, 65-67 (1988).

[24] *See, e.g., Starrett Housing, supra* note 18, at 156-57. This case appears to have been to a large extent an instance of a *de facto* expropriation in the sense that the physical property and the associated contractual rights were taken over by, and economically benefited, the Government. *Cf. Tippetts, Abbett, McCarthy, Stratton, supra* note 17,which appears to have been primarily a deprivation case.

Tribunal not to engage in a due process analysis – the principal one perhaps being the sensitivity of the issue and the at times tense atmosphere of the Tribunal, which may have counselled the resolution of deprivation claims on the basis of effects only rather than by reference to minimum standards of due process. An alternative (and perhaps a more rational) explanation would be that, in view of the circumstances prevailing in Iran during the Islamic Revolution and its aftermath, the Tribunal effectively presumed that claimants, to the extent that they were able to prove their claims, had been deprived of their property rights as a result of irregular measures and thus without due process of law.[25]

In any event, in adopting its effects-driven approach, the Tribunal specifically rejected the argument that the legality of the taking under the domestic law of Iran offered a valid defense.[26] After some initial hesitation, the Tribunal also consistently held that the purpose of the measures did not count: "The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."[27]

The Tribunal's adoption of the "sole effect" version of the effects doctrine can be justified by the mass-claims context in which the Tribunal operates. Given that almost all of the expropriation claims arose out of the extraordinary circumstances that prevailed in Iran during the Islamic Revolution, it was not necessary for the Tribunal specifically to address the due process issue in each case; failure to comply with due process could be effectively presumed. This view is in line with the fact that, in the handful of cases where the alleged deprivation did not occur in the context of the Islamic Revolution, the Tribunal did not apply the presumption. Thus, in *Emanuel Too v. Greater Modesto Insurance Associates*,[28] a case involving an Iranian claimant who sought compensation for loss of property as a result of forced sale and for the seizure of his liquor license by the United States Internal Revenue Service ("IRS"), the Tribunal did require a showing of arbitrary and unjustifiable

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[25] *See* ALDRICH, *supra* note 12, at 172.

[26] *See, e.g., Phelps Dodge Corp., supra* note 20, *reprinted in* 10 IRAN-U.S. C.T.R. 121, 130. *Cf. Sea Land Service, Inc. v. Islamic Republic of Iran, et al.,* Award No. 135-33-1 (June 22, 1984), *reprinted in* 6 IRAN-U.S. C.T.R. 149, 166 (requiring "deliberate interference" as a condition for finding of expropriation).

[27] *Tippetts, Abbett, McCarthy, Stratton, supra* note 17, at 225-26.

[28] *Emanuel Too v. United States of America,* Award No. 460-880-2 (Dec. 29, 1989), *reprinted in* 23 IRAN-U.S. C.T.R. 378.

discrimination and failure to comply with international standards of due process. With respect to the former claim, the Tribunal stated:

> "The Claimant argues that the Respondent failed to protect his property in Turlock, California, from the depredations of anti-Iranian Americans. The Claimant suggests that a State is responsible for injuries resulting to a foreign national or his property from the State's failure to provide protection. Nevertheless, the State cannot guarantee the safety of an alien or of alien property. *Responsibility is incurred only when police protection falls below a minimum standard of reasonableness*. … What constitutes reasonable police protection depends on all the circumstances, including the State's available resources. *Ordinarily, the standard of police protection for foreign nationals is unreasonable if it is less than is provided generally for the State's nationals*. … By these standards, the Claimant has failed to show that local police and fire authorities failed to exercise due diligence in the protection of his property."[29]

The Tribunal on similar grounds disposed of the Claimant's claim against the IRS.[30]

The only other case where the police powers doctrine was specifically mentioned was S*edco, Inc. v. National Iranian Oil Co*.[31] In this case Iran argued that no liability should exist for a transfer of shares of stock pursuant to a law authorizing the nationalization of companies whose debts to banks exceeded their net assets. The Tribunal noted that it was "an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide 'regulation' within the accepted police power of states."[32] However, in the circumstances of the case, the regulatory action resulted in "an outright transfer of title rather than incidental economic injury," justifying a finding of taking.[33]

The Tribunal thus recognized the validity of both the "effects" doctrine and the "police powers" doctrine. However, the great bulk of the indirect expropriation claims was resolved on the basis of the "effects" doctrine. Moreover, in resolving claims arising out of the Islamic Revolution, the Tribunal appears to have presumed, without specifically addressing the issue, that claimants, to the extent that they were able to prove a property loss, were deprived of their property rights

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[29] *Id.* at 385-86 (emphasis added).

[30] *Id.* at 387-88.

[31] *Sedco, Inc.*, *supra* note 19.

[32] *Id.* at 275 (footnote omitted).

[33] *Id.*

without due process of law, thus effectively adopting the "sole effect" version of the "effects" doctrine.

III. Conclusion

There is no doubt but that the Tribunal has made a substantial contribution to the law of expropriation, particularly by confirming the compensability of a deprivation of a property right and by defining the factual circumstances that may give rise to a deprivation. Although it did not always make a clear distinction between *de facto* expropriations and deprivations of property rights, at least a portion of the Tribunal's takings jurisprudence falls under the latter category and relates to "indirect" expropriations.

In order to assess the Tribunal's precedent-setting value, its jurisprudence has to be weighed against the extraordinary context in which the takings and deprivations took place: the turmoil of the Islamic Revolution. Although the Iranian Government sometimes sought to justify its measures on the basis of pre-existing or newly enacted legislation, the measures were often *ad hoc* or otherwise irregular and effectively deprived the owners of their property rights, thus justifying a finding of taking.

Unlike the revolutionary Iranian Government, the post-liberal State is likely to use more sophisticated tools than outright seizures or appropriations of property, appointments of temporary managers and other similar rough-and-ready tools to make a foreign investor's life difficult. To the extent that regulatory measures are taken that affect the value of a foreign investor's investment, and to the extent that such measures are adopted for a *prima facie* legitimate public purpose, the burden is on the investor to demonstrate that the measure is discriminatory. If discrimination between foreign and domestic investors, or between investors from third countries, can be shown, such measures are tantamount to expropriation and create a cause of action under international law. If no discrimination can be shown, the conclusion should be that a political risk has materialized and that the investor should bear the consequences.

Apart from the nature of the measures at issue, another aspect of the Tribunal's nature as a special purpose tribunal also has to be taken into account in assessing the relevance of its jurisprudence. As discussed above, claimants were rarely required to show that the measures complained of were arbitrary or otherwise irregular and thus unlawful under international law. The Tribunal effectively appears to have presumed that a loss of property at the hand of the Government in the circumstances prevailing in Iran in 1978-80, if proven, was a result of arbitrary and irregular measures that failed to respect due process of law and therefore could not be characterized as a materialization of a political risk.

The key issue in drawing the line between the materialization of a political risk and deprivation of a property right appears to have been the attributability of the loss to an act or omission by the Government; if the loss could not be directly or proximately attributed to the Government, it was to be classified as a materialization of a political risk. According to the Tribunal,

> "investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lockouts, disturbances, changes of the economic and political system and even revolution. That any of these risks materialized does not necessarily mean that property rights affected by such events can be deemed to have been taken. A revolution as such does not entitle investors to compensation under international law."[34]

While the approach adopted by the Tribunal may be considered appropriate in the mass-claims context in which the Tribunal operates, adopting a presumption of irregularity would likely be inappropriate in arbitration proceedings addressing claims arising out of "ordinary" rather than extraordinary, *i.e.,* revolutionary or war-like, circumstances. Outside a mass-claims context, administrative and other *ad hoc* (non-regulatory) measures that affect the property rights of a foreign investor may or may not be found compensable, depending on whether they can be considered arbitrary or otherwise irregular and thus not in compliance with due process.[35]

The question remains as to when the "police powers" standard becomes applicable. As suggested above, its proper scope of application is arguably regulatory measures ostensibly taken for a legitimate public purpose. Such regulatory measures, even if they may appear to be facially legitimate, may nevertheless give rise to liability and a right to compensation if discrimination between domestic and for-

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[34] *See Starrett Housing Corp., supra* note 18, at 156.

[35] *See Metalclad Corp. v. United Mexican States,* ICSID Case No. ARB(AF)/97/1, Final Award (Aug. 25, 2000), involving a claim for compensation for indirect expropriation of a hazardous waste facility as a result of the Municipality's decision to refuse to issue a construction permit. Although the Tribunal did not specifically mention the due process requirement, the arbitrary and irregular nature of the Municipality's decision appears to have formed the basis of the Tribunal's finding of indirect expropriation. *Id.* paras. 106-07. *See also CME Czech Rep. B.V. v. Czech Rep, supra* note 3, paras. 603-603 (finding the measures at issue irregular and not "ordinary measures of the State or its agencies in proper execution of the law").

eign investors, *i.e.*, a violation of national treatment, is proven.[36] As noted above, the Tribunal resolved only one case on this basis and found no discrimination.[37]

As the Tribunal frequently found, in cases of direct nationalizations and expropriations, a showing of discrimination is unnecessary. Such measures trigger the host State's liability and give rise to a right to compensation under international law, whether or not the measures are taken for a *prima facie* legitimate public purpose and whether or not they are discriminatory. The possible lawfulness of such measures under international law or under the law of the host State does not really matter; even if the measure were considered lawful, a right to compensation would still arise.[38] Confirming this rule is one of the most important contributions made by the Iran-United States Claims Tribunal to international investment law.

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[36] The national treatment principle is specifically mentioned, *e.g.*, in Art. 2 of the World Trade Organization *Agreement on Trade Related Investment Measures*, available at http://www.wto.org, and Art. 1102 of the NAFTA.

[37] *See supra* notes 28-30 and accompanying text.

[38] *See, e.g., Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, Award No. 425-39-2 (June 29, 1989), *reprinted in* 21 IRAN-U.S. C.T.R. 79, 121-22.

Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society

FRANCISCO ORREGO VICUÑA*

In the lectures in honor of Sir Hersch Lauterpacht recently delivered by this author at the Research Centre for International Law of Cambridge University, it was concluded that dispute settlement in the new century will be characterized by three parallel and intertwined developments: constitutionalization, accessibility and privatization.[1] These trends will undoubtedly have a strong influence on State behavior – not so much because of the dilution of sovereignty in a globalized international community, but rather because of increasing controls that will be exercised on the manner in which States carry out their functions in respect of individuals. This article will discuss one particular aspect of globalization in connection with the settlement of disputes in areas presently or prospectively brought under international protection.

Protecting Rights under International Law: Old Subjects, New Requirements

Foreign investments have thus far been the paramount example of this new approach to the protection of the rights of certain qualifying individuals and the manner in which the international community scrutinizes State behavior in respect thereof. The International Centre for Settlement of Investment Disputes ("ICSID") has been the leading institution in making this new approach possible. Although the standards of control are not well defined, the principle is this: States are accountable to foreign investors to the extent that wrongful State action interferes with their rights as provided for in national legislation, treaties or contracts.

These developments are not really surprising, as they have been taking place over a long time. First, in the field of human rights, not only foreigners but also nationals have been granted the protection of some mechanisms of international control and verification, be they global or regional. Similarly, in terms of the enforcement of international humanitarian law, international conventions and implementation mechanisms have been active for a significant period of time.

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[1] Francisco Orrego Vicuña: *International Dispute Settlement in the Twenty-First Century: Constitutionalization, Accessibility, Privatization*, forthcoming, Cambridge University Press.

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Conceptually, therefore, international control of national activities has been available on a continuing basis, with limits imposed by the extent of the coverage and the subject-matter to which it applies.

Globalization will inevitably mean that the international community will bring new areas into the same type of scrutiny. Besides foreign investments, international trade is also gradually appearing as a strong candidate for this approach. Claims by traders before national courts or administrative mechanisms have often involved delicate issues of international law and not infrequently have been the basis on which States have pursued claims before the World Trade Organization ("WTO"). Claims of this kind are channeled in some instances through regional institutions, as is particularly the case in the European Community.

In some specific free trade agreements – notably the case of NAFTA – individuals affected by wrongful State action have been allowed to take their claims to binational panels. Although they apply national law and standards, these panels entail a process of international control of national administrative actions requested directly by the individuals affected.

Many other examples can be mentioned in this context. Intellectual property, the law of the sea, and claims settlements of various kinds, particularly those resulting from times of war, are but a few areas in which forms of international control have been exercised. Proposals for new areas include the environment – an international environmental court having been suggested – and State bankruptcy and insolvency, as evidenced by recent discussions of the matter in the International Monetary Fund.

Progress and Regression in the Search for Balance

To pursue this discussion, it is first necessary to identify the framework in which domestic and international law will operate. The protection of property and acquired rights is no longer a fundamental issue in international law. For a long time the right to protection could not be easily reconciled with the supremacy of national sovereignty. Only after difficult confrontations was an understanding reached about the limits of the respective contentions, and conditions were established for the exercise of diplomatic protection and the right to expropriate, as well as for the right to compensation. International adjudication was instrumental in reaching such understandings.

The success of this approach, together with inescapable economic realities, has been so evident that outright direct expropriation is today rather exceptional. It must satisfy a number of well-settled requirements in order to be accepted as law-

ful under international law. If one examines the list of ICSID cases of the past few years, one realizes that this type of expropriation is quite exceptional.[2]

Some degree of accommodation has also been taking place in respect of indirect or regulatory expropriation, but this is thus far insufficient, scant and, on occasion, contradictory. The State holds its right to adopt measures in pursuance of public policy. Investors hold their right to be compensated if such measures amount to a taking. Neither of these views can be questioned in and of itself. The problem lies in how and where the respective limits and conditions should be established – that is, in identifying the point of common interest and reconciliation.

Yet, when we might have thought that the legal framework was rightly evolving in the direction of attaining such a balance, principally under the case law of ICSID, all of a sudden the confrontation flares up again. Is there a NAFTA/BIT treatment or merely a minimum customary law standard? Are such standards those of the twenty-first century or still those of the nineteenth century?[3]

International legal thinking has had great difficulty in focusing on the right approach to the issue of regulatory authority, particularly if it entails indirect expropriations as opposed to formal expropriations. This, again, is evidenced by examining the list of ICSID and NAFTA cases, the vast majority of which concern such questions as the right of the State to adopt certain types of regulations, the distribution of powers within the State and its various provincial or local governments, the effects of those regulations and their connection with the treatment embodied in treaties.

States' Rights and Limits of Authority

Two issues must be disposed of at the outset. There can be no doubt about the right of the State to adopt regulatory measures in implementation of legislation and other expressions of sovereignty. This right, generally brought under the vague concept of police powers, has not been questioned nor could it be unless one is aiming at the total dissolution of State functions, which is not the case now and will not likely be the case in the future.

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[2] Direct expropriation was involved, *e.g.*, in the case Compañía de Desarrollo de Santa Elena S. A. v. Republic of Costa Rica, Award of February 17, 2000, 39 I.L.M. 317 (2000). In other prominent cases only regulatory measures alleged to have amounted to expropriation were involved: Metalclad v. Mexico, 40 I.L.M.55 (2001); Waste Management Inc v. Mexico, 40 I.L.M.56 (2001); Pope and Talbot Inc v. Canada, 41 I.L.M.1347 (2002).

[3] Asan Sedigh: "What Level of Host State Interference Amounts to a Taking under Contemporary International Law?", 2 *The Journal of World Investment*, p. 631 (2001).

The second issue is that regulatory authority cannot validly be exercised if it violates the framework of legal rights and obligations in which it operates. It is quite clear today, for example, that regulatory measures cannot validly be adopted in contravention of constitutional standards, legislative mandate or human rights. This will be subject to scrutiny by constitutional bodies, judicial entities or international mechanisms.

The problem lies in establishing the limit of such powers or functions under international law. First, it appears to be a well-established principle that States may not act in a manner contrary to treaties and contracts, at least those contracts that are under some form of protection by international law itself.[4] Second, it is quite evident that, under the principle of attribution, States are responsible under international law for acts not only of central government authorities but also of any other public agency exercising regulatory functions of some sort.[5]

In the light of recent ICSID and NAFTA case law,[6] as well as under many other international precedents,[7] it has also become evident that most of the problems with regulatory authority entailing some form of expropriation occur not with central government authorities, which are conscious of international obligations, but with lesser governmental units, local states, municipalities and the like. This has gone so far that in a recent treaty it was necessary expressly to provide for the obligation to adopt measures ensuring the compliance with the treaty provisions by national, provincial and regional authorities, and a mechanism of supervision was established to this effect.[8]

Such attribution might result in a very long arm indeed, extending eventually to the acts of local authorities to the extent that such acts are adopted in violation of international obligations falling upon the State in question. However, the central government can of course limit this effect by providing expedient and comprehensive domestic remedies for screening the acts of such local authorities.

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[4] Rosalyn Higgins: "The Taking of Property by the State: Recent Developments in International Law", *Recueil des Cours*, Academy of International Law, Vol. 176, p. 263 (1982-III).

[5] James Crawford: *The International Law Commission's Articles on State Responsibility*, Chapter II (2002).

[6] *See, e.g.*, Compañía de Aguas del Aconquija S. A. v. Argentina, 40 I.L.M.425 (2001), and Decision on Annulment 41 *International Legal Materials* 1135 (2002).

[7] Sedigh, *supra* note 3, pp. 666-671.

[8] Protocol to the Argentina-Chile Treaty on Mining Integration and Cooperation, 20 August 1999, Art. 5.

Controlling Discretionary Powers

This in and of itself does not solve the problem of the limits of regulatory powers. On this point it is perhaps of interest to resort to two legal standards that have had or are likely to have a strong influence in domestic and international administrative law. One is the doctrine of discretionary powers of the administration subject to judicial control under certain standards. The other is a more recent contribution of English courts in respect of legitimate expectation.

It has been well established by domestic courts that the powers of the administration are essentially discretionary and not subject to judicial review unless there is *détournement de pouvoir*.[9] However, it has also been emphasized that the rights of individuals must be protected by the rule of law.[10] This approach has also had an interesting expression in the decisions of international administrative tribunals, which, while respecting discretional acts and decisions, have subjected to judicial review the acts adopted by an administration in violation of basic standards.

At first, this standard of review mainly applied to formal aspects connected with due process and transparency. As the World Bank Administrative Tribunal has repeatedly stated, it will not interfere with the exercise of discretion unless the decision contested "constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure".[11] It may be noted that this definition of the standard of judicial review involves not only questions of procedure but also some concerning the substance of the decision reached.

The inclusion of substance gradually became an element of judicial review. In some instances, the focus was not so much on an individual decision but on how a string of decisions might have affected the rights of the individual concerned, and thereby covering a process rather than an isolated act.[12] In other cases, the standard for judicial review has become stricter, particularly when an administration exercises quasi-judicial powers in matters such as disciplinary measures.[13] Still, in other

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[9] *See, e.g.,* decision adopted by the French Conseil d'Etat in Abbé Bouteyre, 10 May 1912, *in* M. Long et al., *Les grands arrets de la jurisprudence administrative*, p. 150 (2001).

[10] Conseil d'Etat: Daudignac, 22 June 1951, *in* Long, *supra* note 9, 447.

[11] World Bank Administrative Tribunal: *Suntharalingam*, *Reports*, 1982, Decision No. 6, para. 27.

[12] World Bank Administrative Tribunal: *Chhabra*, *Reports*, 1994, Decision No. 139, para. 57.

[13] World Bank Administrative Tribunal: *Planthara*, *Reports*, 1995, Decision No. 143, para. 24.

matters, administrative tribunals have been granted appellate jurisdiction allowing for a broader power of review of the act complained of.[14]

More important has been the extension of judicial review to certain instances of legislation adopted by the institution. In *de Merode*, the World Bank Administrative Tribunal held that policies affecting fundamental and essential elements of the rights of staff members cannot be changed without the consent of the staff concerned, unlike those policies that relate to non-essential aspects of the relationship.[15] In *Crevier* and a number of related cases, the very meaning and objective of pension reform had to be examined on the merits in order to deal with the complaint raised; in this case the reasonableness and fairness of the legislation was upheld.[16]

Legitimate Expectations as a New Standard

The second legal standard likely to have significant influence in domestic and international courts is that of legitimate expectations. At first, this standard was applied mainly to procedural questions or to the need to take into account a previous policy.[17] In *Preston*, however, the House of Lords ruled that unfairness amounting to an abuse of power could arise from conduct equivalent to breach of contract or representation.[18] In the recent case *R. v. North and East Devon Health Authority, ex p. Coughlan*,[19] the Court of Appeal in England sought to redress the inequality of power between the citizen and the State.[20] It held that:

> "Where the Court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different

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[14] World Bank Administrative Tribunal: *Shenouda*, *Reports*, 1997, Decision No. 177, para. 12.

[15] World Bank Administrative Tribunal: *de Merode*, *Reports*, 1981, Decision No. 1, paras. 41, 42.

[16] World Bank Administrative Tribunal: *Crevier*, *Reports*, 1999, Decision No. 205, paras. 28, 29.

[17] Associated Provincial Picture Houses Ltd. v. Wednesbury Corp (1947) 2 All ER 680, (1948) 1 KB 223.

[18] Preston v. IRC (1985) 2 All ER 327, (1985) AC 835.

[19] R v. North and East Devon Health Authority, ex Parte Coughlan (2000) 3 All ER 850.

[20] Mark Elliott: "Case and Comment, House of Lords Decisions", 59 *Cambridge Law Journal*, p. 421 (2000).

> course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."[21]

The Court, having examined prior cases, then added:

> "The court's task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or extant promise."[22]

The situation is not altogether different under international law. Governments and international organizations may undertake changes of policy in their continuing need to search for the best choices in the discharge of their functions. However, to the extent that policies in force earlier might have created legitimate expectations both of a procedural and substantive nature, for citizens, investors, traders or other persons, these may not be abandoned if the result will be so unfair as to amount to an abuse of power. As will be discussed below, this also assumes the international protection of the rights concerned. Herein lie the limits of discretion and the role of judicial review as a means of redress.

The implications of this view for the development of international law are most significant. Professor Ian Brownlie[23] and Lady Fox[24] have recently raised the question of whether matters giving rise to legitimate expectations on the part of an individual should be included among the exceptions to the law of State immunity. Just as the commercial activity of States has been recognized as a fundamental exception to immunity so, too, might there be a need to accommodate the increased supervision of government functions.

The World Bank Administrative Tribunal, like other such bodies, has also relied on the doctrine of legitimate expectations, sometimes inadvertently. It has held, for example, that the surrounding circumstances might create a right to have an appointment converted into some other kind of appointment,[25] just as a promise

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[21] *Supra* note 19, para. 57.

[22] *Supra* note 19, para. 65.

[23] Institut de Droit International, Resolution on Contemporary Aspects concerning Jurisdictional Immunities of States, Art. 2 (d), *Annuaire*, 1991-II, 64, 266.

[24] Hazel Fox: *The Law of State Immunity*, 2002, 298-300.

[25] World Bank Administrative Tribunal: *Mr. X*, *Reports*, 1984, Decision No. 16, para. 38.

to undertake such a conversion validly made was enforced since a decision to the contrary was held an abuse of discretion.[26] In the recent case of *Prescott*, the Tribunal also found that a legitimate expectation had been established in favor of a staff member who had been repeatedly assured that his regularization would be considered, what turned out to be untrue.[27]

Searching for a Controlling Jurisdiction

If, conceptually, the proper balance between the functions of the State and the rights of the individual can be achieved, as in fact it is becoming increasingly evident, then the question which remains is under what jurisdiction this can be done. With the exception of a few domestic legal systems where the control of the Executive by the Judiciary is well established and exercised, control by the judiciary is not generally an appropriate approach. Courts in most countries tend to be sympathetic to their own governments or else lack the powers to intervene in matters considered essentially administrative.

Can a special international jurisdiction be established to this end? It has been seen that ICSID tribunals are every passing day exercising some form of control over domestic acts that contravene treaties and standards of international law, but this is limited to foreign investments. It is quite probable that the same trend will soon materialize in respect of foreign trade. These are indeed positive developments.

The question remains whether such a jurisdictional system can be broadened to include other categories of individuals beyond trade and investments, for example foreigners in general, or even citizens of a country who feel that their rights have been affected by abusive regulations. In the area of human rights, this is an exercise that has encompassed foreigners and nationals alike when regulatory acts have been considered to violate conventions and other standards of international law.

This development is certainly to be expected when the rights of foreigners have been brought under some type of international protection, which most probably will include the appropriate jurisdictional arrangements to this effect. If international society some day becomes truly global, and the individual becomes a global citizen, then these protective standards might also be expected to apply to foreigners and nationals alike. There would be no substantive legal separation between nationals and foreigners in respect of the matters so globalized.

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[26] World Bank Administrative Tribunal: *Bigman*, *Reports*, 1999, Decision No. 209.

[27] World Bank Administrative Tribunal: *Prescott*, *Reports*, 2001, Decision No. 253, para. 25.

Meanwhile, however, such steps might gradually extend to some selected categories of individuals, particularly when they enter with States and international organizations into a legal relationship governed by international law. Standards of international law and international jurisdictional arrangements will then apply to such categories of individuals irrespective of their location or national allegiance. The separation of foreigners and nationals is always troublesome, particularly when the former are granted a treatment more favorable than the latter, but this will probably be a reality as long as total or partial globalization does not take place. Non-discrimination will no doubt help to ensure the transition between national treatment and international rights.

A subject-matter threshold can be expected to govern this approach in the near future, just as it does now in connection with investments and, in part, with trade. The regulation of certain activities of crucial importance for the international community and the need to avoid measures entailing expropriation might be generally a good candidate for such a mechanism. The arbitrary denial of governmental permits in such a context might also be an area where the protection of individuals will be of particular importance. This is certainly not the place to draw a precise list, but merely to suggest that areas where the individual is most vulnerable to State arbitrariness and abuse should be included in such a process of judicial review to the extent that it has become an area of international concern and protection.

As this type of international protection develops, other kinds of thresholds might also be appropriate in order to keep the number of complaints under control. From a procedural point of view, it might also be relevant that the mechanism established be able to work flexibly with mass claims, class actions and consolidation of cases.

The institutional format is an aspect that most probably will follow the functional protection of the matters concerned. The number of areas so protected will probably multiply ICSID or WTO types of institutionalized judicial review, combining the experience of international tribunals and administrative courts. At some point, broader regional or international courts might also be envisaged, as is already the case with the European Community and some other arrangements.

Global citizen, Global Protection

The important issue is that individuals should not be left unprotected from the ever-increasing functions of States and international organizations and the not infrequent abuses to which these lead. If domestic systems do not satisfy this concern then the international community must do so in the context of the development of internationally protected rights. This is not to overrule State sovereign

functions but simply to ensure that they respond to legitimate needs and powers and do not result in abuses of power. Both individuals and States would benefit from judicial review of regulatory acts tainted with some form of abuse, whether procedural or substantive.

L'indemnisation d'une expropriation indirecte

YVES NOUVEL*

Supposons une sentence arbitrale établissant qu'une mesure adoptée par un Etat équivaut à l'expropriation d'un investissement étranger : quelles conséquences le Tribunal devra-t-il tirer de cette qualification sur le terrain de l'indemnisation ? D'entrée de jeu, les arbitres le savent : « customary international law acknowledge[s] that a state's sovereign right to nationalize include[s] a general duty to compensate »[1]. En raison de son équivalence à une nationalisation, il en va de même pour une expropriation indirecte. Elle devrait être soumise à un régime juridique identique. Dès lors, s'interroger sur l'indemnisation de l'expropriation indirecte reviendrait à s'interroger sur l'indemnisation de l'expropriation tout court. Il n'y aurait pas lieu d'opérer de distinction. Pourtant, la méthode utilisée pour apprécier la valeur des avoirs expropriés permet de prendre en considération la nature de la mesure ayant provoqué la dépossession. Quand la mesure constitue une règle d'organisation sociale qui modifie « les conditions économiques générales » sur le territoire de l'Etat hôte de l'investissement, le montant de l'indemnisation peut être diminué. En sorte qu'une expropriation indirecte donne parfois lieu à une indemnisation qui n'est pas équivalente à celle due à raison d'une expropriation directe.

En partant d'une définition inspirée de la jurisprudence du Tribunal irano-américain, on peut admettre que l'expropriation indirecte embrasse toute mesure adoptée par l'Etat d'accueil, quel que soit son motif, qui prive l'investisseur étranger de l'usage, des bénéfices ou du contrôle de ses avoirs. Pour indemniser l'investisseur, les arbitres portent essentiellement leur attention sur la rentabilité de l'entreprise expropriée (I), ce faisant, ils prennent en considération les conditions économiques générales pour évaluer les profits futurs que l'entreprise pouvait escompter (II).

I. La rentabilité de l'avoir indirectement exproprié

Deux règles relatives à l'expropriation se dégagent de l'arrêt rendu dans l'affaire relative à l'Usine de Chorzow. La première définit la conduite à tenir dans ce domaine, l'autre définit la responsabilité pour manquement à cette conduite. La norme primaire prescrit que pour être licite, une expropriation doit compenser le *damnum emergens* dont elle est la cause. La norme secondaire prescrit que la réparation due pour la violation de la norme primaire, c'est-à-dire pour une expro-

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[1] Sentence *Shahin Shaine Ebrahimi* (1994), *Iran-US CTR*, vol. 20, p. 170 et s., § 94.

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priation illicite, prend pour mesure le *damnum emergens* et le *lucrum cessans* engendrés par l'expropriation. Depuis longtemps, la jurisprudence internationale admettait en effet que « le dommage causé à une partie par la rupture illicite du contrat comprend, en principe, d'une part, toutes les dépenses qu'elle a faites en pure perte dans l'accomplissement de ses obligations contractuelles (*damnum emergens*) et, d'autre part, tous les bénéfices que l'exécution régulière du contrat lui aurait rapportés (*lucrum cessans*) »[2]. Sous l'empire de ces règles, l'indemnisation avait pour critère la licéité de l'expropriation. Ce critère ignorait la réalité économique car le ressortissant étranger souffrait le même dommage qu'il ait été exproprié de manière licite ou non. Le raisonnement était entièrement tourné vers la réalité juridique du rapport *inter pares* liant l'Etat hôte du ressortissant étranger à l'Etat de nationalité dudit ressortissant. Or, la pratique, tant conventionnelle qu'arbitrale, en matière d'investissement, a progressivement mis l'accent sur la relation *inter partes* entre l'investisseur et l'Etat d'accueil. Il s'en est suivi un effacement progressif des principes posés dans l'affaire relative à l'Usine de Chorzow, au point qu'aujourd'hui, l'indemnisation s'évalue moins selon la licéité de l'expropriation que selon la rentabilité des avoirs expropriés.

L'indemnisation due au titre d'une expropriation tend à s'établir suivant la seule valeur de l'investissement. Juste, réelle ou marchande, la valeur se calcule selon des méthodes complexes aboutissant à un éparpillement des solutions qui fait le désespoir du juriste. De ce domaine embrouillé, il ressort quelques lignes directrices. Quand l'activité expropriée constitue une affaire rentable (going concern), les arbitres recherchent ce que l'investissement aurait rapporté dans l'avenir. Les éléments retenus varient, mais ils ont tous en commun d'inclure une visée prospective. Si l'entreprise expropriée avait vocation à fructifier, les avoirs sont indemnisés selon leur valeur de rendement qui incorpore le *lucrum cessans*. En revanche, si l'activité n'a pas démontré sa rentabilité, elle est indemnisée selon la valeur de remplacement qui tend à se limiter au *damnum emergens*. En forçant le trait, on pourrait dire qu'en matière d'indemnisation, le critère relatif à la rentabilité des avoirs expropriés s'est peu à peu substitué à celui de la licéité de l'expropriation. Dans l'évaluation du *quantum* de l'indemnisation, l'avoir rentable a pris la place de l'expropriation illicite et l'avoir non rentable a pris la place de l'expropriation licite. Dans ce nouveau système prôné par la Banque mondiale, le dommage économique réellement subi passe de beaucoup les considérations relatives à la licéité de l'action qui l'a engendré. Il aboutit à fixer une échelle d'indemnisation sur laquelle le curseur est l'aptitude des avoirs à produire des profits.

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[2] Sentence *Chemin de fer de Medellin* (1899), *Pasicrisie internationale,* p. 552.

La rentabilité de l'avoir s'évalue au moment de son expropriation, mais en faisant abstraction de la mesure qui l'a atteinte. Sa valeur est ainsi établie avant que sa substance ne soit affectée. Cela suppose d'exclure l'effet des mesures ayant provoqué la dépossession, autrement dit, d'aller à rebours de ce qui est pratiqué pour qualifier la mesure d'expropriation indirecte. La reconstitution de ce que valait l'avoir à la date de la dépossession va s'établir aisément pour les fonds investis en pure perte. Les éléments sans visée prospective, tels que le capital investi, sa dépréciation, le capital déjà rapatrié, permettent de fixer sans trop d'incertitude la valeur comptable de l'investissement. Mais pour établir les profits futurs, les choses se compliquent. Comment savoir quels auraient été, bon an mal an, les résultats produits par l'investissement sans l'atteinte portée à son existence ? Au mieux, peut-on déterminer si l'investissement laissait raisonnablement entrevoir la possibilité de bénéfices. Le développement potentiel de l'activité se déduit souvent des résultats déjà obtenus. C'est la raison pour laquelle les entreprises qui n'ont pas eu le temps de mettre en place leur activité ne sont parfois pas considérées comme des affaires rentables, car il leur manque les éléments utiles pour démontrer leur rentabilité. Face à un investissement atteint dans sa substance au point d'être indirectement exproprié, un Tribunal procédera à une extrapolation en établissant à partir des éléments connus « its earning capacity during the remainder of its life »[3].

Pour conduire une telle évaluation dans le détail, un cabinet d'audit est le mieux qualifié. Toutefois, dans son fondement – bien que les sentences arbitrales négligent de le rendre apparent – l'évaluation reste pleinement juridique. Elle repose toute entière sur un principe : la perte d'une chance. En effet, l'investissement international est une opération *de lucro captando*, exposée à des revers et dont il peut aussi résulter des gains immodérés. S'il n'est pas titulaire d'un droit à obtenir des profits, l'investisseur étranger dispose du moins d'une chance en ce domaine. C'est précisément cette chance qu'il faut apprécier pour quantifier l'indemnisation au titre des gains manqués. Dans la sentence *Sapphire*, le juge Cavin a ainsi estimé que, selon les principes généraux fondés sur la pratique commune des pays civilisés, l'abrogation d'une concession minière dans sa phase d'exploration était indemnisable sur le fondement de la perte d'une chance. Pour établir les gains futurs, le Tribunal précise que « there is no need to prove the success of the search, it is sufficient to establish a reasonable probability of success »[4]. Entendu de manière plus générale, il suffit de démontrer que les perspectives de profits anéanties par l'expropriation indirecte

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[3] Sentence *Middle East Cement shipping and Handling Co.* (2002), § 127, en ligne sur le site <www.worldbank.org/icsid/cases/cases.htm>.

[4] Sentence *Sapphire* (1963), *ILR* 1967, p. 187.

pouvaient être raisonnablement attendues. Pour restituer ce qu'aurait été la rentabilité de l'investissement s'il n'avait pas été exproprié, les tribunaux arbitraux recourent à un faisceau d'éléments. Ils tiennent notamment compte des conditions économiques générales auxquelles l'investissement aurait été confronté sur le territoire de l'Etat d'accueil.

II. La prise en considération des conditions économiques générales

Selon la jurisprudence du Tribunal irano-américain relative à l'évaluation de l'indemnisation, « while any diminution of value caused by the deprivation of property itself should be disregarded, […] changes in the general political, social, and economic conditions should be considered to the extent they could reasonably have been expected to affect the value the entreprise's assets »[5]. Quand elle est formée par une règle d'organisation sociale, la mesure équivalant à une expropriation peut avoir un double effet. Elle peut changer les conditions économiques générales tout en entraînant une dépossession par voie de réglementation (regulatory taking). Au titre de cette dernière conséquence, l'investisseur a droit à une indemnisation. Mais au titre de la première conséquence, le *quantum* de l'indemnisation peut être diminué car aucun gain n'était plus raisonnablement réalisable dans l'avenir.

En se constituant sur le territoire d'un Etat, l'investissement étranger pénètre dans un corps social régi par des règles générales. Ces règles contribuent à façonner « les conditions économiques générales » qui forment le milieu dans lequel l'investissement va se développer. Au moment d'apprécier la valeur d'une entreprise expropriée, ces éléments extrinsèques doivent être pris en considération. Ils ne peuvent être ignorés, car ils forment le cadre nécessaire dans lequel toute activité prend place. Procéder autrement reviendrait à créer une forme de "robinsonnade" par laquelle l'investisseur serait isolé de la vie sociale du territoire sur lequel il s'établit. La Cour Permanente de justice internationale a d'ailleurs repoussé en des termes non ambigus cette manière de voir : « Aucune entreprise, surtout de commerce ou de transports, dont le succès est lié au cours changeant des prix et des tarifs, ne peut échapper aux éventualités et aux risques qui sont le résultat des conditions économiques générales »[6]. Aujourd'hui, le traité bilatéral d'investissements n'a pas modifié les choses. Il n'a pas pour objet d'instaurer une enclave juridique dans laquelle la prospérité de l'investisseur serait garantie. Comme l'a retenu un tribunal arbitral dans une sentence récente : « the purpose of an investment treaty is not to put

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[5] Sentence *Harold Birbaum* (1993), *Iran-US CTR*, vol. 29, p. 260 et s., § 42.

[6] Affaire *Oscar Chinn* (1934), arrêt *RCPIJ*, 1934, Série A, no. 63, p. 88.

the investor into a more favourable position than he would have been in the normal development of his investment within the circonstances provided by the host country »[7].

Sauf engagement de stabilisation, l'investissement ne s'implante pas dans un milieu "nomostatique". Ce milieu varie selon la volonté de l'Etat d'accueil. Ces variations, quand elles découlent de règles abstraites ayant un caractère général visant à l'organisation du corps social, doivent être prises en considération au moment d'apprécier la capacité qu'aurait eu une entreprise expropriée à faire des profits. N'est-il pas frappant que pour évaluer les biens expropriés lors de la période révolutionnaire, le Tribunal irano-américain prenne précisément en compte les « general economic conditions »[8] consécutives à cette même révolution ? C'est au mot près la même formule qui revient dans de nombreuses sentences. Si les éléments examinés à ce titre viennent noircir l'avenir, l'aptitude d'une entreprise à fructifier paraît compromise. Dès lors, sans confiance raisonnable dans le retour sur investissement, les arbitres réduisent l'indemnisation des profits futurs[9]. Plus radicalement encore, ils retiennent à partir de ces éléments que l'entreprise ne saurait être considérée comme rentable et que, par conséquent, la méthode prospective d'indemnisation ne s'applique pas. En bref, la pratique du tribunal irano-américain démontre que les profits à venir n'ont de caractère raisonnable qu'au vu des conditions économiques générales. Quand ces circonstances sont bouleversées au point de retirer les perspectives de gains, il faut en tenir compte et limiter l'indemnisation de l'expropriation indirecte au *damnum emergens*, le *lucrum cessans* correspondant au gain auquel la poursuite de l'activité ne pouvait plus effectivement donner lieu dans l'environnement économique modifié par la mesure litigieuse.

Une objection se présente immédiatement : n'a-t-on pas dit qu'il fallait écarter la mesure à l'origine de l'expropriation pour apprécier la valeur de l'entreprise expropriée ? Certes, mais ici, la mesure n'est pas envisagée en tant qu'elle a pour conséquence la dépossession, mais en tant qu'elle entraîne un changement des « conditions économiques générales ». On raisonne sur une autre grandeur. En clair, si la mesure équivalant à une expropriation est constituée par un acte visant à régir bien au-delà de la seule situation légale de l'investisseur, le corps social dans son ensem-

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[7] Sentence finale *Cme Czech Republik B.V.C.* (2003), p.132, § 562, en ligne sur le site <www.cme.cz>.

[8] Sentence Vivian May Tavakoli (1997), *Yearbook of Commercial Arbitration*, 1998, p. 548, §126.

[9] Sentence *Aram Sabet* (2000), *Mealey's International Arbitration Report*, 2000, p. 15.

ble, ses effets importent pour fixer le montant de l'indemnisation. La Banque mondiale ne prône-t-elle pas, pour déterminer la valeur d'un bien exproprié, de se référer au prix qu'un acheteur de bonne foi donnerait pour ce bien compte-tenu « des circonstances où se ferait son exploitation à l'avenir »[10]? Ces circonstances ne peuvent être écartées au motif qu'elles sont produites par la mesure ayant causé l'expropriation indirecte. Quand la mesure en question est une règle d'organisation sociale de l'Etat d'accueil bouleversant les conditions économiques générales, elle retentit sur la réparation à laquelle l'investisseur a droit. Elle conduit, le cas échéant, à retrancher la part afférente aux profits futurs, l'investisseur n'étant indemnisé que selon la valeur comptable de ses avoirs.

L'interrogation centrale consiste alors à déterminer si la mesure litigieuse, en dehors de l'effet qu'elle a exercé sur le patrimoine de l'investisseur, comprend un effet de plus vaste ampleur qui modifie les conditions économiques générales. Pour y voir clair sur ce point, les arbitres pourraient s'appuyer utilement sur la distinction systématisée par la doctrine entre règles et décisions[11]. Si la mesure régit par le biais d'un énoncé hypothétique une situation générale en vertu des pouvoirs éminents de l'Etat d'accueil, elle constituera une règle d'organisation sociale. Il faut alors se demander si, sous l'empire de cette règle qui est appelée à produire ses effets de manière durable, les conditions économiques générales ont été affectées de telle manière que les perspectives de profit dans l'avenir sont anéanties. Inversement, si la mesure prend les traits d'un acte ayant pour destinataire une personne déterminée, alors elle sera une décision. Si « les expropriations et les nationalisations sont des décisions »[12], en revanche l'expropriation indirecte peut être l'effet d'une règle d'organisation sociale. Dans ce cas, la mesure à l'origine de la dépossession produit des effets durables, puisqu'elle est destinée à prolonger son application au-delà de la dépossession qu'elle a engendrée. Ecarter ces effets durables reviendrait à indemniser l'investisseur sur la base de profits qui n'étaient plus économiquement réalisables.

Quant la dépossession est la conséquence d'une règle d'organisation sociale affectant les conditions économiques générales, le montant de la réparation fait une place à l'objet de la mesure dont l'effet est équivalent à une expropriation. Il y

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[10] World Bank Group, *Legal framework for the treatment of foreign investment* (1992), *ILM* 1992, vol. XXXI, Art. IV, § 5.

[11] P. Mayer, *La distinction entre règles et décisions et le droit international privé* (1973), spéc. pp. 35-60.

[12] *Ibid.*, p. 112, § 157.

a fort à parier que des règles prises pour protéger l'environnement, la santé ou la sécurité publiques, soient de cette nature. Pour ces cas, l'indemnisation des avoirs indirectement expropriés devrait tendre à se limiter aux dépenses engagées en pure perte par l'investisseur. En résumé, si les effets de la mesure gouvernent l'éclosion de l'obligation d'indemniser, l'objet de la mesure importe dans le calcul du montant de l'indemnisation.

L'expropriation, l'ALENA et l'affaire Metalclad

ALAIN PRUJINER*

La notion d'expropriation est au cœur des préoccupations des juristes qui travaillent à la recherche d'un mécanisme efficace pour assurer la protection internationale des investissements. Au-delà des cas de nationalisation brutale, les investisseurs cherchent à obtenir des garanties contre toutes les autres formes d'éviction dont ils pourraient être victimes dans les pays qui accueillent leurs capitaux. La recherche de cette protection a amené la Banque mondiale à produire plusieurs instruments importants comme la Convention de Washington de 1965 créant le CIRDI[1] ou l'Agence multilatérale de garantie des investissements en 1985, mais les contraintes qui subsistent ne permettent pas encore aux investisseurs d'obtenir la sécurité juridique qu'ils souhaitent.

Or la mise en œuvre de garanties supérieures risque d'entraîner des conséquences que certains analysent comme une entrave au pouvoir de réglementation des États, en particulier dans le domaine de la protection de l'environnement. Ces préoccupations sont à l'origine de l'opposition virulente qui a joué un rôle important dans l'échec du projet d'Accord multilatéral sur l'investissement (AMI) à l'OCDE. On sait que ce sujet est resté d'actualité et qu'il pourrait revenir dans le cadre des négociations en cours à l'OMC ou ailleurs.

C'est une question qui a connu aussi certains développements dans le cadre de l'ALENA, en particulier à l'occasion de l'affaire Metalclad. Quels sont alors les enseignements qu'il est possible de dégager de cette expérience en Amérique de Nord?

1. L'ALENA et son chapitre 11

Dans l'ALENA, un chapitre est consacré à la protection de l'investissement entre les pays membres de l'Accord : le Chapitre 11, qui fut adopté à l'époque dans l'indifférence générale, les débats entourant la mise en œuvre de ce traité (tout comme de celui qui l'avait précédé entre les États-Unis et le Canada seulement, l'Accord de libre échange ou ALE) ayant porté sur d'autres aspects du projet de

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[1] Convention pour le règlement des différends relatifs aux investissements entre États et ressortissants d'autres États, Washington, 16 mars 1965, créant le Centre international pour le règlement des différends relatifs aux investissements (CIRDI).

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création d'une zone de libre échange commercial. Il faut noter que la définition de l'investissement adoptée dans ce Traité est plutôt large[2].

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[2] ALENA, article 11319 :

investissement désigne :

a) une entreprise;

b) un titre de participation d'une entreprise;

c) un titre de créance d'une entreprise

(i) lorsque l'entreprise est une société affiliée de l'investisseur, ou

(ii) lorsque l'échéance originelle du titre de créance est d'au moins trois ans,

mais n'englobe pas un titre de créance, quelle que soit l'échéance originelle, d'une entreprise d'État;

d) un prêt à une entreprise

(i) lorsque l'entreprise est une société affiliée de l'investisseur, ou

(ii) lorsque l'échéance originelle du prêt est d'au moins trois ans,

mais n'englobe pas un prêt, quelle que soit l'échéance originelle, à une entreprise d'État;

e) un avoir dans une entreprise qui donne au titulaire le droit de participer aux revenus ou aux bénéfices de l'entreprise;

f) un avoir dans une entreprise qui donne au titulaire le droit de recevoir une part des actifs de cette entreprise au moment de la dissolution, autre qu'un titre de créance ou qu'un prêt exclu de l'alinéa c) ou d) ;

g) les biens immobiliers ou autres biens corporels et incorporels acquis ou utilisés dans le dessein de réaliser un bénéfice économique ou à d'autres fins commerciales;

h) les intérêts découlant de l'engagement de capitaux ou d'autres ressources sur le territoire d'une Partie pour une activité économique exercée sur ce territoire, par exemple en raison :

(i) de contrats qui supposent la présence de biens de l'investisseur sur le territoire de la Partie, notamment des contrats clé en main, des contrats de construction ou des concessions, ou

(ii) de contrats dont la rémunération dépend en grande partie de la production, du chiffre d'affaires ou des bénéfices d'une entreprise;

mais ne désigne pas

i) les créances découlant uniquement :

(i) de contrats commerciaux pour la vente de produits ou de services par un ressortissant ou une entreprise sur le territoire d'une Partie à une entreprise située sur le territoire d'une autre Partie; ou

Dans le Chapitre 11, un article, celui qui retiendra notre attention dans cette note, traite directement de la notion d'expropriation : il s'agit de l'article 1110[3].

(ii) de l'octroi de crédits pour une opération commerciale, telle que le financement commercial, autre qu'un prêt visé à l'alinéa d) ; ou

j) toute autre créance,

qui ne suppose pas le versement des intérêts visés aux alinéas a) à h) ;

[3] Article 1110 : Expropriation et indemnisation

1. Aucune des Parties ne pourra, directement ou indirectement, nationaliser ou exproprier un investissement effectué sur son territoire par un investisseur d'une autre Partie, ni prendre une mesure équivalant à la nationalisation ou à l'expropriation d'un tel investissement («expropriation»), sauf :

a) pour une raison d'intérêt public;

b) sur une base non discriminatoire;

c) en conformité avec l'application régulière de la loi et le paragraphe 1105 (1) ; et

d) moyennant le versement d'une indemnité en conformité avec les paragraphes 2 à 6.

2. L'indemnité devra équivaloir à la juste valeur marchande de l'investissement exproprié, immédiatement avant que l'expropriation n'ait lieu («date d'expropriation»), et elle ne tiendra compte d'aucun changement de valeur résultant du fait que l'expropriation envisagée était déjà connue. Les critères d'évaluation seront la valeur d'exploitation, la valeur de l'actif, notamment la valeur fiscale déclarée des biens corporels, ainsi que tout autre critère nécessaire au calcul de la juste valeur marchande, selon que de besoin.

3. L'indemnité sera versée sans délai et elle sera pleinement réalisable.

4. Si le paiement est effectué dans une devise du Groupe des Sept, l'indemnité comprendra les intérêts, calculés selon un taux commercial raisonnable pour cette devise à compter de la date d'expropriation jusqu'à la date du paiement de l'indemnité.

5. Si une Partie choisit de verser l'indemnité dans une devise autre qu'une devise du Groupe des Sept, la somme versée à la date du paiement, si elle est convertie en une monnaie du Groupe des Sept au taux de change du marché en vigueur à cette date, ne pourra être inférieure au montant de l'indemnité due à la date de l'expropriation si ce montant avait été converti en une monnaie du Groupe des Sept au taux de change du marché en vigueur à cette date, et que les intérêts avaient couru, à un taux commercial raisonnable pour cette monnaie du Groupe des Sept à compter de la date d'expropriation jusqu'à la date du paiement de l'indemnité.

6. Au moment du paiement, l'indemnité sera librement transférable ainsi qu'il est prévu à l'article 1109.

7. Le présent article ne s'applique pas à la délivrance de licences obligatoires accordées relativement à des droits de propriété intellectuelle, ni à l'annulation, à la limitation ou à la création de droits de propriété intellectuelle, pour autant que soient respectées les dispositions du chapitre 17 (Propriété intellectuelle).

Par rapport aux textes antérieurs sur ce sujet, assez fréquents dans les traités bilatéraux, ce qui distingue le plus celui de l'ALENA est son extension aux «mesures équivalant à expropriation».

Pour adopter une mesure d'expropriation ou équivalant à expropriation, l'État doit démontrer :

1) qu'il s'agit d'une mesure d'intérêt public,
2) qu'elle est non discriminatoire,
3) qu'elle est légale au regard du droit de cet État,
4) qu'elle est conforme au droit international, incluant «notamment un traitement juste et équitable ainsi qu'une protection et une sécurité intégrales» suivant les termes de l'article 1105 du même chapitre.

Lorsque ces conditions sont remplies, l'État doit verser la compensation appropriée selon les règles fixées dans l'article 1110. Il devient alors indispensable de définir ce qu'est une «mesure équivalant à expropriation». Tout investisseur étranger (d'un autre pays membre de l'ALENA) qui fait face à une mesure qui porte préjudice à ses intérêts peut obtenir une compensation s'il réussit à établir qu'elle équivaut à une expropriation.

L'ALENA fournit ensuite à l'investisseur une procédure efficace pour faire valoir ses droits : un recours direct en arbitrage contre l'État hôte[4].

Il n'est donc pas surprenant que l'article 1110 ait été invoqué dans presque tous les dossiers soumis à l'arbitrage dans le cadre de l'ALENA. (Avec l'article 1105 sur la conformité au droit international. Bien que la question traitée par cet article ne soit pas sans rapport parfois avec celle de l'expropriation, nous la laisserons de côté dans cette note.) Il est important dans l'affaire Metalclad qui a donné lieu à la première intervention judiciaire sur l'interprétation de l'article 1110, dans une action en nullité de la sentence arbitrale rendue.

2. Les faits à l'origine de l'affaire METALCLAD

Pour s'en tenir à l'essentiel d'une histoire assez complexe, on peut retenir que la société Metalclad est une société des Etats-Unis qui a investi des capitaux dans la

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8. Il demeure entendu, aux fins du présent article, qu'une mesure non discriminatoire d'application générale ne sera pas considérée comme une mesure équivalant à l'expropriation d'un titre de créance ou d'un prêt couvert par le présent chapitre au seul motif que la mesure impose au débiteur des coûts qui le forcent à faire défaut au remboursement de la dette.

[4] ALENA article 1116, 1122.

construction d'une usine de traitement des déchets au Mexique. L'investissement dans cette opération avait été approuvé par les autorités fédérales mexicaines, qui avaient accordé les permis requis. Le projet s'est pourtant heurté à une farouche opposition locale. Les autorités municipales ont adopté diverses mesures pour empêcher l'installation de cette usine. Des négociations s'ensuivirent pendant que la construction continuait, avec l'adoption d'une entente (Convenio) entre Metalclad et des partenaires environnementaux mexicains qui comportait des engagements nouveaux sur le respect de l'environnement. Les autorités fédérales confirmèrent alors leur appui à l'opération en émettant un nouveau permis d'opération pour l'usine, qui était maintenant prête à fonctionner. Malgré cela, les autorités municipales de Guadalcazar continuèrent leurs mesures hostiles au projet et le gouverneur de l'État en cause (San Luis Potosi) intervint finalement en créant une zone écologique de protection des cactus en septembre 1997 qui incluait l'emplacement de l'usine. Résultat : l'entreprise n'a jamais pu commencer à fonctionner alors que l'usine est prête depuis 1995.

3. Les procédures

En janvier 1997, avant même que le classement en zone protégée n'intervienne, Metalclad, société des Etats-Unis, a intenté une action en arbitrage dans le cadre du chapitre 11 de l'ALENA contre le Mexique, responsable international des actes des autorités locales, pour non-respect des articles 1105 et 1110 de l'ALENA.

La procédure a été soumise au Règlement additionnel du CIRDI en vertu des dispositions de l'article 1120 de l'ALENA. Le siège de l'arbitrage fut fixé à Vancouver, en Colombie britannique (Canada). Il faut noter que le Mexique (comme le Canada) n'étant pas membre de la Convention de Washington, il n'est possible d'utiliser que la procédure additionnelle du CIRDI dans les litiges avec un investisseur des Etats-Unis ou bien le règlement d'arbitrage de la CNUDCI.

Le classement en zone protégée a ensuite été ajouté comme motif supplémentaire à la plainte de Metalclad, conformément au règlement applicable du CIRDI[5].

La sentence rendue en août 2000 par le tribunal arbitral condamna le Mexique à verser une indemnisation à Metalclad fixée à 16.685.000 $EU.

Le motif principal de la sentence est lié à l'article 1105 : il s'agit du défaut du Mexique d'avoir respecté une obligation de transparence à l'égard de Metalclad, obligation qui serait l'un des buts de l'ALENA selon les arbitres. Le Mexique aurait dû, selon eux, enlever toutes les incertitudes possibles sur le sort de cet investissement. À défaut, l'investisseur étranger n'a pas un traitement juste et équitable, ni une

[5] Règlement additionnel du CIRDI, article 48.

sécurité intégrale. L'État hôte est donc responsable et condamné pour non-respect de l'article 1105 et du droit international.

Le Tribunal retient aussi que les mesures adoptées par les autorités locales, en particulier le classement en zone protégée, constituent une expropriation au sens de l'article 1110.

Une action en nullité contre cette sentence est alors intentée devant le tribunal canadien du siège de l'arbitrage, la Cour suprême de Colombie britannique, conformément toujours au Règlement additionnel du CIRDI qui ne donne pas accès à la procédure d'annulation du CIRDI par un comité d'arbitres.

4. Le jugement

Le juge Tysoe de la Cour suprême de Colombie britannique (le tribunal local de première instance malgré son nom) a rendu son jugement le 2 mai 2001. C'est un long jugement, de plus de 135 pages, qui traite de nombreuses questions. Il n'a pas été porté en appel.

Nous nous en tiendrons à examiner ce qui touche l'expropriation. Le sujet est particulièrement important parce que le juge écarte le motif principal retenu par les arbitres. Il considère en effet que ceux-ci ont excédé leur juridiction en fondant leur raisonnement sur une obligation qui ne fait pas partie du droit international visé à l'article 1105. Il annule donc cet élément de l'ensemble de la sentence. Selon lui, les arbitres peuvent interpréter l'article 1105, ils ne peuvent pas y ajouter des éléments qui ne s'y trouvent pas. Or l'obligation de transparence invoquée ne fait pas partie du droit international dont le respect est visé par cet article.

Le juge doit alors évaluer la motivation fondée sur l'article 1110, donc la notion de mesure équivalent à expropriation, dans la mesure où elle peut être détachée de celle relative à l'obligation de transparence.

Pour cela, le juge distingue entre la période antérieure au classement et celle qui suit.

Dans la première période, il considère que la sentence n'apporte pas d'éléments permettant de considérer qu'il y a eu vraiment expropriation. Le raisonnement suivi est trop dépendant de celui suivi à l'égard de l'article 1105 pour être convaincant. La référence faite à l'arrêt Biloune[6] lui semble peu adéquate, les faits étant trop différents. Pour cette période, la sentence ne permet donc pas d'établir qu'il y a eu expropriation. Le juge prend aussi la précaution d'ajouter que cela ne veut pas dire qu'il n'y a pas eu d'expropriation en fait, mais seulement que la sentence n'est

[6] Biloune v. Ghana Investments Centre (1990), 95 I.L.R. 183.

pas fondée sur une démonstration suffisante à cet égard. Les arbitres sont donc hors juridiction sur ce point aussi.

En revanche, la situation change avec le décret de classement. Il n'était pas très important dans le raisonnement des arbitres, puisque ceux-ci considéraient que la responsabilité du Mexique était déjà engagée lors de l'adoption du décret. Il devient cependant central dans l'appréciation du juge qui n'accepte pas la responsabilité du Mexique auparavant.

La Cour doit donc évaluer si le tribunal d'arbitrage a établi qu'il considérait le classement en zone protégée du site de l'usine de traitement comme une mesure équivalant à expropriation et si cette appréciation relevait de sa compétence.

Sur le premier point, la sentence comporte effectivement une référence au classement et à son effet expropriant. Même s'il s'agit d'un argument secondaire dans la logique des arbitres, il n'en est pas moins présent et détachable de l'argument fondé sur la transparence. Le juge peut et doit alors en évaluer l'effet. Il vérifie alors que le classement, intervenu postérieurement à l'action en arbitrage, pouvait effectivement être inclus dans le litige en vertu de l'article 48 du Règlement additionnel du CIRDI et sa conclusion est positive sur ce point : les arbitres pouvaient évaluer l'impact de ce classement dans leur sentence.

L'argument lié au classement s'appuie sur le texte de l'article 1110. Celui-ci contient l'expression «mesure équivalant à l'expropriation». Les arbitres sont donc bien dans leur rôle en évaluant la portée de cette expression. La situation est différente de celle relative à l'article 1105, car les arbitres avaient alors référé à un concept hors de l'article lui-même, ce qui entraînait leur défaut de juridiction. Ici, ils sont dans le champ de leur juridiction et le tribunal ne doit pas se livrer à une appréciation au fond, interdite par la loi applicable en l'espèce, l'*International Commercial Arbitration Act* de Colombie britannique, loi adoptée sur le modèle de la Loi type de la CNUDCI sur l'arbitrage commercial international.

Le juge vérifie cependant que les arbitres n'ont pas fait une erreur flagrante et déraisonnable dans leur appréciation de la nature expropriante de la mesure. Cet examen est fondé sur le fait qu'une motivation grossièrement déraisonnable entraînerait aussi une absence de juridiction selon le droit canadien ou une contrariété à l'ordre public telle qu'elle devrait provoquer l'annulation de la sentence. Le juge prend la précaution d'indiquer qu'il n'est pas sûr que cette démarche est acceptable dans le cadre des sentences internationales couvertes par *l'International Commercial Arbitration Act* et qu'il n'entend pas décider de cette possibilité puisque son jugement est de toute manière que la sentence n'est pas déraisonnable sur ce point.

Comme il l'indique, il considère que les arbitres ont adopté une définition extrêmement large de l'expropriation telle qu'envisagée par l'article 1110 : «*In ad-*

dition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property». Ce faisant, il reste dans son rôle d'interprète de l'Accord.

Le tribunal d'arbitrage a ensuite bien vérifié que la mesure de classement avait cet effet confiscatoire par l'interdiction permanente des activités de l'usine construite sur le site. Selon le juge, il n'y a là rien de déraisonnable. Par conséquent, la Cour ne peut annuler la sentence lorsqu'elle établit que le Mexique a procédé à une expropriation sans indemnisation. La sentence ne sera donc annulée qu'en ce qui concerne la partie fondée sur l'article 1105, mais sera maintenue sur celle qui invoque l'article 1110 après le classement.

La Cour va donc devoir déterminer si le montant de l'indemnisation fixée par le Tribunal arbitral est conforme à cette responsabilité due au classement. Cela va l'amener à placer le moment de la responsabilité du Mexique au moment du classement, et non avant, comme l'avait fait le Tribunal arbitral, et donc à déduire du montant de la condamnation la partie des intérêts antérieure au 20 septembre 1997, date du classement.

5. L'impact de cette affaire

Il faut distinguer l'impact juridique de l'impact politique.

Impact juridique

Sur le plan juridique, l'adoption du texte de l'article 1110 a provoqué un besoin de détermination de l'extension accordée à la notion d'expropriation. Il a donc été invoqué dans la plupart des autres sentences rendues dans le cadre des arbitrages du chapitre 11 de l'ALENA et les arbitres ont été plutôt prudents dans ce domaine.

Les argumentations fondées sur l'article 1110 ont eu peu de succès dans l'ensemble. Elles ont été rejetées dans les affaires *Azinian*[7] et *Mondev*[8], ainsi que dans *Pope & Talbot*[9] et *Myers*[10]. Cette extension est invoquée positivement dans *Ethyl*[11], mais au stade d'une décision sur la juridiction seulement.

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[7] Sentence du 1er novembre 1999, rejet d'une action contre le Mexique.

[8] Sentence du 11 octobre 2002, rejet d'une action contre les Etats-Unis.

[9] 1ère sentence, du 26 juin 2000.

[10] 1ère sentence, du 13 novembre 2000.

[11] Sentence du 24 juin 1998.

Metalclad est donc le seul dossier dans lequel le demandeur a pu obtenir une condamnation sur la base de l'article 1110 dans toutes les sentences rendues jusqu'à présent en application du chapitre 11 de l'ALENA.

Dans ce cas, les contenus tant de la sentence que du jugement sur la notion d'expropriation semblent conformes à ce que l'on pouvait attendre d'une application du texte de l'ALENA.

L'ouverture de la protection arbitrale aux mesures équivalant à une expropriation devait conduire assez logiquement à sanctionner des situations telles que celle créée par l'intervention de l'État de San Luis Potosi dans ce dossier. Il ne semble pas illogique que les arbitres aient donné effet à une volonté d'extension claire dans le texte. Il n'était peut-être pas nécessaire à cette fin d'adopter une définition aussi large que celle qu'ils ont adoptée : l'expression *reasonably-to-be-expected economic benefit of property* ouvre en effet des perspectives inquiétantes d'une manière inutile dans les circonstances du dossier. S'il est une critique que l'on peut faire sur le traitement de l'expropriation dans cette sentence, c'est d'en avoir trop élargi la notion dans le texte plus que dans la décision.

Il y a sur ce point des différences d'appréciation assez fortes d'un dossier à l'autre, et des définitions plus restrictives que celle énoncée dans *Metalclad* ont été adoptées dans d'autres sentences. Ainsi dans *Pope & Talbot*, les arbitres ont considéré que, pour qu'une mesure équivaille à une expropriation, elle doit priver substantiellement l'investisseur de son investissement, de la possibilité d'en avoir la jouissance ou doit l'empêcher d'en disposer. Ces termes sont plus exigeants que ceux de *Metalclad.* Il n'est cependant pas certain que les arbitres de Pope & Talbot n'auraient pas considéré que les faits de l'affaire *Metalclad* s'inscrivent bien dans leur propre définition.

Il est aussi normal que les juges n'interviennent pas sur cet aspect de l'appréciation juridique des arbitres. Sur ce point, le juge a prudemment refusé de prendre position sur l'applicabilité du contrôle du caractère totalement déraisonnable ou non de l'argumentation de la sentence. C'est un peu dommage. Il aurait pu aussi commencer par se demander s'il devait se livrer à cet exercice avant de le faire et clarifier ainsi la portée de l'ordre public international dans l'examen des sentences internationales au Canada. On peut cependant comprendre qu'il n'affronte pas les difficultés qu'il pouvait contourner au regard de toutes celles qu'il a dû surmonter. Il n'en demeure pas moins que son appréciation est solidement construite sur le caractère non déraisonnable de la motivation des arbitres.

Il reste que la nature arbitrale des procédures ne va pas faciliter l'établissement d'une jurisprudence ferme sur l'interprétation de cet article 1110. La publication de toutes les sentences aura cependant un impact important sur le développement

de cette jurisprudence, les arbitres ne pouvant ignorer ce qui aura été décidé dans les autres dossiers, sans pour autant être liés par une règle de précédent.

Impact politique

Malgré la prudence des arbitres, l'article 1110 (tout comme l'article 1105) est au cœur d'un débat politique virulent. Il est très mal vu dans certains milieux, en particulier dans les organisations de protection de l'environnement (aux Etats-Unis surtout) qui le perçoivent comme une menace au contrôle judiciaire des mesures de protection de l'environnement. La décision *Metalclad* a ainsi nourri un discours hostile à l'ALENA aux Etats-Unis, avec des arguments avancés qui vont bien au-delà de cette décision, mettant alors en cause la capacité des États à prendre désormais des mesures efficaces de protection de l'environnement sans devoir verser des montants considérables à des investisseurs étrangers protégés par des arbitres, tout aussi étrangers, agissant dans des procédures secrètes, hors d'atteinte des défenseurs de l'intérêt public … C'est d'ailleurs ce type d'arguments qui est le plus souvent avancé contre l'extension de ce régime au continent tout entier par le projet de Zone de libre échange des Amériques (ZLÉA).

L'hostilité des ONG se comprend. Il est exact que la procédure arbitrale rend difficile leur intervention comme amicus curiae comme elles le font devant les tribunaux. Les arbitres semblent aussi moins susceptibles d'être influencés par les dimensions politiques de ces dossiers que les juges locaux. Il n'en reste pas moins que ces dossiers sont très publicisés, que les principaux documents de chaque affaire sont facilement accessibles sur les sites web des États membres, y compris les sentences. La possibilité d'intervention des ONG pendant les procédures arbitrales fait en ce moment l'objet de débats.

Il est par ailleurs surprenant de voir se développer aux Etats-Unis un raisonnement très proche de l'ancienne doctrine Calvo, celle que l'Amérique latine est en voie d'abandonner, alors même que les Etats-Unis n'ont encore été l'objet d'aucune condamnation ! Après avoir imposé l'arbitrage des différends relatifs aux investissements aux autres pays hôtes en tant que pays exportateur de capitaux, les Etats-Unis semblent accepter difficilement de devoir subir le même traitement lorsqu'ils sont eux-mêmes importateurs de capitaux.

Peut-être la prudence des arbitres va-t-elle finir par diminuer le niveau de ces craintes suscitées par les premiers débats. Il n'empêche que la définition de l'expropriation restera un sujet périlleux et que le choix du recours à l'arbitrage pour y parvenir continuera probablement à créer des difficultés. Les problèmes d'application de cet article 1110 de l'ALENA illustrent bien la difficulté de rédaction d'un texte international sur la protection contre l'expropriation des investissements étrangers.

Profile / Profil

Sir Elihu Lauterpacht

FRANCES MEADOWS

If there is anyone alive with an insatiable appetite for international law, it is Eli Lauterpacht. It is, quite simply, his daily nourishment. While it would be an over-simplification to claim that he has followed undaunted in the footsteps of his remarkable father, Sir Hersch, it is certainly true that he has made the subject his own. His immersion and absorption appear to be total.

We will have to await Lauterpacht's biography of his father – a project only recently, and somewhat hesitantly, undertaken – to measure the influence of father upon son. Sir Hersch, born in a part of Austria that subsequently became part of Poland and later of Ukraine, studied in Vienna and came to England in 1923 to escape the climate of anti-Semitism festering in Poland at the time. He undertook research and later teaching at the London School of Economics, and in 1937, after only fourteen years in his adopted country, was elected Whewell Professor of International Law at Cambridge University. Described by his son as perceptive and forward-looking as well as profoundly academic, he went on to become a judge of the International Court of Justice from 1955 until his death in 1960.

By contrast, his son, while following the natural pull of gravity towards international law, soon developed a taste for advocacy. The crucial point of divergence between their two careers was to be Eli's increasing orientation towards professional practice, which he began to develop early on alongside his academic career. He was, he discovered, "instinctively an adversarial animal".

Marrying that adversarial instinct with the natural talent of a persuasive and mellifluous speaker, Lauterpacht was called to the English Bar in 1950 and embarked on a career during which he has excelled as teacher, adviser and advocate. The different disciplines feed into each other. Teaching – he, too, taught early on at the LSE – is an important source of both background and discipline in public international law, in his view, as it encourages a systematic approach to analysing a problem. It is vital, for example, when confronted with a case requiring an examination of the sources of international law, to understand how to measure the relative weight to be given in a particular situation to treaties, either directly or indirectly through customary law, to *opinio iuris* or state practice. And conversely, for the academic, exposure to legal practice shows how the subject actually works. Sir Eli describes himself not as a university teacher, nor a practitioner, but, quite simply,

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as "an international lawyer". Even now, in his seventies, he would probably not be entirely happy doing only one of these things to the exclusion of the other. The interview for this profile was conducted on a day when he had given a lecture at the Law Faculty on the subject of jurisdiction, having agreed to take over part of the syllabus on the sudden and untimely death of a faculty colleague. He cheerfully described this renewed exposure to undergraduate teaching as "a great stimulus".

Cambridge is Sir Eli's natural intellectual habitat, and he has been a Fellow of Trinity College since 1953. Apart from *Aspects of the Administration of International Justice*,[1] he has published relatively little – claiming a reluctance to invite comparison with the exacting standards of writing set by his father. However, there are generations of students to attest to the vividness and energy of his powers of communication. Many will look back on his lectures and tutorials ("supervisions" in Cambridge parlance) as having ignited the spark which brought the law to life. His is indeed an exuberant personality: it is a rare teacher who can communicate *joie de vivre* while talking to undergraduates about the law of treaties. Students and colleagues quickly learn that he can be grave, he will frequently be controversial and always inventive, but also that he can be sublimely mischievous.

At the Bar in the 1950s, Lauterpacht worked on commercial cases in the Essex Court chambers of Sir John Megaw, where he mastered the formal techniques of drafting common law pleadings, and the strict standards of relevance and precision required in argument and evidence – disciplines which, he believes, made him a better international lawyer. As practically the only junior counsel specialising in public international law, he was able to work closely with clients such as Shell in the days before companies had large teams of in-house lawyers. Lauterpacht was rapidly drawn into areas where international law was undergoing major upheaval. He was appointed Secretary to the Somervell Committee, a joint committee of the UK Cabinet Office and Foreign Office charged with considering the laws on state immunity, whose deliberations ultimately resulted in the passing of the Diplomatic Privileges and Immunities Act, 1955, the legislation which denied full immunity in the absence of reciprocity. Even within that committee, the subject proved controversial. Fifty years on, now that courts in England and elsewhere are applying international law more and more, Lauterpacht views with disapproval the frequent recourse to arguments of immunity and act of state: he champions the rights of national courts to review other states' decisions, and feels that an absurd amount of time is spent debating the technical niceties of immunity instead of the substantive issues.

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[1] Grotius Publications, 1991.

His views with regard to expropriation of assets are based on much the same legal logic, and it is in this field that Lauterpacht has made his best known contribution to the development of international law. For a compendious account of his early involvement, beginning with the Anglo-Iranian Oil pursuit litigation in the early 1950s, and the intellectual analysis which he has subsequently brought to bear on the problem, there is no better source than the evidence he gave as expert witness in the *Hunt* case in Texas.[2] What first strikes anyone reading the testimony is the freshness and lucidity of the presentation – never for an instant does Lauterpacht seem to have forgotten that he was addressing a jury – and the sense he manages to convey of the real excitement with which, as a very young lawyer, he set about challenging what appeared at the time to be the established doctrine in such an important area. Anglo-Iranian Oil (which later became British Petroleum) initially consulted Hersch Lauterpacht in 1951. Its concession in Iran had been nationalised without compensation. Arbitration failed to resolve the issues, and the International Court of Justice held that it had no jurisdiction. Anglo-Iranian's advisers were seeking a way of upholding the company's rights through actions in national courts to recover the value of the oil as it was exported. Recovery appeared problematic, at least under English law, because of the rule in the case of *Luther v. Sagor*, whereby title to property abroad was determined by reference to the *lex situs*. Convinced that this would lead to results that were deeply unsatisfactory in principle, Eli Lauterpacht set about researching the case law in order to show that an exception existed: property could be restored if the original taking was invalid in international law. In other words, a domestic court should not recognise the consequences of an internationally unlawful act. The British government accordingly declared the criteria it would apply in determining whether it would view a taking as lawful: it must be done for a public purpose relating to the state's internal needs, and accompanied by compensation that was prompt, adequate and effective. Announcements were drafted putting prospective buyers of the oil on notice that the Iranian taking was unlawful, and that they risked legal challenge if they attempted nonetheless to acquire title. While "pursuit" actions failed in Italy and Japan, the argument succeeded in the *Rose Mary* case in Aden, and was consolidated in a series of cases that followed. The pattern was notably repeated, both as to the state practice of issuing warning announcements and as to the legal arguments deployed in court, almost twenty years later when the Libyan government nationalised a concession partly owned by B.P. (which was again advised by Lauterpacht).

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[2] The testimony is reprinted in *The International Lawyer* (ABA), Winter 1983, vol. 17 no. 1, at page 97.

Lauterpacht's involvement throughout the early 1950s in the Anglo-Iranian oil cases meant that, in his first case before the ICJ, *Nottebohm,* he was limited to advising only in the jurisdictional phase. His first opportunity to plead before the Court came in the *Barcelona Traction* case, which, as every international law student knows, was to take on epic proportions. He has since represented numerous governments as advocate, and has served in one case as judge *ad hoc*. He strongly upholds the position of principle taken recently by the Court that no-one should act as advocate in one case and judge *ad hoc* in another at the same time. He does not think that techniques of oral pleading before the Court have changed much in the intervening years; his advice – not to speak so quickly as to defy absorption – is equally valid now, though in the days before simultaneous interpretation it was a matter of necessity. He also, characteristically, emphasises the need to think about the identity and personality of the individual listeners, and to adopt what he describes as a "multi-barrelled approach" when addressing the Court. This is not to suggest that Lauterpacht approves of the tendency in recent years for written pleadings to become extremely prolix. He does not, but neither is he satisfied with the brevity with which certain critical points of law, despite being extensively argued, are treated in its judgments. The ICJ, he says, is an unpredictable body.

Having acted as counsel in the *Nuclear Tests* cases, Lauterpacht accepted an invitation in January 1975 to take up appointment as Legal Adviser to the Department of Foreign Affairs of Australia, where he remained for three years. The Whitlam government saw the advantage of having a recognised international lawyer in that key position – one who, by that time, had extensive experience of every aspect of his subject. Lauterpacht enjoyed the working relationships he built up while in Canberra, and the legal culture which he found to be very close to that of the UK. The skills he acquired in international legal diplomacy were put to good use in the negotiation of the UN Convention on the Law of the Sea, to which, as deputy leader of the Australian delegation, he contributed ideas on dispute resolution.

With experience behind him of dispute resolution in a multitude of fora, Sir Eli is encouraged, rather than concerned, by the recent proliferation of international tribunals. Existing institutional bodies will, he feels, prove unable to cope efficiently with an increased workload, and there is merit in having tribunals with specialist jurisdiction which can contribute in different ways to the body of international law. While permanent establishments may serve to attract and develop a concentration of expertise, there is equally a danger that, over time, they become too rigid in their approach. He sees scope for further development of the role of alternative techniques of dispute resolution, though not, perhaps, in cases involving boundary disputes where each party usually needs a binding legal determination in order to be able to secure internal political backing for the solution. Major

disputes can, however, benefit from mediation, often under the auspices of a regional organisation: Sir Eli cites the recent example of successful mediation by the OAS of a dispute between Guatemala and Bolivia. Sir Eli is himself the President of the Eritrea-Ethiopia Boundary Commission, which is engaged in the two-stage implementation of the Peace Agreement signed in December 2000. Delimitation was completed in April 2002, and the current work on demarcation, involving sophisticated technical surveys, is in progress. As President, he reports each quarter to the Secretary-General of the UN, whose local peacekeeping force has played a helpful role in supporting and facilitating the Boundary Commission's work on the ground.

Despite the recent general tendency to focus on the role of the Security Council to the exclusion of all other aspects of the UN's work, Sir Eli takes a broader and longer view of the United Nations. Its role is vitally important, he insists, not only in active peacekeeping through the forty-two forces currently deployed, but for the general maintenance of stability and the enormous, though less visible, benefits accruing through the work of its other organs. Critical of what he describes as the "unfortunate" willingness on the part of the United States to disregard the Security Council over Iraq, Sir Eli does not see the UN as thereby irreparably damaged: on the contrary, he remains convinced that the international community cannot function without it.

Any treaty commitment, let alone membership of an international organisation with clearly-stated objectives, rules and processes, brings with it a greater or lesser degree of erosion of national sovereignty. Sir Eli declares himself in favour of this – whether one is talking about the European Union, the International Monetary Fund, or the European Convention on Human Rights – because of the concomitant benefits, and because, with regard to the specific subject-matter of the cooperation, sovereignty does not just go away: it is no longer absolute but shared. National sovereignty ends, he is on record as saying, where international obligations begin. His approach is a pragmatic one: "The state remains a sovereign state in international law and continues to be able to guide its future destiny within the limits that it has itself accepted."[3]

One of the first things to emerge from a conversation with Sir Eli on almost any aspect of international law is the importance he attaches to state practice. Documents such as the notice letters issued by the British government during the Anglo-Iranian oil dispute come to be regarded as models or precedents. Customary law is

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[3] "Sovereignty – myth or reality?" in *International Affairs*, Vol. 73, 1997, p. 137, at p. 149.

in large measure derived from the conduct of states, and the importance of the availability of this material to scholars and practitioners alike is obvious. In the UK, however, it was not until Lauterpacht created the publication *British Practice in International Law* in 1955 that it became easily accessible in collected form. On the death of his father, Lauterpacht took over the editing and, subsequently, publication of the *International Law Reports*, now regarded as an essential working tool. He also set up a specialist publishing company, Grotius Publications, which existed independently for fifteen years before being sold to Cambridge University Press in 1993. His founding of the Lauterpacht Research Centre for International Law, housed close to his parents' former home in Cambridge, has provided an institutional setting for the various publications and research activities which Sir Eli has so tirelessly promoted, and has added a new dimension to the University's reputation for the teaching of international law. The Centre stands as evidence of the many things Sir Eli has done to make international law easier and more pleasurable to study, to practise and to teach.

A trunk full of letters which passed between the young Eli and his parents while he was at school in the United States, first in New York and later in Andover, Mass., has provided the impetus for him to embark upon the biography of Sir Hersch. He is exploring with his usual blend of intellectual curiosity and humour the very particular art of writing a biography. Aside from this new literary adventure, and from international law in all the forms in which he has already mastered it, Sir Eli professes to have few other interests outside his family. Reading, for him, always has to have a purpose, and he claims never to "stop" to listen to music – which is, however, not to say that he does not listen to any. "All my interests are in this room", he explains. His study – huge, cluttered and comfortable, with a view of a garden full of daffodils in all the damp and fragile promise of a fenland spring, is enlivened by drawings by his grandchildren. Among the paintings by his wife Cathy is a striking view of Walberswick beach on the Suffolk coast, in a style redolent of Edward Hopper.

Facing Sir Eli across his study desk as he contemplates the latest fax on the Ethiopia-Eritrea Boundary Commission is another painting: a portrait of Grotius himself, dating from 1614, discovered by pure chance and bought, of all unlikely places, at an auction in Yorkshire. Grotius would be happy to have found such a serendipitous home: there is no doubt the two of them would have enjoyed each other's company.

Work in Progress / Travaux en cours

Redefining Progress at the Third World Water Forum in Kyoto

KAREN FRANZ*

Traversing three cities, and occupying nine conference halls, the World Water Forum covered 351 separate sessions on thirty-eight themes.[1] Approximately 24,000 individuals from 182 countries traveled to the cities of Kyoto, Osaka, and Shiga to participate in this mammoth event, which lasted eight days, from March 16th to 23rd, 2003.

The Japanese government did a phenomenal job of accommodating the broad array of themes, which covered everything from the spiritual side of water to toilet construction. As a result, the frazzled participants needed to spend as much time absorbing the voluminous schedule as they did shuttling between venues and cities in order to capture the subjects that pertained most to their attendance at the World Water Forum. Were a speaker detained by travel complications or by other logistical matters, the act of finding a suitable replacement required frantic mobile phone communications and a transit time allowance of a few hours. This was not a venue for last minute coordination, neither for the participants nor for the presenters at the Forum.

Nevertheless, thanks to some very well organized coordination, the potential for "the meeting of the minds" was monumental. Many projects were able to take significant steps forward, as heads of organizations were finally able to meet and confer. The March 23rd, 2003 press release "3rd World Water Forum Concludes 100 New Commitments Made" outlines several outcomes of the Forum, most of which are global and regional agreements focused on the development of financing regimes and cooperation projects to secure basic sanitation programs and improved resource governance, while balancing transportation and environmental requirements.

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[1] <http://www.world.water-forum3.com/2003/eng/topics/topics0323-02.html>.

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Over the course of the Forum, the need for an independent "Water Court" was identified by several scientific organizations and policy groups. As a non-UN affiliated international organization, the Permanent Court of Arbitration was approached because of its involvement in providing a forum for alternative dispute resolution for conflicts and disputes pertaining to natural resources and the environment.

The question has been raised: would the development of an independent "Water Court" be the best way to address water disputes? The nature of the resource requires a multidisciplinary approach as opposed to a strictly legal one. The fourth commitment of the aforementioned 100 commitments details the establishment of a Water Cooperation Facility. The World Water Council and UNESCO, in cooperation with the Permanent Court of Arbitration and the Universities Partnership for Transboundary Waters, have proposed a Water Mediation Facility, to be based in Paris.[2] By combining their resources, all four organizations can together address individual international freshwater disputes from a multidisciplinary platform.

The nature of the dispute can result from a number of unresolved factors, and the matter of the dispute can take a number of forms: whether it be the result of upstream pollution, water scarcity, erosion, or dam construction. No longer is water measured only in terms of a precipitation gauge, as underwater aquifers, climate change, and ceremonial practices all have roles to play in the demands and effects that a population incurs in its various individual relationships with water.

Mediation is a flexible mechanism that can take into account all components of a dilemma and work directly with the parties to reach a conclusion that may have been unforeseen without enacting this multifaceted approach. Whereas lawyers see one angle and speak one language, geologists may be able to introduce solutions that exist outside of the existing legal framework, and again lawyers can coordinate with policy makers to incorporate new developments into a structure that might most benefit the population. The nature of mediation may involve public discussion and the instigation of training programs for the community, empowering those who are involved in the basin's water cycle, be it for sustenance, development, or religious practices.

The World Water Council will provide its services as the foremost policy think tank in this sector, and UNESCO will "… provide the 'water community' with the necessary resources, the favourable environment, political backing, professional support and judiciary mechanisms to anticipate, prevent and resolve water conflicts,"

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[2] <UNESCO press release: http://portal.unesco.org/en/ev.php@URL_ID=10634&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

said Mr. Matsuura, Director-General of UNESCO.[3] The Universities Partnership, which maintains ten Universities on five continents, will provide expertise and training both for scientific developments and for negotiation. The Permanent Court of Arbitration will provide its services in the form of fact-finding commissions of inquiry, and make its existing resources and expertise available to the Water Co-operation Facility when appropriate.

The strength of this Facility lies in its mission to combine the existing resources instead of creating yet another institution which might overlap any efforts already underway. The effectiveness of such a venture requires combining the existing infrastructures and providing a networked structure that will operate in a coordinated manner, whereby the resources of all four institutions are available through a single entry point.

This Cooperation Facility was just one objective established during the "Water for Peace" theme sessions of the World Water Forum. In addition to the development of the international protection of watercourses during times of armed conflict or terrorist attack, there exists a need for additional ratifications of the 1997 UN Convention on the Non-Navigational Uses of International Watercourses, and for strengthening the commitment of the states that have already ratified it. Legal instruments do not stand alone in tackling disputes; countries must take a developmental approach when examining existing and new infrastructures of communication, participation, sharing benefits, and institution and capacity building.[4]

One of the potential areas for dispute that the participants of the World Water Forum identified is in the area of privatization, and more specifically the WTO's Global Agreement on Trade in Services (GATS), which seeks to increase the power of transnational corporations over those of the government at the national, state and local levels. GATS are designed to cover many basic human services, including health care, sanitation systems, and water management and distribution. Contracts can be drawn up between multinational companies and a government, enabling that corporation to assume control over these services. Such agreements may be made with very little public input or notification, and the contract that results from such an agreement may raise public costs and be irreversible by future governments.[5] The WTO argues that GATS do not require the privatization or deregulation of the service, depending on the contract formed with the government.[6]

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[3] See note 1 *supra*.

[4] <http://www.unesco.org/water/wwap/pccp/brochure_2.pdf>, page 21.

[5] <http://www.servicesforall.org/html/tools/GATS_privatization_agenda.shtml>.

[6] <http://www.wto.org/english/tratop_e/serv_e/gats_factfiction8_e.htm>.

The NGO community recognizes that the contracts concluded with governments are binding legal documents, but questions the methods with which GATS are negotiated (conducted in secret), and lack of citizen involvement in the processes – both in regards to transparency and accountability. Certain governments favor fostering relationships with multinational corporations, and they have even attempted to increase the responsibilities that corporations can undertake through GATS. Within this arena, legal disputes may be fairly clear-cut, whereby a contract is not adhered to and thus may be terminated. But the human impacts of not having the necessary provisions of basic health services may be devastating, and if a community is unable to hold its own government accountable for providing water sufficient for basic needs and sanitation services in the name of "boosting private investment", a conflict requiring immediate attention may arise.

Since the first World Water Forum in 1997, the issues swimming around water have increased in their scope and complexity. A transition is taking place whereby policy makers, scientists, and consumers are moving away from looking at water as a product, and instead focusing on benefit-sharing. This approach compliments the Facility's goal to resolve disputes by looking beyond the obvious factor of who gets what. Where there was once potential for conflict, there is now co-operation potential.

The second World Water Forum was held in 2000 in The Hague, and has received criticism due to the lack of commitments made by the international community, specifically in regards to the 1997 Watercourses Convention. Again, the Ministerial Declaration of this most recent forum also did not address the international legal component of the issue. For legal purposes, this one component has become the factor of determination for the success of this global conference. Maybe the international community needs to take a multidisciplinary approach as well, and use the opportunities of such massive gatherings to build bridges, redefine our objectives, and redevelop our notions of progress, instead of waiting to see what the ministerial declaration says and thenceforth declaring success or failure.

Declarations aside, the Water Cooperation Facility represents one of the concrete results of the World Water Forum. It will be functioning as one consolidated agency already in 2002, drawing upon the resources of experienced and renowned institutions, designed specifically to provide services, training, and expertise resources for all beneficiaries of this essential resource.[7]

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[7] Contact Information for the Water Co-operation Facility: pccp@unesco.org.

Conference Scene / Le tour des conferences

Colloque de la SFDI – La pratique et le droit international

MICHEL COSNARD*

La Société française de droit international avait cette année confié aux professeurs Laurence Boisson de Chazournes de l'Université de Genève et Marcelo Kohen de l'Institut universitaire des hautes études internationales le soin d'organiser son colloque annuel[1]. Celui-ci, qui s'est tenu du 15 au 17 mai 2003 à Genève autour du vaste thème de la pratique, s'est ouvert par une tentative d'élucidation de la notion de pratique en droit international. Le terme de "tentative" ne saurait être compris de manière péjorative dans ce contexte ; la tenue même d'un colloque démontre les incertitudes de la notion examinée et la nécessité d'en approfondir l'étude. D'ailleurs, dans son rapport introductif, Laurence Boisson de Chazournes s'est posé la question : « Qu'est-ce que la "pratique" en droit international ? », et a tracé un tableau des « énigmes » de la pratique tant par rapport à la règle de droit que par rapport à son auteur. Après cette classification éclairante des difficultés soulevées par le sujet, il appartenait au professeur Peter Haggenmacher de livrer une perspective historique, en exposant, avec la passion qu'on lui connaît, comment la pratique était appréhendée par les fondateurs du droit international, rappelant très opportunément qu'à l'époque, les distinctions entre les disciplines juridiques n'étaient pas véritablement pertinentes ; dès lors, l'étude de la pratique s'inscrivait dans une réflexion plus globale sur le droit. Cette approche a trouvé un écho au moment de la table ronde de la dernière demi-journée, lorsque la professeur Catherine Kessedjian a apporté l'éclairage des préoccupations des privatistes à propos de la pratique, des usages et de la modélisation juridique que ces phénomènes entraînent.

Sans anticiper plus avant, et en reprenant le déroulement chronologique, cette première demi-journée d'étude s'achevait par la présentation du "plat de résistance" : l'étude des relations de la pratique avec la règle de droit. Le rapport introductif du professeur Marcelo Kohen les examinait d'abord sur un plan théorique, puis dressait un panorama général du rôle de la pratique en rapport avec l'ensemble des "sources"

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[1] Nous précisons que les communications seront publiées comme d'habitude aux éditions Pedone à Paris.

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du droit international. La deuxième demi-journée déclinait les aspects abordés par le rapport introductif. Le professeur Lucius Caflisch étudiait la prise en compte par le juge international de la pratique des États et de celle de ses homologues ; les autres intervenants de cette matinée s'attachaient plus spécifiquement au rôle de la pratique des organisations internationales : le professeur Pierre-Marie Dupuy était chargé d'étudier comment la Cour internationale de Justice appréciait la portée normative de la pratique onusienne, alors que Gabrielle Marceau et Loïc Picard nous livraient "de l'intérieur" comment était prise en compte la pratique respectivement de l'O.M.C. et du B.I.T. dans leur fonctionnement quotidien.

Malgré l'intérêt des communications et le talent des orateurs, une impression de bégaiement se dégageait de l'écoute des interventions : l'analyse des relations de la pratique avec la règle de droit se résume finalement à la recherche de la pierre philosophale transformant le fait en droit, que le fait soit un comportement ou un écrit. Dès lors, chacun des participants illustrait un aspect du caractère obligatoire du "précédent", soit dans le cadre d'un processus de formation de la règle de droit *ex nihilo*, ou bien de formation complémentaire (*praeter legem*), soit de transformation du droit (*contra legem*). En revanche, n'était pas totalement approfondies, par exemple, la distinction, évoquée pourtant dès l'abord de ces journées, entre pratique subséquente créant une règle ou simplement interprétant la règle, ou bien l'incidence de l'apparition de nouveaux "canaux" de la pratique, pour reprendre la formule de Laurence Boisson de Chazournes. Il s'agissait là d'un choix parfaitement assumé par les organisateurs, ainsi qu'ils le présentaient dans la plaquette, ce qui n'empêche pas de regretter cette amputation du sujet judicieusement choisi.

L'impression que le colloque semblait changer de thème pour rechercher le rôle du fait dans le processus coutumier était accru par l'interprétation qu'ont fait les participants de la table ronde de la dernière demi-journée et à l'écoute des conclusions générales. Présidée par l'ambassadeur Nicolas Michel, la table ronde réunissait quatre praticiens à qui il avait été demandé de présenter quelle était la place du droit international dans leur pratique. Si Ronny Abraham a effectivement jaugé la place du droit international dans ses fonctions de jurisconsulte – à savoir qu'il lui appartient de présenter l'analyse et les enjeux juridiques d'une situation tout en laissant au politique la responsabilité de la décision –, Abdulqawy Yusuf s'est davantage attaché à décrire quelle était la pratique à l'UNESCO, le professeur Alain Pellet a immédiatement évacué la question posée – en disant qu'évidemment le droit international tenait une place prééminente dans la pratique de la CDI puisque son rôle est de le codifier et de le développer –, pour expliquer comment cet organe recherchait et découvrait la pratique étatique, relayé par le professeur Philippe Sands qui a décrit comment et où l'avocat recherchait et trouvait la pratique lorsqu'il avait à convaincre le juge de l'existence de la règle de droit invoquée

par son client. La confirmation du sujet véritablement traité par les intervenants est apparue dans les mots du professeur Luigi Condorelli qui, dans ses conclusions, a développé sa conception de la coutume internationale dans la lignée de l'école italienne du droit international.

Ce glissement constaté était assez inévitable. Par hypothèse, la pratique, si elle est étudiée exclusivement sous l'angle de sa portée normative, ne peut donner naissance qu'à une règle non écrite ; c'est donc le processus coutumier qui est à l'examen, que ce soit en tant que tel ou dans ses rapports avec les autres modes de formation du droit international, en particulier le mode conventionnel. Ainsi, la pratique ne peut modifier un traité que dans la mesure où elle génère une règle de même valeur que la norme conventionnelle, c'est-à-dire une règle coutumière. La pratique textuelle des organisations internationales, de même que leur mode de fonctionnement habituel, ne peuvent devenir obligatoire que si ils sont considérés comme ayant fait naître une norme juridique de comportement, nécessairement coutumière. Le refus d'envisager l'apparition de nouveaux modèles comportementaux qui seraient juridiques sans être obligatoires – même si la conclusion aurait pu être pour certains le rejet de cette hypothèse – amenait nécessairement à un déplacement de l'objet du colloque. Une fois admis ce postulat, on ne peut qu'apprécier la richesse des analyses exprimées et des expériences délivrées par les participants ; de ce point de vue, le colloque de Genève est une incontestable réussite.

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