Indirect Expropriations and Regulatory Takings: what Role for the "Legitimate Expectations" of Foreign Investors?

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1. Introduction

The aim of this Chapter is to analyze the role of "legitimate expectations" of foreign investors in international investment rules governing indirect expropriations (or creeping expropriations or regulatory expropriations). The issue is not just a theoretical one. To the contrary, what role foreign investors' expectations should play (if any) vis-à-vis indirect expropriations is a practical issue if one looks not only at the investment case law but also at the most recent State practice on international protection of investments. A definition of indirect expropriation is provided in section 2. A brief overview of the role of legitimate expectations of foreign investors in investment case law and State practice is provided in section 3. In this respect, the concept of legitimate expectations will be discussed in connection with the *Tecmed* case and the U.S. practice, annexing interpretative notes on indirect expropriation to its BIT provisions on expropriation. In section 4 some key features of the case law of the Court of Justice of the European Union (CJEU) and the U.S. Supreme Court in respect of the protection of individuals' economic expectations vis-à-vis regulatory actions are outlined. In section 5 the conclusion is drawn that the reference to investors' legitimate and reasonable expectations in the context of regulatory expropriation claims can pave the way to the use of the doctrine to restrict the scope of the international protection of foreign investors, as opposed to the asserted too far-reaching protection of foreign investments granted by the doctrine of legitimate expectations in the context of denial of fair and equitable treatment claims.

2. Definition of indirect expropriation

It is well established under customary international law (as well as treaty law) that the protection of foreign investors from expropriation encompasses not only formal and direct takings but also indirect takings.[1] A direct expropriation occurs through an official act, which takes or transfers the title of property of the foreign investor

[1] As outlined by Garcia-Amador, ILC Special Rapporteur, in its Fourth Report on State Responsibility (1959), UN Doc A/CN.4/119, at 39, "The patrimonial rights of private individuals may be "affected" by the State not only through acts of expropriation strictu sensu, but also in other ways and for different reasons and purposes."

concerned. Under customary international law even a measure, which does not have all the features of a formal expropriation, could be considered as equivalent to an expropriation if an effective deprivation of the investment is thereby caused. For a tribunal to find an effective deprivation, even if formal title continues to be held, an almost complete loss of value of the property (such as when the property affected is rendered worthless by the measure, as in case of direct expropriation) is required.[2] Hence under classic international law, an expropriation "includes every measure which consists of or directly or indirectly results in the total or partial deprivation of private patrimonial rights, either temporarily or permanently."[3] This is supported by the general direction of the case law under BITs,[4] other international jurisprudence[5] and scholarly legal opinions.[6]

An indirect expropriation substantially deprives the investor of the economical use and enjoyment of its property rights.[7] Measures having that effect are indirect

[2] Ibidem, at 40.

[3] See also the definition of taking of property and use thereof under Art. 10.3(a) and (b) of the Harvard Draft Convention on International Responsibility of States for Injuries to Aliens of 1961. (Sohn, Baxter (1961), 553). According to Art. 10.3(a) of the Harvard Draft Convention on International Responsibility of States for Injuries to Aliens of 1961 "a taking of property includes not only an outright taking but also any such unreasonable interference with the use, enjoy, or dispose of the 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 the interference." According to Art. 10.3(b) of the Harvard Draft Convention on International Responsibility of States for Injuries to Aliens of 1961 a taking of the use of property "includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time."

[4] See, *inter alia*, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, at 285 where the Tribunal stated that "a finding of indirect expropriation would require more than adverse effect. It would require that the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated." See also *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, at 191 where it is stated that "[i]nterference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for the expropriation"; *BG Group Plc v. Argentina*, UNCITRAL, Award, 24 December 2007, at 258-266 and *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, at 245. *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 at 115; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, at 604; *Goetz and others v. Burundi*, ICSID Case No. ARB/95/3, Award (Embodying the Parties' Settlement Agreement), 10 February 1999, at 124.

[5] See *Starrett Housing Corp. v. Iran*, Award, 14 August 1987, 4 Iran-US C.T.R. 122, 154-157; *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award, 29 June 1984, 6 Iran-US C.T.R. 219, 225-226. See also *German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1926 P.C.I.J. ser A, No. 7, Judgement, 25 May 1926, at 14-45; and *Norwegian Shipowners' Claims* (Nor. v. U.S.), Award, 13 October 1922, 1 R.I.A.A. 307. Christie (1962), 311, observing with reference to the Norwegian Claims and the German Interests in Polish Upper Silesia cases, that "the two cases taken together illustrate that even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them."

[6] See Leben (2006), 173-175; Dolzer, Schreuer (2008), 96-104.

[7] Art. 3 OECD Draft Convention on the Protection of Foreign Property of 1967 states that: "No party shall take any measures depriving, directly or indirectly, of his property a national of another Party

expropriations, also when adopted in the form of a legislative enactment and aimed at pursuing legitimate general interests. In the Commentary to Art. 3 of OECD Draft Convention on the Protection of Foreign Property, such measures otherwise legitimate but for their substantially destructive effects on economic profitability of foreign investments are identified as "creeping nationalizations"[8] and entail State's obligation to pay compensation. In the wording of the Commentary, they are measures otherwise legitimate, which are "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."[9] It is widely held that, as a rule, State regulatory actions aimed at the protection of non-trade values (public health, morality, environment) might justify "even severe, although by no means complete, restrictions on the use of property."[10]

2.1 BIT provisions on expropriation

Standard provisions on expropriation of BITs (at least the ones of the European Models of BITs) endorse the same approach and cover every measure, which consists of or directly or indirectly results in the total or partial permanent deprivation of private patrimonial rights.[11] An expropriation could be found even where control over

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unless the following conditions are complied with: (i) The measures are taken in the public interest and under due process of law; (ii) The measures are not discriminatory or contrary to any undertaking which the former may have given, and (iii) The measures are accompanied by provision for the payment of just compensation. [...]."

[8] Notes and Comments to Article 3 OECD Draft Convention on the Protection of Foreign Property, at 3(b), available at http://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf

[9] Ibidem. Se also American Law Institute (ed.), Restatement (Third) of the Foreign Relations Law of the United States § 712 comment g.

[10] In this respect, Christie (1962), 331 and footnote 5 where the prominent scholar emphasizes that "the mere fact that an alien still has a 'record' title will not avoid a conclusion of expropriation where the restrictions on use are complete or almost complete."

[11] Article 5(2) Argentina-France BIT states that: “The Contracting Parties shall not take, directly or indirectly, any expropriation or nationalization measures or any other equivalent measures having a similar effect of dispossession, expect for reasons of public necessity and on condition that the measures are not discriminatory or contrary to a specific undertaking.” Art. 4(2) German Model BIT of 2008 provides that: "Investments by investors of either Contracting State may not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State except for the public benefit and against compensation. Such compensation must be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or other measure became publicly known. [...] The legality of any such expropriation,

the investment remains in the hands of the foreign investor provided that the value or the economic profitability of the investment has been substantially destroyed or neutralized in some other way.[12] Therefore BIT provisions on expropriations also cover in the abstract the so-called regulatory takings, namely State regulations aimed at protecting public welfare objectives, when they indirectly have an equivalent effect to expropriations, and result in an effective and substantial deprivation of the investment of the foreign investor claiming under the BIT.[13] These measures of general application, that States generally claim to be non-compensable, should, however, be considered as unlawful under BITs, unless they are taken in the public interest and under due process of law, they are not discriminatory (or not contrary to a specific undertaking) and, above all, they provide the affected investor with just compensation, in line with customary international law.[14]

3. The role of legitimate expectations in international investment law vis-à-vis indirect expropriations

3.1 The investment case law: The *Tecmed* case as an illustrative example

It is well known that the concept of legitimate expectations of investors has played a significant role in guiding arbitral tribunals in interpreting and applying the absolute BIT standards of protection. This notwithstanding, the contours of the doctrine of protecting "legitimate expectations", developed and accepted by many (but not all) legal systems as a public or administrative law device protecting individuals from the

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nationalization or other measure and the amount of compensation must be subject to review by due process of law." On partial expropriation, namely the expropriation of just some fundamental economic rights, protected under the BIT, over the overall bundle of economic rights constituting the investment see *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, Award, 12 April 2002, at 101, 105, 107, 127; *Eureko B.V. v. Poland*, Partial Award, 19 August 2005, at 239-41.

[12] *Consortium RFCC v. Kingdom of Morocco*, ICSID No. ARB/00/6, Award, 22 December 2003, at 69.

[13] Clause 4 of the Protocol to the 1994 Italy-Peru BIT ["Sarà considerata nazionalizzazione o esproprio di un investitore di una delle Parti Contraenti ogni misura di nazionalizzazione e esproprio di merci o diritti appartenenti ad un'impresa controllata dall'investitore, come pure la sottrazione di risorse finanziarie o di altri beni all'impresa o, viceversa, ogni misura che riduca sostanzialmente il valore della stessa."] With similar wording also Italy/Kazakhstan BIT 1994, Clause 4 of the Protocol; Italy/Saudi Arabia BIT 1996, Clause 4 of the Protocol; Italy/Georgia BIT 1997, Clause 4 of the Protocol.

[14] Manciaux (2004), 457, observing that the form, taken by expropriatory measures under domestic legal systems (legislative acts or administrative acts), has little practical significance from the standpoint of international law; Newcombe, Paradell (2009), 327 observing that "the focus of the expropriation analysis is on the extent of the deprivation that the investor suffers and, to a far lesser degree, on the form or content of the state measure or the intent of the state." Reinisch (2012), 279-285. Reinisch (2008).

withdrawal of administrative measures conferring upon them "vested rights"[15] (rather than from State measures of general application),[16] still appears to be quite blurry when applied in the context of foreign investment protection. This is especially the case when treaty-based tribunals have to evaluate changes effected by host States in the general legal framework through legislative measures or unilateral regulations of a normative or administrative nature. Furthermore, in the context of denial of fair and equitable treatment claims some arbitral tribunals questioned the relevance of the doctrine of legitimate expectations vis-à-vis legislative measures or unilateral regulation of a normative or administrative nature, in the absence of specific stabilization "promises" or guarantees of stability worded in clear and not ambiguous terms and specifically addressed to the foreign investor concerned.[17] The role of legitimate expectations of foreign investors in the context of the fair and equitable treatment standard will not be discussed here.[18] In this respect, it is sufficient to say that the concept has been the object of growing criticisms for its pro-investment bias[19]

[15] As stated by the ECJ in some joined cases of the 1950s, related to administrative acts appointing Community officials, after a comparative review of the law of the (at that time) six Member States governing the revocability of administrative measures giving rise to individual rights, "an administrative measure conferring individual rights on the person concerned cannot in principle be withdrawn, if it is a lawful measure; in that case, since the individual right is vested, the need to safeguard confidence in the stability of the situation thus created prevails over the interests of an administration desirous of reversing its decision." (Joined cases 7/56 and 3-7/57, *Algera and others v. Common Assembly of the European Coal and Steel Community*, 1957 *E.C.R* 56, 56)

[16] *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, at 128–30. In legal literature Snodgrass (2006), 36-39.

[17] See *Total S.A.* v. *Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, at 113–23 and at 319-31. The Tribunal observes at 117 that "In the absence of some "promise" by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a "guarantee" of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor." See also, *inter alia*, *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, at 150-66 and at 242-6; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, at 233-43 (with regard to the interpretation of BIT provision protecting foreign investors from indirect expropriation), and at 350-8 and 364-74 (with regard to the interpretation of the FET standard); *Impregilo S.p.A. v. The Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June, 2011, at 290-291.

[18] On the topic see Potestà (2013).

[19] Just to mention some of these criticisms see in investment case law, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, at 67 where the ad hoc Committee, addressing the criticisms from the Respondent's legal experts to the *Tecmed* standard, states that "the TECMED Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly."

as well as for methodological reasons.[20] Furthermore, as observed by Dolzer and Schreuer, "it is arguable whether the concept of legitimate expectations is part of the general principles of law."[21]

Irrespective of the role of the concept of legitimate expectations in the context of the fair and equitable treatment, some tribunals in the context of regulatory expropriation claims have also referred to the concept. The *Tecmed v. Mexico* case illustrates the role of investors' expectations vis-à-vis indirect expropriation. To more precise, the case illustrates the role that the concept might play in prospect in the context of BIT provisions protecting investors from indirect expropriation, as outlined below.[22]

After having already found that the denial by host State authorities to renew the permit to operate the landfill has caused the substantial and permanent deprivation of the value of the foreign investor's investment, the *Tecmed* Tribunal also considers as necessary under its analysis of the regulatory expropriation claim to "determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation." [23]

According to the *Tecmed* Tribunal, "[T]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."[24]

In this respect, it can be questioned whether a proportionality test, such as the one above, should find any place in the examination of indirect expropriation claims, in the case that a substantial deprivation of the value of the investment is found.[25]

The reference to the concept of legitimate expectations and proportionality test does not lead the *Tecmed* Tribunal to rule in favour of the host State. Nevertheless, the application of the proportionality test can possibly free the host State from its

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[20] See the Separate Opinion of Arbitrator Pedro Nikken in the case *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010.

[21] Dolzer, Schreuer (2012), 115. But see also Snodgrass (2006), 56 concluding for the recognition of a general principle of law that legitimate expectations of investors should be protected.

[22] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003. See also *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, at 103.

[23] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, fn 8, at 122. In this respect, the *Tecmed* Tribunal heavily relies, on the one hand, upon an inapposite ECHR case law and, on the other, upon a too subjective concept of investors' expectations as an object of international protection (at 41, 88, 89, 90, 149).

[24] Ibidem.

[25] In this respect, see also Mairal (2010), 446.

obligation to provide the investor with compensation, even in the event that a substantial or complete deprivation of the value of the investment has occurred.

3.2 State practice

A particularly qualified concept of investors' "expectations" is explicitly mentioned in the US Model BIT of 2012 (as well as in the U.S. Model BIT of 2004) among the factors investment tribunals have to consider in order to determine whether an action (or a series of actions) by a State constitutes an indirect expropriation. In the US Model BIT of 2012 "the extent to which the government action interferes with distinct, reasonable investment-backed expectations" is listed together with "the economic impact of the government action" and "the character of the government action" as a yardstick for a tribunal to determine whether an indirect expropriation has occurred.[26] The U.S. practice, annexing the above interpretative note to treaty clauses on indirect expropriation, reproduces *verbatim* the principles developed by the U.S. Supreme Court in the context of regulatory taking claims under the Due Process and Taking Clauses (as outlined in section 4).

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[26] US Model BIT of 2012, Annex B.4 clarifies that "The second situation addressed by Article 6 [Expropriation and Compensation] is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by- case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory 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 not constitute indirect expropriations." With almost identical wording see Canada Model BIT of 2004, Annex B.13(1) clarifying that:
"a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

. ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and

. iii) the character of the measure or series of measures;

c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation."

The U.S. practice on the point elucidates the U.S. position that the protection of foreign investors' economic interests under the law governing indirect expropriation should not be above the protection granted by the U.S. Supreme Court to individuals' economic interests and rights at the domestic level. The interpretative note (rather than reflects the level of protection of aliens from indirect expropriations under customary international law or provisions on expropriation of other BITs) seems to be a contemporary riproposition of the Calvo doctrine in an American fashion.

An additional element should be mentioned. The above position that investors' reasonable expectations can be relevant to a claim of regulatory expropriation - but are not legally relevant to claims of denial of fair and equitable treatment under the customary law minimum standard of treatment)- is coherently put forward by the U.S. also in the NAFTA context.[27]

4. The role of legitimate expectations vis-à-vis indirect expropriations in the U.S. and EU legal systems

In the U.S. and EU legal systems the role for "legitimate expectations" of individuals and their protection vis-à-vis indirect expropriations is very limited. More specifically, the concept of legitimate expectations plays a limited role in protecting individuals, when legislative acts involving choices of economic policy impair their economic interests and rights. The doctrine has been considered as a basis for a succesful annulment action and, even more rarely, for compensation or indemnification of individuals when legislative actions by a State were at stake, only exceptionally.

This is the case with EU legal system if one looks at the case-law of the Court of Justice of the EU under European Union's non-contractual liability regime (Article 340(2) TFEU).[28] The Court has granted a limited protection under Article 340(2) TFEU to individuals (whatever expectations they might have), when EU legislative acts impair their economic interests and rights.[29] In the Court's wording in the joint

[27] In this respect, *inter alia*, see *Grand River Enterprises Six Nations, Ltd., ed al. v. United States of America*, UNCITRAL case (NAFTA), Award, 12 January 2011, at 127.

[28] Art. 340(2) TFEU (ex Art. 288(2) TEC) provides as follows: "In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

[29] See 5/171, Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Communities, 1971 *E.C.R.* 975, at 11 where the ECJ states that: "[…] the non-contractual liability of the community presupposes at the very least the unlawful nature of the act alleged to be the cause of the damage.

cases FIAMM and Fedon, "[A]s regards, more specifically, liability for legislative activity, [...] the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy."[30] As a result, it is the Court's position that: "…[…] according to settled case-law the principle of protection of legitimate expectations is one of the fundamental principles of the Community, but that traders are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained, particularly in an area such as that of the common organisation of the markets, the objective of which involves constant adjustment to reflect changes in economic circumstances.[31] More specifically, the EU could be held liable under Article 340 TFEU for the adoption of a legislative measure only when "a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred."[32]

Where legislative action involving measures of economic policy is concerned, the community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Art. 215, second paragraph, of the treaty, [now Art. 340(2) TFEU] unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred. For that reason the court, in the present case, must first consider whether such a violation has occurred." See, *inter alia*, T-184/95, Dorsch Consult v. Council 1998 *E.C.R.* II-667, at 76–77; Joined Cases C- 120/06 P and C-121/06 P, Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v. Council of the European Union and Commission of the European Communities, and Giorgio Fedon & Figli SpA, Fedon America, Inc. v. Council of the European Union and Commission of the European Communities, 2008 *E.C.R.* I-6513, at 171–175 and at 181–183.

[30] C-120/06 P and C-121/06 P FIAMM v. Council and Commission and Fedon v. Council and Commission, fn 29, at 171 with reference to Joined Cases C-83/76, 94/76, 4/77, 15/77 and 40/77 Bayerische HNL Vermehrungsbetriebe and Others v Council and Commission, 1978 *E.C.R.* 1209, at 5.

[31] C-104/97 P Atlanta AG and others v. EC, 1999 *E.C.R.* I-6983, at 52. As observed in legal literature in respect of EU's non-contractual liability for its legislative acts and the contents and import of the principle of individuals' legitimate expectations, "per mitigare le conseguenze di questa impostazione, peraltro, la Corte ha interpretato estensivamente i poteri discrezionali delle istituzioni comunitarie nelle scelte di politica economica e monetaria, richiamandosi ai principi generali comuni degli Stati membri, ove essa ha rilevato una concezione della responsabilità dei pubblici poteri per gli atti normativi di politica economica" (see Venturini, G. 2001. 'Art. 288,' Pocar, F. (ed.), *Commentario breve ai Trattati della Comunità e dell'Unione Europea*, Cedam: 973 ff., 974–6 in general and 975, where the above quotation is to be found). In this respect, see also Hartley (2007), 447. For an overview of EU's non-contractual liability regime for its normative acts on the basis of the general principles common to the laws of the Member States see Grossrieder Tissot (2001).

[32] See C-120/06 P and C-121/06 P FIAMM v. Council and Commission and Fedon v. Council and Commission, fn 29, at 172. The Court explains its restrictive approach on EU's liability for legislative measures seriously affecting individuals' economic interests and rights on the basis of two considerations. It is worth reporting *in extenso* the considerations made by the Court: "First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized by the exercise of a wide discretion, which is essential for

In this respect, it is worthy of note that the CJEU has not denied in the abstract that an EU legislative measure seriously affecting the very substance of property rights and individuals' freedom to pursue economic activities could give rise to the EU's non-contractual liability.[33] This notwithstanding, by adopting a restrictive concept of property rights and economic interests deserving legal protection from the European Union's regulatory measures the Court has never substantively found EU's non-contractual liability. In the Court's view, "an economic operator cannot claim a right to property in a market share which he held at a given time, since such a market share constitutes only a momentary economic position, exposed to the risks of changing circumstances."[34] The Court goes on to state that "the guarantees accorded by the right to property or by the general principle safeguarding the freedom to pursue a trade or profession cannot be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity."[35]

The US Supreme Court appears to follow a similar approach in its case-law under the Takings and Due Process Clauses. The case *Concrete Pipe & Products of California v. Construction Laborers Pension Trust for Southern California*[36] illustrates the point. Concrete Pipe argued that a legislative act of 1980 amending the previous law of 1974 on multiemployer Pension schemes imposing new financial burdens on employers, part to the schemes, withdrawing therefrom, violates substantive due process and takes Concrete Pipe's property without compensation.

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implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (see, in particular, Brasserie du pêcheur and Factortame, paragraph 45)." See also Case T-135/01 Fedon & Figli and Others v. Council and Commission, 2005 *E.C.R.* II-29, at 78–82.

[33] See C-120/06 P and C-121/06 P FIAMM v. Council and Commission and Fedon v. Council and Commission, fn 29, at 184 where the Court states that "[…] a Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment, could give rise to non-contractual liability on the part of the Community."

[34] C-120/06 P and C-121/06 P FIAMM v. Council and Commission and Fedon v. Council and Commission, *supra* note 150, at 185 with references to Case C-280/93 Federal Republic of Germany v. Council of the European Union, 1994 *E.C.R.* I-4973, at 79 and Case C-295/03 P Alessandrini Srl and Others v. Commission of the European Communities, 2005 *E.C.R.* I-5673, at 88.

[35] C-120/06 P and C-121/06 P FIAMM v. Council and Commission and Fedon v. Council and Commission, fn 150, at 185 with references to Case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities, 1974 *E.C.R.* 491, at 14.

[36] *Concrete Pipe & Products of California v. Construction Laborers Pension Trust for Southern California*, U.S. 602 (1993).

With regard to due process, under the case-law of the Court: 'It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."[37] Moreover, the Court goes on to state:" '[I]t may be that the liability imposed by the Act . . . was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."[38] In this respect, the Court makes clear that this is true even if the legislation at stake has retroactive effects.[39]

According to the Court, the detrimental retroactive effects of a legislation is not sufficient for an appellant to succeed in taking and due process claims. In fact, the matter before the Court is (rather than one of retroactivity) one of rationality and proportionality. In respect of the test to be applied in order to balance means and ends the Court calls for the applicability to economic legislations of a so high deferential standard of review as to constitute a practically impossible threshold to meet.[40] After having rejected the violation of due process claim of the appellant and asserted that "'it would be surprising to discover' the challenged statute nonetheless violating the Taking Clause",[41] the Court identifies the relevant factors of the fact-based inquiry necessary to determine a regulatory taking claim under the Takings Clause. Besides the nature of the governmental action and the severity of its economic impact,[42] is the degree of interference with individuals' "reasonable investment-backed expectations."

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[37] Ibidem, at 637 with reference to the previous cases *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963) and *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 487–488 (1955).

[38] Ibidem, at 637-638 with reference to *Fleming* v. *Rhodes,* 331 U. S. 100 (1947), *Carpenter* v. *Wabash R. Co.,* 309 U. S. 23 (1940); *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240 (1935); *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398 (1934); *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467 (1911).

[39] Ibidem, at 637-638 with reference to *Lichter* v. *United States,* 334 U. S. 742 (1948); *Welch* v. *Henry,* 305 U. S. 134 (1938); *Funkhouser* v. *Preston Co.,* 290 U. S. 163 (1933).

[40] Ibidem, at 639 where the Court states that "In any event, under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means. See Turner Elkhorn, 428 U. S., at 19." In respect of the standard of review in Takings Clause cases the Court refers to a quite similar balancing test entailing just "rough proportionality" between ends and means. See Dolan v. City of Tigard, 512 U.S. 374, 391 (1994). In legal literature, Snodgrass (2006), 46 observing that both tests are not "particularly searching review."

[41] Ibidem, at 641.

[42] Ibidem, at 643-644 and 645, respectively.

With regard to the degree of interference with the Concrete Pipes' "reasonable investment-backed expectations" and the definition thereof, the Court clarifies that "'[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.'"[43] Given that legislations readjusting rights and burdens are not unlawful solely because they upset otherwise settled expectations, even in the case that they have detrimental retroactive effects, it is the position of the Court that individuals' reliance on normative provisions of a general application is misplaced because there can be no reasonable basis to expect that legislation would never be changed by subsequent laws.[44]

5. Conclusion

Given that the protection of legitimate expectations is very limited vis-à-vis regulatory takings under the domestic systems above reviewed, it is questionable whether the doctrine of legitimate expectations (and the proportionality analysis it entails) should play any role in the law governing indirect expropriations.

First of all, the balancing between the protection of individuals' economic rights and interests and the right of States to regulate in the public interest as well as the deferential standard of review applied by national courts to State regulatory actions do not seem to reflect the level of protection of foreigners vis-à-vis indirect expropriation under customary international law. In fact, when State regulatory measures impair the very substance of economic rights of aliens, compensation is due. This is true even admitting that the concept has became one of the general principle of law mentioned in Article 38(1)(c) of the Statute of the International Court of Justice as a source of international law. In investment case-law the concept has been manly linked to the fair and equitable treatment standard. In this regard, the application of the doctrine of legitimate expectations might be reasonable and appropriate since investment tribunals judge less impairing measures than the ones that could amount to a breach of a BIT provision on indirect expropriation.

Secondly, it is true that it is widely held that mere commercial interests or opportunities do not generally deserve international protection and no protection

[43] Ibidem, at 645 quoting FHA v. The Darlington, Inc., 358 U. S. 84, 91 (1958).

[44] Ibidem, at 646 where the Court stats that "Because 'legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . even though the effect of the legislation is to impose a new duty or liability based on past acts,' Turner Elkhorn, 428 U. S., at 16, Concrete Pipe's reliance on ERISA's original limitation of contingent liability to 30% of net worth is misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted."

should be granted to economic operators against ordinary business risks, such as those of changes in the market conditions.[45] Furthermore, it might be also the case that domestic legal systems (and more specifically Member States' legal systems and the U.S. legal system) do not generally grant economic operators any protection from legislative measures by adopting a restrictive concept of property rights and economic interests deserving legal protection.

Nevertheless, it is still remains the case that under both BITs and general international law on protection of foreigners' property rights, as interpreted and applied by the ECHR,[46] international protection is granted to foreign economic operators from regulatory changes even when they are introduced by legislative measures in certain instances. As Judge Higgins observed in respect of the usefulness of a distinction between non-compensable bona fide regulation and taking for a public purpose: "In this distinction intellectually viable? Is not the State in both cases (that is, either by a taking for a public purpose, o by regulating) purporting to act in the common good? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be "for a public purpose" (in the sense of a general, rather than for a private interest). And just compensation would be due."[47]

Finally, an additional point should be made. The scope of the legal protection granted to investors is strictly dependent on what is deemed to deserve legal protection under any given legal system. The domestic systems reviewed above adopt a restrictive concept of property rights and economic interests deserving legal protection, which excludes goodwill. In respect of customary international law, "[W]hether property rights in the nature of good-will...can be subject of a taking for which a compensation

[45] In this respect, see in investment arbitration case-law Maffezini v. Spain, ICSID Case No. ARB/97/7, *award on the merits* (November 13, 2000) at 64 where the Tribunal emphasizes that: "Bilateral Investment Treaties are not insurance policies against bad business judgments. While it is probably true that there were shortcomings in the policies and practices that SODIGA and its sister entities pursued in the here relevant period in Spain, they cannot be deemed to relieve investors of the business risks inherent in any investment. To that extent, it is clear that Spain cannot be held responsible for the losses Mr. Maffezini may have sustained any more than would any private entity under similar circumstances"; MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, *award* (May 25, 2004) at 178 where the Tribunal states that: "The BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen."

[46] In this respect, see the leading case James and Others v. the United Kingdom, *judgment* (February 21, 1986), 1986 ECHR 2 Series A no. 98, at 63. See also Lithgow v. United Kingdom, *judgment* (July 8, 1986), available at: http://cmiskp.echr.coe.int/tkp197/search.asp, at 116.

[47] Higgins (1982), 331.

must be paid is a question which has plagued the writers."[48] The issue of whether under general international law goodwill could be indirectly expropriated had been considered as an open question in the 1960s.[49]

With respect of treaty law, a distinction between U.S. BITs and EU Member States' BITs must be made. Contrary to the U.S. Model BIT of 2012,[50] BITs of Member States still list a wide range of tangible and intangible assets, economic rights and interests as protected investments. Among covered investments are not only movable and immovable property, any ownership rights in rem, shares, intellectual and industrial property rights, and any economic rights conferred by contract, but also any economic rights conferred by law and goodwill.[51]

The reference to "distinct, reasonable investment-backed expectations" of investors in the U.S. practice seems to be intentional and coherent with the exclusion of goodwill and licences, authorizations, permits, and similar rights, conferred pursuant to domestic law, which "do not create any rights protected under domestic law" from the investments protected under BITs.[52] The reference has the purpose of equating the international protection of investors vis-à-vis indirect expropriation to the domestic protection pursuant to U.S. case-law. As far as concerns the provisions on expropriation of Member States' BITs (at least as worded at the moment), the concept of legitimate expectations of foreign investors vis-à-vis regulatory expropriation claims, entailing the application of a proportionality test, might narrow the international protection of foreign investors from indirect expropriation, in contrast with an interpretation in accordance with Art. 31 of the Vienna Convention on the Law of Treaties of 1969.

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[48] Christie (1962), 319 reviewing the different positions taken by international law scholars at that time

[49] Christie (1962), 319-22, where the author discusses the international case law (the Oscar Chinn case included), concluding that the question must be considered still open, and 335 where the author concludes in favour of States' obligation to pay compensation in cases of indirect expropriation of goodwill. See also The Oscar Chinn case, P.C.I.J., 1934, Series A/B, No. 63, at 88 where with reference to a claim of the U.K. of breach by Belgium of the general principles of international and in particular of respect for vested rights in respect of Mr. Chinn because of the introduction of a de facto monopoly of the fluvial water transportation service the Court states that it "is unable to see in his original position - which was characterized by the possession of customers and the possibility of making a profit - anything in the nature of a genuine vested right. Favourable business conditions and good-will are transient circumstances, subject to inevitable changes; the interests of transport undertakings may well have suffered as a result of the general trade depression and the measures taken to combat it."

[50] U.S Model BIT of 2012, Art. 1. The same definition was contained in the U.S. Model BIT of 2004.

[51] See, for example, Italian Model BIT of 2003, Art. 1(1); German Model BIT of 2008, Art. 1(1); France Model BIT of 2006, Art. 1(1); and UK Model BIT of 2005, Art. 1(1).

[52] U.S Model BIT of 2012, fn 2.

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