The Arbitration Review of the Americas

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Disputes Arising from the Cancellation of Concession Agreements in the Americas

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Disputes Arising from the Cancellation of Concession Agreements in the Americas

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PRACTICAL CONSIDERATIONS

Concession agreements are a useful instrument for governments to attract private participation in public infrastructure projects. Under a concession, a government or a state-owned entity awards a private party (the concessionaire) the exclusive right to use or exploit state-owned assets or to develop new ones, for the life of the concession. In return, the concessionaire is responsible for making investments and developing new infrastructure. The concessionaire is often remunerated based on regulated tariffs charged to end users, for the term of the concession, giving investors a long-term view of the project's revenue streams.

The stability and predictability in revenues that concession assets offer, together with the capital-intensive nature of these projects, makes them well-suited for raising substantial amounts of long-term debt to finance the project. However, these projects are also vulnerable to governmental measures that affect projected revenue streams. This is aggravated by the nature of the financing structures that are often put in place, where the concessionaire is a shell entity incorporated in the host state, with no assets, no income and no previous operating history. The concessionaire acts as a hub for contractual and other activities associated with the project, and it is owned or controlled by a combination of foreign and domestic investors or sponsors that lead the negotiations with the host government and decide the overall structure of the deal. It is also the often the case that the project financing is 'non-recourse', meaning that there is no recourse to the shareholders' assets beyond their equity stake in the concessionaire, with the service of debt being almost entirely based on the stability and predictability of the concessionaire's revenue streams rather than on the overall creditworthiness of the sponsors.

It is, therefore, not surprising that infrastructure projects under a concession are particularly vulnerable to changes in the terms of the concession or the applicable regulatory regime. In response to these risks, international investment agreements (IIAs)[1] provide qualifying investors a number of substantive protections and the right to bring claims against the host state through binding international arbitration.[2] This article focuses on recent trends on the application of these rights in investment disputes involving concession contracts.

RELEVANT JURISDICTIONAL ISSUES

The scope of application of IIAs is limited to qualifying investors and their investments, as defined in the treaty. IIAs protect investors that are nationals (natural persons and legal entities) of the other contracting state.

The nationality of legal entities is often defined by the 'seat', 'place of effective management' or place of 'substantial business activities'. Certain treaties also treat locally incorporated entities that are owned or controlled by nationals of the other contract state as qualifying investors under the treaty.[3] The type of protected investments include almost every kind of asset, including moveable and immoveable property, property rights, liens, pledges, shares, stocks and debentures of companies, claims to money or performance under a contract having financial value, or concessions or licences granted under public law or contract.

As noted above, foreign investors often hold a direct or indirect stake in the concessionaire, a locally incorporated company that owns and operates the underlying business. When a government adopts measures that affect the concession and a foreign investor brings treaty claims against the host state as a result of those measures, two jurisdictional issues are often at issue: (i) whether the foreign shareholder has standing to bring treaty claims for measures addressed to the concessionaire or the concessionaire's rights or assets; and (ii) whether the local company has standing to bring treaty claims.

A foreign investor's standing to bring treaty claims against the host state for actions affecting the local company in which it invested is well established in international investment law.[4] Notably, IIAs usually define 'investment' broadly as encompassing every kind of asset owned or controlled, directly or indirectly, by a qualifying investor, including different forms of participation in a local company. In investment treaty arbitration, this protection has also been extended to indirect shareholding through an intermediate company.[5] For example, in ***Azurix v Argentina***, the claimant held an indirect shareholding interest in an Argentinian entity that had entered into a concession agreement with the government and was ultimately impacted by government measures. Argentina argued that the relevant investment was limited to the claimant's shares in the concessionaire.[6] The tribunal, however, found that 'provided the direct or indirect ownership or control is established, rights under a contract held by a local company constitute an investment protected by the BIT.'[7]

More recently, in ***RREEF v Spain***, an ICSID tribunal confirmed that a shareholder can claim in its own right for damages suffered by the local company. The claimants held a stake in Spanish entities that owned and operated various concentrated solar power (CSP) generation plants in Spain, enjoying a regulated feed-in tariff (FIT) for the electricity produced during the operational life of the plants. RREEF brought claims against Spain under the Energy Charter Treaty (ECT) when Spain withdrew the FIT regime on which RREEF had relied at the time of investing. Spain argued that RREEF could not claim damages suffered by the Spanish entities that owned the CSP plants, as this would be contrary to the general international law principle, endorsed in ***Barcelona Traction***,[8] precluding claims for reflective losses or harm suffered by the company in which the foreign investor holds shares. Relying on the view of other investment treaty tribunals, the RREEF tribunal noted that although Spain's measures were addressed to and involved rights of the local entities, RREEF still had standing to bring ECT claims against Spain in order to protect its interests in a qualifying investment.[9] Citing ***RosInvestCo v Russia***, the RREEF tribunal noted that under 'modern investment treaty arbitration . . . a shareholder can . . . claim protection in respect of measures that directly affect shares in their own right' and can 'also claim protection for the effect on its shares by measures of the host state taken against the company'.[10]

A separate issue is whether a locally incorporated entity has standing to bring treaty claims on its own behalf when it is owned or controlled by foreign investors. The ICSID Convention expressly allows locally incorporated entities to appear as claimants in arbitration proceedings,[11] as long as the respondent state has consented to it (typically under the applicable IIA). Allowing the locally incorporated entity to bring claims on its own behalf has certain advantages for the investor. It allows the locally incorporated entity to claim all damages suffered as a result of the disputed measures, irrespective of the foreign shareholders' interest. Furthermore, naming the local entity as a claimant addresses any potential objection by the respondent state that the foreign shareholder, not being the direct holder of rights held by the local entity, does not have standing to claim for measures affecting those rights.[12]

THE UMBRELLA CLAUSE

Under international law, 'a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law,'[13] unless an IIA applies requiring the host state to observe obligations entered into with regard to qualifying investors and their investments. While the precise wording will depend on the specific treaty, 'umbrella' clauses are often drafted broadly to cover all forms of contractual, legislative or regulatory commitments.

As claimants in investment treaty arbitration are often shareholders in a local concessionaire, a recurrent issue is whether they can rely on the umbrella clause even though they are not a party to the concession contract. Generally, the claimant must demonstrate privity with the respondent state to establish a breach of the umbrella clause. However, in ***SyC v Costa Rica***, the tribunal reached a different conclusion. SyC was the majority shareholder in a Costa Rican entity that had entered into a concession agreement with the government 'for the Provisions of Services for the Creation and Operation of Stations for Integrated Vehicular Technical Inspection' to control polluting emissions. SyC claimed that Costa Rica breached the concession by failing to apply the agreed annual rate increases for vehicle inspection services, a breach that SyC argued was also a violation of the obligation under the Spain-Costa Rica BIT to comply with 'any obligation' entered into with 'investments by investors of the other Party'.[14] Costa Rica argued that the tribunal lacked jurisdiction to decide the umbrella clause claim because SyC was not a party to the concession. The tribunal rejected this argument, reasoning that the umbrella clause protection 'goes beyond the simple direct contractual relationship between the investor and the host State' when the umbrella clause refers to obligations entered into with qualifying 'investments',[15] such as the concessionaire entity in which SyC invested.

The tribunal's decision in SyC can be contrasted with the award in ***Oxus Gold v Uzbekistan***[16], under the UK-Uzbekistan BIT.[17] Here, the tribunal considered that in order to invoke the umbrella clause 'the claimant must establish, among others, that it is the creditor of the obligation at stake',[18] a requirement that has two aspects: (i) the obligation must exist,[19] and (ii) it is an obligation entered into by the state or one of its organs towards the claimant specifically.[20]

An umbrella clause may have 'the effect of transforming possible violations of contracts by the host State into violations of the basic Treaty Protection.'[21] In ***SyC***, discussed above, the tribunal considered that the umbrella clause 'internationalized' Costa Rica's contractual obligations towards SyC.[22] However, the tribunal also noted that not every breach of contract will result in a breach of the BIT. The investor must demonstrate that in breaching the contract, the state acted as a sovereign and not as a private party.[23]

A serious repudiation of a concession would normally amount to a violation of the commitments or undertakings covered by the umbrella clause. In ***EDF, SAUR and Leon Participaciones v Argentina***, the claimants argued that the 'pesification' of a concession was in breach of the Argentina-France BIT, including the umbrella clause contained in other treaties that applied through the most-favoured nation clause (MFN) in the BIT. The tribunal accepted the application of the MFN clause and held that Argentina's measures, violating the concession contract, resulted in a violation of the umbrella clause.[24] On the facts, the tribunal focused on both the 'pesification' of tariffs under the concession, which affected the economic balance of project, and the measures forbidding the concessionaire to vary or suspend performance under the concession.

The umbrella clause is not always confined to contractual obligations. Other 'obligations of the host State assumed unilaterally through legislation or executive acts' may fall within the scope of treaty protection under the umbrella clause.[25] This is in line with the power of states to assume binding legal obligations through unilateral acts, as confirmed by the International

Court of Justice on several occasions.[26] That said, recent case law shows how states may sometimes prevail in their argument that the umbrella clause is confined to commitments directly entered into with a specific investor, even when the umbrella clause is drafted broadly.

In *Philip Morris v Uruguay*,[27] the claimants brought a claim under the Switzerland-Uruguay BIT over Uruguay's tobacco control measures. The tribunal dismissed all claims, including the claim that Uruguay was in breach of the BIT's umbrella clause.[28] The tribunal considered that Uruguay entered into no commitment 'with respect to the investment' by granting a trademark, as the umbrella clause covers only specific commitments between the state and the investor, not general obligations imposed by the law of the host state.[29]

The tribunal's decision in *Philip Morris* can be contrasted with earlier cases in which tribunals interpreted the umbrella clause more generously. Some of the ICSID awards rendered against Argentina show how a broadly drafted umbrella clause - without distinguishing between obligations entered into by law or contract - have allowed tribunals to interpret them to cover the state's commitments under its laws and regulations regarding qualifying investments.[30]

FAIR AND EQUITABLE TREATMENT

Fair and equitable treatment (FET) is the most frequently invoked standard in investment disputes and also the basis of most successful claims pursued in investment treaty arbitration.[31]

Tribunals interpreting the FET standard usually apply Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the Vienna Convention), which require an analysis of the ordinary meaning of the treaty's terms, their context and the object and purpose of the treaty. First, under its ordinary meaning, the term 'fair' means 'just, unbiased, equitable, impartial, legitimate',[32] and the term 'equitable' refers to 'fairness; impartiality; even-handed dealing'.[33] Second, with respect to the context of the FET provision, compliance with this standard is not assessed by reference to the treatment that other parties - including domestic investors - receive.[34] Third, the FET standard is generally interpreted in light of the object and purpose of the treaty, sometimes spelled out in the preamble.[35]

A violation of the FET standard may arise regardless of the state's motives and irrespective of any showing of bad faith.[36] Conversely, a showing of good faith or legitimate cause on the part of the host state does not excuse a violation of the FET standard. When applying the FET standard, tribunals often 'unfold the standard on the basis of casuistic subgroups which will be seen as typical emanations of the standard.'[37] The non-cumulative criteria against which tribunals analyse a state's compliance with the FET standard include: (i) whether the host state breached investors' reasonable and legitimate expectations when the investments were made; (ii) whether the state failed to provide a stable and predictable legal and business framework; (iii) whether the state's conduct was transparent; (iv) whether the disputed measures were applied in breach of due process; (v) whether the state acted arbitrarily or unreasonably; and (vi) whether the disputed measures were disproportionate.[38]

LEGITIMATE EXPECTATIONS

The protection of investors' legitimate expectations is probably one of the most commonly invoked elements of the FET standard. It is also relevant in disputes involving concessions, where investments have often been made relying on certain contractual, legal or regulatory conditions that guarantee that the underlying concession assets will generate stable and predictable revenue streams over the term of the concession.[39]

The protection of legitimate expectations does not mean that the host state must completely freeze its regulatory regime to behave fairly and equitably, but it cannot unilaterally withdraw the entire legal framework on which the investor relied at the time of investing in a particular project.[40] Generally, investors' expectations are often measured against the entire legal, social and economic framework of the host country at the time the relevant investments were made. This framework may also be interpreted broadly.

In ***Urbaser v Argentina***,[41] the tribunal held that the legal framework that the investor knew or should have known at the time of investing included the potential measures that Argentina might have to adopt to protect basic human rights. The Spanish companies Urbaser SA and Consorcio de Aguas Bilbao Bizkaia (Urbaser) brought treaty claims against Argentina over a terminated water utility concession that had been granted in 1999. The tribunal noted that the relevant regulatory regime at the time the investments were made included other legal obligations Argentina had entered into,[42] including Argentina's constitutional obligations ‘to ensure the population's health and access to water and to take all measures required to that effect.'[43] The tribunal recognised that ‘the Province had to guarantee the continuation of the basic water supply to millions of Argentines. The protection of this universal basic human right constitutes the framework within which Claimants should frame their expectations.'[44] That said, the tribunal noted that although these obligations ‘prevail' over the concession, ‘the Government must exercise such responsibility in a manner that comports with the [FET] standard.'[45] Ultimately, the tribunal concluded that Argentina's measures terminating concession were not in breach of the FET standard, except with respect to the manner in which the government sought to renegotiate the concession agreement between 2003 and 2005.

STABILITY AND PREDICTABILITY OF THE LEGAL FRAMEWORK

Investment treaties generally require states to refrain from adopting measures that threaten the stability of the legal framework upon which qualifying investors reasonably relied when investing. Tribunals have generally considered this obligation of stability and predictability to be an essential element of the FET standard.[46] For example, in ***Murphy v Ecuador***, the tribunal noted that ‘protecting the stability and predictability of the host State's legal and business framework . . . underpins the modern customary international law standard.'[47] The dispute arose out of Ecuador's enactment of Law No. 42, imposing a 99 per cent windfall levy on foreign oil revenues. Murphy argued that the law forced it to sell its shareholding interest in a drilling consortium to the Ecuadorian government at an unfairly low price. Murphy claimed a breach of the FET standard, among other breaches of the BIT. On the alleged failure by the Ecuador to ‘ensure the stability and predictability of the legal and business framework',[48] the tribunal held that the 99 per cent levy ‘fundamentally change[d] the nature of the Participation Contract . . . within the context of an increasingly hostile and coercive investment environment.'[49] For these, among other reasons, the tribunal considered that Law 42 ‘ran afoul . . . the Participation Contract and the domestic legal regime, as well as the promise under [the BIT] to accord Claimant's investment fair and equitable treatment'.[50]

Although not directly involving a concession agreement, the recent award in ***EISER Infrastructure v Spain*** is relevant in the scope and nature of a host state's obligation to provide a stable and predictable legal framework.[51] As in the ***RREEF*** case, EISER invested in three CSP plants in Spain relying on the FIT regime that Spain had put in place for RE projects.

The regime was similar to a concession in that it offered a regulated tariff that would apply for a long period of time (at least 25 years), on which both investors and lenders relied. The dispute arose when the Spanish government began to scale back the FIT regime in 2012 and ultimately withdrew the entire regime in 2013, prompting EISER and other renewable energy investors to bring claims against Spain under the ECT.[52] The tribunal held that Spain's drastic overhaul of the regime was a breach of Spain's FET obligation under the ECT, reasoning that 'the ECT did protect Claimants against the total and unreasonable change that they experienced here.'[53] After Spain had 'enticed' investors, it 'completely changed the ground rules and abolished' the regime,[54] which the tribunal found 'profoundly unfair and inequitable'.[55] The tribunal further reasoned that the FET standard contained the 'obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments'.[56]

TRANSPARENCY

The FET standard also requires states to act transparently towards investors, free from ambiguity and uncertainty.[57] In ***Urbaser***, discussed above, the tribunal noted that the obligation of transparency does not require the host state 'to act under complete disclosure of any aspect of its operation', but rather, to 'act in a way to create a climate of cooperation in support of investment activities'.[58] The tribunal considered that Argentina breached the FET standard by failing to create a 'climate of cooperation' when it engaged in renegotiations that, unknown to the claimants, were already doomed by the government's overriding political desire to return the concession to state control.[59] The tribunal awarded no damages, however, because the concession already had 'no future' by the time the renegotiations occurred.[60]

Recently, in ***Crystallex v Venezuela***, Crystallex and the state-owned entity Corporación Venezolana de Guayana (CVG) entered into a mining operation contract (MOC) to develop mining concessions in Venezuela. Crystallex sought all the necessary permits, but the Ministry of Environment denied an environmental permit based on concerns over the project's impact on the environment and indigenous peoples in the area. In several public statements from 2008 to 2010, the government expressed Venezuela's intention to nationalise gold deposits, including those under the MOC. When CVG terminated the MOC in 2011, Crystallex brought claims under the Canada-Venezuela BIT. In analysing Venezuela's failure to act transparently, the tribunal 'linked' the 'the notion of transparency' to the 'concept of consistency', which the tribunal found Venezuela had failed to comply with when dealing with Crystallex. The tribunal found that Venezuela's 'concerns relating to global warming' and 'environmental issues' might be right, but determined that 'the way they were put forward . . . in the Permit denial letter presents significant elements of arbitrariness and evidences a lack of transparency and consistency.' The tribunal found 'the reference to global warming . . . particularly troublesome' as 'such concern had not been raised a single time in the innumerable occasions of exchanges occurred between the Claimant and the Venezuelan authorities throughout the four-year review process'. Therefore, the tribunal found that the process leading to the permit denial had not been transparent because the claimant had not been informed and had not been given the opportunity to comment on any environmental issues.[61]

ARBITRARINESS

It is well established that the prohibition of arbitrariness is a key element of the FET standard.[62] The ordinary meaning of 'arbitrary' means 'derived from mere opinion', 'capricious', 'unrestrained in the exercise of will', 'despotic'.[63] In the ELSI case, the International Court of Justice described arbitrary conduct as 'not so much something opposed to a rule of law, as something opposed to the rule of law . . . . It is wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.'[64] There appears to be two forms of arbitrariness embedded in this definition: substantial and procedural.[65]

First, a measure is 'substantially' arbitrary when it has no rational relationship with the purported goal of that measure. Some treaties impose an obligation for the host state not to adopt 'unreasonable measures', which tribunals have interpreted as 'those which are not founded in reason or fact but on caprice, prejudice or personal preference'.[66] A determination whether a state's conduct was reasonable requires demonstration that the conduct 'bears a reasonable relationship to some rational policy'.[67] Tribunals have also considered measures to be unreasonable if they result in a government's 'unilateral withdrawal . . . of undertakings and assurances given in good faith to investors as an inducement to their making an investment'.[68]

Second, a state acts arbitrarily when acting in breach of due process.[69] For example, in *Copper Mesa Mining v Ecuador*, a Canadian company had been awarded several mining concessions.[70] The concession areas quickly turned violent as anti-mining protestors committed arson and initiated roadblocks to prevent the company from accessing the area,[71] and Copper Mesa responded by orchestrating counter-violence, including recruiting armed men to shoot at protestors.[72] In 2007, Ecuador ordered Copper Mesa to cease activities in one of the concession areas to appease the anti-mining groups,[73] which prevented Copper Mesa from completing a required environmental impact assessment and consulting with local populations.[74] In 2008, based on a new 'Mining Mandate' that allowed the government to terminate concessions without compensation, the government terminated one of Copper Mesa's concessions with no notice, hearing, or compensation, based on its failure to complete the environmental impact assessment and consult with local populations.[75] The tribunal found that Ecuador breached the FET obligation under the Canada-Ecuador BIT - among other provisions - by arbitrarily revoking the concession without due process.[76]

PROPORTIONALITY

Finally, the requirement of proportionality, which is well established in many national laws as well as international law, has also been applied in the context of investment treaty claims. Notably, 'the obligation for fair and equitable treatment has on several occasions been interpreted to import an obligation of proportionality.'[77] For a state measure to be proportionate there must be a reasonable relationship between the burden imposed on the foreign investor and the aim sought to be realised by the state measure.[78] Recent investment treaty cases suggest that in deciding whether the measure was proportionate, it is not always necessary to determine whether the measure had the effect the government intended, but rather, whether it was a reasonable measure when adopted attempting to address a real public concern.[79]

FULL PROTECTION AND SECURITY

The full protection and security (FPS) standard is another standard often invoked in concessions-related disputes, although tribunals rarely determine that it has been breached. This standard undeniably provides protection against physical violence against the investor or its investments in the host state,[80] but concessions-related disputes often raise the question whether the FPS standard extends beyond physical security to include legal certainty.[81]

Tribunals have not been entirely consistent in approaching this standard, although recent cases indicate a narrow interpretation. For example, in ***Azurix v Argentina***, the tribunal accepted the view that FPS is 'not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view.' The tribunal reasoned that 'when the terms protection and security are qualified by full and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.' However, in the more recent ***OI European Group BV v Venezuela*** case, the tribunal dismissed the claimant's argument that the FPS standard covers legal certainty.[82] In practice, the relevance of this debate is limited - once a tribunal has found a breach of the FET standard, it will likely not need to decide whether the disputed measure also violated the FPS standard, as an additional violation of the treaty will not affect the amount of damages.

PROTECTION FROM UNLAWFUL EXPROPRIATION OF CONCESSION RIGHTS

Most IIAs protect qualifying investors and their investments from expropriation, nationalisation or measures of equivalent effect. IIAs protect investments from both direct takings as well as measures that amount to an indirect or 'creeping' expropriation. Generally, however, expropriation is not prohibited, provided that it is: (i) for a public purpose, (ii) non-discriminatory, (iii) in accordance with due process, and (iv) subject to prompt, adequate and effective compensation. Expropriation cases involve two issues: whether an expropriation occurred and whether that expropriation was lawful or unlawful.

HAS AN EXPROPRIATION OCCURRED?

To find out whether an expropriation has occurred, tribunals first examine whether the right that was allegedly expropriated is protected under the applicable IIA. In the context of a concession, protected investments might include shareholding interests in the concessionaire (in the form of both equity and loans) that control, exploit or operate the concession assets.

The question is often raised whether concession rights are capable of being expropriated. Expropriation under international investment law does not necessarily require that the 'legal title of property' be 'disturbed',[83] but can also occur indirectly, when the assets' income-producing potential is diminished as a result of the government's measures.[84] Therefore, expropriation also covers measures that have the 'effect of depriving the owner, in whole or in part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to be the obvious benefit of the host State'.[85]

In the specific context of a concession, even if there is no overt taking by the government of the concession assets, state measures can qualify as expropriation if they effectively neutralise the benefit of the concession for the concessionaire and the sponsors or if the host state authorities interfere with the concession to a degree significant enough to qualify as an indirect expropriation. Tribunals will look at whether the measures withdrew the benefit of the concession regime and if by doing so caused a reduction of cash flows that compromised the ability of the concessionaire to service the debt under the relevant project financing agreements, precluding the shareholders from a meaningful distribution of dividends. Such reduction in cash flow might thus result in a substantial deprivation.

In ***Crystallex v Venezuela***, discussed above, the government unilaterally terminated the concession on grounds that the investor failed to perform under the contract. The tribunal found that Crystallex had rights capable of being expropriated, however, relying on the wording of the Canada-Venezuela BIT, which prohibits expropriation of 'investments', a term drafted broadly to include every kind of asset, including contractual rights.[86] The tribunal also found that 'the conjunction and progression of acts performed by different governmental organs, starting from the actions surrounding the denial of the Permit, continuing with the announcements that Venezuela would' take over the project, 'and ending with the repudiation [of the concession agreement] had the effect of substantially depriving Crystallex of the economic use and enjoyment of its investment, and ultimately rendered it entirely useless'.[87] In other words, the claimants had suffered a substantial deprivation resulting in an expropriation as a result of Venezuela's measures revoking the concession.

Many IIAs refer to expropriation and nationalisation, through direct or indirect means, and to government measures that have an effect that is 'similar' to, the 'same' as, 'equivalent' to or 'tantamount' to expropriation.[88] In cases of indirect or creeping expropriation, the 'decisive element . . . is the substantial loss of control or economic value of a foreign investment without a physical taking'.[89] In addition, the deprivation must be permanent and must not be justified by the police powers doctrine.[90] The application of this test is illustrated in ***Quiborax v Bolivia***, in which the claimants argued that the revocation of concessions through a decree constituted an unlawful expropriation under the BIT.

First, on the question of whether there had been a substantial deprivation, the ***Quiborax*** tribunal noted that 'although the Claimants have not submitted proof of that diminution in value, the Tribunal agrees that, in the absence of the concessions, which were [the concessionaire's] ***raison d'être***, the Claimants' investment in [the concessionaire] was virtually worthless.'[91]

Second, regarding the requirement that a deprivation must be permanent in order to amount to an expropriation, the tribunal noted that the government had issued a decree which 'expressly recognised that the concessions were annulled and the writs of annulment were definitive'.[92]

Third, the police powers requirement is typically deemed an affirmative defence and the burden of proof is on the host state to justify the measure by establishing that the measure was reasonable, non-discriminatory, bona fide and proportionate to the public interest involved. In ***Quiborax***, Bolivia argued that the revocation and annulment of the concessions were justified by the concessionaire's alleged breaches of Bolivian law in the establishment and operation of the concessions.[93] The tribunal agreed with Bolivia that if the revocation was a 'legitimate exercise of its sovereign right to sanction violations of the law in its territory, it would not qualify as a compensable taking'.[94] Ultimately, the question was whether: (i) the revocation was 'based on actual violations of Bolivian law' by the concessionaire; (ii) the alleged violations were 'sanctioned with the termination of the concessions'; and (iii) in terminating the concessions the government had complied with the principle of due process.[95] The tribunal considered that this test had not been met as Bolivia failed to respect due process in revoking the concessions, and found that 'the Revocation Decree was not a legitimate exercise of Bolivia's police powers.'[96]

In addition to considering the degree of interference, tribunals also recognise that a breach of investors' legitimate expectations is also a factor in determining whether an expropriation occurred. For example, in ***EnCana v Ecuador***,[97] the investor claimed that a denial of a tax refund amounted to an expropriation. The tribunal denied the claim and stated that in the 'absence of a specific commitment from the host state, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage.'[98] Generally, the investor will expect to be able to exercise its acquired rights in the host state's law.[99] However, its acquired interests will be subject to the law of the host state and the scope and nature of the legitimate expectations is generally assessed on that basis.

IS THE EXPROPRIATION UNLAWFUL?

Once a tribunal decides that an expropriation occurred, it must determine whether the expropriation is lawful or unlawful, which depends on whether the expropriation is: (i) non-discriminatory; (ii) for a public purpose; (iii) in accordance with due process; and (iv) against payment of compensation. If any of these conditions is not met, the expropriation would be unlawful.

The distinction between lawful and unlawful expropriation impacts the amount of damages that the respondent state has to pay.[100] In ***Tidewater v Venezuela***, the tribunal noted that the 'essential difference' between the two is that compensation for a 'lawful expropriation' is 'fair compensation represented by the value of the undertaking at the moment of dispossession' and 'reparation in case of unlawful expropriation is restitution in kind or its monetary equivalent.'[101] In cases of lawful expropriation, the compensation amount is calculated based on the fair market value of the expropriated investment. However, if a tribunal finds that an expropriation was unlawful under international law, the principle of full reparation under customary international law requires that all consequences stemming from the illegal act must be covered by the damages paid to the investor.[102]

First, an expropriation is illegal when it is not motivated by a 'public purpose,' interpreted broadly to encompass national state interests such as public policy, the protection of human health and the environment, national security, the protection of human rights or a country's economic and financial stability. Tribunals apply a case-specific analysis whether a particular measure satisfies this requirement.

Second, a measure depriving an investor of the economic value of an investment will be unlawful if it is discriminatory in nature. In ***Quiborax v Bolivia***, the government's unilateral termination of the mining concessions was considered unlawful because it was discriminatory, among other due process and statutory reasons. The claimants argued that the revocation decree discriminated against the concessionaire on the basis of the Chilean nationality of its majority shareholder (Quiborax).[103] The tribunal found that other mining companies in similar circumstances were not exposed to the same measures.[104] Therefore, the measures were discriminatory and Bolivia's expropriation of Quiborax's investments amounted to an unlawful expropriation.

Third, most IIAs expressly require that an expropriation must follow due process to be considered lawful.[105] Other tribunals have nevertheless considered that where a BIT does not explicitly establish a due process requirement, the host state has no treaty obligation to assess the value of compensation through a valuation process in which the foreign investor must necessarily participate.[106]

Finally, an expropriation will generally be considered unlawful if the state neither pays nor offers compensation to the foreign investor. In holding that Bolivia's termination of Quiborax's concession was an unlawful expropriation, the tribunal focused on the undisputed fact 'that Bolivia neither paid nor offered compensation to' the concessionaire in which Quiborax had invested, when it revoked the mining concessions.[107] Although Bolivia argued that no compensation was due because there was no expropriation, the tribunal found that the concessionaire had been unlawfully expropriated when Bolivia failed to offer to compensate the investor.[108]

CONTRACT AND TREATY CLAIMS

Disputes between states and investors involving concession agreements (and other forms of state contracts) raise complex jurisdictional issues as to the relationship between treaty-based international arbitration and other available forums under the contract or the laws of the host state. IIAs confer qualifying investors a right of action, through international arbitration, against the offending state. Additionally, a foreign investor may resort to the dispute resolution mechanism envisaged under the contract (e.g., arbitration or domestic courts) or host country laws when bringing claims against the government.

Difficult jurisdictional issues arise from the existence of multiple available forums. First, where treaty claims are brought in respect of a dispute under state contract, governments have sometimes sought to argue that: (i) the claim is purely contractual and not covered by the IIA; (ii) there is no consent to investment treaty arbitration when parties agree that disputes under the contract are to be referred to the local courts; or (iii) the claim is inadmissible because the treaty contains a 'fork-in-the-road clause' that bars the tribunal from hearing the case if the investor has already submitted the dispute to the local courts.

First, where a dispute arises from a state contract and the investor brings investment treaty claims against the state, the respondent may claim that the dispute is purely contractual and not covered by the IIA. Generally, under international law, the violation of a contract between a state and an investor is not in itself a violation of international law. For example, the ***Urbaser*** tribunal discussed above rejected the claimants' submission that the state's multiple, major breaches of the concession contract amounted to breaches of the FET obligation, because the Spain-Argentina BIT did not contain an umbrella clause. The tribunal reasoned that 'purely contractual disputes' do not rise to the level of a BIT breach, though the state must '[take] care' of 'the basic expectations of the investor in respect of the fate of its investment'[109] within the larger context of the state's other obligations.[110]

However, as noted above, many IIAs contain an umbrella clause requiring the host state to observe any commitments entered into with qualifying investors or their qualifying investments. Even in cases where an umbrella clause applies, however, not every breach of contract will result in a violation of the applicable IIA. Assuming that commitments in a state contract are covered by the umbrella clause (a question of treaty interpretation), the protection afforded under an IIA is only granted when the investor can establish that the host state exercised its sovereign authority to depart from its contractual commitments.[111]

Second, states often rely on the dispute resolution forum agreed in the contract to challenge the jurisdiction of a treaty-based tribunal. In the seminal 2001 ***Lanco v Argentina*** arbitration,-[112] the tribunal rejected Argentina's argument that there was no consent to submit the dispute to investment treaty arbitration because the parties had expressly agreed that disputes under the concession would be referred to the domestic administrative courts. The tribunal reasoned that a BIT provides an open offer to qualifying investors to submit disputes covered by the treaty to international arbitration, an offer which the investor accepts - thereby forming the required consent - when filing the request for arbitration.[113] A jurisdiction clause under the concession agreement does not withdraw this consent.[114] Other tribunals have followed a similar approach.

Third, the 'fork-in-the-road' provision in IIA is often invoked to challenge the jurisdiction of an investment treaty tribunal when the investor has already submitted the dispute before the local courts. A fork-in-the-road clause offers the investor a choice between the host state's domestic courts or international arbitration. The choice, once made, is final.[115] In order to know whether the claim presented before local tribunals is the same as the one presented before the arbitral tribunal, most tribunals look at the identity between one proceeding and another (what is known as the 'triple identity test', which requires identify of parties, causes of action and relief sought), but some tribunals have adopted a different approach.

In ***Pantechniki v Albania***, the sole arbitrator emphasised that it is a 'mere assertion that claims based on Treaty provision are inherently different from those [the claimant] pursues as a contractor'.[116] Instead, the tribunal has to analyse 'whether or not the fundamental basis of a claim sought to be brought before the international forum is autonomous of claims to be heard'.[117] He continued that it is necessary to determine 'whether claimed entitlements have the same normative source' and whether a claim 'truly does have an existence outside the contract'.[118]

More recently, the tribunal in ***SyC v Costa Rica*** followed a similar approach, when interpreting the fork-in-the-road clause in the Spain-Costa Rica BIT.[119] The tribunal's decision in ***SyC*** is remarkable as it considered that it had jurisdiction to decide whether Costa Rica breached the concession agreement, because the BIT contained an umbrella clause, but it ultimately concluded that the claims were inadmissible owing to the fact that the investor had already submitted the dispute under the concession to the local courts.

PRACTICAL CONSIDERATIONS

If an applicable IIA is in force, it is necessary to consider on whom it confers legal rights and the nature of those rights, in light of the specific project structure. Also, while the protections discussed above are the most commonly invoked, it will always be necessary to examine the specific wording of the applicable IIA, as there are often important differences. Furthermore, investment treaty protection can be maximised when setting up the transaction or project, restructuring the project (before the dispute arises) in a manner that the concessionaire is owned directly or indirectly by nationals from countries with IIAs in force with the host state.

If the transaction comes under the scope of an IIA, it is still recommended to consider, when negotiating a concession, further issues that could enhance investment treaty protection: (i) the nationality and standing of the sponsors as indirect investors in the concession, taking into account their position in the chain of ownership of the local entities or concession assets; (ii) whether the locally incorporated concessionaire can benefit from treaty protection or whether under the applicable IIA, and based on foreign ownership or control, the concessionaire would have standing to bring treaty claims against the host state; (iii) whether there is scope for negotiating stabilisation commitments in the concession contract regarding the continued application of the agreed concession terms or particular regulatory regimes; or (iv) whether the dispute resolution mechanism agreed under the concession contract is consistent with the dispute settlement procedures under the applicable IIA.

Notes

1.

IIAs are commonly in the form of a bilateral investment treaty (BIT) or a separate chapter in a bilateral or multilateral free trade agreement (FTA).

2. The arbitration forums offered under most IIAs include the International Centre for the Settlement of Investment Disputes (ICSID), conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), arbitration the rules of other arbitration institutions or ad hoc proceedings under the rules of arbitration of the United Nations Commission on International Trade Law (UNCITRAL).
3. See, for example, UK-El Salvador BIT (2000), Article 8(2).
4. Christoph Schreuer, Shareholder Protection in International Investment Law, TDM 3 (2005),www.transnational-dispute-management.com.
5. See, for example, ***CMS Gas Transmission Company v The Argentine Republic***, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007; ***Camuzzi International S.A. v The Argentine Republic***, ICSID Case No. ARB/03/2, Decision on Jurisdiction, 11 May 2005; and ***Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic***, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012.
6. ***Azurix Corp. v The Argentine Republic***, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, paras. 42-43.
7. Ibid., para. 63.
8. ***RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v Kingdom of Spain***, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paras. 93-94. See also ***Barcelona Traction, Light and Power Co., Ltd. (Belgium v Spain)***, ICJ, Judgment, 5 February 1970.
9. Ibid., para. 120, citing CMS (Annulment decision), supra note 5, para. 74.
10. Ibid., citing ***RosInvestco UK Ltd. v The Russian Federation***, SCC Case No. (079/2005), Final Award, 12 September 2010, para. 608.
11. ICSID Convention, Article 25(2)(b) 2nd prong.
12. See, for example, ***CMS Gas Transmission Company v The Republic of Argentina***, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, para. 36.
13. See***Supervision y Control S.A. v Republic of Costa Rica***, ICSID Case No. ARB/12/14, Award, 18 January 2017, para. 279.
14. Spain-Costa Rica BIT, Article III (2).
15. ***SyC***, supra note 13, para. 287.
16. ***Oxus Gold plc v. Republic of Uzbekistan***, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat, UNCITRAL, Award, 17 December 2015. Oxus Gold claimed that the government of Uzbekistan did not grant development rights as required by the contract and in breach of Article 10 of the Uzbek Law on Foreign Investments.
17.

UK-Uzbekistan BIT, Article 2(2): 'Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.'

18. *Oxus*, supra note 16, para. 366.
19. *Oxus*, supra note 16, para. 367.
20. *Oxus*, supra note 16, para. 368. The tribunal found that Oxus Gold could not invoke the umbrella clause because the contract provided only an obligation to negotiate and because the privity requirement was not met.
21. Emmanuel Gaillard, La jurisprudence du CIRDI (2004), p. 833.
22. *SyC*, supra note 13, para. 281, citing *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 54.
23. *SyC*, supra note 13, para. 282, citing *El Paso Energy International Company v. Republic of Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 82.
24. *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v The Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2013. See also *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v The Argentine Republic*, ICSID Case No. ARB/03/23, Decision of the ad hoc Committee on Annulment, 5 February 2016, rejecting Argentina's request for annulment.
25. Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law (2012), p. 177.
26. *Nuclear Tests (Australia v France)*, ICJ Rep 1974, Judgment of 20 December 1974, p. 253. See also *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, ICJ Rep 1961, Preliminary Objections, Judgment of 26 May 1961, p. 17; and *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)*, ICJ Rep 1986, Judgment of 22 December 1986, p. 554.
27. *Philip Morris Brands S.à.r.l., Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016.
28. Switzerland-Uruguay BIT, Article 11.
29. *Philip Morris*, supra note 27, para. 480.
30. See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 275-277; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, paras. 312-314; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 165-175.
31. Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law (2012), p.119.
32. Oxford Dictionaries, Oxford English Dictionary (6th Ed., 2007), p. 920. See also Black's Law Dictionary, 10th ed., p. 715, which defines 'fair' as 'impartial; just; equitable; disinterested' or 'free of bias or prejudice'.

33. Oxford Dictionaries, Oxford English Dictionary (6th Ed., 2007), p. 856. See also Black's Law Dictionary, 10th ed., p. 654, which defines 'equitable' as 'just; consistent with principles of just and right' or 'existing in equity,' with 'equity' being defined as 'fairness; impartiality; even-handed dealing'.
34. See ***United Parcel Service of America, Inc. v Government of Canada (UPS)***, ICSID Case No. UNCT/02/1, Award, 22 November 2002, para. 80.
35. See, e.g., Rudolf Dolzer, 'Fair and Equitable Treatment: Today's Contours,' Santa Clara Journal of International Law, vol. 12, p. 12 (2014). See also ***Técnicas Medioambientales Tecmed S. A. v The United Mexican States***, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 156; ***MTD Equity Sdn. Bhd. and MTD Chile S.A. v The Republic of Chile***, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 113; ***Saluka Investments B. V. v The Czech Republic***, UNCITRAL, Partial Award on Jurisdiction and Merits, 17 March 2006, para. 286; Azurix, supra note 6, para. 360. See also ***Siemens A.G. v The Argentine Republic***, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 290.
36. ***Técnicas Medioambientales Tecmed***, supra note 35, para. 153. See also ***Occidental Exploration and Production Company v The Republic of Ecuador***, LCIA Case No. UN3467, Award, 1 July 2004, para. 186, noting that the FET standard 'imposes objective requirements that do not depend on whether the host State has proceeded in good faith or not'. See also CMS (Award), supra note 5 para. 280; ***Azurix***, supra note 6, para. 372; ***LG&E Energy Corp.***, supra note 30, para. 129; ***Enron***, supra note 30, para. 263.
37. See, e.g., Rudolf Dolzer, 'Fair and Equitable Treatment: Today's Contours', Santa Clara Journal of International Law, vol. 12, p. 14 (2014).
38. Ibid.
39. See, e.g., Rudolf Dolzer, 'Fair and Equitable Treatment: Today's Contours', Santa Clara Journal of International Law, vol. 12, p. 17 (2014), emphasizing that '[t]he protection of legitimate expectations by the FET standard will today properly be considered as the central pillar in the understanding and application of the FET standard.'
40. ***EISER Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v Kingdom of Spain***, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, para. 362.
41. ***Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic***, ICSID Case No. ARB/07/26, Award, 8 December 2016.
42. Ibid., para. 619.
43. Ibid., para. 622.
44. Ibid., para. 624.
45. Ibid., para. 622.
46. CMS (Award), supra note 5, para. 274. See also ***Occidental,*** supra note 36, para. 183; ***Enron***, supra note 30, para. 260;***LG&E Energy Corp.***, supra note 30, paras. 124, 125 and 131-133; and ***Eastern Sugar B. V. v The Czech Republic***, SCC No. 088/2004, Partial Dissenting Opinion of Robert Volterra, 27 March 2007, para. 29; Sempra, supra note 30, para. 300, noting that the FET standard serves to ensure the stability of the law and observance of legal obligations; and ***BG Group Plc. v Republic of Argentina-***, UNCITRAL, Award, 24 December 2007, noting at paras. 307-310 how Argentina's

radical alternation of the legal and business environment 'violated the principles of stability and predictability inherent to the standard of fair and equitable treatment'.

47. ***Murphy Exploration and Production Company v Republic of Ecuador***, UNCITRAL, Partial Final Award, 6 May 2016, para. 207.
48. Ibid., para. 196
49. Ibid., para. 281.
50. Ibid., para. 282.
51. ***EISER Infrastructure***, supra note 40.
52. As of June 2017, there are more than 31 arbitration proceedings pending against the Kingdom of Spain as a result of the measures discussed in the ***EISER*** award.
53. ***EISER Infrastructure***, supra note 40, para. 363.
54. Ibid., para. 366.
55. Ibid., para. 365.
56. Ibid., para. 382.
57. ***Técnicas Medioambientales Tecmed***, supra note 35, para. 154; see also Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law (2012), pp. 133-134, which notes that it is important to note here that the obligation to provide a stable and predictable legal framework is an objective one.
58. ***Urbaser***, supra note 41, para. 628.
59. Ibid., para. 845.
60. Ibid., paras. 846-847.
61. ***Crystallex International Corporation v Bolivarian Republic of Venezuela***, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 598.
62. See UNCTAD, Fair and Equitable Treatment (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012), page 78, emphasising that arbitrariness might be part and parcel of the FET standard p. 78, but it is also a separates standard of treatment. See also***Lauder v Czech Republic***, UNCITRAL, Award, 3 September 2001; ***Plama Consortium Limited v Bulgaria***, ICSID Case No. ARB/03/24, Award, 27 August 2008; ***Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)***, Judgment of July 20, 1989, ICJ Reports 1989; ***Loewen v United States***, ICSID Case No. ARB(AF)98/3, Award, 26 June 2003; ***Genin v Estonia***, ICSID Case No. ARB/99/2, Award, 25 June 2001.
63. Oxford English Dictionary Online, Web. 23 June 2017.
64. ***ELSI***, supra note 62, p. 15, par. 128.
65. Andrew Newcombe & Luis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, p.251 (2009) (referring to the concept of 'substantive' arbitrariness concerning arbitrary conduct and using the expression 'procedural' arbitrariness in the context of due process and denial of justice).
66. ***Plama***, supra note 62, para. 184.
67. ***Saluka***, supra note 35, para. 460.

68. *BG Group Plc. v The Argentine Republic*, UNCITRAL, Award, 24 December 2007, paras. 343, 346.
69. See UNCTAD, Fair and Equitable Treatment (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012), p. 79.
70. See *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA No. 2012-2, Award, 15 March 2016.
71. Ibid., paras. 4.95, 4.96.
72. Ibid., para. 6.99.
73. Ibid., para. 1.106.
74. Ibid., para. 6.84.
75. Ibid., para. 6.55.
76. Ibid., para. 6.85.
77. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para 404. See also *Técnicas Medioambientales Tecmed*, supra note 35, para. 122.
78. *Técnicas Medioambientales Tecmed*, supra note 35, para. 122; and *Case Concerning The Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep 1997, Judgment of 25 September 1997, para. 85.
79. See *Philip Morris*, supra note 27, para. 409.
80. Christoph Schreuer, 'Full Protection and Security', Journal of International Dispute Settlement, Vol. 1, No. 2 (2010), pp. 353-369.
81. See, for example, *Azurix*, supra note 6, para. 396.
82. *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015,, paras. 574, 575; see also *Sempra*, supra note 3, paras. 321-324; *Enron* supra note 30, paras. 284-287.
83. 83 See Jan Paulsson & Zachary Douglas, 'Indirect Expropriation in Investment Treaty Arbitrations' in Norbert Horn & Stefan Michael Kröll (eds.), Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects (2004), p. 152.
84. Ibid.
85. Ibid.
86. *Crystallex*, supra note 61, paras. 659-665.
87. *Crystallex*, supra note 61, para. 708. Similarly, in *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 229 the tribunal considered that Bolivia's measures amounted to an expropriation as they had the effect of transferring the title of the mining concessions to the state.
88. See, for instance, Argentina-Qatar BIT (signed in 2016), Article 5.1 ('same effect'); Mexico-United Arab Emirates BIT (signed in 2016), Article 6 ('tantamount to expropriation').
89.

Christoph Schreuer, 'The Concept of Indirect Expropriation under the ECT and other Investment Protection Treaties', Transnational Dispute Management, vol. 2, issue 5, p. 5, (2005) citing Ian Brownlie, Principles of Public International Law (1998) and Rosalyn Higgins, 'The Taking of Property by the State: Recent Developments in International Law', 176 Recueil des Cours, p. 263, p. 351 (1982-III).

90. 90 See***Burlington Resources Inc. v Republic of Ecuador, (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))***, ICSID Case No. ARB/08/5 Decision on Liability, 14 December 2012, paras. 471-473.

91. ***Quiborax***, supra note 87, para. 239.

92. Ibid., para. 233.

93. Ibid., para. 124.

94. Ibid., para. 202.

95. Ibid., para. 207.

96. Ibid., para. 227.

97. ***EnCana Corporation v Republic of Ecuador***, UNCITRAL (formerly ***EnCana Corporation v Government of the Republic of Ecuador***), Award, 3 February 2006.

98. Ibid., para. 173.

99. Acquired rights have been defined as follows: 'Acquired rights are any rights, corporeal or incorporeal, properly vested under municipal law in a natural or juristic person and of an assessable monetary value. Within the scope of such rights fall interests which have their basis in contract as well as in property, provided they concern an undertaking or investment of a more or less permanent character.' See 'Arbitration under Investment Treaties' in Nigel Blackaby, Constantine Partasides et al. (eds.), Redfern and Hunter on International Arbitration (Oxford University Press 2009), para. 8.86, citing D P O'Connell, International Law (2nd edn Stevens 1970), Vol. II, pp. 763-764.

100. See Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State', The Journal of World Investment & Trade (2007) Vol. 8, Issue 5, pp. 719-720.

101. 101 ***Tidewater v Venezuela Tidewater Investment SRL and Tidewater Caribe, C.A. v Venezuela***, ICSID Case No. ARB/10/5, Award, 13 March 2015, para. 141.

102. See ***Case Concerning the Factory at Chorzów (Indemnity)***, Judgment No. 13, 1928 PCIJ, Series A No. 17, Order, 13 September 1928, p. 47, where the PCIJ held that '[t]he essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by decision of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.'

103. ***Quiborax***, supra note 87, para. 246.

104. Ibid., para. 247.

105. See***Vestey Group Ltd v Bolivarian Republic of Venezuela***, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 309. See also ***Tenaris S.A. and Talta-Trading Emarketing***

Sociedade Unipessoal Lda v Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 493.

106. *Guaracachi America, Inc. and Rurelec PLC v The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, para. 439.

107. *Quiborax*, supra note 87, para. 255.

108. Ibid., para. 255.

109. *Urbaser*, supra note 41, para. 628.

110. Ibid., para. 627.

111. See *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, 21 May 2013, para. 588. See also *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012, paras. 211-212, 246;*SyC*, supra note 13, para. 282.

112. *Lanco International Inc v The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998.

113. Ibid., paras. 39-40.

114. See, for example, *Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, paras. 333-335; CMS (Decision on Objections to Jurisdiction), supra note 5, para. 76; *Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, para. 76; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, paras. 91-94; *Eureko B.V. v Republic of Poland*, Ad Hoc, Partial Award and Dissenting Opinion, 19 August 2005, paras. 112-114.

115. Christoph Schreuer, 'Travelling the BIT Route, Of Waiting Periods, Umbrella Clauses and Forks in the Road', Journal of World Investment & Trade, vol. 5, p. 239 (2004).

116. *Pantechniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 61.

117. Ibid., para. 61 (referring to the America-Venezuela Mixed Commission in the *Woodruff* case (1903)).

118. Ibid., para. 64.

119. See*SyC*, supra note 13, para. 134, 316 (note, however, that the tribunal qualified the underlying provision not as a fork in the road clause but as a waiver, under which 'once the investor chooses international arbitration under the corresponding treaty, it must waive the exercise of any claim before another dispute resolution mechanism, including those already initiated and those it could initiate,' para. 294).

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