Revising neo-liberalism in international law: indirect expropriation and norm change

Reajustando el neoliberalismo en el derecho internacional: expropiación indirecta y cambio normativo

Une révision du néolibéralisme en droit international: L'expropriation indirecte et changement normatif

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Abstract: This article zooms in on the rather unexplored history of indirect expropriation in international investment law. It argues that two major shifts have taken place in its evolution since its inception around 1917. The first concerns its transition, throughout the 1960s and 1970s, from a residual norm protecting investors while accommodating the right of states to pursue public interest, to a markedly neoliberal device providing a considerably higher level of protection for investors. The second shift, around 2000, marked the return to a moderately statist paradigm, largely under the idea of police powers. The article uses this historical reconstruction to reflect on the dynamics of norm change in international investment law and in international law more generally. It suggests four theoretical factors recognizable in the trajectory of indirect expropriation and arguably central in the evolution of any international rule: norm instability, low institutional authority, the interests of powerful states, and public oversight.
Keywords: norm change; neoliberalism; indirect expropriation; investment; statism; police powers.

Resumen: Este artículo busca estudiar la historia relativamente inexplorada de la expropiación indirecta en el derecho internacional de inversiones. Sostiene que se han producido dos cambios importantes en su evolución desde su creación alrededor de 1917. El primero se refiere a su transformación, a lo largo de los años 1960 y 1970, de una norma residual que protegía a los inversores y al mismo tiempo acomodaba el derecho de los Estados a perseguir el interés público, a una norma marcadamente neoliberal que proporcionaba un nivel considerablemente mayor de protección a los inversores, a expensas del poder regulador del Estado. El segundo cambio, alrededor del año 2000, marcó el regreso de la norma a un paradigma moderadamente estatista, en gran medida bajo la doctrina de poderes regulatorios legítimos. El artículo utiliza esta reconstrucción histórica para reflexionar sobre la dinámica del cambio de normas en el derecho internacional de inversiones y en el derecho internacional en general. Sugiere cuatro factores teóricos reconocibles en la trayectoria de la expropiación indirecta y centrales en la evolución de cualquier norma internacional: la inestabilidad normativa, la baja autoridad institucional, los intereses de los Estados poderosos y la vigilancia pública.
Palabras clave: cambio normativo; neoliberalismo; expropiación indirecta; inversión; estatismo; poderes regulatorios legítimos.

Résumé: Cet article essai de pénétrer sur l'histoire relativement obscure de l'expropriation indirecte dans le droit international des investissements. Il soutient que deux changements majeurs ont eu lieu dans son évolution depuis sa création vers 1917. Le premier concerne sa transformation, tout au long des années 1960 et 1970, d'une norme résiduelle protégeant les investisseurs tout en accommodant le droit des États de poursuivre l'intérêt public, à une norme nettement néolibéral offrant un niveau de protection considérablement plus élevé aux investisseurs, au dépit des pouvoirs régulateurs du État. Le deuxième changement, vers 2000, a marqué le retour à un paradigme modérément étatiste, largement fondé sur la doctrine de pouvoirs de police. L'article utilise cette reconstruction historique pour réfléchir à la dynamique du changement de normes dans le droit international des investissements et dans le droit international en général. Il suggère quatre facteurs théoriques reconnaissables dans la trajectoire de l'expropriation indirecte et sans doute centraux dans l'évolution de toute règle internationale: l'instabilité des normes, la faible autorité institutionnelle, les intérêts des États puissants et la surveillance publique.
Mots-clés: changement normatif; néolibéralisme; expropriation indirecte; investissement; étatisme; pouvoirs de police.

I. Introduction

Despite its widespread use in investment arbitration, indirect expropriation remains a somewhat hazy rule of international investment law (IIL).[1] Its exact content is, to this day, controversial, and its history is for the most part unknown among international lawyers and the general public.[2] Arbitrators and scholars have interpreted it in different ways throughout the last century, attributing different functions and limits to it.[3] Therefore, it seems fair to say that fluctuation has been the rule rather than the exception in its historical trajectory. Its underlying values have drifted over time, altering the shape of its normative content.

This article seeks to track this history and reflect on the key systemic and contextual elements that have determined the pace and direction of legal change in indirect expropriation. It focuses particularly on the role that has been attached to the doctrine of police powers (DPP) as a limit to what can be considered to fall under indirect expropriation. Two inflections seem particularly noteworthy in this regard. The first, roughly around the 1970s, implied a transition from a rule protecting investors while accommodating the right of states to pursue public interest to a more markedly neoliberal paradigm seeking to guarantee foreign investors the complete stability of the legal framework in the host country. The second, around 2000, meant a return to a relative sovereigntist understanding of indirect expropriation as a norm that protects investors generally, but not against the use of public power for legitimate purposes.

This historical account is then used as a basis on which to reflect on the systemic and contextual elements that have favoured legal change in this case.

[1] Reinisch, August and Schreuer, Christoph (eds.), "Expropriation", *International Protection of Investments: The Substantive Standards*. Cambridge University Press, 2020, paras. 200, 201; Dolzer, Rudolf y Schreuer, Christoph, *Principles of international investment law*, 2a. ed., Oxford University Press, 2012, pp. 101, 102; OECD, *Indirect Expropriation and the "Right to Regulate" in International Investment Law*, OECD Working Papers on International Investment, 2004, p. 3.

[2] See, for example, Paulsson and Douglas' observation in 2004 that 'the fact that we are no closer to a precise definition of indirect expropriation some forty years after Professor Christie's study only reinforces [the] insight [that] the case-by-case method is the only way to determine what kind of interference constitutes a "taking" under international law'. See in: Paulsson, Jan and Douglas, Zachary, "Indirect expropriation in investment treaty arbitration", in Horn, Norbert (ed.), *Arbitrating foreign investment disputes*. Kluwer Law International, 2004, pp. 146-147.

[3] Reinisch, August and Schreuer, Christoph, *op. cit.*, paras. 202-243.

Four core elements are identified: norm instability, low institutional authority, the interests of powerful states, and public oversight. These, it is argued, have enabled shifts in the understandings of indirect expropriation and the DPP at several historical points of inflection. However, these four features are not exclusive to the trajectory of indirect expropriation, and therefore allow for a broader reflection on the conditions under which the rules in IIL change. The article thus reflects on the extent to which norm instability, low institutional authority, the interests of powerful states, and public oversight can be used to articulate a more ambitious theoretical account of change in IIL and international law in general.

II. Indirect expropriation and the DPP throughout time: a shifting equation

1. *The uncertain birth of indirect expropriation (1917-1970s)*

The law on expropriation, as a subarea of international economic law—as opposed to merely an institution of domestic law—can be broadly said to have emerged around 1917. That year, two crucial yet unrelated events took place: the entry into force of the new Mexican Constitution and the Russian Revolution.[4] Both in Mexico and in the newly founded USSR, revolutionary governments set out to implement large-scale agrarian—and in the case of Russia, also industrial—reforms that often required the forfeiture of the property of foreign investors, what they referred to as 'nationalizations.'[5] Until then, the taking of foreign-owned property had been addressed in international law through the rules on diplomatic protection and the International Minimum Standard (IMS).[6] This meant that the international legal protection of foreign investors was, until then, no different from that offered to any

[4] Greenman, Kathryn and Orford, Anne *et al.*, "International Law and Revolution", in Saunders, Anna, Orford, Anne *et al.* (eds.), *Revolutions in International Law: The Legacies of 1917*. Cambridge University Press, 2021, pp. 1-4.

[5] López Escarcena, Sebastián, *Indirect Expropriation in International Law*. Edward Elgar Publishing [Leuven Global Governance series], Cheltenham, 2014, pp. 23, 24.

[6] Paparinskis, Martins, *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press, 2013, p. 48.

other foreigner—basically a general and mostly procedural safeguard against denial of justice.[7]

Aware that these rules provided mostly unsatisfactory solutions to Soviet and Mexican nationalizations, Western international lawyers and diplomats had to come up with creative solutions. Claims commissions and other mechanisms were set up, and doctrines on protection against expropriation emerged as an international legal standard on its own. Under these new rules, expropriation at the expense of foreign property was not per se conceived as unlawful, but it required to be undertaken for a public purpose, without discrimination, and, crucially, mediating some form of compensation.[8] Yet, judges and scholars alike seem to have been aware that direct expropriation did not cover the whole spectrum of interferences with foreign property rights that, before the Mexican and Russian revolutions, had covered by IMS. Property could be affected, they thought, not only through the formal transfer of property titles, but also through the hinderance of its value by a governmental act or omission.[9] These types of interferences were qualitatively different from direct expropriation, but were still considered to fall within the category of expropriation.

International judges and scholars therefore started including in their writings on the law of expropriation references to interferences that were 'tantamount' to expropriation, sometimes but not always referred to as indirect expropriation.[10] It was recognized from the outset, however, that not all indirect interferences with property could be considered to amount to expropriation requiring compensation under international law. Some measure of adverse effects on the rights of foreign investors was unavoidable from the

[7] Paulsson, Jan, *Denial of justice in international law*, Cambridge University Press, 2005, p. 36; Miles, Kate, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*. Cambridge University Press, 2013, p. 47; Kläger, Roland, *"Fair and equitable treatment" in international investment law*, Cambridge University Press, 2011, pp. 50-53.

[8] López Escarcena, Sebastián, *op. cit.*, p. 25.

[9] Wortley, B. A. and Cheshire, G. C. *et al.*, "Expropriation in International Law", *Transactions of the Grotius Society*, No. 33, 1947, pp. 34-35.

[10] Fachiri, Alexander P., "Expropriation and International Law", *British Year Book of International Law*, vol. 6, 1925, pp. 160-163; Wortley, B. A., "Problèmes soulevés en droit international privé par la législation sur l'expropriation", *Collected Courses of the Hague Academy of International Law,* vol. 67, 1939, pp. 419, 420; Herz, John H., "Expropriation of Foreign Property", *American Journal of International Law*, vol. 2, n. 35, 1941, pp. 251, 252.

normal exercise of government in host states, and could not be considered to be prohibited by international law. These 'normal' functions of government were referred to as 'police powers', a term borrowed from the doctrines of expropriation in common law systems.[11] Yet, while most authors of the interwar period recognized the DPP, uncertainty around its content, and more broadly around the limits between indirect expropriation and legitimate government activity, is evident in the literature of the time.[12]

The jurisprudence of the interwar period is indicative of this state of the law. That acts not formally transferring the property of foreigners but severely damaging it amounted to expropriation was recognized in two seminal cases: *Norwegian Shipowners* before the Permanent Court of Arbitration (PCA)[13] and *Certain German Interests in Polish Upper Silesia (Chorzów Factory)* before the Permanent Court of International Justice (PCIJ).[14] A third case, *Oscar Chinn*, is also informative of the development of indirect expropriation and more specifically of the DPP, although it needs to be read with caution because neither the parties nor the PCIJ used these exact terms, which is maybe indicative of the uneven evolution of IMS towards the law on expropriation.[15] The Court established in its judgment for the first time the principle that regula-

[11] *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)*. In this case, Justice Oliver Wendell Holmes recognized the DPP in the domestic context, famously holding that: 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses [of the Constitution] are gone. One fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude, in most if not all cases there must be […] compensation to sustain the act[…]The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking'.

[12] Fachiri, Alexander P., *op. cit.*, pp. 170-171; Lauterpacht, Hersch, "Règles générales du droit de la paix", *Collected Courses of the Hague Academy of International Law*, vol. 62, 1937, p. 346; Kaeckenbeeck, G., "The Protection of Vested Rights in International Law", *British Year Book of International Law*, vol. 17, 1936, pp. 16, 17; Herz, J. H., *op. cit.*, pp. 252-253.

[13] Permanent Court of Arbitration, *Norwegian Shipowners Claims (Nor. v. U.S.)*, Reports of International Arbitral Awards, vol 1, 1922, p. 307.

[14] Permanent Court of International Justice, *Certain German Interests in Polish Upper Silesia (Germany v. Poland),* Judgment of May 25, 1926, p. 44.

[15] Permanent Court of International Justice, *Oscar Chinn (U.K. v. Belgium)*, Judgment of December 12, 1934, pp. 99-101.

tory measures affecting the value of foreign investments can be lawful under international law depending on their purpose, and thus do not give rise to an obligation to compensate.[16]

After WWII, indirect expropriation remained marginal in the practice of international lawyers and academics, even if now it was unambiguously understood as an autonomous standard.[17] The spread of socialism in Eastern Europe and the gradual process of decolonization led direct expropriation to occupy most of the energies of diplomats, lawyers, and scholars working on investment. Large processes of nationalization took place in different parts of the world,[18] and with them, a heated debate around the issue of compensation for direct expropriation emerged.[19] Developed countries backed the Hull Formula, under which expropriation carried the obligation to ensure prompt, adequate, and effective compensation, regardless of the purpose of the expropriation. All of this on the basis of the *Chorzów* principle, which establishes that reparation ought to wipe out the effects of a legal injury. Developing countries, in contrast, argued that foreign investors deserved the same treatment as national investors, and thus that the standard of compensation should be sovereignly determined by the law of the host state and applied without discrimination.[20] Debates on direct expropriation thus marked IIL during the 1950s, 1960s, and 1970s, leaving indirect expropriation and DPP understudied, underpracticed, and with the somewhat vague legal status that it had before WWII.

Withal, indirect expropriation and the DPP never fully faded away during the decades of the boom of direct expropriation.[21] Several authoritative studies included and discussed them, albeit tangentially. The most important ones were the work of Francisco García Amador as first ILC Special Rappor-

[16] *Ibidem*, párr. 86.

[17] Herz, J. H., *op. cit.*, p. 251.

[18] López Escarcena, Sebastián, *op. cit.*, pp. 25, 26.

[19] Reinisch, August and Schreuer, Christoph, *op. cit.*, pp. 6, 7.

[20] Collins, David, *An Introduction to International Investment Law*, Cambridge University Press, 2016, p. 191.

[21] This is confirmed by the different positions expressed in a meeting of the Grotius Society in 1947 to discuss the state of the law of expropriation at the time. See, in particular Wortley and Loewenfeld's positions acknowledging IE and DPP, in: Wortley, Cheshire, G.C. *et al.*, *op. cit.*, pp. 34, 35, 44.

teur on State Responsibility,[22] the American Law Institute's Restatement of the Law Second of 1965,[23] and the well-known Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens of 1961.[24] In its article 10(5), the latter stated, making clear reference to the DPP, that:

> An uncompensated taking of an alien's property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful.[25]

A similar awareness is reflected in an influential article of 1962 written by George Christie, which was one of the very few thorough works, if not the only, to address indirect expropriation straightforwardly during that period.[26]

2. *Indirect expropriation in the years of neoliberalism: the sidelining of the DPP (1980s-1990s)*

A change towards neoliberalism started to take place in the law on expropriation throughout the 1960s, although it did not manifest fully until the 1980s. It happened gradually and in different fronts —some signs of it were visible even as early as the end of the 1950s. As such, it is impossible to anchor it to a specific moment or event. To begin with, the era of direct expropriation started to slowly fade out during the 1970s. Direct expropriation became less and less common, and the controversy over the standard of compensation ended in favour of the Hull Formula; the position that lawful expropriation requires prompt, adequate, and effective compensation in every case, and that the pur-

[22] ILC, *Fourth report on State Responsibility by F.V. Garcia Amador, Special Rapporteur*, 1959, párrs. 40–45.

[23] American Law Institute, *Restatement of the law second, foreign relations law of the United States*, American Law Institute, 1965, p. 192.

[24] Sohn, Louis B. and Baxter, R. R., "Responsibility of States for Injuries to the Economic Interests of Aliens: II. Draft Convention on the International Responsibility of States for Injuries to Aliens", *The American Journal of International Law*, vol. 55, num. 3, 1961, p. 553.

[25] *Ibidem*, p. 554.

[26] Christie, George C., "What Constitutes a Taking of Property Under International Law?", *British Yearbook of International Law*, vol. 38, 1962, p. 307.

pose of the expropriation is irrelevant for the determination of compensation.[27] In parallel to this, modern IIL saw the day. The political front built by developing states under the banners of decolonization and the New International Economic Order (NIEO), led developed states to abandon any multilateral treatymaking effort and pursue bilateral investment agreements (BITs) and Free Trade Agreements (FTAs) directly with developing countries.[28] Moreover, many developing states found themselves in need of attracting foreign direct investment, for which they thought, and were told by international financial institutions, that entering BITs was a good idea.[29]

These two factors, namely the triumph of the Hull Formula in direct expropriation and the turn to bilateral investment agreements, silently transformed the prevailing understandings of indirect expropriation and the practice of investment claims. More often than not,[30] BITs and FTAs adopted between the late 1960s and the 1990s contained expropriation clauses that joined direct and indirect expropriation with simplistic formulations such as the following, selected randomly from the Indonesia-Netherlands BIT of 1968:

> Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments goods, rights or interests unless[…]: a) the measures are taken in the public interest and under due process of law; b) the measures are not discriminatory[…]; c) the measures are accompanied by provision for the payment of just compensation.[31]

Crucially, and contrary to the common interpretation of indirect expropriation until then, this had the effect of subjecting both direct and indirect expropriation to the same standard of compensation under the Hull Formula, implying that the purpose of any expropriatory measure, whether direct or indirect, was irrelevant for the determination of a duty to compensate. In

[27] Titi, Catharine, *Police Powers Doctrine and International Investment Law*, Social Science Research Network (SSRN), Rochester, 2017, p. 6. https://papers.ssrn.com/abstract=3050417

[28] Reinisch, A. and Schreuer, C., *op. cit.*, p. 6.

[29] López Escarcena, Sebastián, *op. cit.*, p. 34.

[30] Although this seems not to have been the case with the very first BITs. Germany, the main initial promotor of BITs, did not follow this practice until the 1980s.

[31] See article 7 of the Indonesia - Netherlands BIT of 1968. Similar formulations can be found in most BITs of the time.

other words, these provisions eliminated the DPP from the law of expropriation, making it immaterial whether the state was implementing its legitimate police powers in its doings. All measures indirectly affecting the property of foreigners became, through the analogy with direct expropriation, subject to compensation. This was a clear, though silent, rupture with the way indirect expropriation had until then been loosely understood to operate.

How did this shift happen? Two draft conventions are crucial in explaining it. The first one, published in 1959, was known as the Abs-Shawcross Draft Convention on Investments Abroad. This document contained the seed of what was to become the investment protection regime in the following decades.[32] Drafted by Hermann Abs and Lord Shawcross, then Chairman of Deutsche Bank and Director of the Shell Petroleum Company respectively, this text recommended states to adopt multilaterally a framework of investment protection based on three pillars: fair and equitable treatment (FET), the strict respect of contracts and undertakings between states and investors, and the principle that any expropriation ought to be compensated for in terms of the Hull Formula.[33] On this last point, article III read:

> No Party shall take any measures against nationals of another Party to deprive them directly or indirectly of their property except under due process of law and provided that such measures are not discriminatory or contrary to undertakings given by that Party and are accompanied by the payment of just and effective compensation.[34]

This formulation excluded, unlike the fourth report of García Amador to the ILC of the same year and the Harvard Draft of 1961, any consideration of DPP. The bar for exceptions was set much higher, borrowing from article 15 of the ECHR.[35]

[32] Schill, Stephan W., *The Multilateralization of International Investment Law*, Cambridge University Press, 2009, p. 35.

[33] UNCTAD, *Draft Convention on Investments Abroad (Abs–Shawcross Convention)*, International Investment Instruments: A Compendium – Volume V, 2000, p. 395. https://www.international-arbitration-attorney.com/wp-content/uploads/137-volume-5.pdf. See articles I, II, and III.

[34] *Idem*.

[35] Chernykh, Yuliya, "The gust of wind: The unknown role of Sir Elihu Lauterpacht in the drafting of the Abs-Shawcross Draft Convention", in Schill, Stephan W., Tams, Christian J. *et al.* (eds.), *International Investment Law and History*, Edward Elgar Publishing, 2018, p. 271.

The Abs–Shawcross Draft failed to get any meaningful support by states.[36] At the time of the struggle between developing and developed states around the NIEO, it was unfeasible to attempt multilateral consensus on a proposal based on clearly pro-investor criteria. As explained by Georg Schwarzenberger at the time, 'even moderate governments of capital-importing countries [found] it impossible to pay the political price involved in becoming parties to conventions on the Abs-Shawcross lines'.[37] Yet, the ideas of this document deeply influenced a much more authoritative and transcendental draft: the 1967 OECD Draft Convention on the Protection of Foreign Property. This draft followed nearly to the letter the Abs-Shawcross Draft on its three first articles, including its provision on expropriation.[38] Again, it erased the distinction between direct and indirect expropriation in terms of compensation, and overlooked wholly the DPP.[39]

As with its predecessor, the tide of international politics in 1967 did not favour the project, and thus the draft failed to gain the support of OECD member states and was never even formally opened to signature.[40] Yet, its failure cemented the idea in developed countries that a much more feasible way to protect their investors was to engage in bilateral treaty-making with developing countries. That is, BITs and FTAs. Unsurprisingly, the basis on which these started to be drafted in the late 1960s and in the 1970s was precisely the OECD Draft. As a matter of fact, the Draft was recommended by the OECD to its members as a model for bilateral agreements, and thus countries like France, the UK and the US used it as a template during several decades.[41] As the example from the Indonesia-Netherlands BIT shows, the clauses joining summarily direct and indirect expropriation, and subjecting them to compensation on an equal basis, became very common.

Underlying this shift was a deeper change in the philosophy behind the protection of foreign investment. As explained by Barklem and Prieto-Ríos,

[36] Schill, S. W., *op. cit.*, p. 36.

[37] Schwarzenberger, Georg, *Foreign investments and international law*, Stevens and Sons, 1969, p. 134.

[38] OECD, *OECD Draft Convention on the Protection of Foreign Property (Adopted by the OECD Council on 12 October 1967)*, 1967. https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2812/download

[39] The draft established an even higher threshold for derogations in its article 6.

[40] Schill, S. W., *op. cit.*, pp. 36-38.

[41] *Ibidem*, p. 39.

BITs and FTAs, in establishing FET so broadly and in disconnecting indirect expropriation and DPP, responded to the 'investors' lack of confidence in the legal systems of developing countries'.[42] In contrast to the Friendship, Commerce and Navigation Treaties (FCNs) that preceded them, which normally just stated, among other things, that direct expropriation required compensation, BITs sought to establish wider normative liberal frameworks in capital-importing states. This meant that treaties aimed not merely at outlawing abuses to foreign investors by host-state governments, but more importantly at generally guaranteeing favourable conditions for foreign investment.[43] This implied extending the law on expropriation beyond the concern of appropriation of foreign property by the state, towards 'inappropriate regulatory acts, omissions, and other deleterious conduct that undermines the vital normative framework created and maintained by BITs'.[44] A broad understanding of indirect expropriation, decoupled from DPP, was one of the several mechanisms with which to attempt this.

The first immediate manifestation of this change was the jurisprudence, not of arbitral tribunals under BITs, which were marginal until the 1990s, but of the US-Iran Claims Tribunal (IUSCT). The Iranian Revolution in 1979 had affected US interests in different forms, among which stood out the nationalization of several American companies. In many instances, however, the government had stayed short of appropriating American companies and had rather taken control of them without formally seizing their ownership.[45] This led to three crucial cases between 1983 and 1986 where the IUSCT had to deal with indirect expropriation under customary international law, given the substantive narrowness of its founding instrument, the Algiers Accords. These were *Starrett Housing Corp. v. Iran*; *Tippetts and others v. TAMS-AFFA Consulting Engineers of Iran*; and *Phelps-Dodge v. Iran*.[46] In them, the Tribunal established a

[42] Barklem, Courtenay and Prieto-Ríos, Enrique Alberto, "The Concept of 'Indirect Expropriation', its appearance in the international system and its effects in the regulatory activity of governments", *Civilizar Ciencias Sociales y Humanas*, num. 21, vol. 11, 2011, p. 83.

[43] Sloane, Robert D. and Reisman, W. Michael, *Indirect Expropriation and its Valuation in the Bit Generation*. Social Science Research Network (SSRN), 2006, p. 117, https://papers.ssrn.com/abstract=943430 (consulta: 25 de marzo de 2021).

[44] *Ibidem*, pp. 118, 119.

[45] Sedigh, Hassan, "What Level of Host State Interference Amounts to a Taking under Contemporary International Law?", *Journal of World Investment & Trade*, vol. 2, num. 4, 2001, pp. 631, 632.

[46] Aldrich, George H., "What Constitutes a Compensable Taking of Property--The Decisions of

doctrine of indirect expropriation that resonated with the new formulations of indirect expropriation in the BITs of the time, equating direct and indirect expropriation for the purpose of compensation, and doing away with the DPP.[47] *Tippetts* is the best example and the most referenced case of this time. The IUSCT said that:

> A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected[…] The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.[48]

This paragraph, together with the decisions in *Starrett* and *Phelps-Dodge* had an important effect in the later jurisprudential developments of the law on indirect expropriation in the 1990s.

While some other non-BIT arbitral awards also contributed to decoupling the DPP from indirect expropriation during the 1980s,[49] the moment of truth for this doctrine came with the three first BIT/FTA cases between 1998 and 2000. These were *Ethyl Corporation v. Canada, Santa Elena v. Costa Rica* and, crucially, *Metalclad v. Mexico*. The first one concerned a ban on the manufacture of certain petrochemical products for public health and environmental reasons.[50] After the tribunal had admitted the investor's indirect

the Iran-United States Claims Tribunal", *American Journal of International Law*, vol. 88, num. 4, 1994, pp. 588-591.

47 Iran-United States Claims Tribunal, *Phelps Dodge Corp. and Overseas Private Investment Corp. v. The Islamic Republic of Iran*, Award, IUSCT Case No. 99, 1986, para. 22.

48 Iran-United States Claims Tribunal, *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran et al*, Award, IUSCT Case No. 7, 1984, pp. 225, 226.

49 Dolzer, Rudolf, "Indirect Expropriation of Alien Property", *ICSID Review - Foreign Investment Law Journal*, vol. 1, num. 1, 1986, pp. 41, 51, 52; Dolzer, Rudolf and Bloch, Felix, "Indirect Expropriation: Conceptual Realignments?", *International Law Forum*, vol. 5, num. 3, 2003, pp. 155, 162; American Arbitration Association, *Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation*, Award, 1978, paras. 107–133; ICSID, *Benvenuti et Bonfant v People's Republic of the Congo*, Award, Case No. ARB/77/2, 1980, para. 4.61; ICSID, *Liberian Eastern Timber Corporation v. Republic of Liberia*, Award, Case No. ARB/83/2, 1986, para. 70, 71; UNCITRAL, *Biloune and Marine Drive Complex Ltd. v. Ghana*, Award on Jurisdiction and Liability, 1989, para. 81.

50 NAFTA, *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction, 1998, para.

expropriation complaint and dismissed the government's objections on jurisdiction, Canada opted for a settlement. This was perceived at the time as showing that the claim of indirect expropriation might have been grounded.[51] In the second case, *Santa Elena*, the tribunal famously held, citing *Tippetts*, that

> There is ample authority for the proposition that a property has been expropriated when the effect of the measure taken by the states has been to deprive the owner of title, possession, or access to the benefit and economic use of its property […] Expropriatory environmental measures —no matter how laudable and beneficial to society as a whole— are, in this respect, similar to any other expropriatory measures […] : the state's obligation to pay compensation remains.[52]

Finally, in *Metalclad v. Mexico*, a case that concerned the opposition of a local authority to the development of a hazardous-waste landfill, the Tribunal ruled that there had been indirect expropriation in the government's interference with the investor's reasonable expectations. Discarding the argument that the measures pursued legitimate environmental aims, the tribunal held that:

> [It] need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110. However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation.[53]

This determination, rather summary in the award, is so far the starkest judicial endorsement of indirect expropriation decoupled from DPP, and as such it became the unavoidable reference among investment lawyers at the time.[54]

61; Sornarajah, M., *Resistance and Change in the International Law on Foreign Investment*, Cambridge University Press, 2015, p. 204.

[51] *Ibidem*, p. 196.

[52] ICSID, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, Award, Case No. ARB/96/1, 2000, paras. 72, 77.

[53] ICSID, *Metalclad Corporation v. The United Mexican States*, Award, Case No. ARB(AF)/97/1, 2000, para. 111.

[54] Paine, Joshua, "On Investment Law and Questions of Change", *The Journal of World Investment & Trade*, vol. 19, num. 2, 2018, pp. 196, 197.

These cases marked the highest neoliberal point of indirect expropriation. As with direct expropriation, no reference to the DPP nor any consideration to the state's regulatory power was made that could nuance the obligation to compensate. *Santa Elena* and *Metalclad* made such an impact among the investment arbitration community, that they had the effect of consolidating what scholars began calling a doctrine out of the different tendencies interpreting indirect expropriation as autonomous from DPP: the 'sole effects doctrine', a term apparently created by Rudolph Dolzer around that time.[55] Andrew Newcombe, less popularly, characterized it as the 'orthodox approach' to indirect expropriation, an approach which he perceived to be dominant in 2005.[56]

3. *Re-moderation of Indirect Expropriation and Mainstreaming of DPP (2000-on)*

Around the turn of the century, a second inflection took place in the trajectory of the law on indirect expropriation, this time under a moderationist spirit: the DPP re-emerged in international investment law. Many authors identify the year 2000 as the point of change. Allain Pellet identifies it as an 'attempt by investment tribunals to reconcile the sovereign right of the state, as the guardian of the general public interest, to regulate economic activities on its territory with its treaty or contractual obligations'.[57] Catherine Titi talks about it as 'a tendency […] that increasingly decouples an indirect expropriation from the exercise of the state's police powers' which is 'obvious both in the deference shown by investment tribunals to the state's police

[55] Dolzer, Rudolf, "Indirect Expropriations: New Developments", *NewYork University Environmental Law Journal*, vol. 11, 2002, pp. 64, 79, 80; McLachlan, Campbell, Shore, Laurence, Weiniger, Matthew, *International Investment Arbitration: Substantive Principles,* 1 ed., Oxford University Press, 2007, p. 301; Barker, Paul, "Legitimate Regulatory Interests: Case Law and Developments in IIA Practice", in Kulick, Andreas (ed.), *Reassertion of Control over the Investment Treaty Regime*, Cambridge University Press, 2016, pp. 245, 246.

[56] Newcombe, Andrew, *The Boundaries of Regulatory Expropriation in International Law*, Social Science Research Network (SSRN), 2005, p. 8. https://papers.ssrn.com/abstract=703244

[57] Pellet, Alain, "Police Powers or the State's Right to Regulate", in Kinnear, Meg (ed.), *Building International Investment Law – The First 50Years of ICSID*, Kluwer Law International, 2016, pp. 447, 452.

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powers and in recent investment treaty practice'.[58] The simple fact is that, more or less around 2000, all kinds of authorities in the field began acknowledging that measures hindering property short of appropriation do not give rise to an obligation to compensate if they can be considered to fall within a certain core of state functions, or police powers.[59] This view has, today, become virtually uncontroversial.[60]

There are two main manifestations of this change: investment arbitration jurisprudence and practices of investment treaty-making. Concerning the case-law, from 2000 on, BIT and FTA tribunals started to acknowledge and apply the DPP, to the point that it became an unavoidable reference in cases and discussions concerning indirect expropriation.[61] Only very exceptionally tribunals used the sole effects doctrine after 2000.[62]

S.D. Myers, v. Canada is sometimes referred as the first case breaking the sole effects doctrine in *Metalclad* only two months after it, although the decision of the tribunal was based more on the nature of the alleged expropriatory measures than on the DPP.[63] More important was *Marvin Feldman v. Mexico*, of 2002, where the tribunal did substantially overturn *Metalclad* on the meaning of indirect expropriation and the role of the DPP. Endorsing the *S.D. Myers* precedent, it ruled, fatefully, that:

> [G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be

[58] Titi, Catherine, *op. cit.*, p. 11.

[59] *Ibidem*, p. 1.

[60] *Ibidem*, p. 5; Pellet, Alain, *op. cit.*, p. 457; Cox, Johanne M., *Expropriation in Investment Treaty Arbitration*, Oxford University Press, 2019, p. 154; Yannaca-Small, Katia, "Arbitration Under International Investment Agreements: A Guide to the Key Issues", 2nd ed., Oxford University Press, 2018, p. 585; Paulsson, J. and Douglas, Z., *op. cit.*, p. 147.

[61] UNCTAD, *Expropriation: A Sequel*, UNCTAD Series on Issues in International Investment Agreements II, 2012, pp. 91-94. https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf

[62] See, for example: ICSID, *Compañia de Aguas del Aconquija SA and Vivendi Universal v Argentina*, Award, Case No. ARB/97/3, 2007, paras. 7.5.20, 7.5.21.

[63] NAFTA, *S.D. Myers, Inc. v. Government of Canada*, Partial Award, 2000, para. 282.

> achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.[64]

This precedent laid the ground for the next crucial case, considered in the literature as the main jurisprudential turn away from *Metalclad* and towards the DPP: *Methanex Corporation v USA*, of 2005.[65] The tribunal held, in one of the most cited paragraphs on the matter of indirect expropriation and the DPP, that:

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government.[66]

The case that is generally seen as finally consolidating the re-emergence of the DPP is *Saluka Investments BV v. Czech Republic*, of 2006. In its decision, the tribunal rejected that indirect expropriation had taken place in the intervention and eventual forced administration of a private bank by the Czech National Bank.[67] It found that:

> [I]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.[68]

Many cases followed this stream of jurisprudence after *Saluka*. Among them, the literature usually refers to *Chemtura Corporation v. Canada*; *Copper Mesa v. Ecuador*; *Burlington Resources Inc. v. Ecuador*; *WNC Factoring Limited v. Czech Republic*; *Continental v. Argentina*; *Azurix Corp v. Argentina*; *El Paso v. Argentina*, among others.[69] Worth highlighting is one of the relatively recent deci-

[64] ICSID, *Marvin Roy Feldman Karpa v. United Mexican States*, Award, Case No. ARB(AF)/99/1, 2002, para. 103.

[65] Paine, Joshua, *op. cit.*, p. 196.

[66] NAFTA, *Methanex Corporation v USA,* Final Award, 2005, Part IV, Chapter D, para 7.

[67] Cox, J. M., *op. cit.*, p. 160.

[68] Permanent Court of Arbitration, *Saluka Investments BV v. The Czech Republic*, Partial Award, Case No. 2001-04, 2006, p. 255.

[69] Paine, Joshua, *op. cit.*, p. 197.

sions, which is largely seen as reflecting the state of the matter today: *Philip Morris v. Uruguay* of 2016. Capturing the historical trajectory of indirect expropriation, the tribunal decided that:

> [A] consistent trend in favour of differentiating the exercise of police powers from indirect expropriation emerged after 2000. During this latter period, a range of investment decisions have contributed to develop the scope, content and conditions of the State's police powers doctrine, anchoring it in international law. According to a principle recognized by these decisions, whether a measure may be characterized as expropriatory depends on the nature and purpose of the State's action.[70]

As concerns the shift in practices of investment treaty-making, the turning point came in 2004. That year, both the US and Canada issued new model BITs that specified and limited the type of governmental acts that can constitute indirect expropriation.[71] The US model used basically the old formulation from the 1967 OECD Draft in its provision on expropriation, but a specific annex confined its interpretation. It said, among other things, that: "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 expropriation".[72]

The Canadian BIT used nearly the same wording.[73]

A very important number of BITs and FTAs have adopted similar practices since then, especially those entered by developed countries. The most prominent examples include the ASEAN-Australia-New Zealand Free Trade Area of 2010; the Comprehensive Economic and Trade Agreement (CETA) of 2016 between Canada and the EU; the Trans-Pacific Partnership Agreement (TPP), negotiated for many years and finally entered into force in 2018; and the remake of NAFTA, the United States-Mexico-Canada Agreement

70 ICSID, *Phillip Morris v. Uruguay*, Award, Case No. ARB/10/7, 2016, párr. 295.

71 De Brabandere, Eric, "States' Reassertion of Control over International Investment Law: (Re)Defining 'Fair and Equitable Treatment' and 'Indirect Expropriation'", in Kulick, Andreas (ed.), *Reassertion of Control over the Investment Treaty Regime*, Cambridge University Press, 2016, p. 302.

72 US Trade Representative, *US 2004 Model BIT*, Annex B, 2004, p. 38. https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf.

73 UNCTAD, *Canada 2004 Model BIT*, Annex B, p. 21. https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download

(USMCA) of 2020. The Trump-boycotted Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU contained similar provisions too. China seems to have adopted a similar practice, as evidenced by its BITs since 2011.[74]

Developing countries have followed suit in many instances. A great example is article 20 of the Investment Agreement for the Common Investment Area of the Common Market for Eastern and Southern Africa (COMESA) of 2007, which provides that

> Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation.

Colombia is another instance of a developing country adopting the DPP in its BITs since 2008.[75] Other countries, like India and Brazil, have opted for excluding wholly indirect expropriation from their investment treaties, a move that might reshape international investment law on the longer run.[76] This notwithstanding, it must be said that the overwhelming majority of BITs currently in force date from the 1990s and the beginning of the 2000s, and retain the former, unnuanced form of expropriation clause providing no space for the DPP.

These developments, added to the desuetude of the sole effects doctrine, signal that the existence of the DPP is no longer controversial.[77] For a tribunal to follow Metalclad tout court nowadays is unlikely if not impossible, just as an academic work defending the sole effects doctrine without nuances would raise serious doubts. The debate is largely over, and thus the law on in-

[74] See China's BITs with Uzbekistan, Tanzania, and Turkey. Chinese BITs before 2011 did not provide for a DPP clause.

[75] See the BIT between Colombia and France, of 2014: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3488/colombia---france-bit-2014-

[76] See the India-Brazil BIT of 2015 and the Mexico-Brazil BIT of the same year: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3665/brazil---mexico-bit-2015-

[77] Yannaca-Small, K., *op. cit.*, p. 585; Schreuer, Christoph, "The Development of International Law by ICSID Tribunals", *ICSID Review - Foreign Investment Law Journal*, vol. 31, num. 3, 2016, pp. 728-739.

direct expropriation can be said to have changed again. What remains open, however, is the precise content of the DPP, just as at the time of the first texts on expropriation a century ago. On this matter, the discussion is likely to still go on for some time.

III. Indirect expropriation and the DPP: some elements for understanding norm change in IIL

How can these sharp fluctuations in the understanding of indirect expropriation be explained? Without trying to come up with an overambitious theory of change in IIL, this section theorizes some of the main triggers of change observed throughout the trajectory of indirect expropriation. The first two are linked to the legal environment of IIL as such, and thus are systemic in nature: previous norm instability and low institutional authority. The other two, in contrast, are linked to the specific political context of indirect expropriation, and have more to do with the stakes involved for states and more broadly among the general public: the interests of powerful, global north states, and the weight of public oversight. These factors are discussed on the basis of this case alone, although they seek to contribute to a broader reflection on change in IIL and in international law more generally.

1. *Norm instability*

A first background element in the puzzle of indirect expropriation and the DPP is the norm instability of the legal framework surrounding this rule, especially at the key moments of inflection in the 1960s and 1970s and then later in 2000. By norm instability it is meant here a situation where the answer to a legal question is somewhat unclear or disputed within international legal interpretive communities; judges, lawyers, academics, diplomats, etc.[78] This can be either because a situation is unprecedented and its legal implications are mostly unexplored, or because there exists a dispute among interpretive communities and multiple interpretations conflict. The result, in any case, is

[78] The concept of 'interpretive community' is borrowed from Stanley Fish. See: Fish, Stanley Eugene, *Is there a text in this class: the authority of interpretive communities*, Harvard University Press, 1980, p. 394.

that norm instability makes it easier for a change attempt to take place. The argumentative burden of challenging a legal status quo is lower when the law is uncertain or disputed, if anything because there are less people to convince and less authorities to dispute. An argument thus can be put forward and assessed on its own merits, rather than exclusively against the benchmark of the challenged norm.

In the case of indirect expropriation and the DPP, instability has been present since the very beginning. This form of expropriation emerged as a residual norm seeking to capture the cases of governmental interference not squarely falling under the scope of direct expropriation. While most authors inferred that measures tantamount to expropriation had to be covered by the rule on expropriation, this was more a legal analogy based on the desire to protect investors than a certainty founded on solid legal grounds. Unsurprisingly, then, little clarity existed as to the meaning of 'tantamount' and the limits of this protection vis-à-vis legitimate governmental action. No instrument coming close to codifying the matter existed, the caselaw on the matter was very scarce, and no academic work had been devoted to the matter. More importantly, perhaps, the issue remained completely tangential to the main global concern on direct expropriation. The attention of people thinking about the protection of foreign investment was elsewhere, something that became even more marked after WWII.

In this context, it seems less surprising that the provision joining direct and indirect expropriation and excluding the DPP in the Abs-Shawcross Draft went unnoticed and got replicated in the OECD Draft of 1967, eventually becoming part of the legal framework replicated by BITs in the following decades. This change attempt faced little theoretical resistance and close to zero practical resistance. The absence of any strong precedent stating the DPP, added to the ubiquity of direct expropriation in the minds of international lawyers, paved the road for this neoliberal revision to go forward.

Norm instability also played a role, albeit arguably less crucial, in the second inflection of indirect expropriation and the DPP, around 2000. It was seen how the stream of jurisprudence discarding the DPP started with the US-Iran Claims Tribunal in the 1980s and continued with some isolated ad-hoc arbitrations. In their majority these cases provided a collection of useful dicta saying that the intentions of a government in interfering with an investment were less important than the actual expropriatory effect of the interference. But what they did not provide for was an articulated body of

jurisprudence that could truly stabilize this version of the norm. The cases on indirect expropriation during the 1970s and 1980s lacked a clear and unified legal ground that these interpretations could all be related to, as would have for instance been a multilateral treaty on investment, or even common BIT/FTA provisions. On the contrary, the jurisdictional basis of the US-Iran Claims Tribunal was an ad-hoc instrument not even mentioning indirect expropriation, and that of the ad-hoc arbitrations was even more scattered: contracts between multinationals and governments. In this sense, this case-law was not perceived as very straightforward at the time, and it was on this instable basis that the first three BIT/FTA awards upholding the sole effects doctrine had to build on: *Ethyl Corporation, Santa Elena*, and *Metalclad*.

Seen from this perspective, one realizes that the argumentative bar was not set too high for future tribunals to depart and establish a new precedent. This is precisely what happened very shortly after *Metalclad*, when the tribunals in *S.D. Myers, Marvin Feldman,* and *Methanex* discarded the sole effects doctrine without too much fuzz. Today, things have certainly changed. It would be much more difficult for a tribunal nowadays to depart from this new stream of jurisprudence and restate the sole effects doctrine. Not that the norm can be said to have fully stabilized either —few things are fully stable in IIL— but at least a consistent jurisprudential pathway is visible among BIT/FTA tribunals consolidating the DPP in indirect expropriation.

2. *Low institutional authority*

Very much in relation to previous norm instability, low institutional authority has also played a crucial role in the trajectory of indirect expropriation and the DPP. As understood here, the notion of authority builds on the 'deference model' of authority and understands it as the ability to induce deference among actors.[79] As explained by Nico Krisch, deference means that an actor feels compelled to follow some path of action, without him or her being neither openly coerced nor simply persuaded.[80] This implies that the ac-

[79] Friedman, R.B. "On the Concept of Authority in Political Philosophy", in Raz, Joseph (ed.), *Authority*, New York University Press, 1990, p. 56; Nico Krisch, "Liquid authority in global governance", *International theory*, vol. 9, num. 2, 2017, p. 242.

[80] *Idem*.

tor retains some degree of freedom while seeing pressing reasons to opt for a course of action, independently of his or her preference.

Authority understood this way plays a fundamental role in international law. Surely, international law retains a marked voluntarist flavour in that it privileges explicit endorsement by states as the prime form of meaning-making. But this pathway is full of political hurdles and therefore seldom meets the expectations of norm entrepreneurs. Legal meaning in international law is mostly produced elsewhere, namely in the work of international institutions. That is, courts, organizations, experts, multilateral venues. These generate norms and interpretations even if they have no central law-making capacity nor formal stare decisis. Their authoritativeness is thus highly deferential: it compels actors, not coerces them. To achieve that, institutions rely on their standing among international legal constituencies, the general public, and the broader political context. The decisions of the International Court of Justice (ICJ), for instance, have the power to shape international law even if no one but the parties before it is legally bound to follow them. This is fundamentally because the ICJ is perceived as a crucial judicial institution in international law.[81] Most actors are technically free to ignore them, and many certainly do, but the political and reputational cost of doing so is high.

Now, in certain subareas of international law, too, institutions playing central roles exist. That is the case, or at least was until some years ago, of the Appellate Body in international trade law, for example, or of UNHCR in refugee law.[82] These institutions, very different in their nature, play a crucial role in interpreting the rules of their respective fields. IIL, however, lacks institutions of the sort. As the evolution of indirect expropriation shows, arbitral tribunals are the main institutional venues where meaning is produced in this field. Yet, arbitral tribunals have little authoritativeness due to three main reasons. First, they are ad hoc mechanisms designed to rule only over specific disputes on the basis of specific BITs, FTAs or contracts. Quite evidently, this means that nothing binds a tribunal to follow the interpretations of other tri-

[81] This predominant role is confirmed, for example, in the recent works of the ILC on the topic of identification of customary law. See: ILC, *Draft Conclusions on Identification of Customary International Law, with Commentaries (A/73/10)*, 2018, Commentary to conclusion 13, para (4). See also, Jennings, Robert, "The Role of the International Court of Justice", *British Yearbook of International Law*, vol. 68, 1997.

[82] Venzke, Ingo, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*. Oxford University Press, 2014, chapters 3 and 4.

bunals. Second, given their ad hoc nature, there is no institutional continuity that could ensure some form of interpretive coherence in IIL, nor is there any mechanism to solve interpretive conflicts authoritatively or to hold arbitral tribunals politically accountable. And third, the explosion of investment arbitration in the last decades has meant that the opportunities for divergence are huge, making it rare that an award becomes a reference for future cases, and weakening the few that actually do.

The lack of strong institutional authority in IIL has played an important role in explaining the fluctuation in the understandings of indirect expropriation and the DPP. Before the US-Iran Claims Tribunal in the 1980s, the institutional venues where the issue was discussed were limited to the sparse interwar caselaw. Institutional authority was virtually inexistent at this stage. From then on, some authority started emerging, albeit extremely scattered: the IUSCT itself and some ad-hoc contractual arbitrations which were not seen as particularly authoritative. After that, when BIT/FTA arbitration on indirect expropriation took off towards the end of the 1990s, stronger precedents like *Methanex* or *Saluka* surfaced. Yet, it was not the strength of any authoritative institution what built momentum for the DPP to come back, but the repetition of precedents. The result was that, until then, the different versions of indirect expropriation lacked any meaningful institutional support, making change attempts much easier and even unnoticeable.

One can only speculate what could have happened had an authoritative institution interpreting indirect expropriation been around at any point of this story. For instance, if the *Barcelona Traction* case before the ICJ in 1970 had made it beyond the preliminary objections stage. Or if the Court had discussed the issue of the DPP in the *Elettronica Sicula* case of 1989, where it ruled based on other criteria.[83] These cases would not have set the matter on stone, but they would have undoubtedly made it much more complicated to revert any interpretive trend.

3. *Real Politik: The Interests of the Powerful*

One need not look too closely into the history of indirect expropriation to realize that a crucial driver of change has been the interest of capital-exporting, economically powerful states. The first inflection in this story, that

[83] ICJ, *Elettronica Sicula (USA v. Italy)*, Judgment, 1989, paras. 118, 119.

is, the decoupling of the DPP from indirect expropriation in the 1970s and 1980s through BITs and FTAs, was only possible because of the support of the governments of capital-exporting states. After the failure of bringing the Abs-Shawcross and the OECD draft conventions on investment to a serious multilateral discussion, the associations of investors, bankers, and multinational companies that had pushed for them turned again to their governments in an attempt to have them support their new investment regime through bilateral diplomacy. And the policymakers and diplomats of capital-exporting states proved receptive to this. They endorsed the protection of their nationals' investments abroad as a matter of foreign policy, under the conviction that it was the natural business of states to use their diplomatic structures and their political capital to secure certain standards of treatment and compensation for their investors in countries which they saw as unpredictable.[84] The Abs-Shawcross and OECD drafts therefore started being used as a template in the negotiations of BITs and FTAs from the late 1960s on.

But the weight of the interests of capital-exporting states is even more visible in the second inflection around 2000. When developed states endorsed the Abs-Shawcross template for their BITs and FTAs in the 1970s and until the 1990s, they were exclusively thinking of protecting their investors and expanding their economic influence. They never thought that this system could also be used against them. And indeed, this did not happen for three decades. A very liberal version of indirect expropriation, free from the DPP and thus highly constraining of state action, was no problem for them because it targeted their enemies and economically weak countries over which they sought economical hegemony. But this changed radically when Canada and the US became respondents in *Ethyl, S.D. Myers*, and later *Methanex*. These cases opened the eyes of several developed countries, who grew aware of the potential risks inherent in the blunt indirect expropriation clauses in their BITs and FTAs and sought to revert this by reintroducing the DPP.[85]

This is particularly visible in the context of NAFTA, where the US and Canada amended their model BITs in 2004 to limit the scope of indirect expropriation and exclude unambiguously the idea of compensation for gov-

[84] Jandhyala, Srividya, Henisz, Witold J. and Mansfield, Edward D., "Three Waves of BITs: The Global Diffusion of Foreign Investment Policy", *Journal of Conflict Resolution,* vol. 55, 2011, pp. 1047, 1051; Henisz, Witold, J., "The Institutional Environment for Multinational Investment", *The Journal of Law, Economics, and Organization*, vol. 16, 2000.

[85] Brabandere, E. D., *op. cit.*, p. 294; Collins, D., *op. cit.*, p. 165.

ernmental regulation pursing public interest. Tellingly, this came exactly after the saga of *Ethyl, Metalclad, SD Myers,* and *Feldman*. It was a clear reaction to these cases. Several authors also suggest that these model BITs and the apprehension by the Canadian and US governments awoke a sensibility among arbitrators towards the DPP, which would explain why only a year after their publication the tribunal in *Methanex* ruled in favour of allowing environmental regulations, opening the gates for the jurisprudence that followed.[86] In this sense, is seems reasonable to think that there was a reciprocal influence in this evolution: the jurisprudence influenced treaty negotiators and policymakers, and treaty negotiators influenced the jurisprudence back. In any case, what is clear is that the change in jurisprudence and treaty-making in the years following the NAFTA case-law constituted a 'sudden reversal of the way the law was heading'.[87] Many capital-exporting countries, as seen above, followed the example of the US and Canada, and a similar process of realization of the problematic nature of an unnuanced indirect expropriation clause happened in other emerging economic powers like China and India. In the latter, for instance, after decades of being sceptical of the investment arbitration system,[88] the government decided to terminate most of its BITs and renegotiate new ones excluding indirect expropriation completely.[89]

4. *Public oversight*

A last element arguably played an important role in the shifting trajectory of indirect expropriation: public oversight. The role of public awareness over the development of IIL is often overlooked, and indirect expropriation is probably one of the rules in this field whose evolution has been most affected

[86] Kriebaum, Ursula, "FET and Expropriation in the (Invisible) EU Model BIT Special Issue: The Anatomy of the Invisible EU Model BIT", *Journal of World Investment & Trade*, vol. 15, num. 3-4, 2014, p. 466; Paine, J., *op. cit.*, p. 198.

[87] Sornarajah, M., *op. cit.*, p. 204.

[88] Vidyarthi, Abhisar, "Revisiting India's Position to Not Join the ICSID Convention", Kluwer Arbitration Blog, 2 August 2020. http://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/.

[89] Weber, Simon, "What Happened To Investment Arbitration In India?", Kluwer Arbitration Blog, post of 27 March 2021. http://arbitrationblog.kluwerarbitration.com/2021/03/27/what-happened-to-investment-arbitration-in-india/

by it. This part of the story of indirect expropriation and the DPP, however, is not very well known.

It begins in the early 1990s, with the attempt of the OECD to relaunch its old project of a multilateral agreement on investment (MAI), which it had abandoned after the failure of the 1967 Draft Convention. This time the OECD convened its members to start negotiations in 1994, which happened in remarkable secrecy from 1995 to 1998.[90] The meetings were closed, and all the documents remain confidential to this day. Only by a later decision to disclose minimal summaries of the meetings, omitting any reference to names of diplomats and countries, can the development of the negotiations be more or less known.[91] Thus it is possible to see that the first version of the MAI took its expropriation provision from the 1967 OECD Draft with no substantial changes – that is, placing direct and indirect expropriation on the same footing in terms of compensation and giving no place to the DPP.[92] In the discussion about the potential limits of this provision, a remarkably low threshold was mentioned, way below the yardstick of the DPP.[93]

Decisively, however, a confidential copy of the draft agreement was filtered to the public in early 1997.[94] This triggered an unprecedented campaign by civil society organizations from all over the world which took place largely online, something unheard of at the time.[95] Noteworthy is that one of the crucial points raised by NGOs, and specially by Canadian NGOs, was that the MAI's provision on IE was very likely to tie the hands of governments in

[90] Schittecatte, Catherine, "The Politics of the MAI: On the Social Opposition of the MAI and its Role in the Demise of the Negotiations", *The Journal of World Investment & Trade*, vol. 2, num. 1, 2000, p. 333.

[91] The introductory note to the MAI website explains the following: 'In making these documents available, the OECD, at the request of Member governments, has retained the original dates and reference numbers of the documents but removed the names of individuals and countries. Under the OECD's normal release procedures, these documents could not have entered the public domain for several more years. Enquiries concerning the positions of individual countries should be addressed directly to the countries concerned'. See: http://www.oecd.org/daf/mai/intro.htm

[92] OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), *Consolidated Reports by Drafting Group N° 1 and Drafting Group N°2*, (DAFFE/MAI(96)16), 1996, Article 2.

[93] *Ibidem*, p. 21.

[94] Schittecatte, Catherine, *op. cit.*, pp. 337, 338.

[95] *Ibidem*, p. 388.

their efforts for implementing environmental policies. In making this claim they pointed to the *Ethyl* case, which exactly at that point was being heard in a NAFTA panel against Canada, and which provided the perfect example of a state being sued by transnational companies before obscure arbitral tribunals for well-meant environmental regulation.[96] The reference to this case, coupled with the social unawareness of investment arbitration generally, produced a big impression in Canada, turning the public against the MAI and leading the Canadian government to rethink its support to provisions like indirect expropriation decoupled from the DPP.

France is another country where the effect of public oversight was decisive. Catherine Schittecatte explains that activism in France brought the matter to the mainstream media, where great suspicion grew at the secrecy and confidentiality of the MAI negotiations. This, she recalls, provoked a request of inquiry by the Senate on the matter, which made for a big scandal and embarrassment of the Executive, leading France to withdraw entirely from the process in early 1998.[97] While this level of public attention on the matter was not reached in other countries, it is feasible that similar concerns emerged among many governments.[98] Perhaps as a consequence of this, one can clearly see in the documentation available that, from the moment when the draft was filtered onwards, the topic of the DPP suddenly emerged in the negotiations. The summary of a meeting of 1997 says, the following, for example: '[t]he Group took note of comments expressed by some delegations about the scope of the expropriation provision of the MAI in relation to legitimate government regulations in environment, labor, health and other fields that for the took place'.[99]

Because this concern is absent from the records of the negotiations in 1994, 1995, and 1996, this reference strongly suggests that some delegations reacted to the pressure by civil society. In any case, what is clear is that by

[96] *Ibidem*, p. 343.

[97] *Ibidem,* p. 349.

[98] See, as a general reference on the role of public opinion in IIA: Hirsch, Moshe, "Social movements, reframing investment relations, and enhancing the application of human rights norms in international investment law", *Leiden Journal of International Law*, vol. 41, num. 1, 2020.

[99] OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), *Drafting Group No. 3 on Definition, Treatment and Protection of Investors and Investments,* (DAFFE/MAI/DG3/M(97)9), 1997.

March 1998, the issue had clearly become problematic,[100] and a month later the whole process stranded.[101] This signals that public oversight was decisive in the fate of the MAI, and it is certain that the mobilization seen in countries like Canada and France raised alarms among policymakers from all over the world over the potential political cost of clauses like indirect expropriation without DPP.

It is impossible to know the precise weight that the story of the MAI and specifically the public awareness and activism around it had on the change in the understandings of indirect expropriation around 2000. Yet, it is apparent from the secrecy of the negotiations and from the embarrassment of governments over the leaks that, at least developed states realized that they had a lot to lose domestically if they kept pursuing these policies. In the words of Paul Barker, 'growing public disquiet over the functioning of the global economic system, including investor-State arbitration [...] translated into heightened public scrutiny of IIA negotiations'.[102] This certainly had an effect in the positions of states around indirect expropriation and the DPP.

IV. Change in IIL: Elements for a Theory?

To what extent can the elements discussed in the previous section shed light on the processes of normative change in IIL beyond the case of indirect expropriation? Answering this question fully would require a broader analysis than the one offered in this work. Yet, some hypothesis based on the history of indirect expropriation can be drawn from this discussion. Both the systemic and the contextual elements discussed above are present in other areas of IIL, and therefore there exists room for suggesting broader conclusions about change in IIL on the basis of this story.

Norm instability is part and parcel of the entire field of investment, and not only an element of indirect expropriation. At the time of the boom of BITs and FTAs, during the 1980s and 1990s, drafters considered that it would

[100] OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), *CHAIRMAN'S NOTE ON ENVIRONMENT AND RELATED MATTERS AND ON LABOUR*, (DAFFE/MAI(98)10), 1998.

[101] OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), *Ministerial Statement on the MAI*, 28 April 1998.

[102] Barker, P., *op. cit.*, p. 232.

be a waste of time and potentially a counterproductive endeavour to define the standards of treatment in great detail. Arbitral tribunals, they thought, would be better placed to develop the meaning of these rules over time, paying attention to the particularities of each case. As a result, many conventional standards remained considerably abstract in their original formulation. The best example of this is FET, which was originally introduced in BITs as a general, malleable legal standard designed to have an auxiliary function in the interpretation of other provisions.[103] It was left undefined on purpose. Yet, against the imagination of its first drafters, FET became the most frequently used rule in investment arbitration after 2000.[104] This led to lengthy and still-ongoing academic and jurisprudential debates on its content. And it has been precisely because of the instability of the conventional wording of FET and the absence of caselaw in the first decades of the investment arbitration system that attempting to introduce novel interpretations has been easy for norm entrepreneurs, especially between 2000 and 2010, when several interpretive threads on FET emerged in the jurisprudence.[105] As such, it seems granted to say that norm instability has played a crucial role in the development of IIL beyond the case of indirect expropriation.

The lack of solid institutional authority has also marked the trajectory of a number of rules beyond indirect expropriation. Again, because of its centrality in the current practice of IIL, FET is a case in point. Very similar to what happened with indirect expropriation, and even more strongly so, FET is a rule over which little or nothing was known before 2000, precisely because no authoritative institution was there to take up the task of interpreting it.[106] Some cases had stayed on the margins of FET, dealing superficially with related notions such as "constant protection and security", but staying short of

[103] OECD, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment, 2004, pp. 25, http://dx.doi.org/10.1787/675702255435; Muchlinski, Peter T., *Multinational Enterprises and the Law*, Blackwell Publishers, 1995, p. 625; Dolzer, Rudolf, "Fair and Equitable Treatment: A Key Standard in Investment Treaties", *The International Lawyer*, vol. 39, num., 2005, pp. 87, 89.

[104] Dolzer, R., "Fair and Equitable Treatment", *op. cit.*, p. 87.

[105] *Idem*. See also; Hirsch, Moshe, "Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law", *Journal of World Investment & Trade,* vol. 12, 2011, vii.

[106] UNCTAD, *Fair and Equitable Treatment*, 1999, pp. 4-5.

actually dealing with FET.[107] The door was therefore open for creativity and change once BIT/FTA arbitration turned towards FET in 2000. But even then, contradictory jurisprudence started emerging.[108] The most notable example was the discussion over the question whether the legitimate expectations of an investor at the time of the investment would be covered by the rule.[109] And there again no authoritative institution was there to offer a clear solution. It was only after long jurisprudential sagas that the opinion started settling in favour of a weak legitimate expectations rule conditioned by the right of the state to regulate for the purpose of public interest.[110] It is therefore clear that the lack of institutional authority to settle the meaning of FET all throughout its history made of this rule a hermeneutically volatile one, very much like in the case of indirect expropriation.

The more contextual elements of powerful-state interest and public oversight are also factors that shape the course of IIL beyond the case of indirect expropriation. The 'reassertion of control' over IIL by developed states, as de Brabandere puts it, has been an overarching phenomenon in the whole discipline.[111] Together with indirect expropriation, FET is again the clearest example of this. The concerns of capital-exporting states over the scope for policymaking within their jurisdictions have been, with time and after several readjustments, received by arbitrators and scholars across the discipline. This has given IIL a mildly sovereigntist flavour since 2000, public interest playing a significantly bigger role than before. But also public oversight has played a role in the shape of IIL rules beyond indirect expropriation. True, few instances of public exposure have taken the dimensions that the failure of the MAI took in 1998. The awareness of the general public over other rules has

[107] See, for example: Iran-United States Claims Tribunal, *Rankin v. Iran,* Award, Case No. 10913, 1987 and ICJ, *Elettronica Sicula, op.cit*.

[108] López Escarcena, Sebastián, "Aplicación de la Clausula de la Nacion Mas Favorecida y del Trato Justo y Equitativo en la Jurisprudencia Internacional en Materia de Inversion Extranjera - El Caso MTD, La Derecho Internacional Publico", *Revista Chilena de Derecho*, vol. 32 , núm. 1, (2005), pp. 79-88.

[109] Tudor, Ioana, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford University Press, 2008, pp. 151-182.

[110] Ortino, Federico, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness*, Oxford University Press, 2019, p. 8; Hirsch, Moshe, "Between Fair and Equitable Treatment and Stabilization Clause", *op. cit.*, pp. 805, 806.

[111] Brabandere, E. D. *op. cit.*, p. 285.

been in general low. Yet, as Anthea Roberts points out, there have been other instances where the '[dramatic] public law implications of investment treaty arbitration' have been exposed.[112] The critical situation of Argentina facing excessive complaints after a complete shutdown of its economy, or the huge complaints faced by Germany for its decision to shut down nuclear energy are good examples of this.[113] All of this has put significant pressure on IIL to readjust and accommodate public interest in more comprehensive manners.

These different elements are therefore observable throughout the discipline and not just in the case of indirect expropriation and the DPP. All of them could contribute to building a broader theoretical account of change in IIL and understanding better the dynamics that shape its rules.

V. Conclusion

Indirect expropriation has shifted in different directions throughout its history. From being an obscure, underused residual rule before the 1970s which nonetheless acknowledged the right of states to regulate pursing public interest, it transformed into a rule parallel to direct expropriation which required compensation regardless of the aims pursued by a governmental decision. Then, around 2000, public interest came back into the picture through jurisprudence and treaty amendments, repositioning the DPP in the law on expropriation. These inflections were largely driven by the interests of capital-exporting states and, to a lesser extent, by public oversight, and made possible largely by the instability of normative understandings around indirect expropriation and the low institutional authority of the field. But these elements enabling change are not peculiar to indirect expropriation. They operate across IIL. As such, they have the potential of contributing to a broader theoretical discussion on how change in IIL operates. By the same token, they provide useful categories to think of change in international law more broadly.

[112] Roberts, Anthea, "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System", *The American Journal of International Law*, vol. 107, num. 1, 2013, p. 78.

[113] Barker, P., *op. cit.*, pp. 230, 231.

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