UNIWERSYTET WARSZAWSKI

XXXIII LICEUM OGÓLNOKSZTAŁCĄCE DWUJĘZYCZNE IM. MIKOŁAJA KOPERNIKA W WARSZAWIE

WMC

Case Brief and Task

INTRODUCTION

Dear Participants,

What you have in front of you is a set designed for the Warsaw High School Moot Court 2016 (WMC).

The set will serve you to prepare your Written Submissions for the first stage of the WMC, i.e. for the written part of the competition.

It encompasses:

- the Case Brief with a short description of the factual and legal background of the dispute;
- the Task including the assignment you are to prepare;
- the Rules for Written Submissions that constitute a framework for the Task
- the Materials you may use for the preparation of your Written Submissions.

Should you have any questions do not hesitate to contact us via e-mail: **(wmc@warsawmootcourt.com).**

Good luck!

Organisers

RULES FOR WRITTEN SUBMISSIONS

The task of each Team shall answer the questions presented in the Case Package in support of the Claimant's and Respondent's positions. Teams will answer the questions in two written submissions for Claimant and Respondent respectively.

Allowed sources

In preparing the written submissions, Teams may rely both on the materials included in the Case Package, which Teams my support by the 'common sense' arguments and any kind of materials researched on their own. In such a case, all the external sources must be listed and provided for the arbiters.

Whenever an argument is supported by the materials from the Case Package, a footnote at the bottom of the page is required. Any written submission that violates the non-plagiarism rule will automatically not be considered for any award. The Case Package with the materials will be sent to the participants immediately after they have registered.

Formatting and style

Written submissions are intended to be of practical use to the arbitrators in deciding the dispute. They are not intended to be scholarly essays. Particular care should be taken to write in a formal English style that would be appropriate for submission to a court or arbitral tribunal. In particular, slang or contractions (aren't, didn't) should not be used.

Each written submission shall not be longer than 5 (five) A4 typed pages. The name of the Team and whether the memorandum is for the Claimant or for the Respondent must appear on the top of the first page.

Deadline

The deadline for both written submissions is 20th October, 2016, 23:59 EST. Both written submissions shall be filed to the Organisers in one e-mail to the address **warsawmootcourt2016@gmail.com**. The name of the files containing written submissions shall be "Written Submission for the Claimant [Name of the Team]" or "Written Submission for the Respondent [Name of the Team]", respectively.
Teams that fail to submit both written submissions will be not be able to compete.

CASE BRIEF AND TASK

The parties to this dispute are as follows:
Claimant: Soluzioni di energia rinnovabile S.R.L., represented by Counsel for Claimant
Respondent: Czech Republic, represented by Counsel for Respondent

The parties have agreed on the facts described below:

Soluzioni di energia rinnovabile S.R.L. (**"Soluzioni"** or **"Claimant"**) is a mid-size Italian company constructing and running renewable energy installations. It specializes in wind electricity installations. Soluzioni has successfully installed various kinds of wind farms in many European countries. Since European Union enlargement in 2004, it has been investing also in some Central European countries.

The European Commission for years has been calling the Member States to protect environment and to develop green energy technologies. The Renewables Directive (2009/28/EC) established an ambitious goal to increase the share of energy from renewable sources in EU to 20% gross final consumption of energy in 2020. To achieve that, the Member States were encouraged to adopt national renewable energy action plans including financial incentives for renewable energy producers.

Since 2005, Czech Republic (**"Respondent"**) has been providing so-called feed-in tariffs for renewable energy sources. The feed-in tariff (**"FIT"**) is a small amount of money paid for every kWh of installation's capacity guaranteed for a long period of time (usually between 15 and 30 years). The tariffs, combined with connecting renewable energy sources to the grid and obliging the energy providers to buy energy from the renewable energy producers, make the renewables business more profitable than it would be without such support. The amount of the tariff was regulated yearly by the Energy Regulatory Office.

Claimant built its first wind farm in Czechia in 2007. Then, the feed-in tariff was 2,46 CZK/kWh. Even though during the following years the amount was slowly decreasing, Soluzioni expected long-term profits, especially in the face of a guaranteed FIT, the Renewables Directive and new environmental policy taken by the Czech government. The construction of Claimant's two largest wind farms (45 turbines each) in Markvartovice and in Petrovice commenced in March 2009. Since then, more and more investors in the renewables energy business have been investing in Czechia, developing its energy sector and profiting from the FIT program combined with new technologies enabling to make installations, in particular photovoltaic, cheaper.

In the meantime, the European Commission was calling upon the Member States to terminate the bilateral investment treaties (**"BITs"**) concluded between each other, the so-called "intra-EU BITs". The Commission argued that the BITs are no longer necessary within the Union as the EU law provides sufficient safeguards of investor protection. Moreover, in the eyes of the EC, the existence of the intra-EU BITs breaches the principle of non-discrimination. At the same time, most of the investor's rights provided by the BITs are protected by the rules of the EU law. Italy and Czechia were some of the few Member States which followed the call and terminated or renegotiated their intra-EU BITs. The Czech-Italian BIT was terminated by mutual consent of the parties on 30th April 2009. However, pursuant to Article 12 of the Agreement Between the Czech Republic and the Italian Republic for the Promotion and Protection of Investments (**„the BIT"**), the investments made prior to the termination of the agreement are protected by its provisions for a period of ten years from the date of termination.

In 2012, a new law on renewable energy was adopted in the Czech Republic. It was stated in the preamble that the green energy had priority and that the support schemes would be maintained unless the benefits from the incentive program were “manifestly smaller” than costs of state budget. The European Commission examined the incentive program and accepted it as concordant with the EU competition rules. Thus, Soluzioni considered expanding existing or creating new wind farms. In August 2013, it started developing the Markvartovice wind farm by adding additional 30 turbines and increasing the capacity of the older ones. Meanwhile in Petrovice, Claimant decided to exchange the old turbines for 30 new ones, increasing the whole capacity of the farm. At the same time, it created a new farm nearby, connecting it to the grid by the same link as the original Petrovice installation. Due to technological problems, both Markvartovice and Petrovice works ended in February 2015. The development plans went further as on that stage the installations were still unable to generate profits.

However, as the numbers of investors and installations have been growing since 2009, the budget suffered heavily, in particular in the face of economic crisis. After the 2012 legislation passed, various Czech politicians started expressing doubts as to the meaningfulness of the FIT program in current circumstances. On 16th September 2013, Respondent adopted a new law, canceling the financial support for renewable energy sources. The government stated that the FIT program has led to an “unfair windfall” in the green energy business, which has caused flood of renewables investors since 2009, causing large (and still increasing) costs for the state budget, heavily stricken by the crisis. Only the constructions finished by the 2014 were still entitled to the tariffs, which have been significantly lowered.

The renewable energy producers, including Claimant, raised protests against the “unfair and unilateral” decision of the government. They claimed that they were deprived of subsidies keeping their businesses alive. As the guarantees by the government were no longer valid, they lost the promised profits. The Energy Regulatory Office has not published an obligatory pricing decision for 2016 regarding FIT remuneration yet. Because of that, no feed-in tariff is paid for wind farms this year.

On 16th February 2016 under Article 8 of the BIT, Soluzioni filed an arbitration claim to a World Bank-affiliated International Centre for Settlement of Investment Disputes against Czech Republic. Claimant alleged, among others, illegal indirect expropriation by, firstly, canceling the FIT remuneration for installations after the 2014, when its existing installations are not profitable by themselves, and secondly, by not paying any tariff for 2016 for the existing sources. Soluzioni claimed that it could not be aware of a policy shift taken in 2013 before commencing new investments.

On 25th April 2016, the Respondent submitted its response claiming that the Tribunal lacks jurisdiction to hear the case at least with regard to investments created after 2009. It submitted that due to major developments the Markvartovice and Petrovice installations are no longer protected by the “survival clause” of the BIT. In any case, the second Petrovice farm is outside the Tribunal's jurisdiction. With regard to the merits, Czechia claimed that the FIT reduction remains within its sovereign right to regulate and no legal framework may be “frozen solid” irrespective of economic situation. The crisis and the necessity to protect financial stability forced Respondent to diminish the tariff for the public purpose. Moreover, the FIT program became manifestly damaging the state budget while providing no benefits for the energy sector. Thus, it had to be canceled, while Claimant, a prudent business entity knowing market and legal developments, should have been aware of such possibility in such circumstances.

The arbitration is to take place in Warsaw and will be held in English. Claimant nominated Mr. X as an arbitrator. Respondent without any prejudice to its lack of jurisdiction argument nominated Madame Y as an arbitrator. Mr. X and Madame Y together chose Professor Z to chair the tribunal.

During the deliberations the Tribunal made the following order in relation to issues to be addressed by both Counsels in their written submissions:

Acting as counsel for Claimant and Respondent answer the following questions:

1. Does this Tribunal have jurisdiction to hear the case filed by the Claimant with regard to all its investments, only some of them or none?

2. Does the legislative action of the Respondent constitute an expropriation as per art. 5(1) BIT or any other violation of the BIT?

Prepare two separate written submissions for Claimant and Respondent.

A Test for European Solidarity. The Case of Intra-EU Bilateral Investment Treaties

by Cecilia Olivet
(excerpt)

(https://www.tni.org/files/download/briefing_on_intra-eu_bits_0.pdf)

Already during accession of new Member States (MS) in 2004, the EC raised concerns about the bilateral investment treaties that European MS had signed with the newcomers. But it was in 2006, when the position of the EC became clear and explicit. In a letter from Mr Schaub (EC Internal Market and Services) to Czech Deputy Minister of Finance, the Commission Services expressed: “EC law prevails in a Community context as of accession”...”the BIT is not applicable to matters falling under Community competence”... “The commission therefore takes the view that intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence”. The same position was reiterated in a note sent to the Economic and Financial Committee (ECOFIN) dated November 2006, where the EC expressed: “there appears no need for agreements of this kind in the single market and their legal character after accession is not entirely clear”. Since then, the EC has repeatedly argued that bilateral investment treaties between EU Member States are in conflict with EU law, are incompatible with the EU single market and, therefore, should be phased out. The EC has maintained that intra-EU BITs discriminate between EU investors from different Member States because it grants some and not others the right to sue Member States at international tribunals. Furthermore, the EC is concerned that investor-to-state arbitration is binding and is not subject to review by the European Court of Justice (ECJ). The EC understands that ECJ is the forum to resolve issues of EU law involving an EU Member State.

The EC position on this issue was also heard when, in 2008, it presented an amicus curiae (a brief filed with the court by someone who is not a party to the case) in the case of AES v Hungary at ICSID and in 2010, it presented written observations in the case Achmea (at that time Eureko) vs Slovakia. In the Slovakia case brief, the EC stated: “Intra-EU BITs amount to an anomaly within the EU internal market”... “Eventually, all intra-EU BITs will have to be terminated”.

In general, governments from Western European Members States (MS) have rejected the EC proposal to phase out intra-EU BITs. The position of most MS was made clear in the 2008 annual report of the Economic and Financial Committee (EFC) for the Council of the European Union which stated: “Most Member States did not share the Commission’s concern in respect of arbitration risks and discriminatory treatment of investors and a clear majority of Member States preferred to maintain the existing agreements”.

BEST PRACTICES: INDIRECT EXPROPRIATION

By Suzy H. Nikiema
(excerpt)

(http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf)

The concept of expropriation has always been surrounded by controversy, stretching right back to its origins in international law. Expropriation represents both the most serious infringement of private property rights and the manifest exercise of State sovereignty. In international investment law, it is defined as the formal withdrawal of property rights for the benefit of the State or for private persons designated by the State.

This definition covers direct expropriation or formal expropriation, which has long been recognized and regulated in national legislation. International investment treaties however, also recognise that where a State acts in a way that is detrimental to a foreign private investment, this may also be classified as expropriation, even if the investor formally retains its property rights over the investment.

This is known as indirect expropriation, or a "measure tantamount to expropriation." There are therefore two types of "expropriation." The first involves direct expropriation and is usually formalized in an expropriation decree or law. Expropriation of this type is undertaken against one or several investments. Expropriation, or nationalization, can also be against several investments in one economic sector.

The second involves indirect expropriation. This type of expropriation may result from measures that a State takes to regulate economic activities within its territory, even where such regulation is not directly targeted at an investment. In this case, legal title to the investment is not affected. Following a number of disputes in the past (discussion of which is outside the scope of this paper), the conditions under which a State may legally expropriate the property of a private foreign investor are now codified in general terms in international investment treaties. Under international investment treaties, a State has the sovereign right to expropriate private foreign investments located within its territory, provided that it complies with the following three conditions: the expropriation is designed to serve the public interest, the measure is not discriminatory and the investor is compensated for the losses suffered.

Although there is widespread consensus on the definition of direct expropriation, the definition of indirect expropriation remains much more problematic. The most crucial issue is to determine the clear conditions under which measures of a State may be considered as amounting to an indirect expropriation and, as such, require the State to compensate the investor for the damage caused. In other words, under what conditions may a State measure be deemed tantamount to expropriation? Indeed, several arbitral tribunals recognise that not all State regulations that are harmful to investment activities constitute an indirect expropriation and, as such, not all actions of this nature give the injured party the right to pursue compensation.

The definition of indirect expropriation is, without a doubt, presently one of the most important issues in international investment law. In the late 1990s, a number of investment disputes brought under the North American Free Trade Agreement (NAFTA), demonstrated the extent of the problems posed by the concept of indirect expropriation. Since then, the sheer number of cases brought by investors making indirect expropriation claims demonstrates that this remains a major issue to this day. The legal rules governing indirect expropriation are designed to protect investors in cases that fall outside formal and obvious infringements of their rights. Arbitrators and judges are required to look at "the substance of the measure and not its form," as explained by the European Court of Human Rights in the case of Sporrong & Lönnroth v. Sweden.

A State may attempt to "hide" its intention to harm an investment behind a measure that is, on the surface, legitimate and seemingly innocuous. However, due to the fact that current international investment treaties offer substantial protection to private foreign investments, the outstanding uncertainty over the definition of indirect expropriation raises concerns over the ability of States that host such investments to retain their regulatory and policy space. There is good reason to believe that a State might decide not to take action in the public interest if it fears that such measures may qualify as indirect expropriation and, as such, require the State to pay substantial compensation. (…)

Foreign private investors who hold an investment within the territory of another State are currently protected by a vast array of investment treaties that guarantee their rights, including the right to compensation in the event of direct or indirect expropriation. At the same time, a State might adopt public interest regulations that harm the economic interests of investors within its territory. This means that public interest measures that have harmful effects on a foreign investment may engage the host State's responsibility under international law. As cases have illustrated, investment treaties even provide a way for foreign investors to challenge the legitimacy of measures taken by governments in sensitive areas such as public heath, human rights and environmental protection.

It is important to note in this respect that each State has, in principle, the right to expropriate. This is an internationally recognized sovereign right. Investment treaties do not, therefore, prevent States from taking expropriation measures. The only restrictions that apply are that any expropriation measure must not be discriminatory in nature, must be undertaken in the public interest and the investor must be compensated for the losses suffered. Underlying that general rule on expropriation, however, are various complex tensions and difficulties for host States. They arise in three key areas. Firstly, host States (especially developing countries, which have a particular need for foreign capital) do not always have the financial resources needed to compensate investors for the harmful consequences of public interest regulations. The fact that a State is unable to compensate investors for the harmful consequences of public interest regulations using its own public resources may, in turn, mean that the State in question is unable to amend its legislation when needed. This is especially true when one considers that, paradoxically, those States at the very earliest stages of economic development or suffering severe financial crises are those that require the most intensive regulation and the most frequent amendments and adjustments to economic policy. The most striking example of this situation is Argentina, which has been the subject of more than 40 cases brought before ICSID since it introduced drastic measures in response to the economic and financial crisis of 2001.

Secondly, the adoption of a broad definition of indirect expropriation may result in a situation where all State measures that harm an investor can be considered indirect expropriations, regardless of the reasons that underlie any such measure. Under customary international law, however, host States have a recognized right to regulate, without any duty to compensate, in order to protect or promote the public interest (a broad concept that includes public order, public health, national security, human rights, public morals and environmental protection). A foreign investment may therefore be adversely affected by State measures that are not targeted directly at the investment and which do not affect the investor's legal title to the investment. In situations of this type, the investor will claim that the investment has been expropriated indirectly. The State, meanwhile, will argue that its regulation has been passed in the public interest and that it is not liable to compensate investors for any damages that may be caused unintentionally as a result of said regulation. The consequence is that the term "indirect expropriation" (in its broad sense) may cover all measures taken by authorities that have a negative impact on a private foreign investment, irrespective of any other consideration.

Thirdly, States may take measures harmful to investors pursuant to the States' international obligations (e.g., obligations regarding human health, the environment and labour rights). A State may be bound to protect a forest, regulate the cross-border transportation of hazardous waste, impose stricter polluted water recycling standards or increase the level of social security contributions that companies are required to pay on behalf of their employees, as a result of its international obligations. At the same time, however, such measures may threaten the existence or profitability of a private foreign investment. Pursuant to its investment treaties, a State may therefore have to compensate an investor for fulfilling its international human rights, labour or environmental obligations.

In short, the host State needs to protect the public interest and meet its international commitments by maintaining a set of regulations under which it cannot be pursued for compensation. The challenge is therefore to identify a set of criteria governing indirect expropriation that enable the State to regulate without having to pay compensation for every single investment harmed by its actions. This does not, however, mean that the State should be given free rein to harm investments as it wishes and to justify such actions under the heading of "public interest." The target should be to achieve the right balance between public and private interests. Nevertheless, the expropriation clauses that appear in investment treaties do not provide a clear response regarding how to strike that balance.

According to recent official UNCTAD sources, there are at least 2,701 investment treaties in place worldwide. Almost all of these treaties contains a clause on expropriation, covering both its direct and indirect forms. A review of these treaties—both bilateral investment treaties (BITs) and bilateral or regional free trade agreements (FTAs)—shows that the provisions that deal with expropriation can be divided into two main categories, based on the terminology used. The first, and most common, type of provision makes a distinction between (1) (direct) expropriation or nationalisation, and (2) indirect expropriation or equivalent measures or measures with similar/equivalent effects. Treaties that fall into this category use just one of these three expressions to refer to indirect and informal expropriation, excluding the other two expressions.

This category includes clauses that use the following terms:
– "expropriation, nationalisation and any other measure that has an effect tantamount to expropriation or nationalisation"
– "measures that deprive the investor of their investment, either directly or indirectly"
– "expropriation or nationalisation or similar measures"
– "expropriation, nationalisation or measures with a similar effect"
– "measures that deprive an investor of an investment or other measures that have a similar effect"
– "dispossession measures, including nationalization or other measures having similar consequences."

The second type of provision makes a clear distinction between three forms of expropriation: (1) direct expropriation or nationalization, (2) indirect expropriation and (3) equivalent measures and/or measures with similar/equivalent effects. This type of terminology is generally found in treaties signed by North American and Latin American countries and Switzerland. It is the terminology used in the NAFTA (Article 1110 cited above) and in recent FTAs between North American and South American countries, such as the Dominican Republic–Central America–United States Free Trade Agreement (U.S.–CAFTA–DR). Clauses that fall into this category use the following expressions:
– "direct or indirect expropriation or nationalisation, or any other equivalent measure having an effect similar to dispossession"
– "shall not, directly or indirectly, expropriate or nationalise or take any measure with equivalent character or effect."

This type of clause explicitly distinguishes between two types of indirect expropriation. Is Indirect expropriation therefore treated as different from a measure tantamount to expropriation? Does this therefore mean that each of these terms is subject to a different set of criteria? If the answer to this question is "yes," then arbitration tribunals will need to assess the evidence in three stages. Firstly, does the State measure effect a direct expropriation? Secondly, if the answer to the first question is “no,” does it constitute an indirect expropriation? Thirdly, if not, is it a measure tantamount to expropriation? In general, however, tribunals view the two expressions “indirect expropriations” and “measures tantamount to expropriations” as covering the same concept. In the case of Feldman v. Mexico, in its interpretation of Article 1110 of the NAFTA, the tribunal considered “the scope of both expressions to be functionally equivalent.”

The distinction created by this second type of clause is therefore artificial. Some articles expressly state that a State measure may be deemed an indirect expropriation or “tantamount to expropriation” due to its effects or characteristics. Treaties may, for example, use language referring to “expropriation or nationalisation, or any other equivalent measure having an effect similar to dispossession,” or “expropriation, nationalisation, or other measure having a similar effect.” Treaties may also refer to measures “having the same character or the same effect,” or “having a similar effect.” These provisions are more explicit than those that simply mention the terms “indirect expropriation” or “measures tantamount to expropriation.” This is a clear indication designed to assist tribunals in their interpretation. Furthermore, a small number of investment treaties mention “restrictive” measures or measures that “fully or partially deprive” the investor of its rights. The majority of such treaties were signed before 1990. Articles of this type would seem to suggest that indirect expropriation may occur even when the losses caused are not substantial or severe.

Despite these subtle variations in treaties’ provisions on expropriation, as explained by the arbitration tribunal in the case of LG&E v. Argentina, the general fact remains that, “[g]enerally, bilateral treaties do not define what constitutes an expropriation—they just make an express reference to ‘expropriation’ and add the language ‘any other action that has equivalent effects’ [...] and do not establish which measures, actions or conduct would constitute acts ‘tantamount to expropriation.’” Although treaty provisions generally do not explicitly state the factors relevant to determining whether a host State’s measure constitutes an indirect expropriation, they do implicitly indicate which factors do not establish that an indirect expropriation has in fact occurred. Investment treaties commonly state that the State parties are not allowed to take indirect expropriation measures “unless,” “except when” or “on condition that” the measures taken comply with all three of the following legality criteria: the measure is taken in the public interest, the measure is not discriminatory in nature, and the investor is compensated for the damage caused. These three factors establish whether an expropriation is legal, not whether it has in fact occurred. Consequently, arbitration tribunals have to first assess whether the measure constitutes an indirect expropriation and then, if so, whether the measure has been taken lawfully. As the arbitration tribunal explained in the case of Fireman’s Fund Insurance Company v. Mexico, to do otherwise would be “putting the cart before the horse (...).” This means that the criteria used to determine whether a measure effects an indirect expropriation are to be found outside these legality criteria. The two sets of criteria have been interpreted as being mutually exclusive. For example, when a tribunal is required to decide whether indirect expropriation has taken place, “it cannot be argued that because there is discrimination, there is expropriation.” The reverse also holds true. The same observation also applies to State regulations passed in the public interest. This distinction between criteria for determining whether there has been an expropriation and criteria for determining whether it was legal fuels the controversy that surrounds the concept of indirect expropriation. There are some who believe that, precisely because a measure is taken in the public interest (legality criterion), this same measure cannot be identified as an indirect expropriation. Due to the fact that treaty provisions on expropriation seem to exclude the legality criteria from the initial process of determining whether indirect expropriation has occurred, some States have decided to insert new provisions into their recent treaties.

"INDIRECT EXPROPRIATION" AND THE "RIGHT TO REGULATE" IN INTERNATIONAL INVESTMENT LAW
(excerpt)

(https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf)

It is a well recognised rule in international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation. Two decades ago, the disputes before the courts and the discussions in academic literature focused mainly on the standard of compensation and measuring of expropriated value. The divergent views of the developed and developing countries raised issues regarding the formation and evolution of customary law. Today, the more positive attitude of countries around the world toward foreign investment and the proliferation of bilateral treaties and other investment agreements requiring prompt, adequate and effective compensation for expropriation of foreign investments have largely deprived that debate of practical significance for foreign investors.

Disputes on direct expropriation – mainly related to nationalisation that marked the 70s and 80s – have been replaced by disputes related to foreign investment regulation and "indirect expropriation". Largely prompted by the first cases brought under NAFTA, there is increasing concern that concepts such as indirect expropriation may be applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society. The question that arises is to what extent a government may affect the value of property by regulation, either general in nature or by specific actions in the context of general regulations, for a legitimate public purpose without effecting a "taking" and having to compensate for this act.

One leading commentator suggests that the issue of definition of expropriation in this context may become the dominant issue in international investment law. Despite a number of decisions of international tribunals, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated and depends on the specific facts and circumstances of the case. However, while case-by-case consideration remains necessary, there are some criteria emerging from the examination of some international agreements and arbitral decisions for determining whether an indirect expropriation requiring compensation has occurred. (…)

Bilateral Investment Treaties contain brief and general indirect expropriation provisions which focus on the effect of the government action and do not address the distinction between compensable and non-compensable regulatory actions. For example, treaties entered by France refer to "measures of expropriation or nationalisation or any other measures the effect of which would be direct or indirect dispossession ". The UK treaties provide that expropriation also covers measures “having effect equivalent to nationalisation or expropriation”. Other treaties, such as some of those concluded by Sweden, refer to “any direct or indirect measure” or “any other measure having the same nature or the same effect against investments”. The former United States Model BIT mentions “measures tantamount to expropriation or nationalisation”. Several United States treaties are more specific on these measures: “any other measure or series of measures, direct or indirect, tantamount to expropriation (including the levying of taxation, the compulsory sale of all or part of an investment, or the impairment or deprivation of its management, control of economic value…”.

The 1992 World Bank Guidelines section IV (1) on “Expropriation and Unilateral Alterations or Termination of Contracts”, state that : “A state may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation”. (…)

As discussed above, few legal texts attempted to address directly how to distinguish legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation, requiring compensation. Scholars recognised the existence of the distinction but did not shed much light on the criteria for making the distinction. This may reflect reluctance to attempt to lay down simple, clear rules in a matter that is subject to so many varying and complex factual patterns and a preference to leave the resolution of the problem to the development of arbitral decisions on a case-by-case basis.

AGREEMENT
BETWEEN THE CZECH REPUBLIC AND THE ITALIAN REPUBLIC FOR THE PROMOTION AND PROTECTION OF INVESTMENTS[1]

The Czech Republic and the Italian Republic (hereinafter referred to as the "Contracting Parties”),

Desiring to further develop economic cooperation to t:'1e mutual benefit of both contracting Parties,

Intending to create and maintain favourable (*sic!*) conditions for of investors of one Contracting Party in the territory of the other Contracting Party, and

Conscious that the promotion and protection of investments stimulate the business initiatives in this field.

Have agreed as follows :

Article 1 - Definitions

For the purposes of this Agreement:

1. The term "investment" shall comprise every kind of asset invested in connection with economic activities by an investor of one contracting Party in the territory of the other contracting Party, in accordance with the laws and regulations of the latter and shall include in particular, though not exclusively :

a) movable and immovable property as well as any other right in rem such as mortgages, liens, pledges, and similar rights;

b) shares, stocks, debentures, public securities or any other form of participation in a company;

c) financial credits and claims to any performance having an economic value associated with an investment, as well as reinvested income and capital gains:

d) intellectual property rights, including copyrights, trade marks, patents, industrial designs. technical processes , know-how. trade secrets, trade names and goodwill associated with an investment;

e) any right conferred by law or under contract and any license and permit pursuant to law, including the concessions to search for, extract, cultivate or exploit natural resources;

f) any additional contribution to the equity of the original investment.

Any of the form in which assets are invested shall not affect their character as investment.

[1] Text provided by the Ministry of Finance. Czech Republic

2 . The term "investor" shall mean any natural or legal person who invests, directly or through its own subsidiary, in the territory of the other Contracting Party.

a) The term "natural person" shall mean any natural person having the nationality of either Contracting Party in accordance with its laws.

b) The term " legal person" shall mean, with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as legal person by, its laws, having its permanent seat in the territory of one of the Contracting Parties, such as public companies, corporations, partnerships, foundations and associations, regardless of whether their liability is limited or otherwise.

3. The term "returns " shall mean amounts yielded by an investment and in particular, though not exclusively, shall include profits, interests, interests related to loans, capital gains, shares, dividends, royalties or fees as well as any return in kind.

4. The term "territory" shall mean, in addition to the zones contained within the land boundaries, any marine or submarine zones within which both Contracting Parties exercise, in accordance with international law, sovereignty, sovereign and/ or jurisdictional rights.

5. The term "associated activities" shall include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories and other facilities as *well as* the importation and installation *of* equipment necessary for the normal conduct of business affairs; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property; access to the financial market, in particular the borrowing of funds, the purchase, issuance and sale of equity shares and other securities; the purchase of foreign exchange for imports; the granting of franchises or rights under licenses and leasing services rendered in or to the territory of the Contracting Parties.

Article 2 - Promotion and Protection of Investments

1. Each Contracting Party shall encourage, create and maintain favourable (*sic!*) conditions for investors of the other Contracting Party to make investments in its territory and shall admit such investments, in accordance with its laws and regulations.

2. Each Contracting Party shall accord to investments and associated activities made in its territory by investors of the other Contracting Party fair and equitable treatment and shall refrain from adopting unjustified or discriminatory measures which might affect the management, maintenance, use, disposal, transformation or liquidation of the investment, as well as the procurement of the goods necessary to the investment and the sale of the production on domestic and international markets.

3. Each contracting Party or its designated Agency may stipulate, in accordance with its laws and regulations, with an investor of the other Contracting Party an investment agreement on the conditions of the investment project.

4. Each Contracting Party shall, in accordance with its laws and regulations, permit investors of the other Contracting Party who have made investments in its territory to employ top managerial personnel regardless of their nationality.

Article 3. - National and Most Favoured (*sic!*) Nation Treatment

1. Each Contracting Party shall in its territory accord investments and returns of investors of the other Contracting Party treatment which is fair and equitable and not less favourable (*sic!*) than that accorded to investments and returns of its own investors or to investments and returns of investors of any third State.

2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investment, treatment which is fair and equitable and not less favourable (*sic!*) than that accorded to its own investors or of any third State.

3. The provisions of paragraph 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of:

a) any customs union or free trade area or economic and monetary union or similar international agreements leading to such unions or institutions or other forms of regional cooperation to which either of the Contracting Parties is or may become a Party;

b) any international agreement or arrangement relating wholly or mainly to taxation, in particular to prevent double taxation, or intended to facilitate cross border trade and cooperation.

Article 4 - Compensation for Damage or Losses

1. When investments by investors of either Contracting Party suffer damage or losses, owing to war or armed conflict, a state of national emergency, revolt, insurrection. riot or other similar events in the territory of the other Contracting Party, they shall be accorded by the latter Contracting Party a treatment. as regards restitution, indemnification. compensation or other settlement, not less favourable (*sic!*)than that which the latter Contracting Party accords to its own investors or to investors of any third State.

2. Without prejudice to paragraph 1 of this Article, investors of one contracting Party who in any of the events referred to in that paragraph suffer damage or losses in the territory of the other contracting Party resulting from:

a) requisitioning of their property by its forces or authorities,

b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded just and adequate compensation for the damage or losses sustained during the period of the requisitioning or as a result of the destruction of the property.

3. Compensation payments deriving from the events referred to in paragraph 1 and 2 of this Article shall be freely transferable in freely convertible currency without any undue delay.

Article 5 - Nationalization or Expropriation

1. Investments of investors of either Contracting Part.y, including related returns. shall not be, de jure or de facto, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred as "expropriation") in the territory of the other Contracting party except for a public purpose and national interest.

The expropriation shall be carried out under due process of law, on a non-discriminatory basis and shall be accompanied by the payment of prompt, adequate and effective compensation. Such compensation shall be equivalent to the market value of the investment expropriated immediately prior to the moment in which the decision of expropriation has been announced.

The compensation shall include interest calculated on the LIBOR basis from the date of expropriation to the date of payment, shall be made without any undue delay and in any case within two months. shall be effectively realizable and shall be freely transferable in convertible currency.

2. The provisions of this Article shall also apply when a contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in its territory and of which investors of the other contracting Party own shares.

In case that the object of expropriation is a joint-venture constituted in the territory of one of the Contracting Parties, the compensation to be paid to the investor of the other contracting Party shall be calculated taking into account the share of such investor in the joint-venture in accordance with its basic documents.

3. An investor of either Contracting Party that asserts that all or part of its investments has been affected by expropriation shall have the right to a prompt review by the competent Judicial or administrative authorities of the other Contracting Party in order to determine whether such measure has occurred and, if it has, whether such measure and any compensation thereof conform to the provisions of this Agreement and to the principles of international law, and in order to decide all other relevant matters.

4. Compensation will be considered as actual if it has been paid in the same currency in which the investment has been made by the foreign investor, in so far as such currency is - or remains - convertible, or, otherwise, in any other currency accepted by the investor. Compensation will be freely transferable.

Article 6 - Subrogation

If a Contracting Party or its designated Agency makes payments to its own investors under a guarantee it has accorded in respect of non-commercial risks for an investment in the territory of the latter Contracting Party the latter contracting Party shall recognize:

a) the assignment, whether under the law or pursuant to a legal transaction in that country, of any right or claim by the investor to the former Contracting Party or its designated Agency, as well as,

b) that the former Contracting Party or its designated Agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of that investor and shall assume obligations related to the investment

2. in relation to the transfer of payments to the Contracting Party or its designated Agency by virtue of this assignment, the provisions of Article 7 of this Agreement shall apply.

Article 7 - Transfers

1. The Contracting Parties shall guarantee the transfer of payments related to investments and returns. The transfers shall be made in a freely convertible currency, without any restriction and undue delay, after all fiscal obligations have been fulfilled. Such transfers shall include in particular though not exclusively:

a) capital and additional amounts to maintain or increase the investment;

b) profits, interests, dividends and other current income;

c) funds in repayment of loans;

d) royalties or fees, payments for assistance and technical services;

e) proceeds of total or partial sale or liquidation of the investment;

f) renumeration and fees paid to nationals of one Contracting Party for work and services performed in relation to an investment effected in the territory of the other Contracting Party subject to the laws and regulations of the latter Contracting Party;

g) compensation for nationalization or expropriation

2. All the transfers referred to in paragraph 1 of this Article shall be made at the prevailing exchange rate applicable on the date on which the investor applies for the related transfer, unless otherwise agreed.

3. Transfers referred to in Article 4, 5, 6 and in paragraph 1 of this Article, shall be considered to have been made "without any undue delay" when they have been made within the period normally necessary for the completion of the transfer. Such period shall under no circumstances exceed two months.

Article 8 - Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party

1. Any dispute which may arise between one of the Contracting Parties and an investor of the other contracting Party on investments, including disputes relating to the amount of compensation, shall be settled amicably, as far as possible.

2. In the event that such dispute cannot be settled amicably within six months from the date of the written application for settlement, the investor may submit at his choice the dispute for settlement to:

a) a Competent Court of Arbitration Tribunal of the Contracting Party in whose territory the investments have been made;

b) the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of the other States opened for signature at Washington D.C. on March 18th 1965;

c) an ad hoc Arbitration Tribunal, according to the Arbitration Rules of the UN Commission on the International Trade Law (UNCITRAL);

d) any other international arbitration body agreed upon by the parties to the dispute.

3. Should the dispute be submitted to the Arbitration Tribunal envisaged in paragraph 2 c) of this Article the following provisions will apply:

- the Arbitration Tribunal will be composed of three arbitrators;

- the President of the Arbitration Institute of Stockholm Chamber will act as competent Appointing Authority;

- the Arbitration Tribunal shall make its decision taking into consideration the provisions of this Agreement as well as commonly recognized principles of the international law.

<u>Article 9 - Settlement of Disputes between the Contracting Parties</u>

1. Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, if possible, be settled through consultation or negotiation.

2. If dispute cannot be thus settled within six months, it shall, upon request of either Contracting Party, be submitted to an Arbitration Tribunal in accordance with the provisions of this Article.

3. The Arbitration Tribunal shall be constituted for each individual case in the following way. Within two months from the receipt of the request for arbitration, each Contracting Party shall appoint one member of the Tribunal. These two members shall then select a national of a third State who on approval of the two Contracting Parties shall be appointed Chairman of the Tribunal (hereinafter referred to as the “Chairman”). The Chairman shall be appointed within three months from the date of appointment of the other two members.

4. If within the periods specified in paragraph 3 of this Article the necessary appointments have not been made, a request may be made to the President of the International Court of Justice to make the appointments. If he happens to be a national of either Contracting Party, or if he is otherwise prevented from discharging the said function, the Vice-President of the Court shall be invited to make the appointments. If the Vice-President also happens to be a national of either Contracting Party or is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the appointments.

5. The Arbitration Tribunal shall reach its decision by a majority of votes. Such decision shall be binding. Each Contracting Party shall bear the cost of its own arbitrator and its representation in the arbitral proceedings; the cost f the Chairman and the remaining costs shall be borne in equal parts by both Contracting Parties. The Arbitration Tribunal shall determine its own procedure.

Article 10 - Application of other Rules and Special Commitments

1. Where a matter is governed simultaneously both by this Agreement and by another international agreement to which both Contracting Parties are parties, nothing in this Agreement shall prevent either Contracting Party or any of its investors who owns investments in the territory of the other Contracting Party from taking advantage of whichever rules are more favourable to his case.

2. If the treatment to be accorded by one Contracting Party to investors of the other Contracting Party in accordance with its laws and regulations or other specific provisions of contracts is more favourable than that accorded by the Agreement, the more treatment shall be accorded.

Article 11- Applicability of this Agreement

1. The provisions of this Agreement shall apply to future investments made by investors of one Contracting Party in the territory of the other Contracting Party, and also to the investments existing in accordance with the laws of the Contracting Parties on the date of this Agreement coming into force.

2. The provisions of this Agreement shall be applied irrespective of whether or nor the Contracting Parties have diplomatic or consular relations.

Article 12 - Entry into Force, Duration and Termination

1. Each of the Contracting Parties shall notify the other of the completion of the procedures required by its law for bringing this Agreements into force. This Agreement shall enter into force on the first day of the second months after the date of the second notification.

2. This Agreement shall remain in force for a period of ten years. Thereafter, it shall remain in force until the expiration of a twelve month period from the date either Contracting Party notifies the other in writing of its intention to terminate the Agreement.

3. In respect of investments made prior to the termination of this Agreement, the provisions of this Agreement shall continue to be effective for a period of ten years from the date of termination.

In WITNESS WHEREOF, the undersigned, being duly authorised have signed the present Agreement.

Done in duplicate in 1996 in the Czech, Italian and English languages.

In case of any divergence of interpretation, the English text shall prevail.