Global Arbitration Review

The Guide to Energy Arbitrations

General Editor
J William Rowley QC

Editors
Doak Bishop and Gordon Kaiser

Third Edition

The Guide to Energy Arbitrations

Third Edition

General Editor

J William Rowley QC

Editors

Doak Bishop and Gordon E Kaiser

Reproduced with permission from Law Business Research Ltd

This article was first published in January 2019

For further information please contact Natalie.Clarke@lbresearch.com

Publisher
David Samuels

Business Development Manager
Gemma Chalk

Editorial Coordinator
Hannah Higgins

Head of Production
Adam Myers

Copy-editor
Rakesh Rajani

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.globalarbitrationreview.com

ISBN 978-1-78915-099-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following firms for their learned assistance throughout the preparation of this book:

20 ESSEX STREET

ALLEN & OVERY LLP

BAKER McKENZIE LLP

BENNETT JONES LLP

BENNETT JONES (GULF) LLP

DEBEVOISE & PLIMPTON LLP

DOUG JONES AO

EDISON SPA

FRESHFIELDS BRUCKHAUS DERINGER US LLP

FTI CONSULTING

GIBSON, DUNN & CRUTCHER LLP

GORDON E KAISER (JAMS)

HAYNES AND BOONE CDG, LLP

HOWARD ROSEN

KING & SPALDING

ORRICK, HERRINGTON & SUTCLIFFE (UK) LLP

PAUL HASTINGS LLP

SQUIRE PATTON BOGGS

THREE CROWNS LLP

WILMER CUTLER PICKERING HALE AND DORR LLP

Contents

Part II: Commercial Disputes in the Energy Sector

Part III: Contractual Terms

Part IV: Procedural Issues in Energy Arbitrations

Conclusion

Editor's Preface to the Third Edition

Economic liberalisation and technological change over the past several decades have altered the global economy profoundly. Businesses, and particularly those involved in the energy sector, have responded to reduced trade barriers and advancement of technology through international expansion, cross-border investments, partnerships and joint ventures of every description.

The move to today's 'internationality' of business and trade patterns alone would have been sufficient to jet-propel the growth of international arbitration. But when coupled with the uncertainties and distrust of 'foreign' court systems and procedures, the stage was set for a move to processes and institutions more suited to the resolution of a new world of transborder disputes.

Not surprisingly, the concept and number of international commercial arbitrations have grown enormously over the past 25 years. Bolstered by the advantages of party autonomy (particularly over access to a neutral forum and the ability to choose expert arbitrators), confidentiality, relative speed and cost-effectiveness, as well as near worldwide enforceability of awards, the system is flourishing. And if a single industry sector can lay claim to parental responsibility for the present universality of international arbitration as the go-to choice for the resolution of commercial and investor-state disputes, it must be the energy business. It is the poster boy of arbitral globalisation.

Led by oil and gas, the energy sector is marked by enormously complex, capital-intensive international deals and projects, frequently involving prominent parties and state interests. Transactions and partnerships are often long-term in nature, and involve 'foreign' places and players. Political instability and different cultural backgrounds characterise many of the sector's investments. In short, the energy sector is a natural incubator for disputes best suited to resolution through international arbitrations.

Indeed, over the past 50 years or so, following a rash of nationalisations in North Africa, the Gulf States and in parts of Latin America, and the lessons learned in 'foreign courts', there is scarcely a major energy sector contract (whether oil, gas, electric, nuclear, wind or

solar) that does not call for disputes to be resolved before an independent and neutral arbitral tribunal, seated, where possible, in a neutral, arbitration-friendly place.

The experience and statistics of the major arbitral institutions bear out the claim that the energy sector has driven, and continues to account for, major growth in international arbitration. ICSID is illustrative, where 42 per cent of its caseload in 2017 involved the energy sector. At the LCIA, case statistics for 2017 revealed that some 34 per cent of respondents were from the energy and resources sector. Between 2014 and 2015, the Stockholm Chamber of Commerce Arbitration Institute saw a 100 per cent increase in the number of its energy-related cases.

Although much of the evidence of the energy sector's arbitral demand is anecdotal, those arbitrators who are known in the field report growing demand and a steady increase in enquiries as to availability. And having regard to the multifaceted fallout from the oil price crash of 2014, a revival of resource nationalism (which exacerbates the natural tension between energy investors and host states), together with Russia's continuing economic difficulties and a world where sanctions imperil contractual performance, the only realistic expectation is for further reliance on arbitrators and arbitral institutions to cope with the disputes that are surfacing daily.

Another driver towards arbitration is the fact that the number of substantive players in the sector is relatively limited. These parties will invariably have multiple agreements, partnerships and joint ventures with each other at the same time, many of which are long term. These dynamics call for disputes to be resolved by decision makers who are known to and trusted by all, and whose decisions are final. The simple fact about business is that the economic uncertainty associated with an unresolved dispute overhanging a long-term partnership is often considered to be more problematic than getting to its quick and definitive resolution, even if the resolution is unfavourable in the context of the particular deal.

Against this backdrop, when Gordon Kaiser raised the question with me in the summer of 2014 of producing a book that gathered together the thinking and recent experiences of some of the leading counsel in the sector, it resonated immediately. Gordon was also more than pleased when I suggested that we might try to interest Doak Bishop as a partner in the project.

With Doak's acceptance of the challenge, we have tried, in the first two editions, to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by those who do business in the energy sector and by their legal and expert advisers.

Before agreeing to take on the role of general editor and devoting serious time to the project, we needed to find a publisher. Because of my long-standing relationship with Law Business Research, the publisher of Global Arbitration Review, we decided that I should discuss the concept and structure of our proposed work with David Samuels, GAR's publisher, and Richard Davey, then managing director of LBR. To our delight, the shared view was that the work could prove to be a valuable addition to the resource material now available. On the assumption that we could persuade a sufficient number of those we had provisionally identified as potential contributors, the project was under way.

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Energy Arbitration*s being seen as an essential desktop reference work in our field. To ensure the high quality of the content, I agreed to go

forward only if we could attract as contributors colleagues who were among the internationally recognised leaders in the field. The book is now in its third edition, and Doak, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors over the years.

The third edition of *The Guide to Energy Arbitrations* has been expanded with a new chapter on upstream oil and gas disputes. The remaining chapters have all been updated to reflect developments since 2017.

In future editions, we hope to fill in important omissions, such as the changing dynamics of investment cases under the Energy Charter Treaty, including the consequences of the *Achmea* decision of the European Court of Justice; the contours of fair and equitable treatment; injunctions against and the setting aside of awards; bribery and corruption; sovereign immunity and enforcement issues; *force majeure* and contractual allocations; and intellectual property and insurance disputes in the energy sector.

Without the tireless efforts of the GAR/LBR team this work never would have been completed within the very tight schedule we allowed ourselves. David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all of my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this third edition will obviously benefit from the thoughts and suggestions of our readers, for which we will be extremely grateful, on how we might be able to improve the next edition.

J William Rowley QC
September 2018
London

Part I

Investor-State Disputes in the Energy Sector

1

Expropriation and Nationalisation

Mark W Friedman, Dietmar W Prager and Ina C Popova[1]

Expropriation claims have been a perennial feature in energy disputes since the 1970s. At that time, the nationalisation of US oil companies by a newly installed Gaddafi regime gave rise to early energy cases such as *TOPCO v. Libya*[2] and *Libya American Oil Company (LIAMCO) v. Libya*.[3] Over the years, we have seen developments in the mechanisms for resolving energy disputes, such as the rise of investor–state arbitrations and the adoption of the Energy Charter Treaty (ECT)[4] in 1994, but the nature of energy disputes remains fundamentally the same. It is no wonder that this is the case given the cyclical nature of energy markets. In times of rising prices, energy resources represent easy opportunities to capitalise on the upward trend for investors and governments alike.

In addition, investments in the energy sector differ from other sectors. States perceive energy resources as central to economic policy and intimately tied to national sovereignty, frequently making energy policy a high political priority. At the same time, investors in this sector commit substantial financial resources in the hope of returning profits in the long term, despite the risks associated with the venture and the volatile markets. When a dispute arises over an energy investment, therefore, both investors and states stand to make significant gains or incur significant losses depending on the outcome.

Energy disputes, particularly those involving expropriation claims, have thus often prompted the development of international law. As of 30 June 2018, 41 per cent of cases administered by ICSID arose from the energy sector, more than any other sector.[5] Indeed,

1 Mark W Friedman, Dietmar W Prager and Ina C Popova are partners at Debevoise & Plimpton LLP. The authors are grateful for the assistance of Debevoise associate Fiona Poon in the preparation of this chapter.

2 *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. Libyan Arab Republic*, Award, 17 I.L.M. 1 (1978) [*TOPCO v. Libya*].

3 *Libya American Oil Company (LIAMCO) v. Libyan Arab Republic*, Award, 20 I.L.M. 1 (1981) [*LIAMCO v. Libya*].

4 The Energy Charter Treaty, 34 I.L.M. 360 (1995).

5 See Int'l Ctr for Settlement of Inv'r Disputes, The ICSID Caseload–Statistics (Issue 2018-2), at 12 (2018).

energy disputes involving expropriation claims have led to some of the largest damages awards ever issued in investor–state arbitration, including *Yukos v. Russian Federation* (approximately US$50 billion)[6] and *Occidental v. Ecuador* (approximately US$1.1 billion).[7]

Overview of expropriation

At its essence, an expropriation is the taking of private property by a government acting in its sovereign capacity. Nationalisation, a form of expropriation, generally covers an entire industry or geographic region.[8] Nationalisations typically occur in the context of a major social, political or economic change. While international law recognises that states have the right to nationalise or expropriate,[9] that right is subject to certain conditions under customary international law and investment treaties. These conditions have led to a distinction between 'lawful' and 'unlawful' expropriations, which can have consequences for the standard by which damages for the expropriation are assessed.

As reflected in the *TOPCO v. Libya* case, under customary international law a 'lawful' expropriation must be, at a minimum, for a public purpose, non-discriminatory and accompanied by appropriate or fair compensation.[10] Investment treaties recognise a similar standard and generally include the further requirement that expropriation be conducted according to due process of law.[11]

---

6 *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 226, Final Award (18 July 2014); *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award (18 July 2014); *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award (18 July 2014) [collectively, *Yukos*], ¶ 1827. The *Yukos* awards are currently being challenged in Dutch court. They were set aside by the Hague District Court on 20 April 2016. *Russian Federation v. Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited* (C/09/477160/HA ZA 15-1, 15-2 and 15-112). An appeal of that ruling is now pending in the Hague Court of Appeal.

7 *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award ¶ 586 (2 November 2015) (reducing the initial award from approximately US$1.8 billion to approximately US$1.1 billion) [*Occidental v. Ecuador II*].

8 Nicholas R Doman, Postwar Nationalization for Foreign Property in Europe, 48 *Colum. L. Rev.* 1125, 1125 (1948) (describing nationalisation as a 'general, impersonal taking of the economic structure in full or in part for the nation's benefit').

9 See *TOPCO v. Libya*, Award, 17 I.L.M. 1, ¶ 59 (1978) (stating 'the right of a state to nationalise is unquestionable today').

10 Id. at ¶ 87 (citing Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962)). The sole arbitrator in *TOPCO* relied on the UN General Assembly's 1962 Resolution on Permanent Sovereignty over Natural Resources as 'reflect[ive of] the state of customary international law existing in this field.' Id. Like many principles of customary international law the standard for lawful expropriation has historically been the subject of some dispute. However, several other tribunals have similarly recognised the 1962 resolution as an accurate statement of customary international law. See, e.g., Award In the Matter of an Arbitration between The Government of the State of Kuwait and The American Independent Oil Company, 21 I.L.M. 976, 1032 (1982) (describing GA Resolution 1803 as '[t]he most general formulation of the rules applicable for a lawful nationalisation.').

11 See, e.g., *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award ¶¶ 394–404 (3 March 2010) (finding an illegal expropriation of rights in oil pipeline concession agreement under the Energy Charter Treaty where the expropriation was not conducted with due process) [*Kardassopoulos v. Georgia*]. The Energy Charter Treaty forbids expropriations unless they are: '(a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.' The Energy Charter Treaty, 34 I.L.M.

Expropriation can be direct or indirect. A direct expropriation typically occurs when the state directly transfers legal title to the asset to the state, such as through nationalisation.[12] Today, however, nationalisations have become infrequent. Expropriation claims more frequently involve 'indirect' expropriation (i.e., a taking through measures tantamount to expropriation).[13] Most investment treaties explicitly address indirect expropriation as well as direct expropriation. For example, Article IV(1) of the US–Argentina bilateral investment treaty (BIT) provides that 'Investments shall not be expropriated or nationalized either directly or *indirectly through measures tantamount to* expropriation or nationalization'.[14]

In evaluating a claim of indirect expropriation, the central question is whether the investor has been substantially deprived of the value of the investment, even if not of the entire legal interest. Determination of indirect expropriation is thus necessarily highly fact-specific. Not every state measure reducing the value of an investment will amount to an expropriation. Two recently concluded trade agreements, the proposed United States-Mexico-Canada Agreement (USMCA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), expressly recognise the fact-specific nature of indirect expropriation[15] and the need to establish more than just an adverse economic effect on the economic value of an investment.[16] In fact, the proposed USMCA

360 Article 13(1) (1995). An almost identical standard is set forth in the United States-Peru Trade Promotion Agreement, which states 'No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law.' United States-Peru Trade Promotion Agreement, Chapter 10, Article 10.7(1), Signed 12 April 2006. Similarly, Article 6 of the Bolivia-Netherlands BIT proscribes takings unless: 'the measures are taken in the public interest and under due process of law;' 'the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;' and 'the measures are accompanied by provision for the payment of just compensation.' Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia, Article 6, signed 10 March 1992.

12 See, e.g., *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award ¶ 387 (3 March 2010) (holding that the termination of a concession over a major oil pipeline followed by the granting of rights contained therein to a consortium of other oil companies presented 'a classic case of direct expropriation'); *Amoco Int'l Finance Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987); *TOPCO v. Libya*, Award, 17 I.L.M. 1 (1978).

13 See, e.g., *Occidental Petroleum and Production Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, ¶ 85 (1 July 2004) (Expropriation need not involve the transfer of title to a given property, which was the distinctive feature of traditional expropriation under international law.) [*Occidental I*].

14 Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, Article IV, 14 November 1991, 31 I.L.M 124 (emphasis added).

15 United States-Mexico-Canada Agreement, draft as of 1 October 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico, Ch. 14, Annex 14-B ¶ (3)(a) [USMCA] states that 'The determination of whether an action or series of actions by a Party, in a specific fact situation . . . requires a case-by-case, fact-based inquiry'. See also, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed 8 March 2018, Ch. 9, Annex 9-B ¶ 3(a) [CPTPP] providing in identical terms.

16 USMCA, draft as of 1 October 2018, Annex Ch. 14, 14-B ¶ (3)(a)(i) provides: 'the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.'

goes further by providing specific factors to be considered in the determination of whether certain measures constitute indirect expropriation.[17]

Tribunals have often looked to whether the alleged indirect expropriation affected ownership rights. In *Sempra v. Argentina*, the ICSID tribunal gave the following examples of measures that would give rise to a substantial deprivation:

> *depriving the investor of control over the investment, managing the day-to-day operations of the company, arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials or managers, or depriving the company of its property or control in whole or in part.*[18]

Similarly, in applying the substantial deprivation test, the ICSID tribunal in *CMS Gas v. Argentina* considered whether the interference at issue deprived the investor of reasonably expected economic benefits, affected the 'fundamental rights of ownership', or prevented 'the realization of a reasonable return on investments'.[19]

Tribunals addressing indirect expropriation under the ECT have looked to similar considerations. In *Plama v. Bulgaria*, applying the ECT to the alleged indirect expropriation of an investment in a Bulgarian oil refinery, an ICSID tribunal considered the following:

> *(i) substantially complete deprivation of the economic use and enjoyment of the rights to the investment, or of identifiable, distinct parts thereof (i.e., approaching total impairment); (ii) the irreversibility and permanence of the contested measures (i.e., not ephemeral or temporary); and (iii) the extent of the loss of economic value experienced by the investor.*[20]

In *AES v. Hungary*, the tribunal considered a claim of indirect expropriation based on a series of price regulations issued by Hungary in response to public outrage over high profits in the public utility industry.[21] The tribunal explained that:

> *[A] state's act that has a negative effect on an investment cannot automatically be considered an expropriation. For an expropriation to occur, it is necessary for the investor to be deprived,*

17 USMCA, draft as of 1 October 2018, Ch. 14, Annex 14-B ¶ (3)(a) explaining that the determination of indirect expropriation 'in a specific fact situation . . . requires a case-by-case, fact-based inquiry that considers, among other factors (i) the economic impact of the government action . . . (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.'

18 *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award ¶ 284 (28 September 2007) [*Sempra v. Argentina*]. See also *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. Arb/07/19, Decision on Jurisdiction, Applicable Law, and Liability ¶ 6.62 (30 November 2012) (describing 'the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment') [*Electrabel v. Hungary*].

19 *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award ¶ 262 (12 May 2005).

20 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award ¶ 193 (27 August 2008).

21 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, ¶¶ 14.3.1–14.3.3 (3 September 2010).

> *in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value.*[22]

The tribunal dismissed the claim for expropriation in that case, noting that the investors 'retained at all times the control' of the public utility plant and 'continued to receive substantial revenues from their investments'.[23] The ICSID tribunal in *Mamidoil v. Albania* also concluded that indirect expropriation requires not only a showing that 'the investment lost value and the investor was deprived of benefits, but also that these effects resulted from a loss of one or several attributes of ownership'.[24] Several tribunals in the ongoing spate of renewable energy arbitrations against Spain also adopted a similar approach to claims of indirect expropriation arising out of regulations implemented by Spain to wind back and eliminate a special regime of subsidies granted to investors in the renewable energy sector. In *Charanne v. Spain,* the majority of the tribunal concluded that there was no indirect expropriation because the claimants' company was still operating and making profit, and retained possession of its property and assets.[25] Similarly, the tribunal in *Novenergia v. Spain* observed that the claimant remained the 'untouched' owner of its industrial properties and holder of the companies' shares and relevant capital, which did not support a 'taking' by Spain.[26]

Circumstances giving rise to claims of expropriation in the energy sector

In the energy sector expropriations generally fall into three categories: nationalisations; regulatory or fiscal measures tantamount to a taking; and cancellation of contractual rights. This section considers how some of these issues have been addressed by various international arbitration tribunals.

Nationalisations

Outright nationalisations are increasingly rare. When they do occur, the legal implications are sufficiently well settled that the question of the existence of an expropriation is generally not in dispute. For example, in *Guaracachi and Rurelec v. Bolivia*, Bolivia did not contest the claimant's allegation that its nationalisation of a power company was an expropriation.[27] Rather, it argued that it was not required to pay compensation because the value of the

22 Id. at ¶ 14.3.1.

23 Id. at ¶¶ 14.3.1–14.3.2.

24 *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award ¶¶ 568–69 (30 March 2015) ('expropriation describes a specific effect on property itself and not a damage inflicted to property. The effect can be a direct taking as it can be an indirect deprivation of one or several of its essential characteristics. These are traditionally defined by its use and enjoyment, control and possession, and disposal and alienation. If one of these attributes is affected, the resulting loss of value and/or benefit may lead to a claim for expropriation.').

25 *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award ¶ 462 (21 January 2016) (*Charanne v. Spain*).

26 *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Case No. 2015/063, Final Award ¶ 762 (15 February 2018) (*Novenergia v. Spain*).

27 *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award (31 January 2014).

power company was less than zero at the time of expropriation. The tribunal rejected this argument and awarded approximately US$35 million to the claimant.

In the nationalisation context the dispute is more likely to revolve around the question of whether the expropriation was lawful. This was the case, for example, in *Mobil v. Venezuela*[28] and *ConocoPhillips v. Venezuela*.[29]

Regulatory measures

Given the immense public resources involved, as well as the economic, public health and environmental interests implicated, the energy sector tends to be heavily regulated by governments. In this context, regulatory measures of broad application can frequently have an adverse effect on the rights of foreign investors. When such regulatory measures effectively amount to a taking, the sovereign right to regulate in the public interest will not absolve a state of its obligation to pay just compensation. For example, the tribunal in *El Paso v. Argentina* rejected the notion that 'regulatory administrative actions are *per se* excluded' from review and differentiated 'between situations where a general regulation can be considered tantamount to expropriation and situations where it cannot'.[30]

Some investment treaties recognise the right of the state to regulate without absolving it of its duty to pay compensation when such regulation substantially deprives an investor of the value of its investment. For example, the Central American-Dominican Republic Free Trade Agreement (CAFTA-DR) states that 'Except in rare circumstances, nondiscriminatory regulatory actions . . . designed and applied to protect legitimate public welfare objectives . . . do not constitute indirect expropriations.'[31] The proposed USMCA and CPTPP also include similar language, providing that 'Non-discriminatory regulatory actions . . . designed and applied to protect legitimate public welfare objectives . . . do not constitute indirect expropriations, except in rare circumstances.'[32]

Most treaties, however, do not seek to expressly draw the line between permissible regulation and impermissible indirect expropriation. This task has fallen largely to investment tribunals. In several cases, tribunals have found that regulatory measures violated the fair and equitable treatment standard but did not constitute an indirect expropriation where the investor retained control over the investment. For example, *CMS v. Argentina* and *Sempra v. Argentina* both arose out of a series of regulatory measures in the gas industry promulgated

28 *Mobil Corporation, Venezuela Holdings B.V., Mobil Cerro Negro Holding, Ltd. Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 07/27, Award ¶ 288 (9 October 2014) [*Mobil v. Venezuela*]. The Award in *Mobil v. Venezuela* was subsequently partially annulled on other grounds. See *Mobil v. Venezuela,* ICSID Case No. ARB 07/27, Decision on Annulment ¶ 196 (9 March 2017).

29 *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits ¶ 394 (3 September 2013) [*ConocoPhillips v. Venezuela*].

30 *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award ¶¶ 234–36 (3 October 2011) [*El Paso v. Argentina*].

31 The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), Ch. 10 Annex 10-C ¶ 4(b), signed 5 August 2004.

32 USMCA, Ch. 14, Annex 14-B ¶ 3(b), draft as of 1 October 2018. See also CPTPP, Ch. 9, Annex 9-B ¶ 3(b) providing in identical terms.

by the Argentine government following the Argentine economic crisis.[33] These measures included the suspension of a tariff adjustment formula for gas transportation and the redenomination of tariffs in pesos. In both cases, the tribunals rejected the expropriation claims because, among other things, 'the Government d[id] not manage the day-to-day operations of the company; and [the claimant] retained full ownership and control of the investment'.[34]

Some tribunals have also considered the investor's expectations regarding regulation in the industry to be relevant to the question of indirect expropriation. In *Methanex v. USA*, a Canadian corporation argued that California's legislative ban of a gasoline additive methyl tert-butyl ether effectively prohibited the sale of the product in violation of Article 1110 of NAFTA.[35] The NAFTA tribunal rejected Methanex's expropriation claim, stating:

> *as 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 to the then putative foreign investor contemplating investment that the government would refrain from such regulation.*[36]

The tribunal noted that the claimant did not obtain specific commitments prior to investing in a market known to be the subject of extensive government regulation. This idea has been taken up in the proposed USMCA, which explains that 'whether an investor's investment-backed expectations are reasonable depends . . . on factors such as whether the government provided the investor with binding written assurances'.[37]

Similarly, in *Ulysseas v. Ecuador* an UNCITRAL tribunal considered claims of temporary and indirect expropriation based on changes to electricity sector regulations.[38] In dismissing the claim, the tribunal explained that, prior to investing, the claimant was 'well aware of the State's efforts to regulate the power sector' and that 'there was no guarantee of profitability of the regulatory system'.[39] The tribunal concluded that the regulations did not amount to a substantial deprivation sufficient to support a claim of indirect expropriation.[40]

Fiscal measures

Arbitral tribunals have generally been reluctant to uphold claims of expropriation based on fiscal actions adverse to a claimant's interests. In most cases, tribunals have found that the fiscal measure at issue did not rise to the level of a substantial deprivation.

---

33 *CMS Gas v. Argentina*, ICSID No. ARB/01/8, Award (2005); *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award (25 September 2007).

34 *CMS Gas v. Argentina*, ICSID No. ARB/01/8, Award ¶ 263 (12 May 2005). See also *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award ¶ 285 (25 September 2007) ('A finding of indirect expropriation would require . . . that the investor no longer be in control of its business operation, or that the value of the business ha[d] been virtually annihilated.').

35 *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award (3 August 2005).

36 Id. at pt. IV, Chapter D, ¶ 7.

37 USMCA, Ch. 14, Annex 14-B ¶ 3(a)(ii) & n. 19, draft as of 1 October 2018.

38 *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award (12 June 2012).

39 Id. at ¶ 187.

40 Id. at ¶ 200.

Three cases involving fiscal measures imposed by Ecuador illustrate this point. In *EnCana Corporation v. Ecuador*, an oil exploration company alleged that the inconsistent practice of the Ecuadorian government in paying reasonably expected VAT refunds amounted to an expropriation.[41] The London Court of International Arbitration (LCIA) tribunal acknowledged that, under the broad definition of investment contained in the Canada–Ecuador BIT, the right to VAT refunds for past transactions was properly considered an investment that could be subject to expropriation. As noted by the tribunal, the treaty contemplated 'any kind of asset', including 'claims to money' and 'returns'.[42] The tribunal then set forth a framework for evaluating whether the violation of a statutory obligation to make a payment or refund is permissible, including whether '(a) the refusal is not merely wilful, (b) the courts are open to the aggrieved private party, (c) the courts' decisions are not themselves overridden or repudiated by the State'.[43] Considering these factors, the tribunal ultimately rejected EnCana's expropriation claim.

In *Occidental I*, a case arising out of the same fiscal measures, another LCIA tribunal held that the withholding of VAT refunds did not affect the overall investment sufficiently to amount to a substantial deprivation, in particular because the treaty at issue did not expressly protect investment returns.[44] However, the tribunal concluded that Ecuador's actions constituted violations of other protection standards.[45]

In *Burlington v. Ecuador*, a case arising under the US–Ecuador BIT, an oil exploration company alleged expropriation based on Ecuador's imposition of a 'windfall tax' of 99 per cent of oil revenues above a low reference price.[46] After concluding that the BIT provided no guidance on the standard of expropriatory taxation, the ICSID tribunal resorted to customary international law standards.[47] According to the tribunal:

> *Customary international law imposes two limitations on the power to tax. Taxes may not be discriminatory and they may not be confiscatory. Confiscatory taxation essentially 'takes too much from the taxpayer.' The determination of how much is too much constitutes a fact specific inquiry. Among the factors to be considered one counts first and foremost the tax rate and the amount of payment required. If the amount required is so high that taxpayers are forced to abandon the property or sell it at a distress price, the tax is confiscatory.*[48]

The tribunal further reasoned that 'When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment.'[49] In order to meet that standard the tribunal stated that '[i]t must

41 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Award ¶ 194 (3 February 2006).
42 Id. at ¶ 117 and ¶ 182.
43 Id. at ¶ 194.
44 *Occidental I*, LCIA Case No. UN 3467, Final Award, ¶ 89 (1 July 2004).
45 Id. at ¶ 187.
46 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012).
47 Id. at ¶ 392.
48 Id. at ¶ 393.
49 Id. at ¶ 397.

be shown that the investment's continuing capacity to generate a return has been virtually extinguished.'[50] Applying these principles, the tribunal dismissed the claim of expropriation based on the windfall tax because, even though it 'considerably diminished [the investor's] profits', it did not render the investment 'unprofitable or worthless'.[51]

An example of a successful argument of indirect expropriation through taxation is the *Yukos* case. In the *Yukos* arbitrations, an UNCITRAL tribunal considered a series of fiscal measures affecting an oil production facility in Russia.[52] The claimant, a Cypriot oil company, alleged Russia had imposed tax reassessments, fines, VAT charges and asset freezes, and had forced the sale of the facility in violation of the ECT. The tribunal concluded that while Yukos could have expected an adverse reaction to what the tribunal characterised as tax avoidance strategies, the measures taken by Russia were sufficiently extreme to amount to an unlawful expropriation under Article 13 of the ECT. In the tribunal's view, the fact that the expropriation was in the interest of a state-owned oil company did not mean it was in the public interest.[53] Further, the tribunal concluded that the expropriation was not 'carried out under due process of law', because, among other things, in the prosecutions against Yukos executives, the Russian courts 'bent to the will of Russian executive authorities to bankrupt Yukos, assign its assets to a State-controlled company, and incarcerate a man who gave signs of becoming a political competitor'.[54] The tribunal concluded that the fiscal measures amounted to a 'devious and calculated expropriation' because they entailed the 'complete and total deprivation of the Claimants' investments'.[55]

Cancellation or revocation of fiscal incentives has also been the subject of a series of arbitrations against Spain. In 2007, Spain introduced a subsidy in the form of a feed-in tariff to attract investments in renewable energy sectors, which was later rolled back and ultimately eliminated through a series of regulatory reforms. As a result, a number of investors in the photovoltaic generation sector brought arbitrations against Spain claiming, among other things, that the regulatory measures amounted to an indirect expropriation. While Spain has obtained mixed results to date in the arbitrations,[56] it has generally prevailed on the issue of indirect expropriation[57] because investors have failed to establish a loss of control or ownership over physical assets and shareholdings, or a substantial deprivation of the

50 Id. at ¶ 399.

51 Id. at ¶ 450.

52 *Yukos Universal Ltd. v. The Russian Federation*, UNCITRAL PCA Case No. AA 227, Final Award (18 July 2014). As noted above, challenges to the Yukos awards are pending in Dutch national court. The Hague District Court's ruling, however, turned on jurisdiction under the ECT.

53 Id. at ¶ 1581.

54 Id. at ¶ 1583.

55 Id. at ¶ 1037.

56 Thus far, Spain has prevailed in two awards issued in known cases (*Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Final Award (17 July 2016) and *Charanne v. Spain*, SCC Case No. V 062/2012, Award (21 January 2016)) and lost four others (*Eiser Infrastructure Ltd and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award (4 May 2017) and *Novenergia v. Spain*, SCC Case No. 2015/063, Final Award (15 February 2018), *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (16 May 2018), and *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (15 June 2018)).

57 See, e.g., *Charanne v. Spain*, SCC Case No. V 062/2012, Award ¶¶ 462–466 (21 January 2016); *Novenergia v. Spain*, SCC Case No. 2015/063, Final Award ¶ 762 (15 February 2018). Even though the tribunal in

value of their investments. For example, in dismissing indirect expropriation, the majority of the tribunal in *Charanne v. Spain* considered that a decrease in profitability is not in itself sufficient to amount to an expropriation. Rather, the loss of value of an investment 'has to be of such a magnitude as to amount to a deprivation of property',[58] requiring more than '[a] simple decrease in the value of shares' or even a 'reduction in profitability [with] serious economic and financial consequences'.[59]

Cancellation of contractual rights

International law has long recognised that contractual rights can be the subject of expropriation. In the seminal *Chorzów Factory* case,[60] the Permanent Court of International Justice held that the expropriation of a factory also had the effect of expropriating the contractual rights of another German company to operate the factory and exploit certain patents and licences.[61] Similarly, in *Phillips Petroleum Co. Iran v. Iran*,[62] a case before the Iran-US Claims Tribunal, the company successfully obtained compensation for the expropriation of its rights to share in the oil produced and shareholder participation rights under a joint structure agreement with the National Iranian Oil Company.[63]

In the investment treaty context, tribunals have consistently recognised that intangible interests like contractual rights are capable of expropriation.[64] Reliance on customary international law has become less important as treaties often contain very broad definitions of 'investment' to expressly include contractual rights. For example, the Energy Charter Treaty defines 'investment' as 'every kind of asset, owned or controlled directly or indirectly by an Investor and includes . . . any right conferred by law *or contract or by virtue of any licences and permits granted pursuant to law*'.[65]

The standard that tribunals routinely apply remains the substantial deprivation test. It is not the case, however, that any breach of contract automatically constitutes an expropriation of contractual rights by a state. An important factor is whether the state acted in a commercial capacity as a party to the contract or in its sovereign capacity[66] and whether the state's conduct implicated the exercise of sovereign powers.[67]

Novenergia v. Spain concluded that there was no indirect expropriation, it nevertheless found a violation of fair and equitable treatment.

58 *Charanne v. Spain,* SCC Case No.V 062/2012, Award ¶ 464.

59 Id. at ¶¶ 465–466.

60 *Factory at Chorzów (Germ. v. Pol.)*, P.C.I.J. (ser. A) No. 17 (13 Sept. 1928) [*Chorzów Factory*].

61 Id. at 44.

62 *Phillips Petroleum Co. Iran v. The Islamic Republic of Iran and The National Iranian Oil Company*, 21 Iran-U.S. C.T.R. 79, Partial Award 425-39-2 (29 June 1989) [*Phillips Petroleum Co. Iran v. Iran*].

63 Id. at ¶ 88.

64 See, e.g., *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, ICSID Case No. ARB/84/3, Award on the Merits (20 May 1992); ICSID Rev.-FILJ 1993, 328, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S, v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009); *CME Czech Republic B.V. v. The Czech Republic*, Partial Award (13 September 2001).

65 The Energy Charter Treaty, 34 I.L.M. 360 Article 1(6) (1995) (emphasis added).

66 August Reinisch, 'Expropriation', in *The Oxford Handbook of International Investment Law* 407 (Peter Muchlinski, Federico Ortino, & Christoph Schreuer eds., New York: Oxford University Press 2008).

67 See, e.g., *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award ¶ 260 (17 January 2007).

The *Electrabel v. Hungary* case involved an expropriation claim under the ECT by an investor who had acquired a majority interest in a Hungarian electricity-generation company and obtained a power purchase agreement (PPA).[68] After Hungary acceded to the EU, it terminated its PPAs in the power generation sector to avoid violating EU competition law. The tribunal rejected the investor's claim that the termination of its contractual rights amounted to an expropriation because the PPA was only a part of the investor's interest in the electricity-generation company.[69] Accordingly, the tribunal held that the investor had not experienced a deprivation of its entire investment.[70] On the other hand, in *Kardassopoulos v. Georgia*, an ICSID tribunal upheld a claim of expropriation of contractual rights.[71] In that case, the tribunal held that the Georgian government's issuance of a decree terminating the investor's rights in a 30-year concession agreement over an oil pipeline 'presented a classic case of direct expropriation'.[72] Similarly, in *Occidental II*, an ICSID tribunal held that Ecuador's termination of the oil company's participation contract was a disproportionate response to the company's violation of that agreement by transferring an interest in the project to a Canadian investor without prior authorisation. Accordingly, the tribunal concluded Ecuador's conduct constituted a measure 'tantamount to expropriation'.[73]

More recently, the ICSID tribunal in *Caratube v. Kazakhstan* considered whether certain acts of interference by the state in a private contract between the investment company and the Ministry of Energy and Mineral Resources for the exploration and development of oil fields constituted sovereign acts required for an expropriation.[74] A majority of the tribunal ultimately found that a 'recommendation' sent from Kazakhstan's General Prosecutor's Office to the Minister of Energy and Mineral Resources to 'take measures to notify the investment company to address the [contractual] breaches' and 'settle an issue of unilateral termination of the Contract'[75] was 'an order to terminate the Contract'.[76] The majority also rejected Kazakhstan's arguments that the intervention was routine and that the Prosecutor's Office had acted in accordance with its authority and the terms of the contract.[77] In concluding that there was an unlawful expropriation, the majority found that the termination of the contract was caused by Kazakhstan's intervention through the General Prosecutor's Office in exercise of Kazakhstan's sovereign powers, rather than acting in its private capacity as a party to the contract.[78]

68 *Electrabel v. Hungary*, ICSID Case No. Arb/07/19, Decision on Jurisdiction, Applicable Law, and Liability (30 November 2012).

69 Id. at ¶ 6.58.

70 Id. at ¶ 6.63.

71 *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award ¶ 387 (3 March 2010).

72 Id. at ¶ 387.

73 *Occidental II*, ICSID Case No. ARB/06/11, Award ¶ 455 (5 October 2012). The Occidental II award was subsequently partially annulled on other grounds. *Occidental II*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award (2 November 2015).

74 *Caratube International Oil Company LLP and Devinci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award V.C.3. (27 September 2017).

75 Id. at ¶ 915.

76 Id. at ¶ 916.

77 Id. at ¶¶ 927–932.

78 Id. at ¶¶ 934–935.

Remedies for expropriation of energy investments

The remedy for expropriation is generally damages, since return of the investment itself is often not possible or reasonable. In addition to the general principles of valuation of damages, a specific question arises in this context about the distinction between lawful and unlawful expropriations.

Limited availability of specific performance

Seeking return of the expropriated asset can be an attractive remedy in energy expropriations, because typically the expropriation relates to an active, productive, long-term asset. Most tribunals have, however, denied specific performance in practice, awarding monetary damages instead.[79] Tribunals have generally held that specific performance is not available as it would either be impossible or impose a disproportionately heavy burden on the state.[80]

The tribunal in *Occidental v. Ecuador II* considered the availability of specific performance as a remedy in connection with an application for provisional measures.[81] The claimants requested provisional measures to preserve their claim to specific performance of their participation contract, which granted an exclusive right to explore and exploit hydrocarbons in a specified area of the Ecuadorian Amazon. As a result, the tribunal had to determine whether the claimants could establish they had a strongly arguable right to specific performance as part of the application for provisional measures.[82]

Ultimately, the tribunal rejected the provisional measures application. In doing so, it determined that the specific performance requested would impose a disproportionate burden on the state and was materially impossible. For the disproportionality element, the tribunal looked to the rights of both parties and concluded that requiring a state to reinstate a concession after its termination constituted a disproportionate interference with state sovereignty in comparison with the prejudice the claimant would suffer from only receiving monetary compensation.[83] Regarding impossibility, the tribunal observed it is 'well-established' that 'where a State has, in the exercise of its sovereign powers, put an end to a contract or a license . . . specific performance must be deemed legally impossible'.[84] Although the tribunal recognised that specific performance was granted in the well-known *TOPCO v. Libya* case, which arose out of Libya's nationalisation of its oil industry in the 1970s, it also noted that the case was 'unique and fact specific'.[85] The sole arbitrator in *TOPCO v. Libya* declined to hold that specific performance was impossible because Libya failed to appear and did not 'bring forward information . . . to establish that there was an

79 See, e.g., *LIAMCO v. Libya*, 20 I.L.M. 1 (1981), *BP Exploration Company (Libya) Limited v. Libyan Arab Republic*, 52 I.L.R. 297 (1974), *CMS v. Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005).

80 See generally, *Occidental II*, ICSID Case No. ARB 06/11, Decision on Provisional Measures (17 August 2007).

81 Id.

82 Id. at ¶ 68.

83 Id. at ¶ 84.

84 Id. at ¶ 79.

85 Id.

absolute impossibility'.[86] Subsequent claims for non-monetary relief – including in cases arising under facts similar to those in *TOPCO v. Libya*[87] – have generally not been successful.

Evaluation of damages for expropriation

Since monetary damages are the primary remedy awarded in expropriation claims, it is not surprising that there are a number of recurring issues in the assessment of damages. One issue that is specific to expropriation claims, however, is the effect of the state's failure to pay prompt and adequate compensation at the time of the expropriation on the standard for assessing damages.

As explained above, international law permits expropriation that includes, among other requirements, payment of prompt, adequate and effective compensation. Investment treaties frequently articulate the kind of compensation a state must pay as part of a permitted expropriation. The ECT, for example, requires payment of 'the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment'.[88]

However, treaties generally do not expressly stipulate a standard for compensation when the expropriation does not meet the requirements for lawful expropriation. Tribunals turn to customary international law for guidance – specifically, the full reparation standard as articulated in the *Chorzów Factory* case.[89] This principle, later codified in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, calls for compensation in the form of damages equivalent to restitution, which may in any given case differ from the amount that a state is required to pay through a lawful expropriation process.[90]

The question has therefore arisen whether a state's failure to pay compensation renders unlawful an expropriation that complies with all the other requirements for a lawful expropriation. Three cases arising out of Venezuela's nationalisation of the oil industry – *ConocoPhillips*, *Mobil* and *Tidewater* – addressed this issue but adopted different approaches.[91]

The tribunal in *ConocoPhillips v. Venezuela* held that Venezuela had negotiated in bad faith when it proposed to pay book value for the expropriation because the

86 *TOPCO v. Libya*, Award, 17 I.L.M. 1 ¶ 112 (1978).

87 *Occidental II*, Decision on Provisional Measures ¶ 80 (17 August 2007).

88 The ECT, 34 I.L.M. 360, Article 13(1) (1995).

89 *Chorzów Factory*, P.C.I.J. (ser. A) No. 17 (13 September 1928), p. 47 (noting that the full reparation standard should 'as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed').

90 Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, U.N. GAOR, 53rd Sess., Supp. No. 10, Article 31, U.N. Doc. A/56/10 (2001).

91 *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits (3 September 2013); *Mobil v. Venezuela*, ICSID Case No. ARB 07/27, Award (9 October 2014); *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award (13 March 2015) [*Tidewater v. Venezuela*]. The Tidewater Award was subsequently partially annulled on other grounds. See *Tidewater v. Venezuela,* ICSID Case No. ARB/10/5, Decision on Annulment (27 December 2016).

Netherlands–Venezuela BIT required it to pay market value.[92] Accordingly, the tribunal held the expropriation was unlawful, triggering the full reparation standard contained in *Chorzów Factory*.[93] One year later, the ICSID tribunal in *Mobil v. Venezuela* held that 'the mere fact that an investor has not received compensation [at the time of the proceedings] does not in itself render an expropriation unlawful'.[94] The tribunal concluded that the claimant had not met its evidentiary burden to show that Venezuela's proposal of compensation was incompatible with the treaty requirement of 'just' compensation and found that the expropriation was not unlawful.[95] In *Tidewater v. Venezuela*, a third ICSID tribunal surveyed numerous arbitral awards and concluded that 'expropriation only wanting fair compensation has to be considered as a provisionally lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation'.[96] Thus, the nature of any offer of compensation made by the state, as well as the state's general conduct during negotiations, may inform the tribunal's analysis.

Practical considerations for energy investments

To maximise protection in the event of expropriation, several key practical considerations should guide an investor considering an energy investment in a foreign country.

First, investors may structure energy investments to take advantage of investment protections. Each treaty is different. Even though many treaties contain some form of prohibition of unlawful expropriation, the scope of this prohibition, as well as the extent of an arbitral tribunal's jurisdiction, can vary meaningfully across instruments. Some treaties, including several treaties signed by the United States, contain a carve-out from certain treaty protections for matters of taxation. For example, the US–Ecuador BIT at issue in *Occidental v. Ecuador* stated that dispute settlement 'shall apply to matters of taxation only with respect to . . . expropriation'.[97] Other treaties, including those concluded by former Soviet states, may limit the disputes that can be submitted to arbitration to the question of the amount of compensation for any expropriation. The BIT between the United Kingdom and the USSR at issue in *RosInvest Co. UK Limited v. Russian Federation*[98] is one example. It restricted

92 *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits ¶ 394 (3 September 2013).

93 Id. at ¶¶ 337–343, 401.

94 *Mobil v. Venezuela*, ICSID Case No. ARB 07/27, Award ¶ 301 (9 October 2014). The compensation awarded by the Tribunal for one of the expropriated properties was later vacated by the Annulment Committee based on specific limitations on the property rights under Venezuelan law. See *Mobil v. Venezuela*, ICSID Case No. ARB 07/27, Decision on Annulment ¶ 188 (9 March 2017).

95 *Mobil v. Venezuela*, ICSID Case No. ARB 07/27, Award ¶ 306 (9 October 2014).

96 *Tidewater v. Venezuela*, ICSID Case No. ARB/10/5, Award ¶ 142 (13 March 2015). The argument that the full reparation standard is inapplicable where a finding of expropriation is based solely on the state's failure to pay compensation was also raised in *Burlington Resources Inc. v. Ecuador*, but the tribunal did not decide the issue because it held the expropriation in that case did not meet other conditions of the treaty. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award ¶ 176 (7 February 2017).

97 Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, signed on 27 August 1993, Article X.

98 *RosInvest Co. UK Limited v. Russian Federation*, SCC Case No. V079/2005, IIC 315 2007, Jurisdiction Award (5 October 2007) [*RosInvest v. Russia*].

arbitration to legal disputes 'either concerning the amount or payment of compensation under Article . . . 5 of this Agreement [Expropriation] or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement'.[99] The tribunal in that case interpreted the clause as a limitation to its jurisdiction such that it did not have jurisdiction over all aspects of an expropriation.[100] More recently, the proposed USMCA, for example, would significantly curtail the ability of investors to arbitrate investment disputes: after a period of three years from the termination of NAFTA, Canada will no longer allow US investors to submit investment disputes to arbitration, and Canadian investors will not be able to arbitrate investment disputes under the USMCA.[101] Mexico and the US have separately negotiated arrangements to allow arbitration of certain specific claims, such as direct expropriation,[102] but indirect expropriation claims are not subject to arbitration unless they relate to certain investments, such as government contracts in the oil and gas or power generation sectors.[103]

In treaty planning it is therefore important to consider available substantive protections as well as the scope of a tribunal's jurisdiction over any dispute.

The decision in *Mobil v. Venezuela* confirms that such treaty planning is not in and of itself abusive if it occurs before the dispute arose.[104] In 2005, in anticipation of a wave of nationalisations in Venezuela, Exxon restructured its investments in Venezuela through a Dutch holding company to gain the protection of the Venezuela–Netherlands BIT. Venezuela nationalised Exxon's oil and gas exploration projects in 2007 and Exxon commenced ICSID proceedings. The arbitral tribunal held that the restructuring did not amount to an abuse of the treaty system.[105]

Second, investors should consider the availability of other substantive investment treaty protections. When expropriation claims are limited by the applicable treaty, or the investor is unable to establish expropriation, other substantive treaty protections such as fair and equitable treatment may be available.[106] This is demonstrated by *CMS v. Argentina*, *Sempra v. Argentina*, *Occidental II* and more recently *Novenergia v. Spain*, where the arbitral tribunals dismissed the investor's expropriation claims but found a violation of fair and equitable

99 Agreement between the Government of the United Kingdom and the Government of the USSR for the Promotion and Reciprocal of Investments, signed in London on 6 April 1989, Article 8.

100 *RosInvest v. Russia*, Jurisdiction Award ¶¶ 110–12 (5 October 2007).

101 USMCA, Ch. 14, Annex 14-C, draft as of 1 October 2018. Canada and Mexico are parties to the CPTPP under which it is still possible to arbitrate investment disputes.

102 Id. at Ch. 14, Annex 14-D ¶ 1.

103 Id. at Ch. 14, Annex 14-E ¶ 2.

104 ICSID Case No. ARB/07/27 (10 June 2010).

105 Id. at ¶¶ 205–06.

106 See, e.g., *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award ¶ 230 (31 Oct. 2011); *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award ¶ 300 (18 September 2007).

treatment.[107] Some recent or proposed trade agreements have placed additional constraints on fair and equitable treatment protections.[108]

Finally, even though treaty protections give investors some degree of comfort, they are no substitute for contractual guarantees. Contractual protections can offer greater specificity and certainty than treaty standards – even a standard as common as the prohibition on unlawful expropriation. Stabilisation clauses, for example, can be a valuable contractual safeguard in long-term investments like energy concessions, and can offer more robust protection against unwelcome regulatory change than the substantial deprivation threshold required for a successful expropriation claim.

107 *CMS Gas v. Argentina*, ICSID No. ARB/01/8, Award (12 May 2005); *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award (25 September 2007); *Occidental II*, ICSID Case No. ARB/06/11, Award ¶ 455 (5 October 2012); *Novenergia v. Spain*, SCC Case No. 2015/063, Final Award ¶¶ 760–763 (15 February 2018).

108 See, e.g., Comprehensive and Economic Trade Agreement between European Union and Canada, signed 30 October 2016, Ch. 8, Art. 8.10 ¶ 2 provides a list of what the Parties consider as 'breaches [of] the fair and equitable treatment' standard, including 'denial of justice in criminal, civil or administrative proceedings . . . fundamental breach of due process . . . manifest arbitrariness . . . targeted discrimination on manifestly wrongful grounds . . . abusive treatment of investors, such as coercion, duress and harassment.' See also, CPTPP, signed 8 March 2018, Ch. 9, Art. 9.6 ¶ 2, explains that 'fair and equitable treatment' does not require treatment 'in addition to or beyond that which is required by [the customary international law minimum standard of treatment of aliens]' and does not 'create additional substantive rights.' Similar language was included in the Korea-Australia Free Trade Agreement, signed 8 April 2014, Ch. 11, Art. 11.5 ¶ 2. In November 2017, the Energy Charter Secretariat also announced potential work on the modernisation of the ECT, including proposals to update substantive protections of fair and equitable treatment to reflect recent treaty-making trends. See Energy Charter Secretariat, Decision of the Energy Charter Conference CCDEC201723 ¶¶ 2, 4, 5 (28 November 2017), https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2017/CCDEC201723.pdf.

Appendix 1

About the Authors

Mark W Friedman
Debevoise & Plimpton LLP

Mark W Friedman is a litigation partner in the firm's New York and London offices. He has broad experience in civil and criminal matters, with a concentration on international arbitration and litigation. Mr Friedman has represented clients in a wide variety of disputes, including those concerning energy, mining, construction, shareholder relationships, joint ventures, telecommunications and investments. He has acted as counsel or arbitrator in disputes under the major institutional rules.

Mr Friedman has been ranked as a leading individual by *Chambers Global*, *Chambers UK*, *Chambers USA*, *Who's Who Legal: Commercial Arbitration*, *Who's Who Legal: Commercial Litigation*, *PLC Which lawyer? Yearbook* and *Legal Experts*, and as one of the inaugural '45 stars under 45' by *Global Arbitration Review*. Among other positions, he is a vice president of the ICC International Court of Arbitration, a member of the editorial board of *Dispute Resolution International*, was previously co-chair of the International Bar Association's Arbitration Committee, member of the Court of the London Court of International Arbitration, vice chair of the International Dispute Resolution Committee of the International Section of the American Bar Association and co-rapporteur of the International Law Association's Commercial Arbitration Committee.

Dietmar W Prager
Debevoise & Plimpton LLP

Dietmar W Prager is a litigation partner in the firm's New York office who focuses his practice on international arbitration and litigation with a particular emphasis on Latin America. Dr Prager has represented parties in numerous arbitrations throughout the world under the auspices of ICSID, the ICC, the AAA and ICDR and the PCA, as well as in ad hoc arbitration proceedings. He was also one of the youngest lawyers ever to argue before the International Court of Justice.

Dr Prager's recent representations include disputes involving bilateral investment treaties, complex construction projects, mining ventures, oil and gas, the retail sector, the finance sector, sovereign debt and distribution agreements. Dr Prager is a vice chair and member of the executive board of the Institute for Transnational Arbitration (ITA), and served as the first chair of ITA's Americas Initiative. He also regularly sits as arbitrator.

Dr Prager is ranked among the leading international arbitration practitioners by *Chambers Global*, *Chambers USA*, *Chambers Latin America*, *Legal 500 Latin America*, *Benchmark Litigation*, and *Who's Who Legal*.

Ina C Popova
Debevoise & Plimpton LLP

Ina C Popova is a litigation partner in the firm's New York office whose practice focuses on international arbitration, complex commercial litigation and public international law. She is dual-qualified in civil law and common law and she frequently leads contentious matters in Spanish and French. Ms Popova is admitted to practise in Paris and New York and holds advanced degrees in English law. She has particular experience in the mining and energy sectors, in which she regularly handles multibillion-dollar disputes involving commercial, environmental and public international law issues across a variety of jurisdictions. Ms Popova represents private clients and states in arbitrations governed by various substantive laws and conducted under the rules of the major arbitral institutions, as well as in court proceedings in federal and state courts in the United States, including the United States Supreme Court.

Ms Popova serves in a number of leadership positions, including as a member of the ICC International Court of Arbitration and the Court of the Casablanca International Mediation and Arbitration Centre. She has also served as co-chair of the 2016 Annual Meeting of the American Society of International Law and as a rapporteur for the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration. Ms Popova was listed as a Future Star by *Benchmark Litigation* and named as a Future Leader in *Who's Who Legal: Arbitration 2016*. She has taught law at the Institut d'Études Politiques de Paris (Sciences Po) and is a Fellow of the Société de Législation Comparée.

Debevoise & Plimpton LLP
919 Third Avenue
New York
NY 10022
United States
Tel: +1 212 909 6000
Fax: +1 212 909 6836
mwfriedman@debevoise.com
dwprager@debevoise.com
ipopova@debevoise.com
www.debevoise.com

The energy industry shaped international arbitration and – thanks to resource nationalism, changes in the oil price, shifting geopolitics and febrile sanctions lists - remains one of its biggest users.

The Guide to Energy Arbitrations, published by Global Arbitration Review, provides coherent and comprehensive coverage of the most common, most difficult, and most unusual issues faced by energy firms, from some of the world's leading authorities. It's edited by J William Rowley QC, Doak Bishop and Gordon Kaiser.

The Third Edition is fully updated and has new content on upstream oil and gas disputes.

Visit globalarbitrationreview.com
Follow @garalerts on Twitter
Find us on LinkedIn

ISBN 978-1-78915-099-5