The Indirect Expropriation Clause Clarified in Recent Colombian BITs: A 'New Lease of Life' for the Preservation of the Host State's Regulatory Space?

La Clàusula de Expropiación Indirecta Aclarada en los Recientes TBI Colombianos : ¿Un Nuevo Aliento de Vida para la Preservación del Espacio Normativo del Estado Anfitrión?

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Abstract

In response to the crisis in investment law and the controversies surrounding investment arbitration, Colombia has recently adopted several international investment treaties as to limit the interpretative discretion of arbitral tribunals and to guarantee the right of the host state to regulate in the public interest. The recent Colombian BITs contain a clarified indirect expropriation clause which specifies the conditions under which a regulatory measure, adopted in the public interest and affecting foreign investment, constitutes an indirect expropriation. It is therefore in response to the inconsistency and unpredictability of arbitral jurisprudence that Colombia has sought to revisit the indirect expropriation clause to preserve regulatory flexibility to protect public interest objectives. However, a careful analysis of arbitration practice reveals that this reformist response is far from satis-

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factory and does little to remedy the weakness of investment arbitration. After outlining the background to the emergence of the Colombian treaty reform and examining the details of these treaties, this article suggests strengthening the reform by setting clear lines of interpretation for arbitrators to follow.

Keywords: Latin America – Colombia – Bilateral Investment Treaty – Free Trade Agreement – Indirect Expropriation – Regulatory Space – Investment Arbitration.

Resumen

En respuesta a la crisis del derecho de las inversiones y a las controversias en torno al arbitraje de inversiones, Colombia ha adoptado recientemente varios tratados internacionales de inversión con el fin de limitar la discrecionalidad interpretativa de los tribunales de arbitraje y garantizar el derecho del Estado receptor a regular en aras del interés público. Los recientes TBI colombianos contienen una cláusula de expropiación indirecta clarificada que especifica las condiciones en las que una medida reguladora, adoptada en interés público y que afecta a la inversión extranjera, constituye una expropiación indirecta. Por lo tanto, en respuesta a la incoherencia e imprevisibilidad de la jurisprudencia arbitral, Colombia ha intentado revisar la cláusula de expropiación indirecta para preservar la flexibilidad reglamentaria con el fin de proteger los objetivos de interés público. Sin embargo, un análisis cuidadoso de la práctica arbitral revela que esta respuesta reformista está lejos de ser satisfactoria y hace poco por remediar la debilidad del arbitraje de inversiones. Tras esbozar los antecedentes del surgimiento de la reforma de los tratados colombianos y examinar los detalles de los mismos, este artículo sugiere reforzar la reforma estableciendo líneas claras de interpretación que los árbitros deban seguir.

Palabras clave: América Latina – Tratado bilateral de inversiones – Tratado de libre comercio – Expropriación indirecta – Espacio normativo – arbitraje de inversiones.

Introduction

The recent Colombian bilateral investment treaties (BITs) are part of the recent dynamics of international investment law reform, characterized mainly by the clarification of treatment standards (Zhu, 2019, p. 317). Formerly formulated in general and open-ended terms, the clarified indirect expropriation clause would serve to limit the interpretative discretion of arbitral tribunals and to guarantee the right of the state to regulate in the public interest. In the same vein as several BITs and model BITs (Brower, 2023), the recent Colombian BITs contain a clarified indirect expropriation clause which – unlike the traditional type of expropriation clause – specifies the conditions under which a regulatory measure, adopted in the public interest and affecting foreign investment, constitutes an indirect expropriation. While the traditional generation of treaties makes no distinction in treatment between direct and indirect expropriation, several recent treaties provide guidance in determining the latter (Kriebaum, 2013). It has been argued that the new indirect expropriation clause will bring more balance to the field of international investment law and transnational arbitration, by increasing the flexibility of host states (Henckels, 2016). The Colombian state has been led to clarify the indirect expropriation clause in its recent BITs precisely because in several arbitration proceedings regulatory measures adopted by the host state with the objective of protecting human rights and the environment have been claimed by investors as indirect expropriations (Korzun, 2017). Generally invoked by foreign investors, the expropriation clause represents the most

severe form of state interference in foreign private property under international law (Dolzer & Schreuer, 2008, p. 98). It is necessary to recall that expropriation is not prohibited in international law. However, it requires that the taking of foreign property must be in the public interest, non-discriminatory, established through due process and accompanied by compensation to the injured foreign owners. For example, the Colombian model BIT provides that:

> Covered Investments shall not be subject to nationalisations or expropriations, either directly or indirectly (hereinafter, 'expropriation') except when such expropriation is:
>
> a. Adopted for reasons of public purpose or social interest;
> b. Made in accordance with due process of law; and
> c. Made in a non-discriminatory manner.
>
> In the case of a direct expropriation, such expropriation shall be accompanied by a prompt, adequate and effective compensation […].

The doctrine distinguishes two types of expropriation: direct and indirect. The first type of expropriation is carried out in a direct manner through an expropriation decree or a brutal military occupation that deprives the owners of their property title. The most frequent example in the Caribbean context is Venezuela in the 2000s (Koivumaeki, 2015). However, today, most expropriations are carried out indirectly through legislation or regulatory action that affects the economic value of foreign investors' properties without transferring title to those properties (Sloane & Reisman, 2004). In other words, although the purpose of indirect expropriation is not to take formal possession of property, it impacts the foreign investor's business to the point that it becomes economically useless. Thus, indirect expropriation has virtually the same effect as

direct expropriation. However, since traditional BITs do not specify the criteria for indirect expropriation, it is difficult to draw a line between indirectly expropriatory state conduct requiring compensation and legitimate state regulation for which compensation is not required (Portefield, 2011). In the absence of clear guidelines, arbitral tribunals have often erred in their interpretation of the indirect expropriation clause, adopting different approaches to determining whether a public interest measure relating to the environment or public health constitutes a compensable indirect expropriation.

In response to this wandering by arbitral tribunals, several states, including Colombia, have incorporated clarified indirect expropriation clauses into their model BITs and recently concluded BITs. The Colombian model BIT contains provisions that distinguish legitimate regulatory conduct from a compensable expropriatory measure. For example, this model provides that:

> Non-discriminatory Measures adopted by a Contracting Party, designed, applied or maintained for the protection of public objectives such as the protection of public health and safety the environment, consumer, and competition protection, amongst others, do not constitute an indirect expropriation.

The indirect expropriation clause in the 2017 Colombian Model BIT is a reaction to inconsistent case law (Behn, Fauchald, & Langford, 2022). The idea now in vogue is to avoid broad formulas that may compromise the regulatory flexibility of states to protect and preserve public interest objectives (Cotula, 2020). So far, Latin American doctrine has done very little study of these kinds of clauses in recent BITs. There has been no study of recent Colombian BITs. Hence the interest in seeking to fill this gap by examining the extent to which

the clarified indirect expropriation clause contained in these BITs could contribute to preserving the regulatory space of the host state, particularly with respect to the protection of human rights, public health, and the environment. However, while several of Colombia's recent BITs attempt to clarify the indirect expropriation clause, the wording used is not always the same. This can lead to a situation of uncertainty and unpredictability in the interpretation of the concept. Moreover, arbitral tribunals continue to affirm that an exception clause does not relieve the state of its obligation to compensate, which calls the reform movement into question.

This article is divided into three parts: the first highlights the inconsistent and often extreme interpretations of the indirect expropriation clause by early arbitral tribunals. The second part shows how recent Colombian BITs try to contribute to the clarification of this clause, by proposing a variety of formulas. The third part considers the limits of the current treaty practice and suggests ways to a more balanced understanding of the indirect expropriation clause.

I. INDIRECT EXPROPRIATION: BETWEEN VAGUENESS AND DIVINATORY INTERPRETATION

In several cases brought against Colombia, foreign investors have relied on the indirect expropriation clause. In the 20 cases in which Colombia is the defendant state, the indirect expropriation clause has been used in seven, according to the current state of available data (UNCTAD, 2023).

Figure 1. International Investment Breaches Alleged

Cases	Applicable International Investment Agreement	International Investment Agreement Breaches Alleged
Eco Oro Minerals Corp. v. Republic of Colombia (2016)	Canada – Colombia FTA (2008)	Fair and Equitable Treatment Minimum Standard of Treatment **Indirect Expropriation** Full Protection and Security
América Móvil v. Colombia (2016)	Colombia – Mexico – Venezuela FTA (1994)	Fair and Equitable Treatment Minimum Standard of Treatment **Indirect Expropriation**
Telefónica v. Colombia (2018)	Colombia – Spain BIT (2005)	Fair and Equitable Treatment Minimum Standard of Treatment **Indirect Expropriation**
Red Eagle v. Colombia (2018)	Canada – Colombia FTA (2008)	Fair and Equitable Treatment Minimum Standard of Treatment **Indirect Expropriation**
Galway Gold v. Colombia (2018)	Canada – Colombia FTA (2008)	**Indirect Expropriation** Fair and Equitable Treatment Minimum Standard of Treatment
Aris Mining (formerly Gran Colombia) v. Colombia (2018)	Canada – Colombia FTA (2008)	**Indirect Expropriation** Fair and Equitable Treatment Minimum Standard of Treatment Full Protection and Security

Amec Foster Wheeler and others v. Colombia (2019)	Colombia – United States TPA (2006)	Fair and Equitable Treatment National Treatment **Indirect Expropriation** Umbrella Clause

It should be recalled that many BITs do not provide a clear answer regarding the criteria for determining indirect expropriation (UNCTAD, 2017). Nevertheless, several arbitral tribunals have identified three stages in analyzing indirect expropriation.

First, the courts have sought to determine which properties are subject to expropriation. Under the conventional foreign investment network, only the investment is protected from expropriation (Dolzer & Schreuer, 2008, p. 99). The definition of investment in BITs is generally broad or is illustrated with specific examples of investments.

Second, arbitral tribunals assess the impact of the state measure on the investment to determine whether the state's interference with the foreign investor's property constitutes expropriation. They consider both the economic impact of the state measure and the duration of that impact. Most courts have held that there must be a substantial deprivation of the investor's property rights or values to speak of expropriation. In other words, a mere reduction in profits would not constitute expropriation. For example, this was stated by the arbitral tribunals in *Metalclad Corp v. United Mexican States* (ICSID Case No. ARB(AF)/97/1, award of August 30, 2000, p. §103) ; *Biwater Gauff, Ltd c. Tanzanie* (ICSID Case No. ARB/05/22, award of july 24, 2008, p. §643); *Suez Societad General de Aguas de Barcelona S.A. and Vivendi Universal*

S.A. c. Argentine (ICSID Case No. ARB/03/19, award of july 30, 2010, pp. §122-143).

But it is the third step that has been more controversial. This step involves assessing the justifiable grounds for indirect expropriation, such as the protection of the environment, labors' rights or public health. Hence the need to distinguish between compensable expropriation and the exercise of regulation for which no compensation is due. On this question, there are two extreme approaches: the sole effect doctrine and the police powers doctrine.

A. The Sole Effect Doctrine

The sole effect doctrine means that the only decisive factor in considering indirect expropriation is the effect of the state measure on the investor's rights (Paparinskis, 2011, p. 305). Arbitral tribunals that have adopted the sole effect doctrine do not consider the purpose of the state measure. Asserting that the public interest objectives that support a state measure have no bearing on the end of indirect expropriation, these tribunals decide that expropriation occurs when a certain threshold is reached by the measure in question. In the Caribbean context, an example of this approach can be found in the *Santa Elena v Costa Rica* award, in which the tribunal decided whether an environmental objective can affect the expropriative nature of a measure:

> Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a State may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the State's obligation to pay compen-

> sation remains (ICSID Case No. ARB/96/1, award of february 17, 2000, §72).

The same approach appears to have been confirmed by the North American Free Trade Agreement (NAFTA) arbitral tribunal in Metalclad v. Mexico. The court decided not to consider the state's intent behind the decree declaring the land where the foreign investor owned a hazardous landfill site to be a rare plant conservation and protection area:

> The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110. However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation (ICSID Case No. ARB(AF)/97/1, award of August 30, 2000, p. §111).

It should be noted that the issue in this case was whether the existence of a public interest could limit the scope of the indirect expropriation clause so that regulatory measures adopted in the public interest would be excluded from treaty protection and would not require the state to pay compensation to the injured investor. In line with the sole effect doctrine, the arbitral tribunal focused solely on the seriousness of the interference of the state measure with the investor's rights.

By expanding the scope of the concept of indirect expropriation, arbitral tribunals are providing an opportunity for foreign investors to sue the host state for legitimate public interest measures, such as regulation in the environmental interest. In several cases, arbitral tribunals have ruled on public interest regulatory measures taken by states and found,

under the doctrine of mere effect, a violation of the measures equivalent to expropriation by focusing solely on the effect of the challenged measure on the investment (Giupponi, 2019, p. 92).

B. The Police Powers Doctrine

Unlike the sole effect doctrine, the police powers doctrine requires that a court also consider the public interest purpose of the state measure in determining indirect expropriation. In other words, a state's exercise of its police powers precludes any characterization as an indirect expropriation, even where it results in a substantial deprivation of the foreign investor's property. This view is well established in international law:

> However, even in the era of most radical non-intervention policy there were always certain cases in which state interference with private property was not considered expropriation entailing an obligation to pay compensation but a necessary act to safeguard public welfare: e.g., measures taken for reasons of police, that is, for the protection of public health or security against internal or external danger. The right of the state to interfere with private property in the exercise of its police power has been recognized by general international law as referring to foreign property also: interference with foreign property in the exercise of police power is not considered expropriation (Herz, 1941).

Several investment treaty tribunals have accepted the proposition that a non-discriminatory measure adopted by the investment host state that is designed and implemented to preserve or protect legitimate public interest objectives such as public health, safety and the environment does not constitute an indirect expropriation. For example, the arbitral tribunal in *Marvin Feldman v. Mexico* stated that:

> [G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this (ICSID Case No. ARB(AF)/99/1, award of December 16, 2002, §103).

Similarly, the award in *Methanex v. United States* can be placed within this approach. According to the arbitral tribunal:

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation (NAFTA Tribunal, Final award on Jurisdiction and Merits of August 3, 2005, p. §7).

A similar reasoning can be found in the award of the court *Saluka v. Czech Republic* (UNCITRAL, Partial award of 17 March 2006, p. § 255). This tribunal has reiterated the view under international law that the host state is not obliged to compensate a foreign investor where, in exercising its regulatory power, it adopts non-discriminatory and good faith measures aimed at the general welfare.

Such an approach contrasts with the policy of overprotection of investors and stands in stark contrast to the single effect doctrine by reducing the scope of indirect expropriation. But the application of the police powers doctrine is not

always consistent. In the absence of clearly defined guidelines, arbitral tribunals do not always rigorously apply the police powers doctrine. For example, in Rockhopper v. Italy, the arbitral tribunal rejected the police powers doctrine by dismissing the relevance of several important reasons and distancing itself from the extensive body of relevant arbitral jurisprudence and scholarship (Carvosso, 2023).

Furthermore, several tribunals view this doctrine as radical. Seeking to avoid the radical option, several arbitrators have held that certain regulations adopted in the public interest may constitute indirect expropriation (El Paso Energy International Company v Argentina, ICSID Case No. ARB/03/15, award, October 27, 2011, §233).

C. A Third Way: Proportionality

In recent years, several arbitral tribunals have taken on the task of applying a balancing exercise to distinguish non-compensable regulation from regulatory action that may trigger a compensation obligation. This balancing exercise, which would allow for a better articulation between the state's right to regulate in the public interest and the economic interests of the foreign investor, has been identified as the 'proportionality test' (Ranjan, Using the public law concept of proportionality to balance investment protection with regulation in international investment law: A critical appraisal, 2014). According to this test, "the state regulation is justifiable if it is proportionate to achieve public welfare goals" (Zhu, 2019, p. 387).

An illustration of the proportionality test can be found in the reasoning of the ICSID tribunal in *LG&E v. Republic of*

Argentina (ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, p. §189) where it stated that:

> [i]n order to establish whether state measures constitute expropriation [...], the Tribunal must balance two competing interests: the degree of the measure's interference with the right of ownership and the power of the state to adopt its policies.

The court continued, stating that:

> With respect to the power of the state to adopt its policies, it can generally be said that the state has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the state's action is obviously disproportionate to the need being addressed. The proportionality to be used when making use of this right was recognized in Tecmed, which observed that whether such actions or measures are proportional to the public interest presumably protected thereby and the protection legally granted to investments, taking into account that the significance of such impact, has a key role upon deciding the proportionality (§195).

The arbitral tribunal thus adopted the approach used in *Tecmed v. Mexico* that "there must be a reasonable relationship of proportionality between the charge of weight imposed to the foreign investor and the aim sought to be realized by an expropriatory measure" (ICSID Case No. ARB(AF)/00/2, award, May 29, 2003, p. §122).

II. THE CLARIFICATION PROVIDED BY THE RECENT COLOMBIAN BITs: DIVERGENT MODELS AND APPROACHES

Several states have recently clarified the indirect expropriation clause in their BITs and model BITs. It is with this in

mind that Colombia has sought to guide the interpretation of the indirect expropriation clause in its recent BITs to limit the scope of this clause and thus the overprotection of the foreign investor. The indirect expropriation clause in recent Colombian BITs is worded differently: first, more rarely, in some treaties the determination of the indirect expropriation clause requires only a contextual examination or a case-by-case analysis ; second, more often, in most recent Colombian BITs, the contextual analysis is accompanied by a clause that excludes a specific type of state measure from indirect expropriation.

A. A Contextual Analysis of Indirect Expropriation

Several BITs adopt the 'contextualization' approach, providing that consideration of indirect expropriation requires a case-by-case, fact-based inquiry, considering, *inter alia*, the economic impact of the state measure on the foreign investment, its scope, and its degree of interference with reasonable and distinct expectations regarding the investment. In the Colombian context, this approach is rather rare. Only the Colombia-United Arab Emirates BIT refers only to contextual analysis in determining the existence of an indirect expropriation:

> It is understood that:
> (a) indirect expropriation results from a measure or series of measures of a Contracting Party having an equivalent effect to direct expropriation without formal transfer of title or outright seizure;
> (b) the determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact-based inquiry.
> Such determination will consider:
> (i) the scope of the measure or series of measures;

> (ii) the economic impact of the measure or series of measures;
> (iii) the level of interference on the reasonable and distinguishable expectations concerning the investment; in such way that the effect of the measure or series of measures have similar effects to the expropriation of in whole or part of the use or reasonable expected economic benefit of the investment (Colombia-United Arab Emirates BIT, 2017, art. 7).

B. Contextual Analysis and the Exclusion of One Type of State Measure from the Definition of Indirect Expropriation: A Combined Approach

Most recent Colombian BITs clarify the indirect expropriation clause, requiring a contextual analysis of indirect expropriation and at the same time excluding public welfare regulation from the scope of expropriation. For example, the Colombia-Peru BIT provides that the determination of indirect expropriation requires a case-by-case examination and at the same time establishes that non-discriminatory public welfare regulatory measures are excluded from the definition of indirect expropriation, if they are necessary and proportionate to those objectives:

> An indirect expropriation occurs when a measure or series of measures adopted by a Contracting Party has an effect equivalent to a direct expropriation, in the absence of a formal transfer of title or confiscation. In determining whether a measure or series of measures adopted by one of the Contracting Parties constitutes an indirect expropriation, a case-by-case examination shall be made, taking into account, inter alia:
> (a) the degree to which the measure or series of measures affects the right of ownership;
> (b) the economic impact of the measure or series of measures
> (c) the effect of the measure or series of measures on the legitimate expectations of the investor.
> Measures adopted by a Contracting Party to protect legitimate public policy objectives, such as health, safety or the

environment, do not constitute indirect expropriation if they are necessary and proportionate in relation to those objectives and are applied in such a manner as to effectively fulfil the public policy objectives for which they were adopted » (Colombia-Peru BIT, 2007, art. 7).

1. The Varied Language of Contextual Analysis

While several BITs and model BITs require a case-by-case, fact-based inquiry to determine the existence of an indirect expropriation, they nevertheless use different approaches to the question of whether and to what extent the 'character' of a state measure should be considered.

First, many Colombian BITs do not refer to the 'character' of a measure (Belgium-Luxembourg Economic Union - Colombia BIT, 2009, art. IX (3)(b)); (China-Colombia BIT, 2008, art. 4(2)(b)) ; (Colombia-United-Kingdom BIT, 2009, art. VI 2(b)); (Colombia-France BIT, 2014, art.6); (Colombia-Émirats Arabes Unis BIT, 2017, art. 7); (Colombia-Spain BIT, art.11, 2021), although they require a contextual analysis of indirect expropriation.

Second, some Colombian BITs explicitly provide that the 'character' of a measure adopted by the investment host state is to be considered in examining indirect expropriation, but without clarifying the meaning of 'character'. For example, the Colombia-Singapore BIT (Colombia-Singapore BIT, 2013, annexe 2) and the Colombia-Peru BIT (Colombia-Peru BIT, 2007, annexe C) adopt a case-by-case approach where several factors must be considered in determining indirect expropriation, including the notion of character. However, it may be noted that this term remains unclear.

Third, some Colombian BITs link the nature of a state measure to the objectives underlying it. For example, the Colombia-India BIT requires courts to consider "the character and intent of the measures or series of measures, whether they are for bona fide public interest purpose" (Colombia-India BIT, 2009, art. 6 (2) (b) (iv)). The Colombia-Turkey BIT requires courts to determine whether "the character of the measure or series of measures in accordance with the legitimate public objectives searched" (Colombia-Turkey BIT, 2014, art. 7 (2) (b) (iv)). In the same vein, the 2017 Colombian Model BIT clarifies the meaning of the word 'character', establishing the link between the character of the State measure and the objectives underlying that measure, such as public utility or social interest grounds.

Fourth, the Colombia-Korea BIT emphasizes that the 'character' of a state measure is determined not only by its objectives and context, but also by its proportionality, considering its effects on foreign investment (Colombia-Republic of Korea BIT, 2010, art. 5 (2) (d) (iii)).

Fifth, although not in the Colombian BITs, the indirect expropriation clause in the 2017 Colombian Model BIT incorporates a non-discrimination criterion in assessing the 'character' of the state measure.

2. The Varied Language of the Exclusion Clause

As has been pointed out, many recent Colombian BITs adopt a mixed approach containing both a contextual analysis and a clause that excludes non-discriminatory public welfare regulation from the definition of indirect expropriation. With respect to the exclusionary clause, it can generally be of two types.

The first type is a radical reproduction of the police power doctrine. It generally provides that a regulatory measure adopted in the public interest by the host state does not constitute an indirect expropriation. This approach is rather rare in the network of recent Colombian BITs. But it can be found in the Colombia-Turkey BIT:

> Non-discriminatory Measures of a Contracting Party that are designed and applied for public purposes or social interest or with objectives such as public health, safety and environment protection, do not constitute indirect expropriation (Colombie-Turkey BIT, 2014, art. 7 (2) (c)).

Similarly, the 2017 Colombian Model BIT provides that:

> Non-discriminatory Measures adopted by a Contracting Party, designed, applied or maintained for the protection of public objectives such as the protection of public health and safety, the environment, consumer and competition protection, amongst others, do not constitute an indirect expropriation.

In both examples, the police power doctrine is radical, as it is enshrined without any qualification, as when the state measure is grossly disproportionate. Thus, the approach of the 2017 Colombian Model BIT differs from some BITs that consider that, in order to be exempt from indirect expropriation, regulatory conduct must not be "so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith" (Colombia - Belgium-Luxembourg Economic Union BIT, 2009, art. IX(3) (c)).

The omission of the proportionality technique in the 2017 Colombian Model BIT means that non-discriminatory regulatory measures adopted to protect public welfare objectives

can never constitute indirect expropriation (Titi, 2018, p. 284). As one commentator noted:

> The absence of the words 'except in rare circumstances' here means that as long as a regulatory measure is non-discriminatory and is designed for a public welfare objective such as public health, it would not constitute expropriation. Thus, here will be no need for an ISDS tribunal to examine the severity of the measure and compare it with the benefit flowing from the measure. There will also be no need to undertake any kind of proportionality review. Such formulation gives greater regulatory power to the host State to adopt regulatory measures for the purpose of public health. Arguably, the absence of the words 'except in rare circumstances' also opens up the possibility of the host State adopting regulatory measures for the protection of public health that may be too draconian or severe, leading to regulatory abuse (Ranjan, COVID-19, India and Indirect Expropriation: Is the Police Powers Doctrine a Reliable Defence?, 2020, p. 220).

The Colombia-Turkey BIT and the 2017 Colombian Model BIT offer a way to revisit the very broad interpretation by some arbitral tribunals of what constitutes an indirect expropriation (UNCTAD, 2012, pp. 5-6). More interestingly, this dynamic reflects the desire and effort of the Colombian state to inject a measure of predictability and consistency into court decisions (Anthony, 2017), by making proposals that limit the court's discretion in interpreting the standard. But, as already noted, this approach carries a significant risk, as it also opens the possibility for the state to adopt public policy regulatory measures that may be overly harsh or likely to lead to regulatory abuse. The 2017 Colombian Model BIT clearly establishes a presumption in favor of nondiscriminatory governmental measures adopted for a legitimate public interest purpose and implemented through due process.

This differs significantly from the nuanced approach of the regulatory powers doctrine, which specifies circumstances in which a public interest regulatory measure adopted in good faith may constitute an indirect expropriation.

The second type of exclusionary clause, mainly adopted in recent Colombian BITs, provides an important nuance to the police powers doctrine. It provides that, in order not to qualify as an indirect expropriation, the regulatory measure of the investment host state must not be so severe considering its purpose that it cannot reasonably be considered to have been adopted and applied in good faith. For example, Article IX of the British Columbia-Luxembourg Economic Union BIT (2009) contains an 'except in rare circumstances' clause that provides an essential nuance to the radical police power doctrine:

> Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied for public purposes or with objectives such as health, safety and environment protection, do not constitute indirect expropriation. (See also (Colombia-Spain BIT, 2021, art. 11) (Colombia-France BIT, 2014, art. 6) (Colombia-Singapore BIT, 2013, annexe 2) (Colombia- Republic of Korea BIT, 2010, art. 5) (Colombia-United Kingdom BIT, 2010, art. VI) (Colombia-Chine, BIT, 2008, art. 4) (Colombia-Peru BIT, 2007, annexe C).

Determining whether a regulatory measure adopted by the host state to achieve a public welfare objective such as public health falls within the 'except in rare circumstances' category will require a proportionality test that involves weighing the measure against the benefits that should flow from it. In other

words, if the impact of the measure is disproportionate to the objective pursued, the measure cannot be considered as part of the host state's police powers.

However, several investment treaties refer to the phrase 'except in rare circumstances', without clarifying the content of this phrase. In such cases, the proportionality test is not contemplated. For example, the Free Trade Agreement between Central America, the Dominican Republic and the United States of America (CAFTA) provides as follows:

> Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations. (CAFTA, 2004, annexe 10-C (4) (b))

Such a provision is flawed because it contains terms that are not clearly defined. Most treaties offer no clear answer as to the definition of 'rare circumstances'. Some treaties, such as the recent Colombia-Spain BIT, interpret rare circumstances to include the case "where the impact of a measure or set of measures is so severe in relation to its objective as to be manifestly excessive" (Colombia-Spain BIT, 2021, article 11(5)). Similarly, the Colombia-Republic of Korea BIT refers to circumstances such as "when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect" (Colombia-Republic of Korea BIT, article 5(d) (e), 2010). The Colombia-Singapore BIT uses slightly different language, stating that these are "exceptional circumstances, such as when such acts are so serious that they cannot reasonably be expected to be adopted and carried out in good faith to achieve their objectives" (Colombia-Singapore BIT, 2013, annex 2).

Moreover, it should be emphasized that even in the case where the proportionality test is specified, there is no total guarantee of legal certainty. This was observed by the Colombian Constitutional Court in its interpretation of the indirect expropriation clause of the Colombia-France BIT, providing that:

> Measures adopted by a Contracting Party to protect legitimate public policy objectives, such as health, safety or the environment, do not constitute indirect expropriation, if they are necessary and proportionate in relation to those objectives and if they are applied in such a way as to effectively fulfil the public policy objectives for which they were adopted (Colombia-France BIT, 2014, art. (6) (2)).

The Court considered that the term 'necessary and proportionate' may raise problems of interpretation since it would be indeterminate (Constitutional Court of Colombia, sentence C-252 of 2019). It declared the expression 'necessary and proportionate' constitutional, provided that it is interpreted in such a way as to respect the freedom of configuration and the autonomy of national authorities in order to protect legitimate public policy objectives (Constitutional Court of Colombia, sentence C-252 of 2019, p. §281).

In addition, there is no consistent treaty practice regarding certain concepts such as 'legitimate public welfare objectives'. While most recent BITs provide some examples of public welfare objectives, such as public health, safety and environmental protection, some treaties emphasize that 'stabilization of real estate prices' is also a legitimate public welfare objective that may justify indirect expropriation. For example, the Colombia-South Korea BIT provides:

> Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriation (Colombia-Republic of Korea BIT, 2010, art. 5(2)(e))).

In conclusion, Colombia has made significant efforts to resolve uncertainties regarding the indirect expropriation clause. But despite states' attempts to carve certain regulatory measures motivated by public interest out of the protective scope of these BITs, arbitral tribunals continue to disregard these sensitivities.

C. Interpretation of the Environmental Carve-Out in Eco Oro v. Colombia

The *Eco Oro v. Colombia* decision generated considerable controversy, not least because of the arbitral tribunal's unconventional interpretation of the general exception clause in the Canada-Colombia FTA, and its assertion that even when a challenged measure meets the conditions of this exception, the host state's obligation to compensate remains (Ünüvar, 2023). This decision would suggest that reformist attempts at clarification do not necessarily determine the direction arbitral tribunals will take in their reasoning.

Canadian mining company Eco Oro Minerals Corp (Eco Oro) has signed a mining concession agreement with a Colombian state body, granting it exploration rights. This body also extended a conditional right to exploit the deposits, on

condition that the company was able to obtain an environmental license, supported by an environmental impact study. At the centre of this dispute were ongoing series of laws, regulations, and court decisions prevented mining companies from exploiting minerals within the Páramo regions. According to the 2007 study released under Colombia's General Environmental Law, more than half of Eco Oro's concession overlapped with the Páramo, i.e. 54%. In 2014, Colombian environmental authorities confirmed a nearly 55% overlap between the concession area and the Páramo. Eco Oro has initiated an arbitration against Colombia under the Free Trade Agreement in 2016, alleging that Colombia had breached the minimum standard of treatment and expropriated its investment.

Colombia argued that the general exception in Article 2201(3) of the FTA excluded environmental measures from the scope of its consent to arbitrate. Under this Article:

> For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
>
> a. To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;
>
> b. To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
>
> c. For the conservation of living or non-living exhaustible natural resources.

In principle, the arbitral tribunal had to answer three questions. Firstly, does the measure adopted pursue an envi-

ronmental protection objective? Secondly, does the 'environmental protection' measure constitute arbitrary discrimination, a form of disguised restriction or a genuine measure? And thirdly, was the measure necessary for the pursuit of the environmental protection objective?

The arbitral tribunal clearly answered the first and second questions, ruling that the state measures served the purpose of environmental protection, were non-discriminatory and affected domestic investors as well as foreign investors. But it did not answer the question of whether the state's measures were necessary to protect the environment.

The arbitral tribunal appears to recognize the exceptions clauses when it states that the exception provide that a party may adopt a measure within its scope "without finding itself in breach of the FTA" (Eco Oro Minerals Corp. v. Republic of Colombia, p. §830). But it has decided that, even if the exception applies to a measure, "this does not prevent an investor claiming … that such a measure entitles it to the payment of compensation" (Eco Oro Minerals Corp. v. Republic of Colombia, p. §830). More clearly, the tribunal pointed out, while "the state cannot be prohibited from adopting or enforcing an environmental measure in accordance with Article 2201, [it] cannot accept … that in such circumstances payment of compensation is not required" ((Eco Oro Minerals Corp. v. Republic of Colombia, p. §836).

The problem with the tribunal's reasoning is that it appears contradictory in its terms. While it holds that the state did not violate the FTA, it recognizes the obligation to pay compensation. Yet it should not have to pay compensation, since it did not violate the treaty (Health, 2021).

To explain its reasoning, the tribunal arbitral considered Article 2201(3) to be 'permissive'. The stipulations of this article are not drafted in such a way as to exonerate the state from its obligation to pay compensation. The arbitrators are sending an implicit invitation to the states to adopt more radical and binding language, such as the language of police powers.

III. AVENUES FOR A BETTER REBALANCING

Although the terms of the indirect expropriation clause have been reformed with a view to better preserving the State's regulatory space, the interpretation of this clause may continue to be subject to various contradictory interpretations. To enable better consideration of the environmental or climatic exception through the formulation of the indirect expropriation clause, a few lines of interpretation should be defined.

Several elements have been proposed in the literature to establish a test for drawing a line between a compensable indirect expropriation and a non-compensable legitimate regulatory action (Zhu, 2019, pp. 411-416). This test is conducive to aligning the interests of the foreign investor with the public interest objectives of the investment host state and may assist the Colombian state in refining these recent BITs. These include the purpose of the measure; the reasonableness of the measure; the existence of due process; the non-discriminatory nature of the measure; and the reasonable expectations associated with the investment (Zhu, 2019). When a regulatory measure meets these elements, it cannot be characterized as an indirect expropriation.

A. The True Purpose of the Measure

The first consideration is the true purpose of the regulatory action. The regulatory measure must not reflect an ideology or policy hostile to foreign investment disguised in the name of protecting public interest objectives. Thus, the role of the arbitral tribunal is to arrive at an examination of the intent behind the regulatory measure. *Gold Reserve v. Venezuela* is an example of a case where the arbitral tribunal found that the host state had terminated the foreign investor's operating concession for both environmental and political reasons. After noting that the foreign investor had failed to comply with the time limit required by Venezuela's mining laws, it held that as long as there was a plausible non-political reason for the termination of the concession, it could not be considered a mere pretext (Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/01, Award of the Tribunal, Sept. 22, 2014, §667.). In fact, the tribunal's approach is not balanced enough. The tribunal did not attempt to identify and analyze the primary purpose of the measure. A better approach would be to analyze the entire regulatory and factual context to determine the primary purpose of the measure. Based on this reasoning, if the tribunal finds that the measure was adopted primarily for political reasons and only secondarily for environmental reasons, it should conclude that the measure cannot be considered to have a genuine environmental objective and, therefore, should not be exempt from a claim of indirect expropriation.

B. Reasonableness of the Measure

Another element closely related to the purpose of the measure is the reasonableness of the regulatory measure. It has been asserted in recent treaty practice that the measure

must be reasonable to achieve its environmental objective. But the problem is that the threshold for reasonableness is not clearly defined. Most recent treaties require that there be a 'reasonable' connection between the measure and its objective, without illustrating the threshold for reasonableness (Zhu, 2019, p. 412). Other treaties provide that if the measure is not grossly disproportionate to its objective, the measure must be considered reasonable to achieve its objective (Colombia-Republic of Korea FTA, 2013, Annex 8-B(3)(b).).

An example of an objective assessment of reasonableness can be found in *Philip Morris v. Uruguay*. In this case, the arbitral tribunal made an objective assessment of the reasonableness of the host state's public policy measures based on their consistency with international scientific standards. In this case, investors registered in Switzerland claimed that Uruguay's tobacco control measures constituted an indirect expropriation of their investments. In determining whether there was indeed an indirect expropriation, the tribunal specifically considered whether the measures adopted by the host state were arbitrary and unnecessary by considering the evidence contained in amicus curiae briefs submitted by the World Health Organization (WHO) and the Pan American Health Organization (PAHO) (Philip Morris Brands Sarl Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/17, Award, July 8, 2016, p. §306). Accordingly, the court found that:

> But the fact remains that the incidence of smoking in Uruguay has declined, notably among young smokers, and that these were public health measures which were directed to this end and were capable of contributing to its achievement. In the Tribunal's view, that is sufficient for the purposes of defeating a claim under Article 5(1) of the BIT… In light of the foregoing, the Tribunal concludes that the Challenged Measures were a

valid exercise by Uruguay of its police powers for the protection of public health (Philip Morris Brands Sarl Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/17, Award, July 8, 2016, pp. §306-307).

C. Existence of Due Process

Another important element that may allow for the justification of an indirect expropriation is the implementation of the measure within a framework of due process. But the problem is that no treaty explicitly requires courts to take due process into account in determining indirect expropriation. Moreover, due process has not been considered a condition for the measure to be justified under the public interest exemption. On the other hand, a few courts, such as those in *Metalclad v. Mexico and Methanex v. United States*, have considered due process as an important factor in determining whether a measure can be justified under the indirect expropriation clause. To distinguish legitimate regulation from indirect expropriation, they clearly assessed whether the measure was implemented through due process. In the first case, the arbitral tribunal found that Mexico's refusal to issue a permit was not based on a "timely, orderly or substantive basis" and therefore could not be justified under the indirect expropriation clause (Metalclad c. Mexique, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000 , p. §107). In the second case, the arbitral tribunal noted that "the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process" and therefore did not constitute an indirect expropriation (Methanex v United States of America, NAFTA Tribunal, Final award on Jurisdiction and Merits, August 3, 2005, §15).

D. Non-Discriminatory Nature of the Measure

Another condition for justification under the expropriation clause is non-discrimination. In other words, the measure implemented in a discriminatory manner should not be exempt from a claim of indirect expropriation. In the treaty examples cited above, the non-discrimination criterion has been incorporated into the indirect expropriation provision in relation to the exemption from the obligation to protect the public interest (Colombia-China BIT, 2008, art. 4). The courts in *Methanex v. United States of America* (Methanex v. United States of America) *and Chemtura v. Canada* (Chemtura v. Canada) have required that an environmental measure be non-discriminatory to be considered a legitimate non-compensable regulation. In *Oco Oro* decision, the tribunal found that the measures adopted by Colombia to protect the environment were neither arbitrary nor unfairly discriminatory, nor did they constitute disguised restrictions on international investment (Eco Oro Minerals Corp. v. Republic of Colombia). Such a requirement should be widely adopted in arbitration practice.

E. Reasonable Expectations Related to the Investment

A final factor to be considered in determining indirect expropriation is the analysis of the foreign investor's reasonable expectations based on specific commitments made by the host state. If the investor has such expectations, then the host state's failure to meet its commitments will be considered an indirect expropriation. Several treaties have incorporated consideration of investment-related expectations into the indirect expropriation clause. For example, the Colombia – Belgium Luxembourg Economic Union BIT in Article IX(3)(b) includes reasonable and distinct investment expectations

as one of the factors to be considered in the case-by-case analysis of indirect expropriation:

> The determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact-based inquiry considering, amongst other criteria, the scope of the measure or series of measures and their interference on the reasonable and distinguishable expectations concerning the investment.

The assessment of the reasonableness of investment-based expectations should be based on a contextual analysis of the regulatory and factual environment. The Colombia-South Korea FTA links the reasonableness of foreign investors' expectations to the regulatory environment. In a footnote to its Annex 8-B, the agreement provides:

> For greater certainty, whether an investor's investment backed expectations are reasonable depends in part on the nature and extent of governmental regulation in the relevant sector. For example, an investor's expectations that regulations will not change are less likely to be reasonable in a heavily regulated sector than in a less heavily regulated sector or whether at the time the investment was made the host Party had particular regulatory power over the relevant sector can be considered.

In conclusion, taking these various elements into account, a measure adopted for a public interest objective such as the environment or health should not constitute an indirect expropriation if the measure concerns a public interest objective and is profoundly reasonable to achieve that objective; is implemented through due process; is not discriminatory; and is not contrary to specific investment-related commitments made by the host state.

CONCLUSION

For several years, Latin American countries have been involved in investment arbitration proceedings in which a regulatory measure adopted in the public interest has been characterized as an indirect expropriation. But in these cases, the decisions of arbitral tribunals have not been consistent. They have taken different approaches to determining whether a regulatory measure taken to protect the environment constitutes an indirect expropriation. It is therefore in response to the inconsistency and unpredictability of the case law that several states have sought to revisit the indirect expropriation clause to preserve regulatory flexibility to protect public interest objectives. Recent BITs concluded by Colombia have incorporated indirect expropriation clauses with clarified terms. But this clarification has weaknesses, as concepts such as 'character of a measure' and 'rare circumstances' are sometimes vague and imprecise. In other words, even when the indirect expropriation clause is clarified, its interpretation by the tribunals may prove difficult, as seen in the *Oco Oro* decision. Thus, to enable investment arbitration tribunals to draw a line between compensable indirect expropriation and legitimate regulatory action, this article draws on the analysis of Professor Ying Zhu, who reinforces the proportionality test with respect to criteria such as the objective of the measure, the reasonableness of the measure in relation to the objective, the regularity of the measure, its non-discriminatory nature, and its conformity with the specific commitments made by the host state to the foreign investor.

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