
The Guide to Investment Treaty Protection and Enforcement is a guide on the practical side of investor–state disputes. It traces the concept of investment protection through its full life cycle – from negotiation of a treaty to enforcement of an award derived from it and everything in-between. In doing so, it seeks to guide the reader in what to do and think – how to strategise – at every stage of a dispute. As always with GAR, the content is enriched with a series of contributions from arbitrators, on topics du jour.

Generated: February 8, 2024

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2024 Law Business Research
Substantive Protections: Expropriation

Derek Soller, Rafael T Boza, Kristina Fridman and Roland Reimers
Pillsbury Winthrop Shaw Pittman

Summary

INTRODUCTION
THE HISTORICAL RIGHT TO COMPENSATION FOR EXPROPRIATION UNDER INTERNATIONAL LAW
DEFINING EXPROPRIATION
INDIRECT EXPROPRIATION: THE CASE OF ECO ORO MINERALS V. COLOMBIA
ENDNOTES
INTRODUCTION
For centuries, the right to compensation for the taking of private property has been enshrined in most extant modern legal orders, most often at the constitutional level. And, as discussed below, international law has protected foreign investors’ right to compensation long before the International Centre for Settlement of Investment Disputes (ICSID) era.

It is therefore unsurprising that an investor’s right to be compensated for an expropriation is often enshrined in bilateral and multilateral investment treaties as well as trade agreements. It is arguably also the most important protection, for at least two reasons.

First, in some cases it is the only protection practically available to investors. Numerous treaties only provide for arbitration of disputes regarding claims of expropriation, leaving investors without recourse for the violation of other substantive protections technically granted by the treaty. Moreover, other investment treaties, such as the North American Free Trade Agreement (NAFTA) and its successor, the United States–Mexico–Canada Agreement, exclude certain subject matter from all protections except expropriation.

Second, and in relation to the above, to date the protection against expropriation without just compensation has been less ‘controversial’ than the protection of fair and equitable treatment (FET) and even protections afforded by national treatment or most-favoured nation (MFN) provisions. Many states have taken pains to limit the substantive scope of FET protections in both existing and new investment treaties. Similarly, the effect of MFN clauses, particularly the extent to which substantive protections can be imported from one treaty to another through these clauses, has been the subject of considerable debate.

That is not to say that the concept of expropriation is free from controversy. As discussed below, there is no accepted definition of what constitutes an ‘expropriation’ in international law, particularly in cases where a state has not actually taken title to the investor’s property, but, rather, has allegedly deprived an investor of property rights through other means – including through general or specific regulations (‘indirect expropriation’).

Whether and to what degree a state may infringe on the property or activities, or both, of foreign investors without triggering liability for an expropriation is likely to become more controversial, particularly in terms of the consequences of regulations promulgated to protect the environment. As discussed below, the recent decision of the tribunal in *Eco Oro v. Colombia* provides a framework to explore these issues.

THE HISTORICAL RIGHT TO COMPENSATION FOR EXPROPRIATION UNDER INTERNATIONAL LAW
The historical origins of expropriation claims lie in physical seizures of investor property. In the late 19th and early 20th centuries, expropriation claims generally concerned physical takings and, at times, arose in the form of ‘mass expropriations’, such as large-scale confiscations and nationalisations. Mass expropriations of this kind occurred, notably, in the context of revolutionary movements in Russia and Mexico.

One of the earliest international arbitrations concerning the expropriation of physical property is the *Delagoa Bay Railway* matter, decided in 1900. In *Delagoa*, the tribunal considered the issue of compensation due to the United States and the United Kingdom...
from Portugal, which had rescinded a 35-year railway concession and seized a railroad under construction in modern-day Mozambique, without paying any compensation.\[9\]

In deciding this issue, the tribunal held that:

\[w\]hether one would, indeed, brand the action of the government as an arbitrary and dispossing measure or as a sovereign act prompted by reasons of state which always prevails over any railway concession, or even if the present case should be regarded as one of legal expropriation, the fact remains that the effect was to dispossess private persons from their rights and privileges of a private nature conferred upon them by the concession, and . . . the State which is the author of such dispossession is bound to make full reparation for the injuries done by it.\[10\]

Expropriation of physical property also featured in the *Chorzów Factory* case, decided by the Permanent Court of International Justice (PCIJ) in 1928. There, Germany sought reparations from Poland, in the name of two companies, for Poland's seizure of property that those companies had owned in Silesia, a territory transferred to Polish control pursuant to the German–Polish Convention on Upper Silesia of 1922 (the Convention). In its decision, the PCIJ concluded that Poland's physical seizure of the property violated the Convention, and that Poland was 'under an obligation to pay, as reparation to [Germany], a compensation corresponding to the damage sustained' by the two companies on whose behalf Germany made its claim.\[11\]

Around the middle of the 20th century, the notion that expropriation could also occur in the absence of a physical taking – that is, by an 'effective transfer of property rights without physically seizing or formally taking over the property' – gained prominence.\[12\] Grounds for the growing relevance of 'indirect expropriations' lay primarily in two developments: (1) the enshrinement in international investment agreements of investors' right to challenge state conduct; and (2) the heightened frequency with which states intervened in their respective economies.\[13\]

Although subject to increased attention in the mid-20th century, the concept of expropriation of intangible property was not new. In the *Chorzów Factory* case, the PCIJ held that the expropriation of the property at issue also constituted an 'indirect expropriation of the patents and contract' of the German company that had possessed the 'contractual rights for the management and operation of the factory'.\[14\] Similarly, in the *Norwegian Shipowners’ Claims* case, a matter concerning the construction of ships in United States shipyards, the Permanent Court of Arbitration concluded that the violation of 'intangible property rights arising from a contract amounted to an expropriation'.\[15\]

In modern jurisprudence, the principle is now well established that intangible property, 'including rights arising from a contract', is 'susceptible of an expropriation in the same way as tangible property'.\[16\] Decisions issued by the Iran–US Claims Tribunal, as well as by tribunals in ICSID and the NAFTA Chapter 11 cases, have echoed and entrenched this principle in recent decades.\[17\] Underlying this notion is the understanding that the 'key function of property is less the tangibility of “things”, but rather the capability of a combination of rights in a commercial and corporate setting and under a regulatory regime to earn a commercial rate of return’.\[18\] In present times, therefore, it is accepted wisdom that compensable expropriations can be of tangible or intangible property.

**DEFINING EXPROPRIATION**
Most investment treaties protect foreign investors from expropriation or measures tantamount to an expropriation that are not done (1) for a public purpose, (2) in a non-discriminatory manner, (3) in accordance with due process, and (4) against payment of prompt adequate and effective compensation (which is often further defined as market value).

Under these treaties, therefore, investors are owed compensation for expropriation regardless of the reason for it. In addition, investor–state tribunals have distinguished between 'lawful' expropriations, that meet the first three of the above criteria – and 'unlawful' expropriations, that do not. For unlawful expropriations, most tribunals have found that damages should be measured pursuant to the standard of 'full reparation' set forth in the Chorzów Factory case, rather than the payment of 'prompt adequate and effective compensation'.

However, there is no doubt that some tribunals have noted that, in many cases, these standards of compensation are identical. As such, most awards addressing expropriation claims question whether an 'expropriation' has occurred, and if so, whether the appropriate compensation has been provided for the taking.

Therefore, before addressing whether an expropriation is prohibited by the treaty, a tribunal must determine whether an expropriation has occurred at all. This implicates two questions: whether there is 'property' capable of being expropriated and whether a state's actions constitute an expropriation, or a measure tantamount to expropriation, of that property.

In cases of classic expropriation, the state openly and officially takes title to a piece of private property. Tribunals and commentators refer to these acts as 'direct expropriation'. Here, generally, there is little discussion about whether 'property' exists, as it is the type of property (such as real property, stock ownership or certain types of intellectual property) subject to official, recorded recognition by the host state. Neither is there a discussion of whether a state's actions constitute an expropriation because usually the state has openly transferred ownership to another party or itself.

However, most disputed expropriation claims implicate state measures alleged to be 'tantamount to an expropriation'. Tribunals and commentators refer to these cases as 'indirect expropriation'. Below, we first discuss the types of property that tribunals have found to be subject to expropriation and then examine the ways in which tribunals have determined whether particular actions of the state constitute a measure tantamount to expropriation.

**TYPES OF PROPERTY SUBJECT TO EXPROPRIATION**

For an expropriation to exist, there must be a property right to be expropriated. Whether there exists a notion of property in international law has been subject to debate. In 1982, Judge Rosalyn Higgins in her lecture in The Hague Academy of International Law said:

> I am very struck by the almost total absence of any analysis of conceptual aspects of property. So far as the concept of property itself is concerned, it is as if we international lawyers say: property has been defined for us by municipal legal systems; and in any event, we know property when we see it. But how can we know if an individual has lost property rights unless we really understand what property is?  

Judge Higgins's insight remains compelling some 40 years later. In the context of investment protection, a host state's laws regarding property remain the starting point for determining
whether an expropriation has occurred. However, there is more guidance now compared to 1982, as to what constitutes ‘property’ for the purposes of investor claims.

First, investment treaties often define and enumerate examples of what constitutes an ‘investment’ of a foreign investor that is subject to expropriation. A typical formulation of the definition of investment in these treaties reads: ‘every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk’ and includes ‘[an] enterprise, “shares, stock, and other forms of equity participation in an enterprise”, construction contracts, licenses, authorization, and permits, among others.’

Second, tribunals have grappled with the definition of property, explicitly or implicitly, in dozens of investor–state cases. They do so in the first instance when determining their jurisdiction, which only exists if an ‘investment’ exists per the definition in the relevant treaty. In addition, certain ICSID tribunals have added the criteria for ‘investments’ most famously enumerated by the tribunal in Salini v. Morocco. These factors require tribunals to evaluate whether the claimant’s investment involves: (1) a contribution of money or assets; (2) a certain duration; (3) an element or assumption of risk by both sides; and (4) a contribution to the economic development of the host state (the Salini Factors). In cases where a tribunal has found that a claimant’s activities do not constitute an ‘investment’, there cannot be an expropriation.

In many cases in which an investor claims the loss of a property right recognised by municipal law, or in the relevant treaty, there is no further discussion of whether an expropriation can exist. This is true, for example, in cases involving real property, stock ownership and intellectual property. However, there are two types of rights that may not traditionally be considered property as such in domestic legal systems but are the subject of multiple expropriation claims: contractual rights and commercial opportunities.

**CONTRACTUAL RIGHTS**

It has become well accepted that contractual rights are a type of property that can be the subject of claims for indirect expropriations, even if these ‘rights’ may not be formally recognised under the host state law.

However, it is equally well accepted that not every breach of contract can be considered an indirect expropriation. Rather, tribunals have consistently held that the deprivation of contractual rights must be the result of exercise by the state party of sovereign authority, rather than simply the actions of a contracting party.

In cases where the investor has a contractual relationship with a state body, authority, state-owned entity or even a private entity that acts on behalf of the state, a breach of contract may rise to the level of an expropriation of contractual rights if the state-owned entity acted as a sovereign. As stated by the tribunal in Parkerings-Compagniet v. Lithuania:

[A] breach of an agreement will amount to an expropriation only if the State acted not only in its capacity of party to the agreement, but also in its capacity of sovereign authority, that is to say using its sovereign power. The breach should be the result of this action. A State or its instrumentalities which simply breach an agreement, even grossly, acting as any other contracting party might have done, possibly wrongfully, is therefore not expropriating the other party.
OTHER INTANGIBLE RIGHTS

In some investor–state cases, the investor did not seek to identify any alleged property right formally recognised by a host state’s legal system or guaranteed by contracts. Rather, the investor alleged a state’s interference with the commercial opportunities of the investment undertaken.

There are numerous examples of tribunals rejecting this type of claim. These tribunals tend to subscribe to the logic, as expressed by the tribunal in *Emmis v. Hungary*, that these rights are not ‘asset[s] capable of ownership, valuation and alienation’.

More recently, in *PACC v. Mexico*, the tribunal dismissed an expropriation claim, holding that the claimant only had an expectation, not a right, to enter into additional contracts with a state-owned enterprise. Similarly, in *Lee-Chin v. The Dominican Republic*, the tribunal dismissed a claim of expropriation over a waste-to-energy plant that ‘appear[ed] to be a potential undertaking the Claimant never attempted to materialize in any possible way’.

However, a few awards have recognised the existence of some right to commercial opportunities, while not finding an expropriation. For example, the tribunal in *Pope & Talbot v. Canada* recognised that access to a market could be a type of ‘property right’ under NAFTA. In that case, the tribunal did not find an expropriation because the claimant was still able to have limited market access. Similarly, in *Cargill v. Poland*, the tribunal found that, in principle, the claimant ‘has a right to use and enjoy the production facilities owned by its subsidiary’ because that use and enjoyment is an ‘intangible asset which is included in the definition of Investment given by the Treaty.’ However, it found that the deprivation of this asset did not sufficiently deprive the investor of its overall investment to be considered an expropriation.

Finally, in at least one case, *UP v. Hungary*, the tribunal found that an indirect expropriation may be based on the diminution in value of an investor’s shares, without interference with any other property right. There, the investor engaged in the business of selling food vouchers that employers could provide to employees as compensation at a lower tax rate than salary. A change in Hungarian law reduced the tax benefit to these vouchers and created other vouchers that were more beneficial (and could only be issued by banks, which the claimant was not). Because 97 per cent of the claimant’s business had been the sale of food vouchers, the tribunal found that there had been an indirect expropriation of the claimant’s shares. The tribunal did not address whether the result would be the same if the claimant had owned a more diverse investment, rather than one that was based on one aspect of the Hungarian tax code.

DETERMINING WHETHER A GOVERNMENT ACT CONSTITUTES AN EXPROPRIATION

If a protected property right is identified, tribunals examining claims of indirect expropriation must examine whether the property right has in fact been indirectly expropriated. It has long been accepted that such indirect expropriation may be accomplished with one action, or through a series of measures that have a cumulative effect of an expropriation – a ‘creeping expropriation’.

In either case, tribunals have used different formulations to define whether a state’s actions constitute an expropriation under the relevant treaty. However, these can be roughly divided into two tests: the ‘sole effects’ doctrine and the ‘police powers’ doctrine. They are discussed in turn below.
THE SOLE EFFECTS DOCTRINE

Under the sole effects doctrine, a tribunal determines the existence of an indirect expropriation solely through an inquiry into the ‘reality of the impact’ of government action, without examining the stated purpose or propriety of the measure.

The rationale behind this test was stated by the tribunal in *Siemens v. Argentina*, which held that:

> The [relevant bilateral investment] treaty refers to measures that have the effect of an expropriation; it does not refer to the intent of the State to expropriate. A different matter is the purpose of the expropriation, but that is one of the requirements for determining whether the expropriation is in accordance with the terms of the Treaty and not for determining whether an expropriation has occurred.

The impact of the state measures to the investment must be ‘of a certain “magnitude or severity” in order to constitute an expropriation’. There is no clear ‘red-line’ determining what is that ‘certain’ magnitude that must be reached before a measure or series of measures can be considered expropriation. The ‘test is whether that interference is sufficiently restrictive to support the conclusion that the property has been “taken” from the owner’.

In certain cases, tribunals have focused on the effect on the claimants’ entire investment. Thus, for example, in the recent award in *Muhammet Çap & Sehil İnşaat Endustri v. Turkmenistan*, the tribunal stated that ‘[i]n the Tribunal’s view, to constitute expropriation, the acts, omissions and interferences must affect the value of the whole investment, not just part(s) of it’. However, other tribunals have emphasised that this test can be applied to an entire investment or ‘distinct part thereof’.

The first formulation, requiring a diminution of the value of an entire investment, has generally been applied in cases in which the claim of expropriation regards the diminution in value of an investment due to the expropriation of ‘commercial opportunities’ rather than traditional property rights. For example, in *Muhammet Cap*, the claimant alleged a creeping expropriation through a series of alleged government actions, including breaches of contract and unwarranted investigations that allegedly destroyed the value of the claimants' business.

In *Pope & Talbot*, the claimant alleged that Canada's regulation of the amount of softwood timber it could export to the US at a particular price was tantamount to expropriation and that each time Canada reduced its quota allocation, a further expropriation occurred. The tribunal held that the claimant's 'access to the U.S. market is a property interest subject to protection under Article 1110', but that Canada's interference with that property right was not substantial enough to constitute an expropriation. Given that the claimant was still in control of its business, still exporting softwood lumber to the US, and still earning a profit, the fact that its profits had diminished was insufficient to show an indirect expropriation. The tribunal in *Renergy v. Spain* reached a similar conclusion and dismissed an expropriation claim, finding that, despite the challenged measures, 'there was still space for some revenue for the shareholders'.

In *ADM v. Mexico*, as another example, the government imposed a significant tax for four years that the claimants alleged was discriminatory and amounted to an expropriation.
The tribunal again held that the tax was not sufficiently restrictive to amount to an expropriation.\[^{59}\]

Finally, in *Total v. Argentina*, the claimant alleged that the loss of value to its shares due to Argentina’s freeze on gas tariffs in response to the 2001 financial crisis amounted to an expropriation.\[^{60}\] The tribunal held that, as the claimant retained control of its investment, it had failed to show that it had been deprived of all or substantially all of the value of its investment and thus no expropriation had occurred.\[^{61}\] However, where identifiable rights traditionally considered ‘property’ are the target of the alleged expropriation, tribunals may be more open to considering that an entire investment need not be affected. For example, a state's permanent seizure of a factory owned by an investor's subsidiary would be an expropriation, regardless of whether that company owned numerous other assets.\[^{62}\]

While some commentators have called the sole effects doctrine the ‘majority rule,’\[^{63}\] this may only be true in a certain type of case, namely one in which the effect of the alleged measure was specific to the claimant’s property, rather than a measure of general application that happened to affect the claimant.

For example, in *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina*, a water concession was the subject of numerous actions by local authorities that destroyed the claimants’ ability to run the concession profitably.\[^{64}\] Similarly, in *Metalclad v. Mexico*, the claimant received a federal permit to construct a hazardous waste landfill. Months after construction began, local authorities eventually demanded that claimants apply for a municipal building permit, which was denied after construction was finished.\[^{65}\] In the case of *Santa Elena v. Costa Rica*, the subject of the alleged expropriation was a particular piece of property, taken in all but name (and later in name) by the host state for purposes of creating a nature preserve.\[^{66}\]

In *Burlington v. Ecuador*, as a more recent example of the sole effects test, Ecuador passed Law 42, which taxed certain profits from crude oil at 50 per cent and then later at 99 per cent.\[^{67}\] In setting out the standard for an indirect expropriation, the tribunal noted that ‘[w]hen assessing the evidence of an expropriation, international tribunals have generally applied the sole effect and focused on substantial deprivation.’\[^{68}\] The tribunal concluded that Law 42 did not constitute an indirect expropriation even at the 99 per cent tax rate because the claimant was still able to generate a commercial return, even if its profits had diminished considerably.\[^{69}\]

In each of these cases, faced with an action or series of actions aimed at a particular piece of property, the tribunal looked only at the effects of those actions to determine whether the state had effected an indirect expropriation.

**THE POLICE POWERS DOCTRINE**

Numerous other tribunals have foregone the sole effects test and instead relied upon the ‘police powers’ doctrine to determine whether a state’s actions constitute an indirect expropriation.\[^{70}\] Under this analysis, the tribunal reviews the alleged purpose of state actions as well as the effect of the measures to determine whether the regulation is within the valid police powers of the state.\[^{71}\] If the measure is (or at least some combination of) rational, proportional and non-discriminatory, the state will not be liable for expropriation, even if the investor is substantially deprived of a property right.\[^{72}\]
The cases in which tribunals apply the police powers doctrine tend to be those in which a government action does not prima facie concern one particular piece of property, but rather arise out of measures of general application that have an effect on the claimants’ property.\[^{72}\]

In these cases, as stated by the late Francisco Orrego Vicuña, ‘Government officials love to regulate, investors and businessmen hate to be regulated. Reasonable regulations are not an obstacle. They are needed and many times welcome. It is the abusive regulation that ought to be controlled. International mechanisms are one way of doing this.’\[^{74}\]

The decision in *Philip Morris Brands Sàrl et al v. Oriental Republic of Uruguay* is a well-known example of application of the police powers doctrine.\[^{75}\] The tribunal was composed of three well-known arbitrators, Professor Piero Bernardini, Gary Born and Judge James Crawford, under the Switzerland–Uruguay Bilateral Investment Treaty (BIT). Philip Morris argued that Uruguay’s regulations imposing restrictions on the sale of tobacco products, including uniform presentation of tobacco products (the ‘single presentation’) and displaying warnings and images on the cigarette boxes (the ‘80/80 requirement’) were indirect expropriations of its brand and goodwill.\[^{76}\] Uruguay contended that the challenged measures were a legitimate exercise of its ‘police powers’ to protect public health. The tribunal analysed both the sole effects (as ‘substantial deprivation’) and police powers doctrines and found using both doctrines that there was no expropriation.

As to the specific analysis of Uruguay’s police powers, the tribunal considered that a state’s ‘reasonable bona fide exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that measures taken for that purpose should not be considered expropriatory.’\[^{77}\] Specifically, in evaluating Uruguay’s adopted measures, the tribunal considered that they were consistent with Uruguay’s international obligations, where adopted for the public welfare, they were not discriminatory and they were proportionate. Arbitrator Gary Born dissented, but not as to the existence of an expropriation. Rather, Mr Born argued that the measures were breaches of the obligation to provide FET and considered that the single presentation requirement was ‘arbitrary and disproportionate’ and ‘wholly unnecessary to accomplish’ its purpose.\[^{78}\]

Finally, certain recent investment treaties have included text that arguably requires tribunals to use the police powers doctrine when deciding on the existence of an indirect expropriation. For example, Annex 811(2)(b) of the Canada–Colombia Free Trade Agreement (FTA) includes guidelines as to what constitutes an expropriation. The recent case of *Eco Oro*, discussed below, shows how one tribunal applied this language to a claim of indirect expropriation. Notably, the tribunal’s decision in *Eco Oro* classified the application of the Annex as an ‘exception’ to actions that would otherwise have constituted an indirect expropriation.\[^{79}\] This may signal that the tribunal would have used the sole effects test, but for the inclusion of the Annex.

**INDIRECT EXPROPRIATION: THE CASE OF ECO ORO MINERALS V. COLOMBIA**

As discussed above, it has long been recognised that contractual rights may be indirectly expropriated, but there is some disagreement among tribunals regarding whether and when regulation that deprives an investor of its property amounts to an indirect expropriation. One area in particular has created significant tension between the investor–state dispute settlement framework and the state’s power to regulate: the environment. Climate change is only getting worse, and many countries are far from the targets set in the Paris Agreement.\[^{80}\] Regulation curtailing fossil fuel investment and prioritising renewable energy, among other
environmental initiatives, is necessary for states to meet those commitments. However, implementing environmental regulations can have significant impacts for states.

For example, when the Obama administration denied the permit for the controversial Keystone XL Pipeline, the company behind the project, TC Energy Corporation, filed a US$15 billion NAFTA claim. After the Trump administration subsequently approved the project, TC Energy voluntarily discontinued the arbitration. However, after the Biden administration changed course again and cancelled the Keystone XL Pipeline, TC Energy announced in July 2021 that it had filed a new notice of intent to renew its claim for US$15 billion. The matter is pending.

As another example, when Germany passed legislation to shut down all of its nuclear power plants in response to the 2011 Fukushima crisis, it was hit with a €7 billion claim by Vattenfall, alleging breaches of the Energy Charter Treaty (ECT). Germany eventually settled all of the claims related to the shutdown for a total of €2.4 billion. These, and other examples, have caused some scholars to worry that the protections afforded to foreign investors may stand in the way of states' ability to effectively deal with the issue of climate change or to address security concerns with the use of certain types of energy sources.

One way that states have tried to address this issue is by limiting the applicability of protections for foreign investors when it comes to environmental regulations. A survey in 2011 found that over half of the new treaties concluded since 2005 addressed environmental concerns in some way. A similar, but expanded study in 2014 found that nearly all of the investment treaties concluded in 2012 and 2013 included some language regarding the environment. This language generally falls into three categories: recognising protection of the environment as a goal of the treaty, carving out environmental regulation from measures that can constitute an indirect expropriation and preventing a race to the bottom by prohibiting the contracting states from avoiding environmental regulation to attract foreign investment. Admittedly, despite the growing popularity of these provisions in new BITs, and particularly trade agreements with investment protection clauses, most BITs and other investment agreements still do not include any provisions mentioning the environment.

Nonetheless, *Eco Oro v. Colombia* provides a useful case study of tribunals interpreting these new provisions. Eco Oro Minerals Corporation (Eco Oro) obtained a mining concession from Colombia in 2007 after beginning its exploration activities in the 1990s. Colombia subsequently passed new environmental regulations banning mining activities in páramo ecosystems, but then failed to demarcate the area of Eco Oro’s concession that overlapped with the Santurbán Páramo. Eco Oro then brought its claims against Colombia pursuant to the Canada–Colombia FTA.

Annex 811 of the Canada–Colombia FTA provides as follows:

Indirect Expropriation
The Parties confirm their shared understanding that:
Paragraph 1 of Article 811 [regarding expropriation] addresses two situations. The first situation is direct expropriation, where an investment is nationalized or otherwise directly expropriated as provided for under international law. The second situation is indirect expropriation, which results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure. The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations, and
the character of the measure or series of measures;
Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation.[98]

The tribunal began its analysis by examining whether Eco Oro had rights that were capable of being expropriated, namely, the right to explore and exploit and the right to extend its concession. [99] After an examination of the status of concession rights under Colombian law, the tribunal found there was such a property right.

The tribunal then considered whether the challenged measures were a legitimate exercise of Colombia's police powers in accordance with Annex 811. [100] Acknowledging that there was 'no clear consensus' on the order of analysis, the tribunal evaluated (1) whether the criteria for indirect expropriation are met, and (2) whether an exception applies. [101] Specifically here, the tribunal analysed whether the challenged measures were 'non-discriminatory' as 'designed and applied to protect the environment'. [102] Using this analysis, the tribunal found that Eco Oro's loss of its 'right to exploit' was 'capable of being considered to be a substantial deprivation, such as to amount to an indirect expropriation'. [103] Nevertheless, the tribunal concluded that Colombia's measures were not discriminatory, were designed and applied to protect a legitimate public welfare objective (the environment), and were adopted in good faith, thereby a legitimate exercise of police powers and not an indirect expropriation.

The Eco Oro tribunal interpreted Annex 811(2)(b) of the Canada–Colombia FTA as 'an assessment of whether there has been interference “with distinct, reasonable investment-backed measures” and “the character of the measure or series of measures” . . . can only take place with reference to whether those measures “are designed and applied to protect legitimate welfare objectives”'[104]. The tribunal further [found] that the question of whether the measure has been adopted in good faith or bona fides is the same for both the inquiry into expropriation and that into police powers and necessitates consideration of the purpose of the measures and the degree to which the State's public policy concern is genuine as opposed to the process by which the measures were created. [105]

Although the tribunal rejected Eco Oro's indirect expropriation claim, the tribunal did find a breach of Article 805 regarding the minimum standard of treatment (MST). [106] This decision is in line with other recent trends, most notably for the myriad of cases brought under the ECT for changes in renewable energy schemes where 'indirect expropriation has played a subordinate or non-existent role in resolving those disputes', with claimants instead relying on FET. [107]

Notably, both party-appointed arbitrators filed a partial dissent. Professor Horacio A Grigera Naón, appointed by Eco Oro, argued that exceptional circumstances had been met in this case because of the retroactive effect of Colombia's environmental regulations. [108] Therefore, according to Professor Naón, there was an indirect expropriation in accordance
with Annex 811 of the Canada–Colombia FTA. In regards to the environmental motivations of the measures, Professor Naón emphasised that ‘the unilateral pursuit of such objectives by the State without the payment of compensation cannot be privileged without ignoring the reference to rare circumstances because an interpretation of this provision ignoring such express qualification of the State’s rights to protect the public welfare would be incorrect.’ Professor Philippe Sands KC (then QC), appointed by Colombia, argued that Colombia had not breached MST.

Professor Sands made clear that his view was motivated by the reasons for the regulation:

This case turns on a struggle between competing societal objectives which pull in opposite directions: on the one hand, the protection of the treaty rights of an international investor; on the other hand, the ability of a community to take legitimate measures to conserve its environment.

Like many governments around the world, Colombia has found the challenge of taking reasonable measures to protect its environment to be daunting, one that takes time and is often composed of a multitude of decisions that apparently take contrary directions. . . . In the age of climate change and significant loss of biological diversity, it is clear that society finds itself in a state of transition. The law – including international law – must take account of that state of transition, which gives rise to numerous uncertainties. The Majority has taken the evidence before the Tribunal and concluded that the Respondent was somehow not truly motivated by the aim of environmental protection. This conclusion is difficult to comprehend, given the evidence and the finding in the context of the expropriation claim that the Respondent’s actions were motivated by a desire to protect the environment.

In sum, the decision of tribunals regarding whether an environmental regulation constitutes an indirect expropriation may be motivated by not only the specific provisions of the applicable treaty, but also the arbitrators’ view regarding the importance of the regulation implemented.

Endnotes

1 Derek Soller is a partner, Rafael T Boza is special counsel and Roland Reimers and Martín Ruiz García are associates at Pillsbury Winthrop Shaw Pittman LLP. The authors would like to thank Elizabeth Dye and Gary Shaw, associates, and Kristina Fridman, a former associate, for their significant contributions to this chapter, and Richard Deutsch, partner, for his invaluable guidance. ~Back to section
2 See, e.g., US Constitution, Amendment V; J Ristik, ‘Right to Property: From Magna Carta to the European Convention on Human Rights’, 30 SEEU Review 145, 146–47 (discussing how the Magna Carta ‘provided the foundation for property rights protection’); Norway Constitution of 1814 with amendments to 2016, Article 105 (‘If the welfare of the State requires that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Treasury’); Basic Law of Germany (1949), Section I, Article 14; Constitution of the Federative Republic of Brazil of 1988 with Amendments to 2017, Article V, Sections XXII–XXV (guaranteeing the right to property and establishing that expropriation is allowed for public necessity with just compensation). The greatest exception, of course, were (and are in fewer cases) socialist and communist legal orders, which often limit (or even prohibit) personal ownership of certain types of property. See, e.g., Constitution of the USSR (1936), Chapter I, Articles 5–6, 10 (establishing that all property except personal property is owned by the state); Constitution of the USSR (1974), Chapter I, Articles 10–13 (same); The Constitution of the Socialist Federal Republic of Yugoslavia, Chapter I, Article 12 (‘The means of production and other means of associated labour, products generated by associated labour and income realized through associated labour, resources for the satisfaction of common and general social needs, natural resources and goods in common use shall be social property. No one may acquire the right of ownership of social resources.’)  

3 See, e.g., Mongolia–US Bilateral Investment Treaty (BIT) (1997), Article XI (exempting most protections except those against expropriation and transfer in the treaty for ‘matters of taxation’); US–Argentina BIT (1994), Articles XI and XII (exempting ‘measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests’ and all but expropriation and transfer for ‘matters of taxation’); see also, e.g., A Newcombe, ‘General Exceptions in International Investment Agreements’, Draft Discussion Paper for the British Institute of International and Comparative Law’s Eighth Annual World Trade Organization Conference (2008) (discussing some of the general exceptions included in investment agreements).  

4 United States–Mexico–Canada Agreement, Chapter 14, Annex 14-E.2 and 6(b) (limiting the availability of arbitration to certain covered sectors). North America Free Trade Agreement, Chapter II, Article 1114 (allowing environmental regulation otherwise consistent with the treaty), Article 1138 (excluding decisions motivated by national security) and Annex 1138.2 (excluding acquisition decisions in Canada and Mexico from protection).  


7 ibid.


9 See D C Baldus, ‘State Competence to Terminate Concession Agreements with Aliens’, 53 Kentucky L.J. 1, 56, available at https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=2996&context=klj.

10 ibid.

11 See United Nations, ‘Summaries of Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice’ (2012), available at https://legal.un.org/PCIJsummaries/documents/english/PCIJ_FinalText.pdf. The Chorzów case is most often cited for its holding on damages in the case of an illegal expropriation, namely that damages should restore a claimant to the same position it would have been in if not for the illegal acts. Therefore, the state either (1) must give the property back (restitution), or (2) if restitution is not practical or possible, pay full reparations for all damages resulting from the illegal acts.

12 See B Sabahi, N Rubins, D Wallace (footnote 5) at Section 18.03.

13 See UNCTAD (footnote 6).


15 See C Schreuer (footnote 14). See Norwegian Shipowners’ Claims (Norway v. United States), Award, 13 October 1922, 1 RIAA 307 (analysing the requisitioning of ships being built, and yet to be built, by shipyards in the United States for Norwegian buyers).
16 See C Schreuer (footnote 14).

17 ibid. (collecting cases).

18 C Schreuer (footnote 14) (citing T Wälde and A Kolo, ‘Environmental Regulation, Investment Protection and “Regulatory Taking” in International Law’, 50 Int’l & Comp. L. Quarterly 811, 835 (2001)).

19 See, e.g., Energy Charter Treaty, Article 13(1); Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Article V; Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, Article VI.

20 See, e.g., ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, 2 October 2006, paragraph 480.

21 See, e.g., id., at paragraph 481 ('The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation'); but see, British Caribbean Bank Ltd. v. Government of Belize, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, paragraph 261.

22 See Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016 ('the Tribunal does not have to make a finding in this context as to whether the compensation standard to be applied is the standard contained in Article 5(1) subparagraphs 2 and 3 of the Treaty or rather the customary international law standard of restitution. In any event, the amount of compensation to be paid to Claimant will be based on the valuation of Norpro Venezuela as of the date of expropriation, i.e., 15 May 2010.'). See also, Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, 1 June 2009, paragraph 541 ('[I]n the present case the distinction between compensation for a lawful expropriation and compensation for an unlawful expropriation may not make a significant practical difference.'); Reinhard Hans Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09/20, Award, 16 May 2012, paragraph 307 ('It is not surprising, therefore, that, generally, where an unlawful expropriation is found to have occurred, treaty-based compensation will often provide the same result as compensation based on customary international law.').
23 See, e.g., *Tidewater Investment Srl and Tidewater Caribe, C.A. v. Venezuela*, ICSID Case No. ARB/10/5, Award, paragraph 27 (discussing ‘at the outset’ respondents’ acceptance that certain governmental acts had an expropriating effect before turning to a discussion of compensation); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (discussing finding of expropriation before turning to other issues); but see *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Partial Dissenting Opinion of Brigitte Stern, 7 September 2015, paragraphs 6–24 (setting out that a legal expropriation and an expropriation that only lacks compensation should not be treated the same, and that the standard of compensation for a legal expropriation is just compensation and the standard of compensation for an illegal expropriation is full reparation).  

24 R Higgins, 'The Taking of Property by the State, Recent Developments in International Law', 176 *Recueil des Cours* 267, 268 (1982) (emphasis in original); see, e.g., *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, CA, et al. v. Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, paragraphs 116–17; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paragraph 460; A Newcombe and L Paradell, *Law and Practice of Investment treaties: Standards of Treatment* (Kluwer, 2009), paragraph 7.19 (‘Conceptually, property can only be expropriated if it exists. If a right was never acquired or has been otherwise extinguished under local law, it cannot be expropriated.’); Z Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009).  

25 See *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, 14 July 2006, paragraph 47; *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, 6 February 2007, paragraphs 69–80, 267–69 (discussing potential application of local law with respect to property rights and interpretation of applicable treaties); *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41. See, e.g., *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, paragraph 162 (‘In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.’); *Georg Gavrilović and Gavrilović d.o.o. v. Croatia*, ICSID Case No. Arb/12/39, Award, 26 July 2018, paragraph 432 (holding same); *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, paragraph 705 (‘If no valid rights exist under domestic law, there can be no expropriation’).  

26 Some tribunals have held that whether an asset is capable of being expropriated is a separate question from whether that asset meets the definition of investment set forth in the applicable treaty. See, e.g., *Lone Pine Resources Inc. v. The Government of Canada*, UNCITRAL, Final Award, 21 November 2022, paragraph 503.  


29 See, e.g., Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Award, 3 June 2021 (holding that ‘the Tribunal has held that the 2008 Concession and Industrias Infinito’s other pre-existing mining rights did not qualify as “investments” of the Claimant under Article I(g) of the Treaty, because they are assets controlled indirectly by the Claimant through a host State enterprise that do not fall within the scope of the Treaty’s definition of investment. For the same reason, these assets do not qualify as investment that can be expropriated directly in breach of Article VIII of the Treaty’).  ~ Back to section

30 See, e.g., Georg Gavrilović and Gavrilović d.o.o. v. Croatia, ICSID Case No. Arb/12/39, Award, 26 July 2018; Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1.  ~ Back to section

31 ICSID Case No. ARB/06/2, Award, 16 September 2015, paragraph 239 (finding that the respondent’s revocation of the claimant’s concessions substantially deprived the claimant of the value of its investment – the shares that the claimant held in a company).  ~ Back to section

32 Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, 8 July 2016, paragraphs 272–73, 286 (the tribunal looked at the Uruguayan Trademark Law and the relevant treaty to determine whether claimants had a property right to trademark, finding that claimants have such a right, but denying the claimants’ indirect expropriation claim under the police powers doctrine and because the claimants only suffered a partial loss of its profits).  ~ Back to section

33 See, e.g., Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Final Award, 22 December 2003, paragraph 61 (citing the Norwegian Shipowners Claim for the proposition that international law recognises the possibility of expropriation of contractual rights); Saipem S.p.A. v. People’s Republic of Bangladesh, ICSID Case No. ARB/05/07, Award, 30 June 2009; but see, Accession Mezzanine Capital L.P. and Danubius Kereshkedohaz Vagyonkezelo v. Republic of Hungary, ICSID Case No. ARB/12/3, Award, 17 April 2015 (holding that ‘it is not possible to expropriate a pure contractual right because it is not a thing that has an independent existence from the personalized contractual relationship in which it is embedded’).  ~ Back to section


See, e.g., Oxus Gold plc v. Republic of Uzbekistan, UNCITRAL, Final Award, 17 December 2015, paragraph 301 ("right to formal negotiations cannot be subject to an "expropriation" in the sense of Article 5 of the BIT, because it lacks the nature of proprietary right, i.e. of "asset" in the sense of Article 5(2) of the BIT"); Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, paragraph 118 (finding no expropriation because it appears to the Tribunal that the Claimant never really possessed a "right" to obtain tax rebates upon exportation of cigarettes); Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award, 4 September 2020, paragraph 472 ("At best, Eskosol might argue that it was well positioned to eventually secure a legal right, but nothing in the Italian legislation transformed positioning to secure a future legal right into a legal right as such."

Eurus Energy Holdings Corporation v. Kingdom of Spain, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021, paragraph 256 ("Article 13 of the [Energy Charter Treaty], like other expropriation guarantees, is concerned with the protection of property interests, including certain legal rights to money or benefits, from seizure or taking, or with conduct equivalent thereto. It is not intended to protect the wider range of interests associated with the idea of reasonable or legitimate expectations.")

Emmis International Holding B.V. et al. v. Hungary, ICSID Case No. ARB/12/2, Award, 16 April 2014, paragraph 192.

PACC Offshore Services Holdings Ltd v. United Mexican States, ICSID Case No. UNCT/18/5, Award, 11 January 2022, paragraph 250.

Michael Anthony Lee-Chin v. The Dominican Republic, ICSID Case No. UNCT/18/3, Final Award, 6 October 2023, paragraph 354.


Cargill, Incorporated v. Republic of Poland, ICSID Case No. ARB(AF)/04/2, Award, 29 February 2008, paragraph 583.

id., at paragraphs 586–89.

UP (formerly Le Chèque Déjeuner) and C.D. Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Award, 9 October 2018, paragraphs 304–05.

ibid.

id., at paragraphs 352–54.


C McLachlan, L Shore and M Weiniger (footnote 47), at 295; see also B Appleton (footnote 47), at 38 (explaining that the US Supreme Court considered that ‘regulatory takings require the court to look to the impact of the regulation and to establish the existence of a substantial impact’); see also *Compañía del Desarrollo de Santa Elena SA v. Costa Rica*, Award, ICSID Case No. ARB/96/1, 17 February 2000 (the Santa Elena property, owned by Compañia del Desarrollo de Santa Elena, SA (CDSE), comprised more than 15,000 hectares of land, including 30km of Pacific Ocean coastline, a tropical dry forest and numerous rivers, springs, mountains and valleys. CDSE purchased the property in 1970 to develop portions of the tract as a tourist resort and residential community. On 5 May 1978, Costa Rica issued an expropriation decree for Santa Elena to convert the property into a national park. However, Costa Rica did not compensate CDSE for the expropriation and did not take title to the property until this tribunal issued its arbitral award); K I Juster, ‘The Santa Elena Case: Two Steps Forward, Three Steps Back’, 10 *Am. Rev. of Int’l Arb.* 3, 371 (1999).

*Siemens A. G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, paragraph 270.


C McLachlan, L Shore and M Weiniger (footnote 47) (citing *Pope & Talbot*).

*Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, paragraph 809.


*Pope & Talbot Inc. v. The Government of Canada*, Interim Award, 26 June 2000, paragraphs 81–86.

id., at paragraph 96.

id., at paragraphs 100–05.

*Renergy S.â.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, paragraph 1003.
Substantive Protections: Expropriation

EXPLORE ON GAR
72 See *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paragraphs 291–301, 305; see also *Glencore Finance (Bermuda) Ltd v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Award, 8 September 2023, paragraph 201 (holding that if a state takes a measure in the lawful exercise of its police powers, no expropriation has taken place at all). Tribunals have also considered that a court judgment could constitute an expropriation. In those cases, however, the finding of a 'judicial expropriation [is] contingent on a finding of denial of justice' or at least subject to a standard similar to that of denial of justice claims. *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, paragraph 1202; *PACC Offshore Services Holdings Ltd v. United Mexican States*, ICSID Case No. UNCT/18/5, Award, 11 January 2022, paragraph 229. ~ Back to section

73 See e.g., *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, paragraphs 279–88; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the tribunal on Jurisdiction and Merits, 3 August 2005, Part IV.D, paragraph 7 ('[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.'); *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paragraphs 237–40 ('In sum, a general regulation is a lawful act rather than an expropriation if it is non-discriminatory, made for a public purpose and taken in conformity with due process'). ~ Back to section


75 ICSID Case No. ARB/10/7, Award, 8 July 2016; for an extensive discussion of the *Phillip Morris v. Uruguay* case, see P Ranjan, ‘Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay’, 9 *Asian J. of Int’l L.* 98 (2019). ~ Back to section

76 ICSID Case No. ARB/10/7, Award, 8 July 2016. ~ Back to section


79 See *Eco Oro*, paragraphs 623–99. ~ Back to section


82 At the time of the request for arbitration, the company was called TransCanada Corporation. See ‘About our name change’, www.tcenergy.com/TC-Energy.


84 TransCanada Corporation & TransCanada PipeLines Limited v. United States of America, ICSID Case No. ARB/16/21, Request for Discontinuance pursuant to Rule 34(1), 23 March 2017; TransCanada Corporation & TransCanada PipeLines Limited v. United States of America, ICSID Case No. ARB/16/21, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding, 24 March 2017.


87 ibid.

88 See e.g., K Tienhaara (footnote 81); K Miles, ‘Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes’, 1 Climate L. 63, 76 (2010) (‘It is the emergence of this approach in investor-state arbitral jurisprudence that causes concern for the implementation of new environmental protection measures, including new climate change mitigation regulation.’). The tribunal in Rockhopper v. Italy analysed a law banning offshore oil and gas production within a certain distance of Italian shores. The tribunal rejected Italy's police powers defence, noting that the Italian authorities had already made a finding of the project's environmental compatibility prior to the passing of the law at issue. Rockhopper Italia S.p.A. et al. v. Italian Republic, ICSID Case No. ARB/17/14, Award, 23 August 2022, paragraphs 6, 152.


K Gordon, J Pohl and M Bouchard (footnote 90), at 5, 10. Some scholars have also questioned the prudence of these provisions, arguing that they may open the door for states to abuse environmental regulation to expropriate foreign investors’ property. See, e.g., J Marlés, 'Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law', 16 J. Transnat’l L. & Pol’y 275, 329–35 (2007). Back to section

Eco Oro Minerals Corp. v. The Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 10 September 2021. Back to section

Eco Oro v. Colombia, Decision on Jurisdiction, Liability and Directions on Quantum, paragraphs 96–104. Back to section

The páramo is a high mountain ecosystem located in the Andes of South America, between the upper limit of the high Andean forests and the lower limit of the eternal snows (between 3,000 and 4,000 meters). Back to section

Eco Oro v. Colombia, Decision on Jurisdiction, Liability and Directions on Quantum, paragraphs 110–73. Back to section

id., at paragraph 1. Back to section


Eco Oro v. Colombia, Decision on Jurisdiction, Liability and Directions on Quantum, paragraphs 440, 623. Back to section

id., at paragraph 624. Back to section

ibid. Back to section

id., at paragraphs 627, 635 (emphasis added). Back to section
103 id., at paragraph 634; see also Tecnicas Medioambientales Tecmed SA v. United Mexican States, ICSID Case No. ARB (AF)/00/2 I, Award, 29 May 2003 (the tribunal awarded compensation under a BIT between Mexico and Spain, in respect of a refusal by a Mexican state agency, the National Institute of Ecology, to renew a licence to operate a landfill site).  ~ Back to section  

104 Eco Oro v. Colombia, Decision on Jurisdiction, Liability and Directions on Quantum, paragraph 629 (emphasis added).  ~ Back to section  

105 ibid.  ~ Back to section  

106 id., at paragraph 821.  ~ Back to section  

107 I V Timofeyev, J R Profaizer and A J Weiss, 'Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty', Global Arbitration Review, 10 November 2020, www.globalarbitrationreview.com/guide/the-guide-energy-arbitrations/4th-edition/article/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty. See also Renergy S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18, Award, 6 May 2022, paragraph 1006 (noting that, in most cases challenging Spain’s measures regarding the renewable energy sector, the claimants did not claim expropriation or they withdrew the expropriation claim during the course of the proceedings).  ~ Back to section  

108 Eco Oro Minerals Corp. v. The Republic of Colombia, ICSID Case No. ARB/16/41, Partial Dissenting Opinion (Horacio A Grigera Naón).  ~ Back to section  

109 id., at paragraphs 31–32.  ~ Back to section  

110 id., at paragraph 28 (emphasis in original).  ~ Back to section  

111 Eco Oro Minerals Corp. v. The Republic of Colombia, ICSID Case No. ARB/16/41, Partial Dissent of Professor Philippe Sands QC, 9 September 2021.  ~ Back to section  

112 id., at paragraph 1.  ~ Back to section  

113 id., at paragraphs 32–33.  ~ Back to section  

114 id., at paragraph 34.  ~ Back to section