"State Regulatory Measures under CETA"

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Introduction

In the current international investment law, the accurate determination of the regulatory measures and its consequences are one of the main problems. Despite the fact that the regulatory measures and the regulatory expropriation are coincided and have the same meaning\(^1\), we usually use the term regulatory measures maybe because the term expropriation inevitably refers to the compensation, which is the dominant feature of its concept, while the regulatory measures are non-compensable and this is the principal difference with the indirect expropriation.

In the Feldman Case\(^2\), the arbitration tribunal adumbrated the outline of the facets of this issue. According to the tribunal,\(^2\) the states should have the capability to serve the wide public purpose, for example through the protection of the environment and the establishment of tax regimes or the amendment of the existing ones, the granting or withdrawal of subsidies and the increase or reduction of the tariffs. These reasonable government actions would not be achieved if the state has the obligation to pay compensation. In the merits, the regulatory measures juxtapose, on the one side, with the rights, which are affected and on the other side, with the right of the state to exercise its policy power and especially to legislate.\(^3\)

The Canadian government in the Ethyl Case\(^4\) drew a distinction line between the expropriation-taking of property and the regulations. According to Canada, only the former is compensable, whilst the latter are non-compensable, as well as they fall under in the framework of the <police power>.\(^5\) Canada alleged that it acted for the protection of the health and the environment, so its actions did not constitute an expropriation and subsequently there is no obligation for compensation.\(^6\)

\(^1\) In the Jurisprudence of the arbitral tribunals these two terms are used interchangeably without any difference
\(^2\) Marvin Feldman v. United Mexican States ICSID Case No. ARB(AF)/99/1 Award 16 December 2002 par. 103 available at: www.naftaclaims.com
\(^3\) P. Glavinis International Economic Law Sakkoulas Publications 2009 pag. 638
\(^4\) There was no award on the merits of the dispute because Canada chose to settle the case out of the court.
\(^5\) K. Banks NAFTA’s Article 1110 – Can Regulation Be Expropriation Law and Business Review of The America Vol. 5 1999 pag.509
\(^6\) T. Wilson Trade Rules Ethyl Corporation v. Canada (NAFTA Chapter 11-Part I) Claim and Award on Jurisdiction Law and Business Review of The America Vol. 6 2000 pag.63-64
The regulatory measures, as an expression of state power to regulate for the public interest, are in conflict with the rigid aim of the investment protection, as a concept, seems to be an accepted principle of international investment law. The draft convention on the International Responsibilities of States for Injuries to Aliens by the Harvard Law School in the article 4 par. 2 exempted from the category of the international offences the necessary measures, which the state took in order to maintain the public order, public health and morality according to the laws, have been enacted for these purposes insofar these measures are not taken against the aliens in a way deviating from the relevant legislation or the principles of justice, which characterize the application of these measures. Similarly the draft exempted the neutral measures.

The Multilateral Investment Guarantee Agency (MIGA) in the analysis of the covered risks excludes from the field of the expropriation the non-discriminatory measures of general application, which takes the governments in order to harmonize the economic activities in their territory.

We can also find the notion of the regulatory measures in the frame of European Law. In the first Protocol of the European Convention of the Human Rights the notion of this form of measures looks to be inherent as the Protocol which includes three distinct and interrelated rules. The first rule is the general guarantee of the respect of the property of every person. This rule provides protection from the state’s interventions. The second rule defines the conditions, under which a person can be deprived from its property and the third rule is related with the measures, which control the use of the property and provide an additional assurance for the guarantee of the property, such as the control of the property identifies the power of the state to enact laws interfering in the sphere of the property and they are necessary for the public purpose.

The regulatory measures have particular significance in the energy sector. The energy and specifically its forms, the methods of the extraction, the processing and the exploitation are closely linked with the environment and the health. Since the protection of the environment and the health are rights and simultaneously obligations of the state, the interaction between the protection of them and the business function of an investment in the energy field is obvious.

The demarcation of the problem

Despite the fact that the states understand and acknowledge the necessity of the regulatory measures as a fact inherent to the police power, however they cannot agree with the acceptance of the appropriate criteria, which could contribute to the elucidation of the pertinent term and the distinction of them from the other forms of expropriation.

The core of the issue and the crucial element is the precise delimitation and the exact borderline between the indirect expropriation and the regulatory measures. The international law

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7 M. Sorharajah Ibid pag 214
9 Multilateral Investment Guarantee Agency Chapter III, Article 11
has not determined with a comprehensive and definitive manner what kind of regulations are permissible and commonly accepted and subsequently, which state measures fall under the field of the regulatory power of state and thus are non-compensable.\textsuperscript{12}

The negotiators of Multilateral Agreement on Investments (MAI) dealt with the issue of the distinction between Indirect Expropriation and Regulatory Measures in the report by the chairman of the Negotiating Group\textsuperscript{13}. In the draft of the Multilateral Agreement on Investments (MAI) there is an explicit reference to the regulatory measures. More specifically, according to the MAI, the state “A Contracting Party may adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns, provided such measures are consistent with this agreement”\textsuperscript{14} while according to the interpretative note to article 5 with the title “Expropriation and Compensation”, “This Article is intended to incorporate into the MAI existing international legal norms. The reference to expropriation or nationalisation and "measures tantamount to expropriation or nationalisation" reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments. It is understood that default by a sovereign state subject to rescheduling arrangements undertaken in accordance with international law and practices is not expropriation within the meaning of this Article\textsuperscript{15}. Finally the Ministers in the framework of the negotiations issued a statement. According to this\textsuperscript{16} “The MAI would establish mutual beneficial international rules which would inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory power would not amount to expropriation.”

The fact that there is no definition for the indirect expropriation makes the situation more complicated. The state measures, which can affect an investor and its investment vary in a high degree, in order to fall under a certain category, so eminent arbitrators, consider that a precise definition of the indirect expropriation is not feasible\textsuperscript{17}.

The indirect expropriation can be understood by the form of a negative influence of the state measures to the property rights of an investor, which do not end up to the transfer of the ownership from the investor to the state, but to the deprivation of the investor from the data which constitute the investment.\textsuperscript{18}

\textsuperscript{12} Saluka Investments BV (The Netherlands) v. The Czech Republic The Matter of an Arbitration under the UNTRICAL Arbitration Rules 1976 Partial Award 17 March 2006 par. 263

\textsuperscript{13} OECD Indirect Expropriation and the Righty to Regulate in International Investment Law 2004 pag.9

\textsuperscript{14} The Multilateral Agreement on Investment (Report by the Chairman to the Negotiating Group0 DAFFE/MAI(98)17 Annex 3 article 3

\textsuperscript{15}Ibid pag. 15

\textsuperscript{16} UNCTAD Series on Issues in International Agreements II 2012 Expropriation pag. 81-82

\textsuperscript{17} Z. Alqrashi Indirect Expropriation in the Field of Petroleum The Journal of World Investment & Trade Vol. 5 2004 pag.904-905

\textsuperscript{18} Parkening – Compagniet AS v. Republic of Lithuania ICSID Case No. ARB/05/8 Award 11 September 2007 par. 437 available at: https://icsid.worldbank.org

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For the ascertainment of the regulatory measures and the differentiation from the indirect expropriation four basic approaches have been developed\textsuperscript{19}: According to the first, the dominant feature is the impact of the measures, the intention of the state is not a condition. This approach is also known like “Sole Effect Doctrine”. The second focuses on the character and the purpose of the measures\textsuperscript{20}. The third adopts a combination from the economic impact of the measures and the appropriation of the investment of the host state. This approach is closed linked with the principle of the unjust enrichment. It has the advantage that it can restore the equilibrium, but it cannot recant the main weakness of the “sole effect doctrine”, which is the determination of the limits of the economic impact of the measures on the investor. At the same time, this approach, although it induces the notion of the appropriation \textsuperscript{21} of the investment by the state like a condition, interdependently of the result of the measures, it does not specify the link between these two notions. The Fourth approach combines various elements, is flexible and operates in the logic of the case by case examination. It does not ignore the impact of the measures nor the character of them, but simultaneously recognizes the need of the achievement of a balance between the legal expectations of the investor and the legitimate state right to legislate for the public purpose\textsuperscript{22}.

The “sole effect doctrine” and the “purpose doctrine” are the two approaches which have been at the center of the conflict. The tension and the underlying topics between these two doctrines are printed in the well-aimed questions of Rudolf Dolzer. According to Dolzer\textsuperscript{23}: “Is there any specific point on the spectrum of the many diverse effects on property of governmental measures at which and beyond which compensation is required regardless of the objective and the nature of the governmental measure? Is a balancing of interests which weighs the effect on the property against the objective of the governmental measure always required?”

Regarding to the third approach, the Doctrine of Unjust Enrichment is not unknown in International law, as well as it was used by Jimenez De Arechaga like the base for the specification of the compensation in the case of the expropriation. According to this Doctrine, the base for the determination of the compensation should not be the loss of earnings of the foreign investor but the benefits, which obtain the state, which proceeds to the expropriation\textsuperscript{24}. The theory of the unjust enrichment does not explain\textsuperscript{25} why in the case of large scale expropriation, which aims to a broader social program, the compensation is lower than the compensation in an isolated case of expropriation. The gradation of the compensation according to the specific facts of the

\textsuperscript{20} It is also known as <Purpose Doctrine>
\textsuperscript{21} In the Case Lauder v. Czech Republic, the tribunal examined the element of the appropriation and the obtainment of benefits from the state for the typesetting of the expropriation. Ronald S Lauder and Czech Republic Final Award in the matter of an UNTRICAL Arbitration 3 September 2001 par. 2013
\textsuperscript{22} This proposal seems to confront the problem with a versatile and holistic manner. The features of this approach are reflected in the adjustments of CETA for the distinction of the forms of the expropriation and the ascertainment of the indirect expropriation.
\textsuperscript{23} R. Dolzer , F.Bloch Indirect Expropriation: Conceptual Realignments? In International Law Forum de Droit International Vo; V Issue 3 pag.158-159
\textsuperscript{24} E. Jimenez De Arechaga State Responsibility for the Nationalization of Foreign Owned Property New York University Journal of International Law and Politics Vol. 11 No.2 1978 pag. 182-183
expropriation implies the difficulties of the unjust enrichment to provide adequate justification for the non-compensable measures.

The fourth theory operates, as it is described above, synthetically and tries to estimate the factual context of the dispute in every case, avoiding the adoption of doctrinal considerations. It is reflected on high degree in the settings of CETA for the regulatory measures and the indirect expropriation.\(^{26}\)

In the following paragraphs the basic features of the Sole Effect Doctrine and the Purpose Doctrine will be analyzed.

**The “Sole Effect Doctrine”**

According to this doctrine there is an indirect expropriation, if the state measures have as a result the substantial deprivation of the investor of its property or the substantial loss of the economic value of the property.

It is obvious that the state interference must have some characteristics and especially it must exceed a certain limit in order to be considered that it constitutes an indirect expropriation.\(^{27}\) The problem in this case is the fact that the jurisprudence has not elucidated the requisite degree of the state interference in the property of the investor\(^{28}\) in order to ascertain the existence of the expropriation.

A classical case, where the arbitration tribunal aligned with the approach of the “Sole Effect Doctrine” was the case Santa Elena v. Costa Rica. Although it was a case of direct expropriation, the reasoning of the tribunal in the matter of amount of the compensation, was related with the subject under consideration. According to the tribunal, the obligation of the environmental protection although it has an international character, this fact does not change the situation. The measures even if they operate for the benefit of the society as a whole, they do not recant the obligation of state to pay compensation. When the property is expropriated even for national or international environmental reasons the obligation for compensation remains.\(^{29}\)

In the case Metalclad v. Mexico, the ascertainment of the expropriation relied on the sole effect doctrine. The contentious issue was the refusal of a local authority of Mexico to grant a permission for the construction and operation of a landfill of hazardous waste facilities (while the foreign investor has assured a federal permission) and the issue of an Ecological Degree, declaring a Natural Area for the protection of rare cactus. The Natural Area encompasses the area of the landfill.\(^{30}\) According to the tribunal, the notion of the expropriation constitutes in disguised interferences, which have as a result the deprivation of the investor from the use of its property as a whole or in a significant part\(^{31}\), or the reasonable expected economic benefits of the property.\(^{32}\)

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26 See Below pag.16-17  
27 As we say above, the deprivation or the loss of the value must be substantial. See above pag. 6  
28 Tokios Tokeles v. Ukraine ICSID Case No.ARB/02/18 Award 26 July 2007 par.120 available at: https://icsid.worldbank.org  
29 Compania Del Desarrollo de Santa Elena and The Republic of Costa Rica ICSID Case No. ARB/96/1 Final Award 17 February 2000 par. 71-72 available at: https://icsid.worldbank.org  
30 Metalclad Corporation and the United Mexican States ICSID Case No. ARB(AF)/97/1 Award 30 August 2000 available at: https://icsid.worldbank.org. For the factual incidents of the dispute see par. 28-59  
31 The term “whole” or “significant” part is clearly different from the term “substantial” which is used by the majority of the arbitration tribunals to specify the kind of the deprivation, demanded for the establishment of the indirect
Ecological degree had as a result the ban of the operation of the landfill forever. The Tribunal considered that there is no reason to decide about the motivation or the intention of the issuance of the Ecological Degree.

In the case Techmed v. Mexico the arbitration tribunal considered that in order to judge if the measure is tantamount to indirect expropriation it must first determine if the investor has been radically deprived from the economical use and enjoyment of its investment. This determination is very important as well as the main element of the distinction between the regulatory measures, which is an ordinary expression of the exercise of the state’s power which entails a decrease in the assets or the rights of the investor whilst the indirect expropriation has as a result the deprivation of those assets and rights of any real substance. The intention of the state is less important than the effects of the measures on the investor or the benefits which arise from the assets.

It is evident that the effect of the measure and the degree of its severity is a critical element for the specification of the impugned measure. The controversial issue is if the effect of the state measure is the only and exclusive factor which an arbitration tribunal must take into account for the ascertainment of the form of the expropriation. The advantage of this approach is its flexibility and the capability to comprise arbitrary and unlawful state measures.

The main weakness of the sole effect doctrine is that it seems to create an unequal situation during the assessment of the facts which constitute the dispute. It cannot contribute to the production of a clear distinction between the indirect expropriation and the regulatory one, insofar tends to absolutely ignore the purpose and the character of the measures. On the other side, one opponent of this doctrine can support that the indirect expropriation can be examined only by the reference to its effects, otherwise the notion of the indirect expropriation renders to be fraudulent.

The “Purpose Doctrine”

In the well-known Methanex case, the arbitration tribunal describes the elements which a state measure should have so as to fall under the notion of the non-compensable regulatory measures. The dispute arose from an Executive order and the Regulations of California, which prohibited the use of the MTBE, a gasoline additive because it was harmful to the environment.
Methanex does not produce the MTBE, but the methanol, which was a key component of MTBE.\textsuperscript{42} Under the case of Methanex view, the measures which were adopted by California, were discriminatory and aimed to the promotion of the producers of ethanol.\textsuperscript{43} According to the tribunal, a regulation which does not have any discriminatory character, aims first to the promotion of the public purpose, second is enacted according to the due process and third affects, among others, a foreign investor or its investment, is not an expropriatory act, which has as a result the payment of compensation, except for the case, where the host state has undertaken, as far as the foreign investor is concerned, specific commitments, that will abstain from such kind of regulatory measures.\textsuperscript{44} The tribunal dismissed Methanex’s allegation that the measures did not constitute expropriation.\textsuperscript{45}

For some, the Methanex Case was considered to have drawn a sharp line in relation with the expropriation which demands the payment of compensation.\textsuperscript{46} But the award of the case has been criticized as to its legal foundation. The decision repeated and duplicated the three\textsuperscript{47} of the four conditions,\textsuperscript{48} which are demanded for the legality of the expropriation according to the article 1110 of NAFTA and International Custom Law. Under the rational of the Methanex Decision, as it is reflected above, the notion of the compensation will be meaningless.\textsuperscript{49}

Beyond these specific observations, the arbitration tribunal in the dispute El Paso v. Argentina confronted with skepticism the reasoning in the Methanex Case. It accepted\textsuperscript{50} in principal that a general, no-discriminatory regulation measure, which was adopted according to the due process and the rules of the good faith, does not entail the payment of compensation. But the tribunal dissent with the view, that a general state regulation, which interferes in the rights of foreign investors, could never be considered as an expropriation because it is an expression of the state sovereign or the policy power.\textsuperscript{51} After a detail examination, the tribunal ended up to the conclusion\textsuperscript{52} that the decisive factor for the expropriation is the substantial deprivation of the investor not only from the benefits, which stem from its investment, but also from the use of the investment. The mere loss of the investment’s value does not entail the interference in the control and use of the investment.

The supremacy of the public purpose in order to draw the boundaries between indirect expropriation and non-compensable regulatory measures is not undisputable. According to the tribunal in Pope & Talbot Case, “a blanket exception for regulatory measures would create a gaping

\textsuperscript{42} Ibid Part II – Chapter D par. 2-3
\textsuperscript{43} Ibid Part II – Chapter D par. 24-25
\textsuperscript{44} Ibid Part IV – Chapter D par.7-9
\textsuperscript{45} Ibid Part IV – Chapter D par.15
\textsuperscript{46} H. Mann The Final Decision in Methanex v. United Stated: Some New Wine in Some New Bottles International Institute for Sustainable Development August 2005 pag.7
\textsuperscript{47} The public purpose, the no discrimination and the due process
\textsuperscript{48} The obligation for compensation although it is referred as a prerequisite for the expropriation, in practice the compensation renders to be the consequence of the expropriation. P. Glavinis International Economic Law Publications Sakkoula 2009 pag.647
\textsuperscript{49} J. Elcombe Regulatory Powers vs Investment Protection under NAFTA's Chapter 1110: Metaclad, Methanex, and Glamis Gold University of Toronto Faculty of Law Review 2010 Vol. 68 (1) pag.85
\textsuperscript{50} El. Paso Energy International Company v. The Argentina Republic ISCID Case No.ARB/03/15 Award 31 October 2011 par. 240
\textsuperscript{51} Ibid par. 234
\textsuperscript{52} Ibid par. 256
loophole in international protections against expropriation”53. The arbitration tribunal in the dispute Vivendi v. Argentina considered that “if the public purpose automatically immunizes the measure from being found to be expropriatory, then they would never be a compensable taking for a public purpose”.54 Under another perspective, the right of the state to regulate for the public purpose is not unlimited and must have limits.55 According to the supporters of the “Sole Effect doctrine” the police powers, which is the cardinal fact of the “Purpose Doctrine” should be considered as the expression of the general law of the international law that the state has the right to act with the way it wishes unless there is a rule which prohibits this act.56

It is true that, the criterion of the purpose has an inherent weakness, as from its nature the notion of the public purpose is very wide and at the same time every state has the right to specify unilaterally the politics which considers as matters of public purpose. It is not accidental the fact that the arbitration tribunals were rather hesitant to define the public purpose. This was due to the extent of the concept of the public purpose and to the fact that the others states cannot reexamine this notion as it is defined by each state.57 A general application of the purpose doctrine without further specialization of its components includes dangers. Taking into account the fact that some regulatory measures will lead to the payment of compensation while some others will not, the taxonomy of the content of the public purpose in relation with its impact to the characterization of the kind of the expropriation is indispensable. The answer probably to the question whether a regulatory measure equates to the indirect expropriation depends on the general international acceptance of the specific measure, which serves the public purpose.58

**Concluding Remarks on the “Sole Effect Doctrine” and the “Purpose Doctrine”**

Both Doctrines seem to move on different directions. While the Sole Effect Doctrine seems to favor the investor and the investment, the Purpose Doctrine seems to favor the state, but the rigid and strict application each of them can lead to unfair results. Additionally, the doctrinal nature of these approaches tends to ignore and not understand not only the versatile character of an investment relation but also the fact that in the case of a dispute, the aim is the counterbalance between the conflicts interest of the investor and the Host State.

The variety of the above criteria and the fluctuations of the arbitral jurisprudence, as mentioned above, indicates that they cannot reinforce the predictability of the international investment law. So under these circumstances, the legal instruments, which govern the investment relationship, are very important insofar they regulate these issues.

53 Pope & Talbot Inc and The Government of Canada In the Matter of an Arbitration Under Chapter Eleven of the North America Free Trade Agreement Interim Award 26 June 2000 par. 99 This point of view seems to be in a straight contrast with not only the public purpose doctrine but also with the notion of the no-compensable regulatory measures as a principle of international investment law.

54 Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentina Republic ICSID Case No. ARB/97/3 Award 20 August 2007 par. 7.5.21

55 ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary ICSID Case No. ARB/03/16 Award October 2 2006 par. 423


57 A. Reinisch Standards of Investment Protection Oxford University Press 2008 pag.179

58 A. Weiner Indirect Expropriations: The Need For Taxonomy of Legitimate Regulatory Purposes International law Forum de droit International Vol. 5 2003 pag.172 and 175
The first generation of the BITs but also regional and sectoral agreements, like NAFTA and Energy Charter Treaty, were generally referred to the matter of the expropriation without further specification of its forms. They usually include the terms direct or indirect expropriation or measures tantamount or equivalent to expropriation. According to one view, the terms measures tantamount or equivalent to expropriation, which is used in NAFTA and Energy Treaty, are intended to encompass the notion of regulatory measures as neither of these treaties can ignore the topic of the regulatory expropriation.

Beyond the terminology, the primary aim of the BITs was the inclusion of the elements, which were needful for the legitimacy of the expropriation. The lack of comprehensive provisions and precise criteria, as much as this is possible, concerning the distinction between the indirect expropriation and the regulatory measures, did not permit the induction of secure conclusions. The globalization of the economy, the importance of the foreign direct investments and the increasing flow of them, made clear that the confrontation of the topics which could be arisen in relation with the types of the expropriation, required a more detailed adjustment.

The FTAs and the next generation of BITs attempt to give more clarity to the notion of the expropriation. Under this notion, they try to do this in two ways. First, they include texts in order to make clear that the obligations regarding expropriation intent to reflect the protection, which are provided by the customary international law and second, the clarifications are accompanied by guidelines in order to specify the meaning of the indirect expropriation. The first clauses, which aimed to the elucidation of the indirect expropriation and the institutionalization of the no-compensable measures, were included in treaty models of the USA and Canada. The expropriation clauses are complemented by explanatory annexes, which comprise a list of factors operating as indicators for the arbitration tribunals, in order to determine when the controversial measure constitutes an indirect expropriation. The provisions of CETA about the indirect expropriation and the criteria for the distinction between this kind of expropriation and the no-compensable measures have been inspired by these annexes.

The adjustments of CETA for the Regulatory Measures.

The first reference to the regulatory measures is in the preamble of CETA. According to this, «RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties’ flexibility to achieve legitimate policy objectives, such as

59 Article 1110 NAFTA
60 Article 13 Energy Charter Treaty
62 A classical expropriation clause, before 2000, ordinarily included the reference to the public purpose, the non-discriminatory character of the measure, the due process, the compensation and its hallmarks. See Canada-Ukraine BIT (1994) article VIII, Canada-Poland (1990) article VI, Bulgaria-Greece BIT (1993) article 4, Bulgaria-United Kingdom article 7, Bulgaria-Portugal (1993) article 4
63 It would be out of the reality if we want to establish absolute strict criteria, which would fit in any dispute. The proper approach of the problem presupposes certain but flexible criteria, which can be applied to a large and undefined number of cases and be adapted to the peculiarity of each case.
64 B. Hanotiau Are Bilateral Investment Treaties and Free Trade Agreements drafted with sufficient clarity to give guidance to tribunals American University Law Review Vol. 53 2016 pag.331
65 S. Nikiema Indirect Expropriation International Institute for Sustainable Development March 2012 pag.9
66 Ibid Nikiema pag.11
public health, safety, environment, public morals and the promotion and protection of cultural diversity.» From the preamble, it is unequivocally the position of the regulatory measures to the legal order, which is established by the CETA.

According to Article 8.9 par. 1 and 2 of CETA under the title “Investment and Regulatory Measures” “1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.”

Regarding issues of terminology, we must point out two topics. First, the use of the term «reaffirm» is not random but demonstrates the fact that the notion of the regulatory measures is a component of the international investment law and encases a rule with international customary character. Second, the term «for reasons regarding the public purpose» perhaps would be more appropriate than the term «policy objectives», as it is used in the text, because the former is more objective and neutral than the latter, which by nature has an intense political complexion, does not suit with the depoliticized character of the international investment regime. Beyond these semantic differentiations both terms have the same meaning.

In the essence of the provisions, the article includes a general clause, as it results from the term «to achieve legitimate policy objectives» following by a list, which illustrates the notion of the policy objectives. The term «such as», which is used in order to describe the expressions of the policy objectives, makes evident that the list is indicative and not exclusive. It is apparent that the illustration of the policy objectives cannot be comprised by a close number of factors which operate as indicators of the police objectives. The terms policy objectives and public purpose have a very wide content.

Under the international law, there are two wide categories of measures, which fall under the regulatory competence of the state and they might justify the non-payment of compensation. The one category is the protection of the public order and morality. The second one is the protection of the human health and environment. The state taxation could be considered as a case of non-compensable measures.

We must pinpoint that the notion of the policy objectives or the public purpose is not static. It is a changing notion at the passage of time closely connected with the evolution of the state's role.

67 In the preamble the term recognizing is used instead the term reaffirm. The two terms are conceptually different as well as the recognition implies something less than the reaffirmation.
68 See above pag. 2
69 According to the tribunal in the Saluka Case « in the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary international law today» Saluka Investments BV (The Netherlands) v. The Czech Republic The Matter of an Arbitration under the UNTRICAL Arbitration Rules 1976 Partial Award 17 March 2006 par. 262 available at: www.italaw.com/cases/documents
70 A.Newcombe The Boundaries of Regulatory Expropriation in International Law ICSID Review 2005 Vol. 20 N. 1 pag. 23
According to Sornarajah 71 “In later times, states became interventionary. The welfare state as a provider of facilities and services to the community intervened regularly in the market place. There concerns were introduced through the interaction of international and domestic norms. Legal areas, nonexistent in the past, developed as a result of the concern of societies with new issues that confronted them globally as well as domestically. These related to the promotion of human rights, the protection of the environment, the recognition of labour rights, the promotion of corporate responsibility, prevention of corruption, taxation of excessive profits, protection of cultural property, the conservation of indigenous rights to land, and the protection of the health and welfare of society.” This point of view reveals the multidimensional character of the policy objectives. The drafters of the CETA beyond the classic issues of the public health, the safety, the environment and the public moral added the social or consumer protection or the promotion and protection of cultural diversity. The consumer’s protection could include a variety of acts and its field can change from state to state, as it is defined according to the needs, which want to serve every state, and is related with the level of the economic and social system of every state’s governance.72

The cultural diversity is a particular and very sensitive case, as it results from the experience of the MAI. In the framework of MAI’s negotiations - where the prospect of the cultural creation’s incorporation to the rational of the open economy caused a lot of reactions from the France Government and the European states - led to the proposal from the French Government of the inclusion of a cultural exception clause. The relevant clause redrafted from the European Parliament. According to this, any provision of the MAI’s agreement could not be interpreted in way that it prevents every part from receiving any measure to regulate the investments of the foreign enterprises and the exercise of their activities.73

CETA refers to this issue in its preamble defining that: «AFFIRMING their commitments as parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, done at Paris on 20 October 2005, and recognising that states have the right to preserve, develop and implement their cultural policies, to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and to preserve their cultural identity, including through the use of regulatory measures and financial support». The protection and the maintenance of the cultural diversity is a common aim both in the clause of the European Parliament and the preamble of CETA. The direct connection between the cultural diversity and regulatory measures in the preamble and the article 8.9 of the text clearly indicate the significance which they have.

The express reference to the social or consumer’s protection and the cultural diversity, as two more specific manifestations of the policy objectives, has significant importance for two basic reasons. The first one is the illustration of the policy powers in CETA’s text which expands in a high degree the scope of the setting and the second one is that, at the same time, it prevents the

71 M. Sornarajah. Resistance and Change in the International Law on Foreign Investment Cambridge 2015 pag.212-213
72 The states of the European Union and Canada has common economic and social system of governance as well as they operate according to the democratic values and the principles of open markets. More specifically between the European Union’s states there is even more great uniformity in the social and economic level because of the harmonization of their legislation through the regulations and the directives.
73 P. Stangos The draft text of the Multilateral Agreement on Investment: A review of the most significant provisions in the light of the criticism forwarded by the Civil Society at: The legal regime of international investments. The Draft Multilateral Agreement on Investment. Edited by P. Stangos, A. Bredimas Sakkoulas Publications Athens-Thessaloniki 2000 pag.96-98
disagreements of the parties about the validity of the notions, which constitute the police power and are explicitly defined.

**The distinction between the regulatory measures and the indirect expropriation under CETA**

As we mentioned above, the main problem is the border between the regulatory measures and the indirect expropriation\(^{74}\) which has as a result the deployment of different approaches\(^{75}\) for the criteria, which can be used. Under these circumstances, each effort for the overall consideration of the contentious issue premises the assessment of the factors, which constitute the indirect expropriation and subsequently the delimitation of them in relation with the regulatory measures. Any setting which would not have taken into account this relation would be deficient.

According to par. 2 of article 8.9 in the frame of the regulatory measures, the amendment of a law - in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits - does not amount to a breach of an obligation under the section of the Investment Protection, so it cannot equate with an indirect expropriation since the adjustment of the expropriation falls under the field of the specific section. In the essence, this paragraph sets a general rule according to which the negative impact of a state measure on the investment does not recant the character of this measure as a regulatory one.

The Explanatory Annex 8-A under the title Expropriation in the paragraph 1 describes the features of the indirect expropriation and gives a definition of this and in paragraph 2 includes a factor’s list, which can be used in order to find if an indirect expropriation have been occurred. According to this « 1.…. (b) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure. 2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors: (a) 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; (b) the duration of the measure or series of measures of a Party; (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and (d) the character of the measure or series of measures, notably their object, context and intent».

The paragraph 3 of the Annex confirms the right of the states to take regulatory measures as they are defined in the preamble and the Article 8.9 and sets the limits of their legitimacy. If the measure outstrips these limits it can be considered that it falls under the category of the indirect expropriation. More specifically, according to par. 3 «For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations fact that the article does not specify the degree or the quality characteristics of the negative impact».

\(^{74}\) See above pag.3
\(^{75}\) See above pag.4-5
As we said above, the annex of CETA has been influenced by the Canadian and the United States Model BITs. There are a lot of similarities among CETA, the Canadian and the United States Model BITs but there are significance discrepancies too. The first and major difference is that, while CETA includes a definition of the indirect expropriation through an inductive process, the other two models are referred to the indirect expropriation without a definition of this notion. The second difference is that CETA encompasses one additional criterion, the duration of the measures or series of measures, for the ascertainment of the indirect expropriation in relation with the Canadian and the U.S. Model BIT.

A first Comparison between the Article 8.9 and the Annex 8-A

The crucial issue for the regulatory measures is the elucidation of the elements, which compose its notion and the understanding of this as a totally separate category from the indirect expropriation. The difficulty of this attempt is reflected in the dispute Generation Ukraine v. Ukraine. According to the tribunal “It would be useful if it were absolutely clear in advance whether particular events fall within the definition of an “indirect” expropriation. It would enhance the sentiment of respect for legitimate expectations if it were perfectly obvious why, in the context of a particular decision, an arbitral tribunal found that a governmental action or inaction crossed the line that defines acts amounting to an indirect expropriation. But there is no checklist, no mechanical test to achieve that purpose. The decisive considerations vary from case to case, depending not only on the specific facts of a grievance but also on the way the evidence is presented, and the legal bases pleaded. The outcome is a judgment, i.e. the product of discernment, and not the printout of a computer program”. So in order to proceed with safety in the distinction between the contentious issues the comparison of their definitions or hallmarks, as they are imprinted on the text, are inevitable.

The article 8.9 determines the regulatory measures in relation with the pursuit of legitimacy objective policies. Under these circumstances, the regulatory measures are characterized by a high degree of subtraction. The fact that the negative impact of the measure, which interferes with the investor’s expectations, does not challenge the nature of the measure and does not equate with an indirect expropriation as a breach of the obligations under the chapter for the investment protection, is not enough to substitute the lack of clarity, which the definition demands. On the contrary, the Annex gives an enough comprehensive definition of the indirect expropriation as well as it specifies the basics features of this form of expropriation. The expression «substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment» encases the substance of the meaning of indirect expropriation. In this way, the Annex draws the line, the excess of this, leads to the identification of the indirect expropriation. Under this notion, every measure which has the previous characteristics could be considered, regardless of its name, an indirect expropriation.

This conclusion is indisputable, as it exclusively relies on a narrow grammatical interpretation of the relevant provisions. The interpretation of the setting must be done according to

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77 Generation Ukraine INC v. Ukraine ICSID CASE No. ARB/00/9 Award 16 September 2003 par. 20.29
the rules, which are foreseen by the agreement. The article 29.17\textsuperscript{78} under the title General Rules of interpretation states that “The arbitration panel shall interpret the provisions of this Agreement in accordance with customary rules of interpretation of public international law, including those set out in the Vienna Convention on the Law of Treaties. The arbitration panel will also take into account relevant interpretations in reports of Panels and the Appellate Body adopted by the WTO Dispute Settlement Body”.

The article 31 par. 1 of The Vienna Convention on the Law of Treaties states that a treaty must be interpreted with good faith according to the ordinary meaning, which is given to the terms of the treaty \textsuperscript{79}within the general framework of them and under the light of their object and purpose. Under this notion, the main point is the object, which is persuaded by the contracting parties, since this object is formulated in the text.\textsuperscript{80}

The article attempts to combine the three main interpretative methods, the subjective which emphasizes on the intention of the Treaty draftsmen, the objective which is emphasizes on the text of the treaty and the teleological which emphasizes on the object and the purpose of treaty. The third approach is relevant to the doctrine of effect utile, which aims to the major effect of the treaties provisions in order to achieve its object and the purpose. As it is apparent from the above, the interpretation according to article 31 is a single combinatorial procedure which leaves significant margins to the interpreters.\textsuperscript{81}

From the above interpretative rule of article 31\textsuperscript{82} and the aggregate provisions of Annex 8–A, we cannot end up to the conclusion that every measure who has the characteristics which are described by the par. 1 (b) of the Annex automatically subject to the notion of indirect expropriation. This conclusion would be totally wrong as it results from a carefully reading of the Annex’s settings. The paragraph 2 illustrates the factors which must be examined\textsuperscript{83} for the finding of the indirect expropriation but the most important fact is the paragraph 3, where the expression <except in the rare circumstance when the impact of the measure or series of measures is so severe in the light of its purpose that is manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations> which is used, inducts in the international law of the expropriation the principle of the proportionality as a decisive element for the identification of the regulatory measures. Between par. 2 and par. 3 there is an internal coherence and unity as the first sets the means and the second the applicable principle.

\textsuperscript{78} CETA Text Chapter Twenty-Nine Section D
\textsuperscript{79} The reference to the ordinary meaning creates a rebuttable presumption. The parties can prove that they did not have the intention to use the term with its ordinary meaning but the proof is born by the party which invoked this view. \textit{K. Hatzikonstantinou – B. Pergantis} at fundamental Concepts in International Public Law K. Hatzikonstantinou – \textit{X. Apostolidis – M. Sarigiannidis} with the contribution of B. Pergandi Edited by Sarigiannidis Sakkoulas Publications 2014 pag. 363 footnote 240
\textsuperscript{80} \textit{A. Cassese} International Law Edited by F. Pazartzi Translation J. Saridakis Gutenberg Publications 2012 pag.217
\textsuperscript{81} \textit{A. Konstandinidis} The law of the International treaties at: The Law of the International Community Edited by K. Antonopoulos & k. Magliweras Nomiki Bibliothiki 2011 pag.279
\textsuperscript{82} The interpretative means of the article have the same value and there is no hierarchical relation between them. \textit{A. Konstandinidis} Ibid pag.279
\textsuperscript{83} We can characterize them as a bundle of instruments.
The criteria of the distinction

The annex encompasses the majority of the criteria, which have been developed by the jurisprudence of the arbitration tribunals such as the economic impact of the measure which is known as solo effect doctrine\(^{84}\), the character, object and intent of the measure which is also known as Purpose Doctrine\(^{85}\), the legal expectations of the foreign investor and the duration of the measures. In essence the Annex corresponds to the basic methodological approaches for the specification of the indirect expropriation. The central idea, as it stems from the Annex’s text, is a combinatorial interpretative method, namely a total consideration of the factual background.

According to the tribunal in the dispute Saluka v. Czech Republic\(^{86}\) “....Faced with the question of when, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity”

The list is not exclusive but exhaustive as it turns out from the formulation of the article and the use of the expression “... the determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors”. The first conclusion from the above mentioned list is that on the one side, it takes into account the total of the parameters, which constitute the investment relation. On the other side, it attempts to establish an intermediate approach in order to eliminate the disadvantages of the solo effect doctrine and the purpose one. The one – sighted consideration, which characterized each of these approaches tends to conceal the complicated character of the investment and its facets.

The assessment of all these factors essentially leads to an alternative approach, which tends to reduce the tension and the underlying conflict between the solo effect doctrine and the purpose one. This approach could be named conciliatory approach\(^{87}\) as well as it aims to achieve an equilibrium between the solo effect doctrine and the purpose doctrine.

The Duration of the measures

We must point out that the duration of the measures although, in CETA is a separate and independent criterion, in practice and from the decisions from the arbitration tribunals seems to be as a fact closely related with the impact of the measure and it is used for the assessment of the influence of the contentious measures.

In general the measures must have a permanent and not a temporary character, unless the successful development of the investment activities is depended on its realization within a certain time interval.\(^{88}\) The permanent or temporary character of the measures is a relevant notion. The arbitration tribunal in the dispute S.D. Meyers v. Canada adopted an equivocal position regarding

\(^{84}\) See above pag.6-8
\(^{85}\) See above pag.8-11
\(^{87}\) M. Dani & A. Akhtar-Khavari The uncertainty of legal doctrine in indirect expropriation cases and the legitimacy problems of investment arbitration Widener Law Review Vol. 22 2015 pag.20
\(^{88}\) LG&E Energy Corp, LG&E Capital Corp, LG&E International INC and Argentina Republic ICSID Case No. ARB/02/1 Decision on Liability 3 October 2006 par. 193 available at: https://icsid.worldbank.org
the time of the measures. According to the tribunal, the expropriation usually corresponds to the lasting obstacle of the investor from the exercise of its rights but under certain circumstances an expropriation can be occurred even if the measures have a partial and permanent character.  

In the international law there is not certain or predefined time in order to examine the notion of the duration and the jurisprudence has differentiations as far as the notion of the time is concerned. The parameter of the time is not a stiff notion. The arbitration tribunals would be examine the circumstances of every case. Different sectors, which operated under different regimes can give different meanings to notion of the same time accordingly to each case. Finally in the case we have a series of measures the time and the duration are depended upon the cumulative impact’s measures.

The “Reasonable” or “Legitimate Expectations”  

The legitimate expectations are directly linked with the principle of the fair and equitable treatment and they are its dominant feature and they constitute a more specific expression of it. This principle of the fair and equitable treatment, according to some authors, corresponds to an international minimum standard of treatment, namely to a minimum limit of personal, economic and procedural rights and for others authors moves beyond the limits of the international minimum rule of treatment. It is an absolute standard of treatment as well as it is not determined in relation with another level of treatment but it embodies specific preexisting rules. It is also a different notion from the principle “ex aequo et bono” because fair and equitable treatment is a concrete legal principle with normative content.

The legitimate expectations is a broad and ambiguous notion which needs further specialization. In the dispute Thunderbird Gaming Corporation v. Mexico the tribunal give a general definition of the legitimate expectations under the NAFTA’s regime. “... the concept of “legitimate expectations” relates, within the context of the NAFTA framework, to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party

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101 Azurix Corp and the Argentine Republic ICSID Case No. ARB/01/12 Award 14 July 2006 pag. 313 available at: https://icsid.worldbank.org  
102 The two terms are used alternatively and have the same meaning. According to Dolzer the terminology is not uniform but the term legitimate «provides a more contextual argumentative basis». R. Dolzer Fair and Equitable treatment: Today’s Contours Santa Clara Journal of International Law Vol. 12 Issue 1 pag.18 footnote 23  
103 Saluka Investments BV (The Netherlands) v. The Czech Republic Ibid par. 302  
104 K. Stefanou- X. Gortsos International Economic Law Nomiki Bibliothiki 2006 pag.133  
105 On the contrary, the principle of National Treatment and most-favored Nation are relevant standards since they refer to principles and rules, which change during the time and the state has an important and or even the unique role in these changes. A. Fatouros – P. Stangos International Economic Law Part A- International Trade Relations Observer Publications 1984 pag.32-33  
106 Which is included in the article 38 par. 2 of the statute of the International Court of Justice and provides the tribunal the ability to edify the contentious relation with criteria even exonomic but with judicial methodology, under the condition that the litigants consent to this. K. Ioannou at International Public Law Theory of Sources K. Ioannou- K. Oikonomidis- Ch. Rozakis – A. Fatouros Sakkoulas Publications Athens-Komotini 1988 pag.471  
107 P. Glavinis International Economic Law Sakkoulas Publications 2009 pag.621
to honour those expectations could cause the investor (or investment) to suffer damages”. 98 It should be pinpointed, the outline of the legitimate expectations is reflected in the tribunal’s award in the dispute Kuwait v. Aminoil, which stated that in the long-term agreements, regarding an important investment are necessarily included economic calculations and weighting of rights, obligations, occasions and risks, which constitute the equilibrium of the contractual relationship. The above factors cannot be neglected neither in the case of the necessary modifications, nor in the case of the compensation. This equilibrium constitutes the substance of the agreement. For the assessment of this balance and the legitimate expectations, which stems from this, not only the text of the agreement but also the amendments, the interpretations and the behavior of the parties during the operation of the agreement must be taken into account, which sometimes indicate incidentally the way in which the parties are understood the legitimate expectations where sometimes change depending on the circumstances.99 As a result from this point of view, the notion of legitimate expectations could be subjected to multiple readings accordingly to the perspective of its part and aims which would like to achieve in the frame of a dispute. In addition, it demonstrates the difficulties which can be arisen by the application of this notion.

The theory of the legitimate expectations is based on the structure and the particularities of the investment relationship. The investment is not an instantaneous action but a complex procedure. One of the main hallmarks of the investment is its duration and its installation in the territory of the host state. On the one hand, an investor decides for the realization of the investment on the basis of the law, which is in force in the territory of the host state. The return of the investment will depend on the stability and predictability of these laws.100

On the other hand, between the investor and the state, there is an unequal relation since the state as the regulator of the legal order, within the investment is operated, has the ability to change the legislate framework. The legality of the legislative changes under the internal law does not mean that these changes are legal under the international law as the lawful character of an act in the international field is judged by the international law.102

It is obvious that the legitimate expectations are inseparable with the changes in the statutory status of the host country. There is no rule in the customary international law, which prevents the states to alter their legislation so they generally have the discretion to change their laws.103 Under this presumption, a crucial issue arises: when the frustrations of the investor’s expectations can be considered reasonable or legitimate and then lead to the rise of the state

98 International Thunderbird Gaming Corporation v. The United Mexican States In the matter of a NAFTA arbitration under the UNCITRAL Arbitration Rules Award January 26 2006 par. 147 available at: www.italaw.com/cases/documents
100 The other hallmarks, according to Salini Test, are the investor’s contribution to money or other assets, the risks which confront the investment in the Host State and the contribution to the economic development of the host state Salini Costruttori S.p.A. and Italastrade S.p.A. v. Kingdom of Maroco ICSID Case No. ARB/OO/4 Decision on Jurisdiction 23 July 2001 par. 52 42 ILM 609 (2003). For a fully conceptual determination of the investment we can add three additional requirements: the investment’s acceptance of the host country, the control of the investment from the investor and the foreign of the investment. P. Glavinis Ibid pag.357-370
101 R. Dolzer Ibid pag.17
102 Article 3 of the Draft articles on Responsibility of States for Internationally Wrongful Acts
103 It is totally different the case where in the frame of an investment agreement there is a stabilization clause, which prohibits the state to change its laws.
responsibility. The arbitration tribunals have adopted two different approaches: the broad and the narrow\textsuperscript{104}.

**The broad Approach of the Legitimate Expectations**

According to this, the host state must act with a stable and clearly manner, without ambiguity in order for the investor to have the ability to know beforehand the regulations and the laws, which will govern its investment. The broad approach is imprinted with a repousse manner in the award of the dispute Tecmed v. Mexico regarding to the legitimate expectations the tribunal stated: “The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”\textsuperscript{105} The arbitration tribunal in the dispute CMS v. Argentina aligned with the above mentioned view in the Tecmed case, considering that these features of the state action constitute an objective requirement, which is unrelated with the intention or the good faith of the state which adopted the contentious measures.\textsuperscript{106}

This point of view seems to operate unilaterally and in favor of the investor. In the merits it recants the regulatory power of the host state and because of this is on a straight contract with the state sovereign, from which is stems the state’s regulatory competence. It also seems to understand the legitimate expectation as an inelastic and one sighted concept. At the same time, it ignores an important actual fact that the long duration of the investment inevitably includes the possibility of the subsequent law alterations.

The investors should expect the changes of the regulations at the passage of the time as a normal process of the host state’s economy.\textsuperscript{107} According to the tribunal in the dispute Phillip Morris v. Uruguay\textsuperscript{108} the changes in the general legislation are not prohibited by the principle of fair and equitable treatment when firstly, they do not exceed the “normal” regulatory state power, which aims at the achievement of the public purpose and secondly, it does not modified the regulatory frame, in which the investor has been relied in order to proceed to the investment, beyond “the acceptable margin of changes”\textsuperscript{109}

\textsuperscript{104} Z. Asqari Investor’s legitimate expectations and the interest of the host state in foreign investment Asian Economic and Financial Review 2014(12) pag.1909
\textsuperscript{105} Tecnicas Medioambientales Tecmed s.a v. The United Mexican States ISCID Case No. ARB (AF)/00/2 Award 29 May 2003 par. 154 available at: icsid.worldbank.org
\textsuperscript{106} CMS Gas Transmission Company and the Argentine Republic ICSID Case No.ARB/01/8 Award 12 May 2005 par. 279-280 available at: icsid.worldbank.org
\textsuperscript{107} Fair and Equitable treatment UNCTAD Ibid pag.67
\textsuperscript{108} Phillip Morris Brands SARL, Phillip Morris Products S.A. and Abal Hermanos S.A v. Oriental Republic of Uruguay ICSID Case No. ARB/10/7 Award 8 July 2016 par. 423 available at: https://icsid.worldbank.org
\textsuperscript{109} The terms “normal” regulatory state power and “the acceptable margin of changes” are equivocal and susceptible to multiple interpretations. In a dispute, every part, could give these concepts totally different meanings.
The fact that the legitimate expectations imply the existence of a stable business environment, it would not be correct to lead to an unqualified formulation and the frozen of state’s capability to regulate the economic activities in its territory in contrast with its ordinary regulatory power. Except for the cases, where specific commitments or representations have been made by the state to the investor, the latter must not rely on the BIT against the risk of any change in the regulatory framework of the host state. Finally, we must have in mind, that the legitimate expectations are subject to the limits, which limits are defined by the nature of investments and its inherent risks. The investment’s protection does not amount to a policy of protection. The arbitration tribunals have reminded the investors many times that they undertake the usual risks, which are related with the investment activities. It is characteristic the approach of Comprehensive and Progressive Agreement for Trans Pacific Partnership (TPP-11) about the legitimate expectation. According to interpretative footnote for the elucidation of the concept of the legitimate expectations, one of the criteria which can be used, is also the potential for the taking of regulatory measures in the relevant sector.

The narrow Approach of the Legitimate Expectations

According to this, there must be a number of qualifying requirements. Under this, there are some main factors which must be taken into account just as: firstly, the specific representations or commitments which have been taken by the host state and the investor has relied on them; secondly, the fact that the investor must be aware of the general regulatory framework in the host state and thirdly, the equilibrium between the legitimate expectations and the regulatory power of the host state. This approach sets certain benchmarks in order to determine the existence of legitimate expectations. It seems to be more objective than the previous as it aims to the achievement of a balance between the interests of the state and the foreign investor.

The legitimate expectations should not be examined by the investor’s subjective perceptions but they must have an objective character as this arises from the circumstances of the case and with due regard to the state’s rights. In the Metalclad Case, the tribunal examined the legitimate expectations of the investor and considered that the certifications by the Federal Government for the demanding investment’s permits, which they were not finally given, contributed to the finding of the indirect expropriation. On the contrary, in the Methanex Case, the arbitration tribunal ascertained that there were not implicit state’s commitments, that the state would abstained from regulatory actions, which were related with the investment. At the same time, the investor knew

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110 EDF (services) Limited v. Romania ICSID Case No. ARB/05/13 Award 8 October 2009 par. 217 available at: https://icsid.worldbank.org
112 TPP-11 Text Annex 9-B interpretative footnote 36
113 Fair and Equitable treatment UNCTAD Series on Issues in International Investment Agreements II United Nations 2012 Pag.68
115 Ibid par. 358
116 Metalclad Corporation and The United Mexican States Award 30 August 2000 ICSID Case No. ARB(AF)/97/1 par. 107 available at: https://icsid.worldbank.org
well that it entered into a market which gave significant importance in the sector of the environmental and public health protection.\textsuperscript{117}

There is an issue, if the representations or the commitments must be specifically addressed to specific investors or it can be generally addressed to an indeterminable number of people aiming at the investment’s attraction. The arbitrations between the state of Argentina and the foreign investors,\textsuperscript{118} after the economic crisis in the late 1990s, could provide some guidelines for this topic. The majority of the disputes in this case has a common background. These disputes relied on the regulatory framework which has been adopted by Argentina in the early 1990s and has as a result the attraction of foreign investors in the privatization of public companies with crucial importance for the national economy as the energy sector.\textsuperscript{119}

The regulatory framework of Argentina aimed at the reform and restructure of its economy through the increase of foreign investment’s flow. The “Convertibility Law” was enacted in 1991 and pegged the peso to the dollar to one to one exchange in order to confront the inflation. Under this law, the prices and the savings quoted in dollars, and pesos could be freely converted to dollars in the official exchange rate.\textsuperscript{120}

At the same time, Argentina proceeded to the adoption of various laws in the energy sector such as: The Law No 24.0056/ The Electricity law and the Decree No. 1398/92/The Electricity Degree and relevant regulations, which aimed at the attraction of foreign investments in the field of the electricity energy.\textsuperscript{121} In the Gas Sector enacted the Decree No. 1738/92 and the regulations which have been adopted according to its transport and distribution tariffs were calculated in Dollars and then expressed in Pesos.\textsuperscript{122} The above mentioned Acts constituted a general legal grid and it is obvious that they did not subject to the concept of the specific commitments or representations, so the question arises is whether this kind of state action could be considered that creates legitimate expectations to the candidate foreign investors.

According to the arbitration tribunal, in the dispute Enron v. Argentina the decisive element for the foundation of the legitimate expectations are the conditions, which were given by the host state at the time of the investment’s realization and the fact that the investor actually relied on these conditions in order to proceed to the investment.\textsuperscript{123} Furthermore, the tribunal moved to the reference of the actual facts, which justified and explained its conclusion. The Tribunal stated\textsuperscript{124}:

“The measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented. Argentina in the early 1990s constructed a regulatory framework for the gas sector containing specific guarantees

\textsuperscript{117} In The Matter of an International Arbitration Under Chapter 11 of The North America Free Trade Agreement and the Uncital Arbitration Rules between\textsuperscript{118} Methanex Corporation and United States of America Final Award of the Tribunal on Jurisdiction and Merits 3 August 2005 Part IV – Chapter D par. 9-10 available at:www.naftaclaims.com

\textsuperscript{118} which have been invested in its territory in the early 1990s

\textsuperscript{119} A. Koutoglidou The law of the Foreign Investments The multiplicity of ways solving the disputes between the states and the foreign investors. Prologue P. Glavinis Sakkoulas Publications 2011 pag.99

\textsuperscript{120} A. Honore Argentina: 2004 Gas Crisis Oxford University for Energy Studies NG 7 November 2004 pag.11

\textsuperscript{121} El. Paso Energy International Company v. The Argentina Republic ICSID Case No. ARB Decision on Jurisdiction 27 April 2006 par. 21 available at: https://icsid.worldbank.org

\textsuperscript{122} LG&E Energy Corp, LG&E Capital Corp, LG&E International INC and Argentina Republic ICSID Case No. ARB/02/1 Decision on Liability 3 October 2006 par. 41 available at: https://icsid.worldbank.org

\textsuperscript{123} Enron Corporation, Panderosa Assets LP and Argentine Republic ICSID Case No. ARB/01/3 Award 22 May 2007 par. 260 and 262 available at: https://icsid.worldbank.org

\textsuperscript{124} Enron Corporation, Panderosa Assets LP and Argentine Republic Ibid par. 264
to attract foreign capital to an economy historically unstable and volatile. As part of this regulatory framework, Argentina guaranteed that tariffs would be calculated in US dollars, converted into pesos for billing purposes, adjusted semi-annually in accordance with the US PPI and sufficient to cover costs and a reasonable rate of return. It further guaranteed that tariffs would not be subject to freezing or price controls without compensation. Foreign investors were specifically targeted to invest in the privatization of public utilities in the gas sector. Substantial foreign investment was undertaken on the strength of such guarantees, including the investment made by Enron in TG.”

Under the above view, a general regulatory legal framework regarding an undefined people’s number is enough to establish the notion of the legitimate expectations.125

This position however is not unquestionable. The arbitrator Pedro Nikken in its separate opinion in the dispute Suez v. Argentina started from the ascertainment that the term legitimate expectations is misleading and leads to confusion, then he distinguished between the violation of specific commitments and the violation of general statements watching different legal results in each category. More specifically, if the legitimate expectations are referred to the specific commitments regarding the investment, which commitments later infringed or disputed by the state, the infraction of the legitimate expectations is based on the inappropriate state’s conduct. If the expectations are referred to general statements of the state or to the general promotion of the investment policy there is no basis in general international law to consider that they create legally forcable obligations.126

The tribunal in the dispute Phillip Morris v. Uruguay127 aligned with the previous position and supported the view that the legitimate expectations must be relied on specific commitments or representations. A general legislation applicable to an undetermined number or class of people cannot lead to the establishment of the legitimate expectations.

In the dispute Continental v. Argentina the tribunal appears to adopt rather a pragmatic than doctrinal consideration about the legitimate expectations. The central idea is that in order to determine and estimate the abstract notion of the fair and equitable treatment and the legitimate expectations and subsequently to examine if there is an infringement, we must take into account some factors such as: first, the specificity of the commitments, on which the investor have relied on. Second, general statements of legislative character, which create reduced expectations. Their enactment by their nature fall under to amendments and possibly to cancellations within the limits, which are defined by the human rights and the rules of ius cogens. Third, the unilateral modification of contractual state’s commitments, which have been undertaken especially according to a legislative frame, aiming to obtain economic resources from the foreign investors. This case as well as creating legal rights and subsequently expectations to compliance with them, require further examination and finally, it is also relevant the impact of the changes on the function of the foreign investment, which in general includes its profitability, the good faith, the absence of discrimination and also the pertinence of the public purpose intended by the State; some accompanying measures

125 With the self-evident condition that this regulatory framework constituted the basis for the relevant investor’s decision.
which aimed at decreasing the negative influence are also to be evaluated in order to certify fairness. The evaluation of the above factor for the specification of the legitimate expectation’s concept rends to counterbalance the absence of single commonly accepted definition, which could reduce the inherent ambiguity of legitimate expectations meaning.

Finally, another topic is if the provisions in the preamble in a BIT or in FTA are referred to the maintenance of a stable framework of the investments, this could lead to the creation of the legitimate expectations from the investor’s side. The critical element is the formulation of the preamble, which could give to this a consultative or normative character. In the latter case, legal results and the creation of the legitimate expectations could be stemmed from the specific concept of the preamble. According to the preamble of the Argentina – United States BIT Agreement that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources” The above preamble is obvious that it has an advisory meaning and produces a loose legal framework, where the maintenance of a stable framework is the ideal aim and not a legal obligation in itself. It is a presupposition of the one of two objects of the treaty, namely the promotion of the investments than the reciprocal protection of them. The stability of the legal framework is very important for the attraction of foreign investments and investors. It would be unreasonable for a state to promise not to change its legislation if need be, or even more bind itself by this way in case of a crisis so as not to alter its legislation. This position would be contrary to an effective interpretation of the Treaty.

The principle of the Proportionality

As we mentioned above the par. 3 of the CETA’s Annex defines the limits of the legitimacy of the regulatory measures and operates complementary to the article 8.9, which establishes the concept of them. According to this: “For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations fact that the article does not specify the degree or the quality characteristics of the negative impact”.

The Annex does not explicitly referred to the principle of the proportionality, but from the Annex’s structure and formulation, the concept of the proportionality is absolutely clear. The principle of proportionality is originated from the public law and especially from the administrative one. It aims to solve a legal collision with particular characteristics, usually between a) an individual person or a legal entity that has rights and b) a state which has taken measures for the achievement of an important public purpose, which negatively affects the holders’ right.

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128 Continental Casualty Company v. the Argentine Republic ICSID Case No. ARB/03/9 Award 5 September 2008 par. 261 available at: https://icsid.worldbank.org
130 As it is results from the title of the relevant treaty. Ibid
131 Continental Casualty Company v. the Argentine Republic Ibid par. 258
132 See above pag.17-18
133 A. S. Sweet and G. Della Cananea Proportionality, General Principles of Law and Investor- State Arbitration: A Response to Jose Alvarez International Law and Politics Vol. 56 2014 pag.917
purports to manage an equilibrium between the conflicting private and public interests. It is a systemic principle of the European Court of Human Rights but its application is not without reactions and controversy in the field of the international investment law.

The methodology of the proportionality comprises three stages: in the first stage, it is examined if the contentious measure serves a public aim and generally if it is appropriate for the achievement of the purpose. In the second stage, it is examined if there are less restrictive measures which can be applied and if these measures are equally effective for the intending aim. Finally, in the third stage it is examined the balance between the impact of the measures and the importance of the public purpose. The principle of the proportionality stricto sensu demands the measures not to be excessive in relation with the purpose. In order to find this, we must take into account all the factors, such as the relation between cost and benefit, the significance of the right, which is affected, the degree of the intervention, the duration of the measure and the available alternative measures with less restrictive character, which could be used.

Under one view, a basic objection, as to the substance of the above principle, is the argument that it could be lead to a situation where the state right’s would not has limits and the invoked public purpose would be raised to a high level. So every impact, including also the “substantial deprivation”, would not equated to the expropriation, since the result of the impact would be proportionate to the significance of the state’s aim. This practically would end up to the cancellation of the clause of expropriations in the investment agreements. The procedure of the third stage will set the limits to the state power. The estimation of all the factors of the third stage, which are mentioned above, operates like safeguards and can deter the relevant danger.

Regarding the appropriateness of the application of the principle of the proportionality, as a method for the distinction between the indirect expropriation and the regulatory measures, some authors have expressed their doubts about the suitability of the principles of domestic public law in the field of the international law, in order to interpret international investment agreements. They support: that the principles of the domestic public law emanate from another economic and social context, so if one does not deeply understand this discrepancy, there is the risk of the automatic transport of notions from the internal regime to the international one. The circumstances, in the field of the international law, are sometimes totally different from those in the national law, so rules, which under the internal law serve the aim of the justice, do not necessarily have the same result in their application in the international sector. The judge of the International Court of Hague, Sir Arnold McNair, in its separate opinion on the Advisory Opinion for the regime of the South West Africa, underpinned that the international judges should confronted the facts, which are

134 S. Nikiema Best Practices Indirect Expropriation Institute for Subsustainable Development March 2012 pag. 14
135 The examination of the factors in the essence includes the majority of the criteria, which are used in Annex 8-A. See and below pag.34
137 P. Ranjan Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law Cambridge Journal of International and Comparative Law (3) 3 2014 pag. 870-871
138 P. Ranjan Ibid pag.855
similar to rules of the private law, like indications of a policy or principles and the international judges should not directly inducted these principles and institutions in the international field.\footnote{Separate Opinion by Sir Arnold McNair at International Status of South-West Africa Advisory Opinion of July 11th 1950 ICJ Reports pag.148}

This view reflects a facet of the wider problematic about some of the sources of public international law and makes indispensable the examination of the principle of the proportionality in the international legal order.

**The principle of the Proportionality in the International Investment Law**

According to the Statute of the International Court of Justice, among the other sources of the international law, we can find the general principles of the law recognized by the civilization nations.\footnote{Article 38 (1) (c) of the Statute of the International Court of Justice. We must point out that the term “civilization nations” is a historical residue and does not correspond to the values and concepts of the contemporary international law. For this topic see analytically Separate Opinion of Judge Ammoun at The North Sea Continental Shelf Cases Judgment 20 February 1969 ICJ Reports pag.132-133.} They are ascertained and determined through the systematic comparison of different national legal systems with aim the outcome of a common resultant. A principle, in order to be qualified as a general principle of the law, is not indispensable to be established in all the national legal systems but it is enough to be in the most representative legal ones.\footnote{K. Salonidis The Sources of the International Law at: The Law of the International Community Edited by K. Antonopoulos & k. Magliveras Nomiki Bibliothiki 2011 pag.48} It is evident that its finding is not a mechanic exercise.\footnote{T. Gazzini General Principles of Law in the Field of Foreign Investment The Journal of the World investment and Trade Vol. 10 No. 1 2009 pag.107}

In this point, we must make some terminology illustrations. The terms “general principles of the law” and “principles of the international law” are different notions. According to the professor Dupuy,\footnote{K. Salonidis The Sources of the International Law at: The Law of the International Community Edited by K. Antonopoulos & k. Magliveras Nomiki Bibliothiki 2011 pag.48} the “principles of the international law” have a wider concept than “the general principles of the law”. But the affinity of the terminology between the two concepts caused confusion, which was deteriorated by the fact that the International Court of justice has used the term “general principles of the law” with various verbal variants.\footnote{T. Gazzini General Principles of Law in the Field of Foreign Investment The Journal of the World investment and Trade Vol. 10 No. 1 2009 pag.107} Beyond the above mentioned distinction, the “general principles of the law” can include some fundamental and general principles of the international legal system, which are inherent in the notion of the law, like the principle of the proportionality, applied in various international law sectors, among which is the international investment law.\footnote{T. Gazzini General Principles of Law in the Field of Foreign Investment The Journal of the World investment and Trade Vol. 10 No. 1 2009 pag.107}

As it turns out, the legalization of the proportionality’s principle relies on a two basis: the “general principles of the law” and the “principles of the international law”. Furthermore and beyond the provisions of the Annex 8-A, the applicability of this principle is established and in the article 8.31 par. 1 under the title “Applicable law and interpretation”. According to this “When rendering its decision, the Tribunal established under this Section shall apply this Agreement as

\begin{footnotesize}
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\item \footnotesize{\textsuperscript{140} Separate Opinion by Sir Arnold McNair at International Status of South-West Africa Advisory Opinion of July 11th 1950 ICJ Reports pag.148}
\item \footnotesize{\textsuperscript{141} Article 38 (1) (c) of the Statute of the International Court of Justice. We must point out that the term “civilization nations” is a historical residue and does not correspond to the values and concepts of the contemporary international law. For this topic see analytically Separate Opinion of Judge Ammoun at The North Sea Continental Shelf Cases Judgment 20 February 1969 ICJ Reports pag.132-133.}
\item \footnotesize{\textsuperscript{142} K. Salonidis The Sources of the International Law at: The Law of the International Community Edited by K. Antonopoulos & k. Magliveras Nomiki Bibliothiki 2011 pag.48}
\item \footnotesize{\textsuperscript{143} T. Gazzini General Principles of Law in the Field of Foreign Investment The Journal of the World investment and Trade Vol. 10 No. 1 2009 pag.107}
\item \footnotesize{\textsuperscript{144} Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of The Libyan Arab Republic Award on the Merits I.L.M. 1 1978 par. 41}
\item \footnotesize{\textsuperscript{145} K. Ioannou at International Public Law Theory of Sources K. Ioannou- K. Ekonomidis- Ch. Rozakis – A. Fatouros Sakkoulas Publications Athens-Komotini 1988 pag.361}
\item \footnotesize{\textsuperscript{146} K. Salonidis Ibid pag. 47 and 49-50}
\item \footnotesize{\textsuperscript{147} The principle of the proportionality is a recognized rule of law in the majority of the legal systems. In the Greek legal system the principle has constitutional force, according to article 25 par. 1 after the constitutional revision of 2001.}
\end{itemize}
\end{footnotesize}
interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties”. The principle of the proportionality, as a part of the rules and the principles of the international law, according to this article, diffuses in the aggregate of the CETA’s provisions.

It is apparent that the inclusion of the principle of the proportionality in CETA’s system is a well-weighted and successful choice. The extensive range of the criteria, which are included in par. 2 of the Annex 8-A, for the specification of the indirect expropriation and its distinction from the regulatory measures and especially the heterogeneous and opposite character of the impact of the measure and the aim of the measure, make necessary the principle of the proportionality, in order to achieve a counterbalance between the investor’s and state’s conflicting interests.

The application of the principle of the proportionality by the arbitration tribunals

The arbitration tribunal in the case Tecmed v. Mexico was the first tribunal, which used the principle of proportionality. The disputed measure was the refusal from the Mexican state organization the INE to renew a license, which was required for the operation of a landfill from two subsidiaries companies of the claimant.148 The claimant argued that the refusal of the landfill permit’s renewal was an expropriation of its investment and was due to political reasons.149 The tribunal initially stressed that the impact of the measure was one the main elements for the distinction between the regulatory measures and the expropriation150. It considered that, in order to assess the impact of the measure and decided if this corresponded to expropriation, it would have to examine whether the measure was proportional for the intending public purpose. Subsequently, with reference to the decisions of the ECHR, the tribunal ended up that: “There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure”151 and found that, the prevailing reasons for the INE’s decision, were related with social and political circumstances and the pressure, which has been exercised by the municipal and state authorities and even on INE itself, created by the circumstances. So the tribunal examined, except for the economic impact of the measure, which has deprived the investor of its investment without compensation, if the relevant pressure and its consequences, which were the trigger for INE’s refusal to renew the permit, was so extensive that it led to a serious situation of emergency, social crisis or a public unrest. The above factors would weighted for the assessment of the measure’s proportionality in relation to the pursuant purpose.152 According to the tribunal, the state measures, which have been taken for the confrontation of the social-political difficulties, that however did not correspond to the level of an emergency situation and did not have wide and serious results, they did not justify the impact of the measures. In addition, the landfill’s operation did not endanger the ecological degree, the protection of the environment and health153. The tribunal ended up to the conclusion that the contentious measures constituted an expropriation.154

148 Tecnicas Medioambientales Tecmed s.a v. The United Mexican States ISCID Case No. ARB (AF)/00/2 Award 29 May 2003 par.38-39 available at: icsid.worldbank.org
149 Ibid par. 41
150 Ibid par. 115
151 Ibid par. 122
152 Ibid par. 132-133
153 Ibid par. 147-148
The arbitration tribunal in the dispute Azurix v. Argentina directly referred to the Tecmed Award and the decision of the ECHR in the case James and Others, considering that the elements in Tecmed case, including the principle of proportionality, provided useful guidance for the distinction between non-compensable regulatory measures and expropriation.\textsuperscript{155}

The resource of the tribunal to the jurisprudence of the ECHR in the context of the proportionality as a method was a controversial issue.\textsuperscript{156} According to the tribunal, in the case Fireman v. Mexico the principle of the proportionality as a factor, used by the ECHR, is questioned if it is a viable source of interpreting the article 1110 of the NAFTA for the expropriation.\textsuperscript{157} Under one view, the cases of the ECHR are not “pure” international law, since the cases under protocol 1 based on a special legal regime and they do not rely on the international custom law when they apply the test of the proportionality. Between the system of the European Union on the one hand and the BITs and customary international law on the other, there are important discrepancies.\textsuperscript{158}

The European Union is the most evolved form of regional integration process, thus its legal principles cannot be easily transferred to the international investment law, which relies primarily on a grid of BITs\textsuperscript{159} and its dispute settlement system lacked harmony.\textsuperscript{160} Furthermore, there is another more specific difference between the ECHR and the tribunal in the Tecmed Case, concerning the way they use the principle of the proportionality. The former used the principle of the proportionality in the cases of established expropriations, in order to specify the amount of the compensation, while the latter used the principle to ascertain the existence of the expropriation.\textsuperscript{161}

Finally, the ECHR and the tribunals of the ICSID have procedural differences. We must have in mind that the first is not a property court and the compensations it adjudicates are characterized by the notion of the “fair satisfaction” while the compensations by the ICSID tribunals although they are not full, like the compensations in the international trade disputes, however they are substantial.\textsuperscript{162} Beyond the above theoretical controversies, the principle of proportionality seems to be a concept accepted in the sector of the international investment law. According to the arbitration tribunal in the dispute Occidental v. Ecuador the Tribunal observes that there is “a growing body of arbitral law, particularly in the context of ICSID arbitrations, which holds that the principle of proportionality is applicable to potential breaches of bilateral investment treaty obligations”.\textsuperscript{163} In

\textsuperscript{154} Ib\textit{i}d par. 151

\textsuperscript{155} Azurix Corp. and the Argentine Republic ICSID Case No. ARB/01/12 Award 14 July 2006 par.311-312 available at: icsid.worldbank.org

\textsuperscript{156} This matter reminds the problematic about the general principles of the law in the field of the international law. See above pag.33

\textsuperscript{157} Fireman’s Fund Insurance Company v. The United Mexican States ICSID Case No. ARB(AF)/02/01 Award 17 July 2006 pag.83-84 footnote 161


\textsuperscript{159} The lack of a multinational treaty, regulated the total topics of the investments, has been substituted by The BITs and FTAs, which set the normative legal context of the international investment law and cannot contribute to the creation of a single and uniform legal frame. This has as a result the fragmentation of the rules of the investment law. On the contrary, the European Law is comprised by comprehensive and consolidated rules of law.

\textsuperscript{160} S. Nikiema Ib\textit{i}d pag.16-17

\textsuperscript{161} Selected Recent Developments in IIA Arbitration and Human Rights UNCTAD/WEB/DIAE/IA/2009/7 United Nations 2009 pag.6 footnote 17

\textsuperscript{162} P. Glavinis International Economic Law Sakkoulas Publications 2009 pag.606

\textsuperscript{163} Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador ICSID Case No. ARB/06/11 Award 2 October 2012 par.402
any case, the key point is the correct application of the pertinent principle itself. The transplantation of the one regime to another could be effected only after the estimate of its appropriateness.  

In the dispute Phillip Morris v. Uruguay the impugned measures are two: first, the Single Presentation Requirement (SPR). According to this, each brand of tobacco products should have a single presentation. Therefore, the use of multiple presentations of any cigarette brand was banned. Second, the Presidential Decree 287/009, also known as 80/80 Regulation, defining that the tobacco companies had to increase the size of health warnings on the cigarette packages from 50 to 80 per cent, on the lower part of each its main sides on every package. Because of this, the companies had to restrict their brand names in the rest 20 per cent of the front and the back package’s side. The tribunal initially examined the impact of the measures and found that none of them felt under the concept of the indirect expropriation, since both the Single Presentation Requirement and the 80/80 Regulation did not have substantial effect on the investment. Subsequently, the tribunal supported the view, that the contentious measures did not constitute expropriation for an additional reason, since their adoption was a valid exercise of the State’s police power. Scrutinizing the notion of the policy power the tribunal concluded that the measures were adopted for the fulfillment of the national and international Uruguay’s obligations for the public health’s protection. The measures have been adopted with good faith, they were not discriminatory and they were proportionate to the objective they meant to achieve.

In the case LG&E v. Argentina, the arbitration tribunal began from the assumption that the establishment of the expropriation’s notion presupposes the balance of two competitive elements: the degree of the state measures interference with the right and the state power to apply its policies. For the estimation of the first element, the measure’s economic influence, its interference with the investor’s legitimate expectations and the duration of the measure should be examined. Then, the tribunal proceeded to the principle of proportionality considering that there should be a balance in the analysis of the causes and the effects of a measure for the finding of its nature and if this has an expropriatory character. In the tribunal’s opinion, according to the state’s power to adopt its policy, it can generally be said that the state has the right to take measures intending to the social or general welfare purpose. These measures must not entail the liability of the state, except for the cases, where the action of the state is obviously disproportionate to the needs, which wish to encounter.

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164 UNCTAD Series on Issues in International Agreements II 2012 Expropriation pag.99-100
166 Ibid par. 121-122
167 Ibid par. 286
168 Ibid par.284
169 Ibid par. 276
170 Ibid par. 287
171 Ibid par.291-300
172 Ibid par. 302
173 Ibid par.306
174 LG&E Energy Corp, LG&E Capital Corp, LG&E International INC and Argentina Republic ICSID Case No. ARB/02/1 Decision on Liability 3 October 2006 par.189-190 available at: icsid.worldbank.org. In the essence the award comprises the factors of paragraph 2 of the CETA’s Annex 8-A, which used for the ascertainment of the indirect expropriation and its distinction from the regulatory measures.
175 Ibid par.194-195
It is worth noting the fact that the tribunals, although they invoked the principle of proportionality, however, in order to end up to their conclusions, they did not necessarily used the pertinent principle, focusing on the relation between the impact of the measure, the state purpose and mainly the proportion between them. In both cases, Azurix v. Argentina\textsuperscript{176} and LG&E v. Argentina,\textsuperscript{177} they primarily based on the impact of the measures on the investment. In the Phillip Morris case, the tribunal, despite the fact that it found that the measures were appropriate to the intending purpose, however, it did not apply the test of proportionality stricto sensu, namely they did not examine the equilibrium between the impact of the state measure and the importance of the state purpose. The fact that the measures had a minor impact on the investment weakened the company’s claim for the expropriation in a high degree and determined the upshot of the dispute. Therefore, and under these circumstances, the proportionality’s principle could not have the primordial role. It was auxiliary operated, reinforcing the tribunal’s outcome for the dismissal of the allegation’s expropriation, as it turns out from the formulation of the award stated that “\textit{There is however an additional reason in support of the same conclusion …….”}\textsuperscript{178}

\textbf{Conclusions}

The regulatory measures and its distinction from the indirect expropriation will continue to be on the center of debate between the states and the foreign investors. The technological evolution and its potential impacts on the environment and the public health, the preferential field where state’s regulatory power is expressed, inevitably creates an interactive relationship with conflict interests. The environment and health protection’s wide character, concealing sometimes political motivations and pursuits is an additional problem.

The above elements set the factual frame, within the issue of the regulatory measures is developed, which CETA’s agreement is called upon to resolve. It is obvious that they cannot settle the issues that may arise, with an absolutely defined and predictable manner but this is not what is requested. The above fact will ignore the complicated character of the investment relationship and that is not an one-sighted notion.

The main contribution of CETA is that provides a general conceptual context. The case by case examination of the dispute, the combination of the established criteria for the ascertainment of the non-compensable measures and the indirect expropriation and their cumulative consideration mitigates the vagueness, characterizing each of them. At the same time, the above elements avoid the doctrinal character of the two predominant theories, focusing the one on the impact of the measures and the other on the purpose of the state and they do not have the demanding flexibility for a total approach of the issues, comprising the dispute.

The CETA’s provisions for the regulatory measures and the indirect expropriation codify the main approaches as they have been developed by the jurisprudence of the arbitration tribunals. Under this perspective, the CETA’s provisions conduce to the progressive development of the international expropriation’s law. The way of the criteria’s application depends upon the arbitration tribunals, since from their nature and in the context of a specific dispute, can be subjected to different interpretations, leaving to the arbitrators an extensive margin of their evaluation.

\textsuperscript{176} Ibid par.322
\textsuperscript{177} Ibid par.198-200
\textsuperscript{178} Phillip Morris v. Uruguay Ibid par.287