

**CLASS 3**

**EXPROPRIATION**

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# UNDERSTANDING EXPROPRIATION

Expropriation?

Scope of expropriation?

□ Definition of investment?

□ Definition of investor?

Definition of expropriation?

□ expropriation may be direct/de jure (when there is a formal transfer of the title) or indirect/de facto (when the title remains to the investor but the State acts in such a manner thus impairing the essence of the investment, to the effect that the investment is in fact nationalized and deprived of the actual use or enjoyment of the investor's benefit). Indirect or de facto expropriation must be distinguished from non-compensable regulatory action that has adverse economic results for the investor. Legality?

## UNDERSTANDING EXPROPRIATION

- Neither BITs, nor NAFTA give a clear definition of acts (or processes) that amount to expropriation
- VCLT article 31 § 3 c provides that in order to interpret the term, recourse shall be had to the relevant norms of international law applicable between the parties. These norms may refer to treaties, customs and general principles of law. Many scholars have sought to make a comparative analysis of the various legal systems of municipal law in order to infer general principles on the law of expropriation
- As Rudolf Dolzer suggests, expropriation remains to a large extent rough and sketchy and there are still significant lacunae in its definition under international law

# UNDERSTANDING EXPROPRIATION

Indirect and direct expropriation?

Indirect expropriation and non-compensable regulatory action?

How to distinguish between all of these actions? What to look at?

## DIRECT EXPROPRIATION

Direct (overt) expropriation supervenes when the State proceeds to an open, deliberate and acknowledged taking of property, such as outright seizure or formal or obligatory transfer of the formal title of ownership over the investment or when the investor is legally coerced to transfer its title to the State itself or a third party (*Metalclad v. Mexico*, §103)

- Rarely happens
- Negative publicity
- Indirect measures are more common

## INDIRECT EXPROPRIATION

As a general rule, indirect (covert, incidental, creeping, de facto) expropriation supervenes when the State interferes with the use of property without taking the formal title thereof and has an **effect** equivalent to direct expropriation, because it deprives the owner, in whole

OR in **significant part** of the use

OR reasonably to be expected benefit of property, even when if this is not necessarily to the obvious benefit of the State (Metalclad, §103)

## NON-COMPENSABLE REGULATORY ACTION

Difference with indirect expropriation?

- Clash of interests of investor and state
- the community cannot reasonably be expected to bear the normal commercial risks associated with investments
- Foreign investors cannot conduct themselves in a manner detrimental to the general welfare (SD Myers c. Canada)
- On the other hand, investors cannot be expected to bear and pay risks that should be socialized
- Nonetheless, **not every measure** that affects the economic value of the investment or its profitability amounts to an expropriation

# NON-COMPENSABLE REGULATORY ACTION

## Police powers doctrine

- Under customary international law, a State has the right to regulate or take other measures (administrative etc.) in order to protect the general welfare interests of the community
- ***Tecmed v Mexico*** - the Tribunal held that the principle, according to which 'the State 's exercise of sovereign powers within the framework of police power may cause economic damage to those subject to its powers as administrator, without entitling them to any compensation whatsoever, is undisputable' (§119)
- What do you think?



# NON-COMPENSABLE REGULATORY ACTION

## Police powers doctrine

- ***Feldman v Mexico*** - the Tribunal noted that (§ 112) 'not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation under Article 1110 NAFTA
- ***'governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this'***.

# NON-COMPENSABLE REGULATORY ACTION

How to draw the line?

The International Law Commission in its 36th Conference in 1930 in New York defined that States are not liable to pay compensation under certain criteria. Those criteria are:

1. When the State acts in the normal exercise of **police powers and the measure falls within the ambit of its powers**: according to Black's Law Dictionary, police powers stem from national sovereignty and confer to the sovereign the right to enact all laws necessary and appropriate to protect a legitimate public interest (public order, safety, health, morals and justice).
2. When the measure is enacted in the interests of **public welfare**: this is a criterion inherent in the concept of '**police powers**'. In the last years, the most significant arbitral cases concerned the clash between investors' interests and environmental policies.

## NON-COMPENSABLE REGULATORY ACTION

3. When the measure is **not discriminatory and of a general nature**: the measure must be generally applicable to the entire community and not targeted against a specific investor. E.g. the Harvard Draft Convention for the International Responsibility of States for Injuries to Aliens (Prof. Baxter) defines as non-compensable the taking of alien property or a deprivation of use, which results from: general taxation, general change in currency, action taken to maintain public order, health or morals.
4. When the measure is taken **bona fide**.

# NON-COMPENSABLE REGULATORY ACTION V EXPROPRIATION

3 approaches:

1. Sole-effect approach
2. Purpose approach
3. Contextual approach

## SOLE EFFECT APPROACH

- attaches particular weight to the effects of the impugned measure on the investment/investor, in particular the degree or intensity of the measure and the frustration of the investor
- If the regulatory action is far too restrictive (regardless of its purpose and the public welfare it serves), it is tantamount to an expropriation
- Public welfare objective and purpose are irrelevant

Is this acceptable?

## SOLE EFFECT APPROACH

- In ***Trippetts v. TAMS AFFA***, the Tribunal held that: 'the intent of the Government is less important than the effects of the measure on the owner and the form of the measures is less important than the reality of their impact'.
- The sole-effect test was explicitly upheld in ***Metalclad***, where the Tribunal held that 'it is not necessary to decide or consider the motivation of the adoption of the Ecological Decree.'

## SOLE EFFECT APPROACH

### **- *Santa Elena SA v Republic of Costa Rica***

The case concerned a direct, de jure expropriation order issued by Costa Rica with respect to the assets of US national investors that had the majority of shares in a Costa Rican company. Both the parties agreed that the expropriation was lawful. The contentious issue, however, was the determination of the amount of compensation due to the claimant.

In particular, Costa Rica contented that its obligation to pay damages should be set aside, due to the fact that it was obliged to conform to different international obligations to preserve and protect the environment and the unique ecology of the area in which the Santa Elena property was situated, by expropriating it and incorporating into a national park. Costa Rica adduced detailed evidence as to its international environmental obligations.

## SOLE EFFECT APPROACH

- *Santa Elena SA v Republic of Costa Rica*
- the Tribunal noted that the purpose of the expropriation does not affect the obligation to compensate the owners of the assets expropriated
- 'while expropriation or taking for environmental reasons may be classified as a taking for public purpose and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking
- the purpose of protecting the environment, for which the Property was taken, does not alter the legal character of the taking for which **adequate compensation must be paid**



## SOLE EFFECT APPROACH

The sole effect approach is further divided into the

- (i) effects on the **investment** and
- (ii) effects on the **investor**:

# SOLE EFFECT APPROACH

## Effects on investment

- the arbitral Tribunal will have to assess whether the impugned measure was so restrictive and burdensome, that it deprived the investor of all substantial economic benefit and use of its property thus rendering the investment economically useless, for the investor had no other reasonable alternative, in order to exploit and make profit out of its property assets
- Effect on **property rights**

## Criteria

## Authority

1. Unreasonableness

**American Law Institute**, Restatement of the Law – Third, The Foreign Relations of the USA, 1987: When the regulation ‘prevents, **unreasonably interferes** with or unduly delays the effective enjoyment of an alien’s property’

2. When the interference ‘renders the rights **so useless**, that it must be deemed to have been expropriated, even if the State ’

**Starrett Housing Corp v. Iran.**

the claimants were a group of companies that made a large investment in a housing project in Tehran. Through a ‘revolutionary decree’, the Iranian Government appointed a **manager that had the power to direct on behalf of the government, the entire project**. The Tribunal found that the investors were effectively deprived of their right to manage their property [effective use & enjoyment of their property] and thus there was an expropriation.

3. When the interference deprives the investor from the ‘**fundamental rights of ownership** and the deprivation is **not ephemeral**’

**Award Tippetts v. TAMS-AFFA.**

the claimants were an American consultant enterprise that had a 50% interest in a Partnership with an Iranian engineering enterprise, established for the purposes of constructing the Tehran International Airport. The partnership was managed by a 4-members committee, each partner appointed 2. Following the revolution in Iran, the **government appointed a temporary manager that had the power to sign checks and make managerial decisions contrary to the will of the investors**. The Tribunal found that the investors were deprived of the fundamental rights of ownership.

## Criteria

## Authority

4. When the interference is '**sufficiently restrictive** to support that the property has been 'taken' from its owner'.

### NAFTA Award *Pope & Talbot c. Canada*

the claimant was an American corporation that invested in a Canadian subsidiary company that manufactured and exported softwood. In 1996, Canada signed an agreement with the US on Lumber. In conformity with the Agreement, **Canada issued domestic regulation that restricted softwood exports from Canada to the US**. The company claimed that it had been expropriated, because it was deprived of its ordinary ability to sell its products in its traditional market (the US). The Tribunal held that the test to be applied is the **restrictiveness** of the regulatory measure and dismissed the claimants' contentions: indeed **the measure may have been restrictive, but the investors still had the ability to control their investment, export substantive quantities and make profit**. Thereby, the measure was not sufficiently restrictive to be deemed as expropriation.

5. '**covert or incidental interference with the use of property** which has the effect of depriving the owner, in whole or in significant part of the use **or reasonably-to-be-expected economic benefit** of the property '

### Award NAFTA, *Metalclad v. United Mexican States*

A landmark case: **the only one where an expropriation was found under NAFTA**. The case was about a US corporation that had invested in Mexico through a locally incorporated subsidiary. The project was about the development and operation of a hazardous waste landfill. **The Government had reassured the investor that all the required permits had been collected**. After the construction project had been effected, the operation could not begin because the **municipal authorities refused to issue a municipal permit** on the grounds that it would have negative environmental impact. The Tribunal concluded that the interference was **absolute**, as it prevented the investor from a meaningful return of its investment and was equivalent to expropriation. Mexico was condemned to pay \$17 million. The award was later put aside by the Columbia Supreme Court for different reasons.

## Criteria

## Authority

6. **Loss of effective control** over the use or disposition of substantial portion of property

Award, *Revere Copper v. OPIC*, 24 August 1978

Revere Copper had made a substantial commitment of investment in Jamaica in the bauxite mining sector. Following an agreement between the investor and the Jamaican Government, **taxes and royalties had been fixed for a period of 25 years and no further burdens would be applied to the investment.** In 1972, the newly elected Government announced far reaching reforms in bauxite sector and increased revenues so much that the investor ceased operating in 1975. Revere Copper sought for compensation by the Insurance Company, OPIC, alleging that the measures taken amounted to 'expropriation' under the insurance contract. The Tribunal held that **although there had been no physical taking of his property, the repudiation of the guarantees given to the investor had resulted into 'preventing the enterprise from exercising effective control over the use or disposition of substantial portion of its property'.**

7. Effective **neutralisation of the property benefits**

Award, *CME v. Czech Republic* (UNCITRAL)

the case is about the claimant's argument that the Media Council's actions that had made possible for the investor's local partner to **cancel the contract** that formed the basis for the investment. The Respondent replied that there had been no physical taking of the property, thus no expropriation. The Tribunal rejected the argument: *'the Media Council's actions and omissions caused the destruction of CNTS's operations, leaving it a company with assets, but without business...what was destroyed was the commercial value of the investment by reason of coercion...de facto expropriations i.e. measures that do not involve an overt taking but that **effectively neutralise the benefit of the property** are subject to expropriation claim. This is not disputed under international law.'*

# SOLE EFFECT APPROACH

## Effects on investor

What to consider here?

- (a) Legitimate expectations. How?
  - (a) Usually for FET standard
  - (b) Normal business risks □ Starrett Housing v Iran
- (b) Control over the investment / enterprise. How?
  - (a) Finding loss of control □ Pope Talbot v Canada – there must be **total or substantial deprivation**
  - (b) when the investor does not lose the entire control over the investment, but rather retains some control over the overall investment, albeit deprived of specific rights, several Tribunals have rejected a finding of expropriation in this scenario (Feldman, Occidental Ecuador, CMS v. Argentina, Enron v. Argentina, AES v. Hungary □ FET
  - (c) Measuring loss of control □ (a) Sufficiently affected, (b) diminution of value (%)

## PURPOSE APPROACH

- Looks on the purpose of measure
- if the measure serves a legitimate public purpose (the environment, public order, public safety, morals), then this purpose, in and of itself, is enough to cast the measure as being in the realms of police powers and hence non-compensable, regardless of the magnitude of its effect on the investment
- known as the approach 'which treats police powers as an **exception from expropriation** because it conflates lawful expropriation with police powers: all the expropriations that are done with a public purpose shall not be compensable
- Acceptable?

## PURPOSE APPROACH

- In the case of Methanex Corporation v. the United States, Methanex claimed that it had been directly expropriated under Article 1101 of the NAFTA. The Tribunal dismissed its claims stating establishing the following:
- 'an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation.
- But as a matter of general international law, a non-discriminatory regulation
- for a public purpose,
- which is enacted in accordance with due process and,
- which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable
- **UNLESS specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation' (in the sense of legitimate expectations). In the same judgment: "[i]t is a principle of customary international law that, where economic injury results from a bona fide regulation within the police powers of a Stat , compensation is not required"**



## PURPOSE APPROACH

### ***Sea Land Service Inc. v. Iran***

- 'A finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was a **deliberate governmental interference with the conduct of Sea-Land's operation, the effect of which was to deprive it of the use and benefit of the investment.**'

*Phillips Petroleum Co Iran v. Iran* - emphasized that "**a government's liability to compensate for expropriation of alien property does not depend on proof that the expropriation was intentional**"!!!

*Feldman v. Mexico* - this is out rightly rejected in §98: 'If there is a finding of expropriation, **compensation is required, even if the taking is for a public purpose, non-discriminatory and in accordance with due process of law**'.

## CONTEXTUAL APPROACH

- The third approach weighs **both the purpose and the effects** of the measure in a 'regulation/expropriation equation':
  - the **higher the purpose** of a measure and the greater the practical benefits to the community, the greater the impact that has to be demonstrated on the interference.
  - Conversely, the higher the **magnitude of interference**, the more compelling and convincing public objectives have to be adduced to justify it. The parameters of the contextual approach are *various and need a cautious integral assessment*.

# CONTEXTUAL APPROACH

## *Saluka v Czech Republic*

'international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States and, thus, **non-compensable**. In other words, it has yet to draw a bright and easily distinguish-able line between non-compensable regulations on the one hand and, on the other, measures that **have the effect of depriving foreign investors of their investment** and are thus unlawful and compensable in international law' (§263). 'It thus inevitably falls to the adjudicator to determine whether particular conduct by a State **"crosses the line"** that separates valid regulatory activity from expropriation. 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.' (§264).

## CONTEXTUAL APPROACH

### *SD Myers v Canada*

Tribunal shall take into account the public welfare objective or the emergency pursued by the measure, its duration, its effects, as well as the character of the measure, in a proportionality analysis.

What is proportionality analysis? How to implement?

# CONTEXTUAL APPROACH

## 1. Defining the problem

- even if the regulatory measure is fully legitimate (from a public policy perspective) and non-discriminatory, is there a breaking point, below which no compensation is due (because it simply affects negatively the economic value of the investment) and above which compensation is due, because individuals are required to make a special sacrifice in terms of proprietary rights?

# CONTEXTUAL APPROACH

## 2. Definition of proportionality

- **Legitimacy**: at a preliminary stage, the measure must pursue the *public good* as spelt out in a public welfare objective. This filters out illegitimate or impermissible purposes.
- **Suitability**: the measure must be able to attain the legitimate purpose to which it is avowed.
- **Necessity**: the measure must be the less restrictive means in view of its final ends.
- **Strict proportionality**: it requires the court to weight the two competing interests and arrive at a conclusion whether the benefits stemming from the measure are proportionate to the harm inflicted to the right/interest at stake through a cost/benefit analysis.

## CONTEXTUAL APPROACH: SUMMARY

In accordance with the principle of proportionality:

- a general, non-discriminatory regulatory measure,
- enacted bona fide by the State
- for the interests of protecting a public welfare objective falling in the remit of 'police powers' under customary international law, may,
- notwithstanding its purpose and character, be tantamount to expropriation (and require adequate compensation) IF,
- the measure in question, notwithstanding its qualitative characteristics, is disproportionate to the legitimate aim pursued, BECAUSE the latter could have been achieved **with less restrictive measures** that would not have been expropriatory on the investor.

**Total S.A. v. Argentina:** 'legitimate, proportionate, reasonable and non-discriminatory legislative measures would not be held to be expropriatory', § 197.

**El Paso v. Argentina:** 'general regulatory measures would not amount to indirect expropriation unless they are unreasonable, arbitrary, discriminatory, disproportionate or otherwise unfair', §§241, 243.

## CONTEXTUAL APPROACH: PRACTICE

***S.D. Myers v. Canada (NAFTA)***, was a case that concerned the application of an export ban on PCB exports to the US. PCB is a toxic substance both for humans and animals. Since 1970, both the US and Canada banned the manufacture of PCB. In 1980 the US closed its borders to PCB (ex-ports/imports), with the exception of imports where approval was granted by the Environmental Protection Agency (EPA). Conversely, Canada also banned exports of PCB, with the exception of PCB exported to the US, upon approval of the EPA. An American corporation took advantage of this legal framework in order to invest in the PCB exports. It created a subsidiary company in Canada (SD Myers), conveniently located in the borders between the US and Canada. Its main operation was to extract PCB from contaminated equipment and destroy the isolated PCB in the US. In 1995, the Canadian Minister of Environment issued a ban on the commercial export of PCB waste for disposal. Subsequently, the Ban was lifted two years later, in 1997. The claimant held that the Order was an indirect expropriation as it deprived the investor of a meaningful control over its assets.



## CONTEXTUAL APPROACH: PRACTICE

Tribunal focused on the **effect of the measure**, noting that the **purpose thereof was also relevant** to the question of expropriation. In §281, 'the Tribunal accepts that, in legal theory, rights other than property rights may be "expropriated" and that international law makes it appropriate for Tribunals to examine the purpose and effect of governmental measures'. As to the purpose, the Tribunal held that the ban on the export was not, in reality, imposed for environmental purposes but was a thinly-disguised protectionist trade measure (§ 162). In §282, the Tribunal seems to imply proportionality between purpose and effect: 'expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference.' But a relevant factor in the balancing exercise is the duration of the measure. In §283 the Tribunal stressed: 'An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary'. In the instant case, however, the closure of the border was temporary (only 18 months). In view of the limited duration of the interference, the measure was not "tantamount to an expropriation" under NAFTA (§§ 285, 287). What is most interesting in this case is §221, where the Tribunal underlined that where a State can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade, citing the case-law of the WTO. This may be seen as a first form of expression of proportionality.

## CONTEXTUAL APPROACH: PRACTICE

In **Feldman v. Mexico** the complainant was a US National natural person, Mr. Feldman, who owned a Mexican subsidiary company in Mexico. The complainant claimed that the refusal of Mexico to rebate excise taxation on the cigarettes exported by the company was tantamount to 'expropriation' under NAFTA. The Tribunal acknowledged that 'no one can seriously question that in some circumstances government regulatory activity can be a violation of Article 1110' (§110).

Nonetheless, 'not all regulatory activity that makes difficult or impossible for an investor to carry out a particular business, change in the law or in the application of existing laws, that makes it uneconomical to continue a particular business, is an expropriation.' The Tribunal dismissed the applicant's claim. Taking into account the purpose and effect of the measure, it held that there was no expropriation (§§111, 112). The case is important because the Tribunal holds that a regulatory measure that 'unreasonably interferes with...' the investor's property, might be expropriatory (§§ 103, 105). The measurement of 'reasonableness' is the conceptual predecessor of proportionality in investment Tribunal's reasoning.

## CONTEXTUAL APPROACH: TECMED

in **TECMED**, the investor was a Spanish parent company that invested in a Mexican subsidiary, Cytrar. The main operation of the investment was a hazardous waste disposal facility in a rapidly expanding urban area of Mexico. Following fierce community opposition against the location of Cytrar facilities, the authorities entered into an agreement in order to relocate the facility. Although the new location could be found within a relatively small time frame, the authorities refused to renew the permit of the facility and ordered Cytrar to cease its operations immediately (despite the fact that the new location had not been secured). As an effect, the investor could no longer continue operations or use the specific site for other purposes, due to the accumulation of hazardous material. Mexico argued that the actions taken were enacted with the objective of protecting the environment and public health, but the Tribunal stressed that this was a mere pretext and the true purpose was the community pressure on the government, rather than the breach of the permit's conditions for environmental reasons.

## CONTEXTUAL APPROACH: TECMED

**The claim and response:** the main contention of the claimant was that the non-renewal of the permit of the Landfill through the Resolution of November 1998 caused damage and expropriated its investment in an indirect expropriation. Without such permit, the property would have no individual or aggregate market value and the existence and function of the investment were completely destroyed following the refusal. The Government refused this contention; it claimed that it had the **discretionary power to grant and deny permits** and that the denial of permit was a **non-discriminatory measure enacted within the State 's police power to regulate and extremely sensitive framework of environmental protection and public health**. As such, it did not amount to an expropriation.

## CONTEXTUAL APPROACH: TECMED

the Tribunal oscillated between the **sole-effects** and the **contextual** approach:

□ **Sole effect.** In § 116, the Tribunal notes: the measures adopted by a State , whether regulatory or not, are an **indirect de facto expropriation** if they are irreversible and permanent and if the assets subject to such measures have been affected in such way that any form of exploitation has **disappeared**. Nonetheless, ***“the government’s intention is less important than the effects of the measures on the owner of the assets; and the form of the measure is less important than its actual effects.”*** Hence, the Tribunal held that **from a sole-effects perspective**, the decision of Mexico can be deemed as expropriatory under Article 5(1) of the Agreement (§117).

## CONTEXTUAL APPROACH: TECMED

- **Contextual approach.** quite surprisingly, however, in §118, the Tribunal 'deems it appropriate to examine...whether the Resolution, due to its characteristics and considering **not only its effects**, is an expropriatory decision'. But this is quite unclear. The Tribunal does not explain the logical relationship between the characteristics and the effects in order to assess the expropriatory character of a measure.
- §122 - ***'the Tribunal will consider, in order to determine if they are to be characterised as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality'***

## CONTEXTUAL APPROACH: TECMED

*Hence, 'there must be a reasonable relationship of proportionality between the charge or weight imposed to the investor and the aim sought to be realized by any expropriatory measure. To value such weight, it is very important to measure the size of the ownership deprivation caused ... whether such deprivation was compensated or not. On the basis of a number of legal and practical factors, it should be also considered that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitled to exercise political rights reserved to the nationals of the State , such as voting the authorities that will issue the decisions.*

## CONTEXTUAL APPROACH: TECMED

- **Effects of measure:** It is crucial to examine whether the person was stripped of the enjoyment of its property assets and whether the economic value thereof has been destroyed or substantially decreased. The effects of the measure have a 'key role' in the final judgment, but not an exclusive one.
- **Public purpose:** The Tribunal shall also assess the measure in light of its public purpose and its purported legitimate aim.
- **Reasonable policy:** The authorities shall be allowed 'due deference' in forming their policies, but that does not impede the Tribunal from examining whether the reasonable test has been observed.
- **Relationship of proportionality:** Between the measure and the aim there must be a reasonable relationship of proportionality: the measure must be appropriate to achieve its aim, the less restrictive among the available appropriate means and must be reasonable and proportionate to the final end, in the sense that it must not place an excessive individual burden on the investor. The case seems to set a stringent review of proportionality and allow a high threshold of reasonableness in the relationship between the measure and its end.
- **Various factors:** Various factors that have to be weighted are: the duration of the measure, the size of the deprivation, whether the investor received any compensation at all, the legitimate expectations of the investor and his limited participation in the decision-making process.



## TECMED

Do you agree with the tribunal's reasoning?

Criticism □ (1) no examination of legitimacy, suitability and necessity; (2) subjectivity and facts; (3) ECHR case law, (4) very strict scope of police powers doctrine

**THANK YOU**