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### INTERNATIONAL AND RUSSIAN ENVIRONMENTAL LAW AND INDIRECT EXPROPRIATION OF FOREIGN INVESTMENTS (abstract)

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МЕЖДУНАРОДНОЕ И РОССИЙСКОЕ ЭКОЛОГИЧЕСКОЕ ПРАВО  
И КОСВЕННОЕ ОТЧУЖДЕНИЕ ЗАРУБЕЖНЫХ ИНВЕСТИЦИЙ

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#### I. Foreign Investments: Opportunities and Risks

A state that enters an investment agreement with a foreign investor is not interested only in economic profit. It must also take into consideration ecological and other factors that are not peculiar to private investor.

Foreign corporation naturally has other aims, and the conflict between these competing interests may generate serious disagreements between the parties.

How environmental problems are connected to the problems of expropriation of foreign investments on the recipient's territory?

#### II. Russian Law on Direct Expropriation of Foreign Investments

Russian legal system among the compulsory measures of withdrawal of foreign property establishes nationalisation, requisition and confiscation. According to the Russian legislation there are three guarantees that are directly devoted to securing foreign property from withdrawal out of 11 main guaranties envisaged by Federal Law dated the 9th of July 1999 № 160-FZ "On foreign investments in the Russian Federation" (as am. 06.12.2011).

The compensation payment is a fundamental principle in case of nationalization. The Art. 8 of the Federal Law "On foreign investments in the Russian Federation" states "In case of nationalisation the value of the property nationalised or other losses shall be compensated to a foreign investor or commercial organisation with foreign investment".

The acting law did not perceive the generally accepted in international law provision on possible nationalisation only in case when this measure is applied "for public purpose" and also "prompt, adequate and effective compensation". On the contrary to the "old" Law the acting one have not directly foreseen that the provision of payable compensation shall be equivalent to the fair market value of the expropriated investment.

#### III. Indirect expropriation connected with environmental problems

The disputes on direct expropriation – mainly related to nationalisation that marked the 70s and 80s – have been replaced by the disputes related to foreign investment regulation and "indirect expropriation".

State intervention into foreign investment activity connected with ecological reasons is new indirect form of withdrawal of foreign investments.

Increases in taxes, increasingly harsh regulations, import and export restrictions, price controls, zoning laws, prolonged "temporary seizures" of assets, high minimum wages, control of expatriation of profits – all these are the examples of indirect withdrawal of foreign investments.

Art. 11, 12 of the Federal Law "On foreign investments in the Russian Federation" allow non-admission of indirect or latent forms of withdrawal of foreign investments.

Neither Russian Foreign Investment Law nor Environmental Protection Law do not say about indirect expropriation in the purposes of environmental protection.



Bilateral investment treaties (BIT) are often contain brief and general indirect expropriation provisions which focus on the effect of the government action and do not address the distinction between compensable and non-compensable regulatory actions.

#### IV. Investment arbitration and Environmental Law

*The Case Compania del Desarrollo de Santa Elena v. Costa Rica*

The panel decided that:

"While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus 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. That is, the purpose of protecting of the environment for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference".

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

Despite a number of decisions of international tribunals, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated and depends on the specific facts and circumstances of the case. However, while case - by case consideration remains necessary, there are some criteria emerging from the examination of some international agreements and arbitral decisions for determining whether an indirect expropriation requiring compensation has occurred [1, 3].

#### V. Formal grounds and real state of affairs

Legislation of foreign states can be divided at three major ways representing different approaches to expropriation of foreign investments. Part of state systems of law provide for compensation. Its amount, terms and general value which is reasonably may be claimed differ from one to another.

Some cannot be considered as offering any guaranties. Indirect expropriation of foreign investments is not a matter of their laws at all. At the same time environmental reasons prevail economic, especially in case of improper handling with property – as in Art. 9.4 [2, 39].

And, what serves as a ground for more formal disadvantage is optional taking, directly envisaged by national law without any reimbursement, subject to conditions – as in Art. 16A.c(ii) [3, 209].

In the future we are menacingly faced with a solution of the problem addressed in the following words: «. . . we even encounter a paradox within a paradox, since environmental policy, and the legal measures supporting it, are simultaneously denounced as a luxury we cannot afford in times of crisis and heralded as a way to innovate ourselves out of economic stagnation towards 'green growth'» [4]. Thus, **we have to manage this controversial affair –indirect expropriation of foreign investments on environmental concerns is to be legally limited and abandoned, what enable us to make the 'green growth' an overall dominating trend.**

#### List of literature

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