

Taking of Aliens' Property: The Line between the Concept of Indirect Expropriation and Government Regulatory Measures Not Requiring Compensation

KUDIRAT MAGAJI W. OWOLABI
Kwara State University, Malete, Nigeria

Abstract. It is a well recognised rule in international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation. Two decades ago, the disputes before the courts and the discussions in academic literature focused mainly on the standard of compensation and measuring of expropriated value. The divergent views of the developed and developing countries raised issues regarding the formation and evolution of customary law. Today, the more positive attitude of countries around the world toward foreign investment and the proliferation of bilateral treaties and other investment agreements requiring prompt, adequate and effective compensation for expropriation of foreign investments have largely deprived that debate of practical significance for foreign investors. In this paper, we shall be looking at takings; the indirect expropriation and see how tribunals have dealt with the issue of taking on case by case bases. Although the scope of indirect expropriation was expanded even further by use of the language “take a measure tantamount to nationalization or expropriation of such an investment,” NAFTA’s Chapter 11 did not contain any standard for identifying an indirect expropriation. Moreover, since the decisions of international tribunals do not have precedential value, there has been no consistency among the indirect expropriation cases. Many scholars have criticized NAFTA’s Chapter 11 provision for going beyond U.S.

regulatory takings laws, and the U.S. government also realized that this broad definition of indirect expropriation could result in the undesirable situation of having a legitimate regulation for public welfare hindered by an individual investor under Chapter 11. Therefore the paper further examining the thin line between the concept of indirect expropriation that requires compensation and Government regulatory measures that not requiring compensation.

1. Introduction

Expropriation (direct and indirect) requires compensation, based on clearly set rules of customary international law. However, while determination of a direct expropriation is relatively straightforward to make, determining whether a measure falls into the category of indirect expropriation required tribunals to undertake a thorough case-by-case examination and a careful consideration of the specific wording of the treaty. However, a close examination of the relevant jurisprudence reveals that, in broad terms, there are some criteria that tribunals have used to distinguish these concepts.

1.1. What constitute takings?

In the early instruments on foreign investment, the terms mostly used to describe takings were “nationalization” or “expropriation”. Though the

distinction between the two terms was not clearly made; they basically applied to the taking of property by the State through legislative or administrative measures. In modern law, as suggested, it is best to refer to takings by states as expropriation, as in most instances these takings are carried out for an economic or a public purpose. Expropriation, the targeting of a specific business, will be the most usual form of governmental interference with which the law has to be concerned. Therefore, theory of litigation in the Ethyl and Methanex Cases was that any depreciation of the assets of the foreign investor amounted to a taking.

However, customary international law does not preclude host states from expropriating foreign investments provided certain conditions are met. These conditions are: the taking of the investment for a public purpose, as provided by law, in a non-discriminatory manner and with compensation. There are two ways in which takings can occur. It is direct taking where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright physical seizure. Expropriation could also occur through interference by a state in the use of that property or with the enjoyment of the benefits even where the property is not seized and the legal title to the property is not affected. The measures taken by the State are generally termed “indirect”, “creeping”, or “de facto” expropriation, or “constructive” taking, or measures “tantamount” to expropriation.

However, under international law, not all state measures interfering with property are expropriation. The interference must be of a certain quality and exceed a certain magnitude, degree, or intensity. States have the right, indeed the duty, to regulate and public governance would be impossible if States were liable to pay compensation for every measure that reduced the value of foreign investments. As Brownlie has stated, “state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle, such measures are

not unlawful and do not constitute expropriation”. Similarly, according to Sornarajah, non-discriminatory measures related to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the efficient functioning of the state.

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.

1.2 Criteria for identifying indirect expropriation

The contours of the definition of an indirect expropriation are not precisely drawn. An increasing number of arbitral cases and a growing body of literature on the subject have shed some light on the issue but the debate goes on. In *Midland Eastern shipping and Handling Co. v. Egypt* indirect expropriation was described as ‘measures taken by a state, the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights’. In *Lauder v Czech Republic*, the tribunal stated that such taking ‘does not involve an overt taking but effectively neutralises the enjoyment of property.’ Such descriptions, while providing catchy labels for takings outside the obvious situation of direct takings of physical property, do little to further the identification of indirect takings which will attract the application of the international law on expropriation. However, the difference between a direct and indirect expropriation turns on whether the legal title of the owner is affected by the measure in question. A typical feature of an indirect expropriation is that the state will deny the existence of an

expropriation and will not contemplate the payment of compensation. Today it is generally accepted that certain types of measures affecting foreign property will be considered an expropriation, and require compensation, even though the owner retains the formal title. Few legal texts attempted to address directly how to distinguish legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation, requiring compensation. Scholars recognised the existence of the distinction but did not shed much light on the criteria for making the distinction. This may reflect reluctance to attempt to lay down simple, clear rules in a matter that is subject to so many varying and complex factual patterns and a preference to leave the resolution of the problem to the development of arbitral decisions on a case-by-case basis. The two most prominent sources of such decisions were the Iran-United States Claims Tribunal and decisions arising under Article 1, Protocol 1 of the European Convention for the Protection of Human Rights. The recent period has seen a further body of jurisprudence, from cases based on NAFTA and bilateral investment treaties (BITs). At the same time, a new generation of investment agreements, including investment chapters of Free Trade Agreements has developed, which include criteria to articulate the difference between indirect expropriation and non-compensable regulation.

1.3 Jurisprudence

Although there are some ‘inconsistencies’ in the way some arbitral tribunals have distinguished legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation. A careful examination reveals that, in broad terms, they have identified the following criteria: (a). the degree of interference with the property right, (b). the character of governmental measures i.e the purpose and the context of the governmental measure and (c). the interference of the measure with reasonable and investment-backed expectation.

2. Degree of Interference with the Property Right

2.1 Severe Economic Impact

Most international decisions treat the severity of the economic impact caused by a government action as an important element in determining whether it rises to the level of an expropriation and requiring compensation. International tribunals have often refused to require compensation when the governmental action did not remove essentially all or most of the property’s economic value. There is broad support for the proposition that the interference has to be substantial in order to constitute expropriation, i.e. when it deprives the foreign investor of fundamental rights of ownership, or when it interferes with the investment for a significant period of time. The European Court of Human Rights (ECHR) has found an expropriation where the investor has been definitely and fully deprived of the ownership of his/her property. If the investor’s rights have not disappeared, but have only been substantially reduced, and the situation is not “irreversible”, there will be no “deprivation” under Article 1, Protocol 1 of the ECHR.

Under the Iran-United States Claims Tribunal, it was held in *Starrett Housing* that the foreign investor had not been expropriated formally but a local “temporary manager” had been put in charge of the project. The tribunal found that this amounted to an expropriation:

‘It is recognised by international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.’

In the NAFTA context, in the *Pope & Talbot* case, the Tribunal found that although the introduction of export quotas resulted in a reduction of profits for the *Pope & Talbot Company*, sales abroad were not entirely prevented and the investor was still able to make profits. It was stated:

‘Mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required.’

The European Court of Human Rights, in the most widely cited case under Article 1, Protocol 1 of the European Convention Human Rights, *Sporrong and Lonnroth v. Sweden*, did not find indirect expropriation to have occurred as a result of land use regulations that affected the claimant’s property because:

“Although the right of peaceful enjoyment of possessions lost some of its substance, it did not disappear. The Court observes in this connection that the claimants could continue to utilize their possessions and that, although it became more difficult to sell properties as a result of the regulations, the possibility of selling subsisted.”

A different approach was taken by the Tribunal in the case of *CME (Netherlands) v. the Czech Republic*, the Claimant had purchased a joint venture media company in the Czech Republic and alleged, inter alia, breach of the obligation of the host country not to deprive the investor of its investment because of the actions of the national Media Council. The Tribunal, citing inter alia, the *Tippetts and Metalclad* cases, found that an expropriation had occurred because ‘the Media Council’s actions and omissions caused the destruction of the joint venture’s operations, leaving the joint venture as a company with assets, but without business. It stated also that although “regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the host state’ the administrative measures taken by the host country did not fall under this category. It therefore concluded that:

“Expropriation of the Company’s investment is found a consequence of the host country’s actions and inactions as there is no immediate prospect at hand that the joint venture will be reinstated in a position to enjoy an exclusive use of the license.”

2.2 Duration of the Regulation

The duration of the regulation could be another criterion of whether the regulation has had a severe enough impact on property to constitute a taking. In order to constitute an appropriation, regulatory measure should be definite and permanent. A measure that leads to a temporary diminution in value or loss of control would normally not be viewed as expropriatory. The Iran-United States Claims Tribunal has acknowledged this was an issue but it has had little difficulty in finding that the appointment of “temporary” managers may constitute a taking of property, when the consequent deprivation of property rights is not “merely ephemeral (in *Tippetts, Phelps Dodge and Saghi* cases). In *S.D. Myers v. Canada*, the tribunal dismissed the expropriation claim because the measure was temporary in its effect:

“In this case, the interim order and the final order were designed to, and did, curb SDMI initiative, but only for a time.....An opportunity was delayed. The tribunal concludes that this is not an expropriation case.”

Equally, in *Suez v. Argentina*, the tribunal found that the measures taken by Argentina to cope with the financial crisis “did not constitute a permanent and substantial deprivation” of the investment.

However, some of the temporary measures may also be considered expropriation depending on the specific circumstances of the case. As noted in the explanatory note to Article 10(3) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), whether an interference might amount to indirect expropriation will depend on its extent and duration, but “there obviously comes a stage at which an objective observer would conclude that there is no immediate prospect that the owner will be able to resume the enjoyment of his property.” It was on these grounds that the Iran- United States Claims Tribunals found in a number of cases that the appointment of “temporary” managers constituted a taking, particularly because the surrounding circumstances after the Islamic revolution gave

no realistic prospect that the investors could resume their business activity.

2.3 Economic Impact as the Exclusive Criterion.

There is no serious doubt that the severity of the impact upon the legal status and the practical impact on the owner's ability to use and enjoy his/her property is one of the main factors in determining whether a regulatory measure effects an indirect expropriation. What is more controversial "is the question of whether the focus on the effect will be the only and exclusive relevant criterion, 'sole effect doctrine' or whether the purpose and the context of the governmental measure may also enter into the takings analysis". The outcome in any case may be affected by the specific wording of the particular treaty provision. From the doctrine and the case examination, it seems however that the balanced approach is pre-dominant.

A few cases have focused on the effect of the owner as the main factor in discerning a regulation from a taking. In two nearly simultaneous awards, Tippetts case and Sea-Land Service case, the Tribunal seemed to endorse different approaches to whether a finding of expropriation required a finding that the state concerned had intended to expropriate the property. In the Tippetts case, the Iran-United States Tribunal held that:

"The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact".

In the Metalclad case, the claimant had been assured by the federal government that his project for a landfill facility had complied with all relevant environmental and planning regulations. Subsequently the local municipal authorities denied a construction permit. Then, the regional government declared the land in question a national area for the protection of rare cactus. The Tribunal upheld the investor's claim under the NAFTA's provision on expropriation. It said:

"expropriation under NAFTA includes not only open, deliberate and acknowledged takings of

property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also 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 of reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State".

The case *Compania del Desarrollo de Santa Elena v. Costa Rica*, has attracted particular attention because the panel expressly stated that the environmental purpose had no bearing on the issue of compensation. In this case, the Claimant (Company Santa Elena) was formed primarily for the purpose of purchasing Santa Elena, a 30 kilometer terrain in Costa Rica with the intention of developing it as a tourist resort. In 1978, Costa Rica issued an expropriation decree for Santa Elena aiming at declaring it a preservation site. While this case concerns a direct expropriation where the issue was the day of the taking for purposes of determining compensation, the panel, citing the Tippetts case, indicated that a compensable expropriation could occur through measures of state which deprives the owner of access to the benefit and economic use of his property or has made those property rights practically useless. The panel held 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 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." It also added that:

"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 expropriate, even for environmental

purposes, whether domestic or international, the state's obligation to pay compensation remains."

Character of Governmental Measures, i.e the Purpose and the Context of the Governmental Measure

A very significant factor in characterizing a government measure as falling within the expropriation sphere or not, is whether the measure refers to the State's right to promote a recognized "social purpose" or the "general welfare" by regulation. "The existence of generally recognized considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no 'taking'". In the context of the jurisprudence of the ECHR, the State may affect control on activities by individual by imposing restrictions which may take the form of planning controls, environmental orders, rent controls, import and export laws, economic regulation of professions, and the seizure of properties for legal proceedings or inheritance laws".

According to Article 1 of Protocol 1 of the ECHR, the European Court has given States a very wide "margin of appreciation" concerning the establishment of measures for the public interest and has recognized that it is for national authorities to make the initial assessment of the existence of a public concern warranting measures that result in a "deprivation" of property. The Court held that the state's judgment should be accepted unless exercised in a manifestly unreasonable way. Also, the Court has adopted a common approach to "deprivations" and "controls" of use of property. In either case, there has to be a reasonable and foreseeable national legal basis for the taking, because of the underlying principle in stability and transparency and the rule of law. In relation to either deprivation or control of use, the measures adopted must be proportionate. The Court examines whether the interference at issue strikes a reasonable balance between the demands of the general interest of the community and the private interests of the alleged victims of the deprivation and whether an unjust burden has been placed on the claimant. In order to make this assessment, the Court proceeds into a factual analysis insisting that precise factors which are needed to be taken

into account vary from case to case. In the James case for example, the Court said that:

"The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being 'in the public interest'. In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being in the 'public interest', even if they involve the compulsory transfer of property from one individual to another".

In the *Sporrong and Lönroth v. Sweden* case, the Court stated that Article 1 contains "three distinct rule":

"the first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of the possessions and subjects it to certain conditions; it appears in the second sentence in the same paragraph. The third rule recognizes that the States are entitled, amongst other things to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph."

The European Court of Human Rights found no expropriation as a result of the first test, yet found compensation to be required as a result of the second test. Under the "fair balance test", it found that over the years the state had failed to take proper account of individual interests involved. Since the state had neither shortened the temporal effect of the rules nor paid compensation, the court rules that the State had placed "an individual and excessive burden" on plaintiffs and therefore acted in violation of Article 1.

The Claimant in *Tecnicas Medioambientales Tecmed S.A v. The United Mexican States* filed a claim with ICSID alleging that the Mexican government's failure to re-license its hazardous waste site contravened various rights and protections set out in the bilateral investment treaties (BIT) between Spain and Mexico and was an expropriatory act. The Tribunal in order to determine whether the acts undertaken by

Mexico were to be characterized as expropriatory, citing the ECHR's practice, considered 'whether such actions or , measures are proportional to the public interest presumably protested thereby and the protection legally granted to investments, taking into account the significance of such impact plays a key role in deciding the proportionality' it added that there must be a reasonable relationship of proportionality between the charge of weight imposed to the foreign investor and the aim sought to be realized by an expropriatory measure.

2.4 Interference of the Measure with Reasonable Investment-backed Expectations

Another criterion identified is whether the governmental measure affects the investor's reasonable expectations. In these cases, the investor has to prove that his/her investment was based on a state of affairs that did not include the challenged regulatory regime. The claim must be objectively reasonable and not based entirely upon the investor's subjective expectations. In the Oscar Chinn case, the Permanent Court of International Justice (PCIJ) did not accept the contention of indirect taking noting that, in those circumstances, a granting of a de facto monopoly did not constitute a violation of international law and that "favourable business conditions and good will are transient circumstances, subject to inevitable changes":

"No enterprise can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State".

The Iran-U.S. Claims Tribunal in *Starett Housing* took into account the reasonable expectations of the investor:

"Investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of economic and political

system and even revolution. That any of these risks materialised does not necessarily mean that property rights affected by such events can be deemed to have been taken".

3. State Practice

The recently concluded US-Free Trade Agreements with Australia, Chile, Dominican Republic-Central America, Morocco and Singapore and the new US model BIT107 provide explicit criteria of what constitutes an indirect expropriation. As set out therein, the criteria for a finding of indirect expropriation are as follows:

The economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

The extent to which the government action interferes with distinct, reasonable, investment-backed expectations; and

3.1 The character of the government action.

However, a number of treaties have taken the approach of adding a relevant explanatory clause (in an annex or in the expropriation provision itself). It is often phrased as follows:

"Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.

Recent treaties concluded by other countries also include similar language. For instance, Belgium /Luxembourg-Colombia BIT (2009), provides in Article IX(3)(c):

"except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied for public purposes or with objectives such as public health, safety and environment protection, do not constitute indirect expropriation."

This formulation requires, *inter alia*, an assessment of the severity of the measure and its *bona fide* nature.

Relevant clauses usually describe those measures that do not constitute an indirect expropriation and, therefore, are non-compensable. Some clauses additionally set out conditions or criteria that would render a measure expropriatory that is *prima facie* non-compensable. The Protocol to the India-Latvia BIT (2010) provides:

“(b) Actions by a Government or Government controlled bodies, taken as a part of normal business activities, will not constitute indirect expropriation unless it is *prima facie* apparent that it was taken with an intent to create an adverse impact on the economic value of an investment.”

Importantly, even though the relevant clarifications are legally confined to those treaties where they are made, the exception of good faith non-discriminatory regulatory measures exists in general customary international law on the basis of the police powers doctrine. Indeed, many treaties specify that the clarifications with respect to indirect expropriations are “intended to reflect customary international law concerning the obligation of States with respect to expropriation. Criteria for the delineation of such measures formulated by investment tribunals are similar to the ones that can be found in recent treaties

In *Fireman’s Fund v. Mexico*, the tribunal summarizing the law of expropriation under NAFTA (which does not have additional clarificatory language on regulatory measures) stated as follows:

“To distinguish between a compensable expropriation and a non-compensable regulation by a host state, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host state; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the *bona fide* nature of the measure.”

The treaty approach has been to introduce so-called general exceptions, which exclude from the scope of the treaty as a whole government

measures necessary for, or relating to, certain public policy objectives. They often include objectives such as the protection of human or animal or plant life or health, the conservation of exhaustible natural resources and the protection of public morals. Relevant examples can be found in the India-Republic of Korea Comprehensive Economic Partnership Agreement (CEPA)(2009), Article 10.18(1)

More so, general exceptions usually come with safety valves which ensure that the exceptions are not abused by the State. For instance, the Canada model BIT provides in the chapeau of Art.10 that the measures concerned must not be applied “in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment”

While being a progressive and balanced solution, the limitation of this approach is that it carves out only measures that relate to public policy objectives specifically mentioned in the general exceptions clause. Potentially, there might be public interest measures that do not fall within the scope of the listed exceptions but which still must be considered non-expropriatory and non-compensable. Therefore, some countries, such as Canada and India, have combined the two approaches- a clarification clause with respect to indirect expropriation and general exceptions provisions

4. The Ideas of Property

The philosophical underpinnings of property have also become important in the analysis of taking. Property has been seen not as a single right of ownership but as involving a series of rights relating to its use and enjoyment. The growth of modern law, particularly administrative law, has resulted in the rediscovery of the idea that, when government interference occurs, it targets only some of the rights in the bundle of rights that constitute ownership and thereby reduces the value of the ownership in the property. However, protection from expropriation relates not only to tangible property or physical assets but to a broad range of rights that are economically significant to the

investor. In the words of Professor Giorgio Sacerdoti:

“All rights and interests having an economic content come into play, including immaterial and contractual rights.”

This principle is reflected in the definitions of the terms “investment” in the treaties for the protection of investments. The ECT in Article 1(6) refers not only to tangible but also to intangible property. In addition, it lists, among others, claims to money and claims to performance pursuant to contract, intellectual property and generally any right conferred by law or contract among protected investments. The NAFTA and BITs contain similarly comprehensive definitions.

Judicial practice unanimously supports a wide concept of “property,” that includes intangible rights especially rights under contracts, for purposes of expropriation and equivalent measures in the *Amoco* case, the Iran-US Claims Tribunal said with respect to rights arising from a concession agreement:

“Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction.”

Therefore, for there to be a recovery for expropriation, there must be a taking of property. Significantly, in the *Oscar Chinn* case, market access was held not to amount to property. The Belgium Government, with a view to maintaining viable shipping on the river Congo, gave a subsidy to UNATRA and directed it to charge nominal freight rates. The effect was to close down the business of Mr Chinn, who was UNATRA's sole competitor. The United Kingdom argued that this amounted to a breach of the general principles of international law, in particular of respect for vested rights. The Court, however, rejected this position, reasoning thus, ‘the Court is unable to see in his original position which was characterised by the possession of customers and the possibility of making a profit anything in the nature of a genuine vested right’.

5. Conclusion.

Although the scope of indirect expropriation was expanded even further by use of the language

“take a measure tantamount to nationalization or expropriation of such an investment,” NAFTA’s Chapter 11 did not contain any standard for identifying an indirect expropriation. Moreover, since the decisions of international tribunals do not have precedential value, there has been no consistency among the indirect expropriation cases. Many scholars have criticized NAFTA’s Chapter 11 provision for going beyond U.S. regulatory takings laws, and the U.S. government also realized that this broad definition of indirect expropriation could result in the undesirable situation of having a legitimate regulation for public welfare hindered by an individual investor under Chapter 11.

At the same time, prudence required to recognise that the list of criteria, which can be identified today from state practice and existing jurisprudence is not necessarily exhaustive. Despite the efforts of authors and adjudicators alike to define in sufficiently concrete terms, the meaning of indirect expropriation is still unclear. Indeed, the doctrine and case law on indirect expropriation in international law remain somewhat unsettled. Several factors may explain why this is so. These include the university interests at play, divergences in cultural, economic and legal concepts of property, different understandings of the role of the State, and a general heterogeneity in state practice. Indeed, new investment agreements are being concluded at a very fast pace and the number of cases going to arbitration is growing rapidly. Case-by-case consideration, which may shed additional light, will continue to be called for. Therefore, this deficiency in indirect taking cannot be cured but there should be standard for what should be an indirect taking.

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- The US-Chile Free Trade Agreement was signed on 6 June 2003 (Annex 10-D).
- US – Dominican Republic-Central America Free Trade Agreement signed on 5 August 2004, (Annex 10-C). The countries Parties to the Agreement are: Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the United States.
- US-Morocco Free Trade Agreement signed on 15 June 2004 (Annex 10-B).
- US Trade representative Robert Zoellick to Singapore Minister of Trade and Industry, George Yeo on 6 May 2003.