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To: Nathalie Bernasconi Osterwalder
International Institute for Sustainable Development - IISD
International Environment House 2
9 chemin de Balexert
1219 Geneva, Switzerland

Expropriation clauses in International Investment Agreements and the appropriate room for host States to enact regulations: a practical guide for States and Investors [1]

From: Bassant El Attar, Bo-Young Li, Didier Kessler, Miguel Burnier

[1] This memorandum is a research paper prepared on a *pro bono* basis by students at the Graduate Institute of International and Development Studies (IHEID) in Geneva. It is a pedagogical exercise to train students in the practice of international trade law, not professional legal advice. As a result, this memorandum cannot in any way bind, or lead to any form of liability or responsibility for, its authors, the supervisors of the IHEID trade law clinic or the Graduate Institute.

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Executive Summary

The reciprocal need for an investor and a host state to establish a viable premise for the protection of investments has been reflected for decades in the evolution of expropriation clauses. This evolution has naturally been aided and abetted by the increasing complexity of the definition of expropriation. It has developed from the mere connotation of a 'taking' of property rights by government officials to include advanced and controversial notions regarding the type of investment involved, whether a transfer of property rights is necessary, and the notion of 'non-compensatory takings'. This evolution is no doubt greatly influenced by the development of jurisprudence in the area of expropriation, creating a plethora of expropriation clauses, ranging from simple and traditional provisions, to more complex clauses, incorporating elements in response to jurisprudential development and lacunae.

A particularly recent tendency to further limit the scope of application of expropriation clauses has been to include exceptions within an investment agreement to guarantee that no derogation from the intended level of protection is possible. This has been achieved in several ways through general and specific exceptions to the investment agreement in its totality or to the expropriation clauses. Past practices have included, but are not limited to, extremely precise definition of expropriation, the establishment of a definition of police power-centric regulatory measures, the adoption of specific carve-outs for the expropriation clause, and the limitation of the applicability of the agreement to certain subject matters.

Regarding the past and present practice, this memo has concluded that the simplest form of expropriation clause was rarely used by developed countries, which gave preference to expropriation clauses that included "measures tantamount to" and more recently included qualifying criteria to define indirect expropriation. Developing countries, on the other hand, still use simple direct expropriation clause, although it was observed that they also preferred expropriation clause with "measures tantamount to".

With respect to the use of restrictions, almost all International Investment Agreements adopt some type of limitation to the expropriation clause. It was confirmed that the adoption of most complex forms of expropriation clause is directly linked with an increased use of different restrictions in the same agreement.

Introduction

The issue of public taking of private assets raises major questions within the realm of international law, touching on the determination and legality of expropriation. It essentially concerns a balance between investor protection and state sovereignty - an issue which becomes increasingly difficult to resolve with such divergent opinions and jurisprudence.

In their analysis of model approaches to expropriation, Been and Beauvais succinctly illustrate the invariable link between a host state's obligation towards its citizens and towards its foreign investors through what they deem to be the 'regulatory chill thesis'[2]. They argue that 'potential added cost occasioned by expropriation claims will inhibit or deter governments from taking measures to enhance the quality of life for the greatest number of their citizens'[3].

As a direct result of the propensity for proliferation of this 'regulatory chill thesis', a relatively new trend has emerged on behalf of both host states and foreign investors, each trying to define the contours of 'expropriation'. Host states tend to favor a notion of expropriation which is distinct from 'regulation' – the idea that takings for public purposes fall under the police powers of a state and as such are not compensable. In response, foreign investors have also brought multiple claims which expand the notion of expropriation to include measures which may incite expropriatory effects.

This memorandum will examine the concept of 'takings', first attempting to define and provide a certain framework for the definitions of direct and indirect expropriation through examining various bilateral and international investment treaties. Secondly, an overview and analysis of exception clauses is provided in order to illustrate how some states seek to explicitly incorporate the notion of non-compensatory takings in international investment agreements (IIAs)[4]. Finally, a classification of prominent IIAs according to content and their exception clauses will be presented.

1. The Definition and Evolution of Expropriation and Related Terms

1.1 Definition of Investment as it relates to Expropriation

The link between investment and expropriation is one which can be explained through investment protection. One of the key issues for an investor is not only making a profit, but

[2] Weiler, Todd. International Investment Law and Arbitration . Cameron, 2005 .pg 599.
[3] *ibid.*
[4] In this paper IIAs include bilateral investment treaties (BITs), multilateral investment agreements (MIAs) and investment chapters in free trade agreements.

maintaining the security and longevity of this profit. 'If [investors] acquire property they expect to be entitled to keep it. The feeling of insecurity in [this] respect is, perhaps, the major deterrent to the flow of direct foreign investment in less-developed countries'[5].

The tribunal in *Salini Costruttori v. Morocco* defined an investment as[6]:

(i) a significant contribution in assets, tangible or untangible, monetary or not, technology transfer, equipment transfer etc...

(ii) a significant duration, meaning that the investment has been made to last over time,

(iii) a significant amount of risk taken by the investor and remunerated by a return on the investment,

(iv) a significant contribution to the development of the host country.

One of the fundamental elements in defining expropriation is qualifying the property at issue. In order to claim expropriation of an investment, the investor must show that the 'property' being expropriated is 'protected'. For a long period of time customary international law dictated that only tangible, material representations of investments are protected by expropriation clauses.

However, in the 1981 case of *Liamco v. Libya*, the tribunal made a clear distinction between the perhaps narrow definition of protected property under customary law, and the slightly revolutionary notion of intangible property.

> 'It is well known that property in its general meaning is of two kinds: corporeal and incorporeal. The first, by unanimous opinion of jurists, covers all physical things…..On the other hand, incorporeal property comprises all interests and rights which though incapable of immediate material composition, may produce corporeal thing or may be evaluated in financial and economic terms. In other words, incorporeal property includes those rights that have a pecuniary or monetary value.[7]'

Consequently, the definition of investment as it relates to expropriation is highly dependent on the scope of 'protected' investment and how that is examined by each tribunal. Although this issue is not often explicitly addressed within the expropriation provisions, the qualification of an 'investment' is the first step in the analysis of an expropriatory measure.

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[5] Adeoye Akinsanya, International Protection of Direct Foreign Investments in the Third World, 36 International and Comparative Law Quarterly 58 (1987).
[6] Salini Costruttori SpA & Italstradee SpA v. Morocco, ICSID ARB/00/4, June 13 2000.
[7] LIAMCO v. The Government of the Libyan Arab Republic, (Ad Hoc Arbitration 1981).

1.2 Definition of Expropriation

The definition of expropriation can be traced as far back as 1961, when Professors Louis Sohn and Richard Baxter drafted a Convention on International Responsibility of States for Injuries to Aliens, using customary international law to define a compensable taking of property as:

> *…not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an interference that the owner thereof will not be able to use, enjoy, or dispose of the property…*[8]

It is interesting to note the difference made between a direct taking of the property and any potential interference which may hinder the use of property. This distinction has been met with much controversy and reluctance by the international community, leading to a modern evolution of expropriation as a single notion.

Consequently, in his article Regulatory Takings: The International Law Perspective, Appleton argues that the definition of expropriation is one which 'has been developed and accepted by national governments over the last hundred years'[9]. As such the general consensus is that:

> *The term "expropriation" carries with it the connotation of a "taking" by a governmental-type authority of a person's "property" with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the "taking".*[10]

From this definition one can deduce 3 main criteria, (i) it is an act attributable to the state, (ii) involves a transfer of property rights or rendering their use obsolete, and (iii) receives consequent compensation.

Nevertheless, the acknowledgement of two different types of 'takings' is notably absent from this broad definition. To return to Professors' Sohn and Baxter's conception, an important distinction must be made between two types of 'takings' to which these three criteria apply, with perhaps some contention with regard to the second and third elements. Primarily there is direct expropriation, a taking which requires 'legislative or administrative

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[8] Louis B. Sohn & R.R Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens II. Draft Convention on the International Responsibility of States for Injuries to Aliens.

[9] Appleton, Barry. "Regulatory Takings: The International Law Perspective." NYU Environmental Law Journal (2002), pg 46.

[10] S.D. Myers, Inc. v. Government of Canada, Partial Award (Nov. 13, 2000),International Legal Materials, para. 280.

acts that transfer the title and physical possession'[11]. In contrast, there has been an emergence of a novel type of 'taking' which can 'result from official acts that effectuate the loss of management, use or control, or a significant depreciation in the value of the assets'[12] such as the revocation of a license or the denial of a permit or the levying of taxation– essentially indirect expropriation. Both types of expropriation are firm-specific. At this point, an examination of the three defining elements of expropriation will ensue, within the double dimension of direct and indirect expropriation.

1.2.1 Defining elements of expropriation

(i) An act attributable to the state

With the recent adoption of the Draft Articles on State Responsibility, attribution of certain acts has become more defined and internationally recognized. Chapter II of the Project consists of 8 articles which contemplate all possible means of attribution of an act to a state. Article 4 states the fundamental rule attributing to the state the conduct of its organs. Article 5 on the other hand gives a broader view, dealing with the conduct of entities *empowered* by the state. The following articles become increasingly specific, including different possibilities for the attribution of state conduct.[13]

The point of the matter is attribution of certain acts to the state has in fact arisen in several cases including *Metalclad Corp v. Mexico (ICSID, 2000)*, and has become an essential element in the determination of indirect expropriation.[14] This introduces a new concept to expropriation, that of state responsibility. Who is liable for state action? In which case, is an act of omission, or failure to act, also considered expropriatory? This concept was established in jurisprudence as early as the 1984 *Sea Land Service Inc. v. Iran* case brought before the Iran-US Claims Tribunal. If an investor has legitimate expectations that a government will grant license or a permit, this state commitment is expected to apply to all organs of the state or those organs which are *empowered* by it. [15]

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[11] UNCTAD, Taking of Property. UNCTAD series on issues in international investment agreements (UNCTAD/ITE/IIT/15), UN, 2000, pg 3.
[12] *ibid.* pg 4.
[13] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, adopted in the General Assembly Report (A/56/10).
[14] See Metalclad Corp. v. United Mexican States, 40 I.L.M. (ICSID 2000) in Annex V
[15] Sea-Land Service, Inc. v. The Government of the Islamic Republic of Iran, Ports and. Shipping, Award No. 135-33-1, 22 June 1984.

(ii) Transfer or rendering the use of property rights obsolete

With regard to this criterion, there are two main elements to consider, primarily, the determination of the property 'protected' under an expropriation clause, and secondly which measures are qualified as resulting in transferring or rendering the enjoyment of property right obsolete.

Rosalyn Higgens, in her lecture in The Hague Academy of International Law, expressed the importance of indentifying the investment or the property right being expropriated, normally a concept taken for granted.

> 'So far as the concept of property itself is concerned, it is as if we international lawyers say: property has been defined for us by municipal legal systems and in any event, we know property when we see it. But how can we know if an individual has lost property rights unless we really understand what property is'[16].

This issue has been partially addressed by investment treaties through including detailed provisions which define 'protected property'; however these definitions exceed those predetermined by customary international law. On the other hand, some investment treaties remain silent on the definition of 'protected property' and leave it up to the tribunal to determine, on a case-by-case basis, whether the investment at issue is in fact protected. Either option is controversial and has led to much debate and ensuing discrepancies.

Other approaches include incorporating *pacta sunt servanda* in the same manner which this principle is applied to other international treaties. The idea is that *pacta sunt servanda* should be representative of state-protection of the investment embodied within a contract. In this instance, there is heavy reliance on state responsibility, especially with the introduction of indirect expropriation.

Nevertheless, the prevailing trend seems to follow in the footsteps of the aforementioned distinction made in the *LIAMCO* case between corporeal and incorporeal property, a distinction which was also upheld in a more recent case, *CME v Czech Republic (2001),* where the tribunal determined that an investor had a right to a license for the operation of a television station within the framework of 'investment'[17].

As previously mentioned, in differentiating between direct and indirect expropriation, there is much contention surrounding this criteria in combination with the element of compensation. It is primarily the qualification of the type of property being taken which

[16] Rosalyn Higgens, *The Taking of Property by the State, Recent Developments in International Law* 176 Recueil des Cours 321, 268 (1982).

determines whether or not the measure qualifies as a compensatory regulation. If the property at issue is 'corporeal', the measure is considered expropriatory and the relevant legal examination ensues. However, when the investment is dependent on state commitment through the granting of a license or permit, or even through inaction - legitimate expectations of the investors- we still find recourse to the much disputed concept of indirect expropriation, which triggers questions regarding the need for compensation[18].

A second element to consider here, especially with the recent proliferation of indirect expropriation, is the actual impact of the measure on the protected property. In cases of direct expropriation, once the property was identified as 'protected' there was an understanding that a direct transfer of property rights from the investor to the host state was sufficient to require compensation. Nevertheless, indirect expropriation broadens this impact requirement, as shown in the first Iran-US Claims Tribunal case Starrett Housing Inc, which considered the question of appointing Iranian managers to an American housing project. The tribunal found expropriation, stating:

> *"[I]t 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".*[19]

It must be noted no property rights are transferred in this case, they fully remain with the investor; however, not allowing the investor to reap the benefits associated with this property has now become a possible prerequisite for the establishment of indirect expropriation.

(iii) Compensation

In his article, Appleton makes a distinction between expropriation and non-compensatory takings. He argues that compensation is only triggered as a result of a violation of international law. This violation can be provoked in three circumstances, if expropriation (a) is not for a public purpose, (b) is discriminatory, or (c) violates principles of international law. Nevertheless, Weiler goes a step further in the distinction through considering expropriation, including compensation, as an international norm from which derogation not

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[17] CME Czech Republic B.V v. Czech Republic (UNCITRAL, Partial Award of Sept. 3, 2001) para 593, 599.
[18] See Marvin Feldman v. United Mexican States, Case No. ARB (AF)/99/1 (Dec 16, 2002), 42, ILM 625 (2003) para 100.
[19] Starret Housing Corp. v. Iran, 4 Iran-United States Cl. Trib. Rep. 122, 154 (1983).

only requires compensation for the impact of the expropriatory measure, but also for the violation of the norm. He argues that 'host states 'break the law' when they fail to observe certain conditions when taking the property. Thus failure to act for a public purpose is a breach; just as to practice discrimination in the taking is a breach'[20]. Consequently, it is important to make the distinction between compensation for reparation of breach and compensation as a requirement of expropriation.

2. The Definition, Scope and Application of Indirect Expropriation

2.1 The definition of indirect expropriation

In *Metalclad Corp v. Mexico,* the tribunal stated:

> *Expropriation under NAFTA includes not only open, deliberate and acknowledged taking of property, such as outright seizure or formal obligatory transfer of title in favor of the host state, but also covert or incidental interference with the use of property with the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state.*[21]

This general notion has been articulated by various commentators and international tribunals, albeit in many different formulations. A particularly notable commentator, Brownlie, introduces the idea of *de facto* takings in lieu of the term 'indirect expropriation', emphasizing that a *de jure* expropriation is not necessarily the only requisite for compensation.

> *'Expropriation in international law connotes the deprivation of a person's use and enjoyment of is property, either as the result of a* ***formal*** *act having that consequence, or as the result of other actions which* ***de facto*** *have that effect'*[22].

In combining previous jurisprudence with opinions of commentators, one can deduce two dimensions in terms of the definition of indirect expropriation, (i) the taking of corporeal versus incorporeal property and (ii) whether this taking was *de jure* or *de facto.* Both of these questions remain, in the large part, unanswered definitively. A *de facto* taking may place an extremely high burden of proof on a claimant because there is no legal benchmark to support an intent to expropriate. Furthermore, if the measure at issue concerns the taking of incorporeal property, an investor may face much difficulty in proving expropriation.

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[20] Weiler, Todd. International Investment Law and Arbitration. Cameron, 2005, pg 631.
[21] Metalclad Corp. v. United Mexican States, 40 I.L.M. 36, 50 ¶103 (ICSID 2000).

2.2 The scope of indirect expropriation

Another issue which is often prominently debated is the determination of the scope of indirect expropriation – whether or not it includes measures tantamount to expropriation. When drawing on NAFTA treaty architecture, Article 1110 requires compensation for both indirect expropriation and measures tantamount to expropriation, implying that they should be considered as two different notions. Weiler consequently argues that this has been reflected in case law where the implicit broadness incorporated in 'tantamount to' has triggered an examination of liability beyond the framework established by general principles of international law - as was normally the case with direct expropriation. This argument was upheld in ample jurisprudence such as *Waste Management Inc. v. Mexico*[23], a case concerning the application of NAFTA Article 1110, but decided by ICISD. The tribunal found that:

> *The phrase "take a measure tantamount to nationalization or expropriation of such an investment" in Article 1110(1) was intended to add to the meaning of the prohibition, over and above the reference to indirect expropriation.* [24]

Nevertheless, this ICSID interpretation is widely seen as divergent from the interpretation of NAFTA tribunals, most prominently in *Pope & Talbot v. Canada* where the tribunal found that the scope of measures tantamount to expropriation does not encompass more than that of expropriation.[25] Arguably, this was confirmed in the expropriation provision contained within DR-CAFTA indicating that measures tantamount to expropriation are in fact a sub-group of measures within the overall framework of indirect expropriation.

Despite the varying expropriation clauses, commentators and international organizations can still deduce broad principles from the jurisprudence to guide in the determination of indirect expropriation. For example, in his article 'Protecting Foreign Investments Against Expropriation Measures', Naewmalee makes a distinction between direct and indirect expropriation. His line of argumentation follows the idea that a direct expropriation is defined by 'directly taking control of the rights belonging rightfully to the private owners'[26], while

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[22] Ian Brownlie, Principles of Public International Law 508-509, (Oxford University Press, 6th ed., 2003).
[23] See Annex V for relevant excerpt.
[24] Waste Management Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3, Award 30 April 2004), para 144.
[25] See Pope & Talbot, Inc. v. Canada (NAFTA Ch. 11 Arb. Trib. June 26, 2000), available at http://www.appletonlaw.com/cases/P&T-INTERIM%20AWARD.PDF.
[26] Naewmalee, K. Protecting Foreign Investments against Expropriation Measures: Risks and Concerns Related to the New Draft Amendment of the Foreign Business Act of 1999 , TDRI Quarterly Review Vol.22 No.3 pg 21.

indirect expropriation, including measures tantamount to expropriation, 'does not involve a seizure of control over the rights of the investor. Rather it may involve a government measure that may 'interfere' with the usage of the property rights instead of taking direct control of the assets'[27]. This definition, extremely similar to the one given in the UNCTAD study demonstrates an already well established general acceptance of this evolutionary notion.

2.3 The inclusion of creeping expropriation

Creeping expropriation, a controversial subset of indirect expropriation, is particularly characterized by two factual modalities, the modality of time and the 'combined effect' factor.

In terms of 'time', a measure considered as indirectly expropriatory consists of a series of cumulative acts which, when considered in their totality, have the effect of rendering the enjoyment of property rights obsolete. These measures entail 'a slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment'[28]. The incremental nature of these measures can pose several difficulties in setting a threshold for the determination of the occurrence of creeping expropriation.[29] Furthermore, since creeping expropriation can only be examined retrospectively, the investor must first tolerate several consecutive acts by the host state before a claim of creeping expropriation can be made. Consequently, within the modality of time, it is important to note the timeframe in which these measures were taken in order to support a claim of creeping expropriation, independent of indirect or measures tantamount to expropriation.

In terms of 'combined effect', the Project on State Responsibility also reflects the importance of state acts and omissions in the determination of creeping expropriation: 'a breach of international obligations may arrive through a series of acts or omissions defined in the aggregate as wrongful'[30]. This is also relevant in light of the attribution of expropriatory actions to a state, where creeping expropriation will take into account the combined effect of breaches through uncoordinated action on federal, state and local levels.[31]

2.4 Indirect expropriation versus Non-compensatory takings

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[27] *ibid.*
[28] RUBINS/KINSELLA, *International Investment*, 207.
[29] HIGGINS, "The Taking of Property by the State", 353.
[30] Weiler pg 625
[31] See Article 4 of Project on State Responsibility, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, adopted in the General Assembly Report (A/56/10).

With such a broad and continuously evolving definition of expropriation, it is hard to separate the notions of direct and indirect expropriation. After examining a proliferation of investment treaties, it is evident that many discrepancies still remain. More specifically, with the introduction of the non-compensatory takings, it becomes increasingly difficult to determine if specific government measures are in fact indirect expropriation or merely non-compensatory interferences.

> *It should be said at the outset that any determination of whether there has been indirect or regulatory expropriation is highly dependent on the particular facets of the dispute….leading commentators have long recognized that a case-by-case basis approach is imperative.*[32]

Christie, in his article 'What Constitutes a Taking of Property under International law?' complements this case-by-case approach by insisting that 'the determination of when State conduct crosses the line between non-compensable regulation and compensable indirect expropriation tends to involve a balancing of several considerations'[33] which may prove to be frustrating when trying to distil a definitive and concise international legal norm.

This was also confirmed recently in *Feldman v. Mexico* (2003) where the tribunal declared

> *..it is much less clear when governmental action interferes with broadly-defined property rights…crosses the line from valid regulation to a compensable taking, and it is fair to say that o one has come up with a fully satisfactory means of drawing the line.*[34]

Nevertheless, the Third Restatement of Foreign Relations Law of the United States specifically outlines that:

> *…a State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action that is commonly accepted as within the* ***police power*** *of states.*[35]

Despite these prevailing discrepancies, when combining their respective analysis of indirect expropriation, a certain number of criteria can be amalgamated in order to determine

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[32] *ibid*. pg 450

[33] Christie G., "What Constitutes a Taking of Property under International Law?" British Yearbook of International Law (1962), pg 33.

[34] Marvin Feldman v. United Mexican States, Case No. ARB (AF)/99/1 (Dec 16, 2002), 42, ILM 625 (2003) para 100.

[35] Restatement (Third) of Foreign Relations Law of the United States, para 712, (American Law Institute 1987).

whether the measure at hand is in fact indirect expropriation[36]. The United States Model BIT, issued in 2004, outlines the following criteria[37]:

(1) The impact of the authoritative action,[38]

(2) Reasonable expectation of the investor,[39]

(3) The degree of interference and the extent of the ensuing harm,[40]

(4) The duration of the harm,[41]

(5) The character of the authoritative action.[42]

3. The legality of expropriation: expropriation clauses

For expropriation to be legal, whether direct or indirect, it must satisfy certain conditions which take the form of limitations on a host country's power to take property: (i) non discrimination, (ii) public interest, (iii) compensation, and (iv) due process. [43]

(i) Non-discrimination

Following the principles of general international law, discrimination was aimed primarily at avoiding the concept of alienating entities on the basis of national origin. However, with the evolution of expropriation, the notion of comparative discrimination also transformed. The determination of discrimination based on a relativity analysis has ceded the way for a new method of establishing discrimination. With regard to takings, a discriminatory action is one that does not have legitimate justification, or is arbitrary. The prohibition of discrimination is unique in that it applies to the three other criteria and is consequently inseparable from them. A host state will violate international law if it is discriminatory with regard to the reason for discrimination, the accordance of due process or the allocation of unequal compensation. Furthermore, the non-discrimination criterion also carries with it an obligation for the host state to a non-discriminatory treatment of members from the same group of aliens.[44]

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[36]Edsall, R.D, Indirect Expropriation under NAFTA and DR-CAFTA: Potential inconsistencies in the treatment of state public welfare regulations, Boston University Law Review. Vol 86:931, pg 940.
[37] U.S Model BIT, see article 6, Annex A.
[38] See, e.g., Metalclad Corp. v. United Mexican States, 40 I.L.M. 36, 50, para103. (ICSID 2000)
[39] See, e.g., id. ¶107
[40] See, e.g., Pope & Talbot, Inc. v. Canada, 37 ¶102 (NAFTA Ch. 11 Arb. Trib. June 26, 2000)
[41] *See, e.g.*, S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408, 1440 ¶283 (NAFTA Arb. 2000)
[42] *See, e.g., id.* ¶281
[43] UNCTAD, Taking of Property. UNCTAD series on issues in international investment agreements (UNCTAD/ITE/IIT/15), UN, 2000, pg 12.
[44] *ibid.*pg13.

(ii) Public Interest

This requirement is one that has been echoed in several international treaties and is usually used as a justification for derogation from generally accepted principles. Public interests under the GATT Article XX Exceptions, for example, may include the regulation of health, environment, culture etc. This is similar to the public interest criterion implied within expropriation clauses which allows a host state to not only qualify what is in its public interest, but to expropriate a foreign property for the protection of this interest. Nevertheless, one must take into account that in contrast to GATT Article XX which provides for a pre-determined list of instances which would qualify as 'public interest'. This term, within the framework of expropriation, remains largely undefined.

Some commentators have attempted to set a general framework for 'public interests', under expropriation. 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.[45]

This is confirmed by Brownlie,

> *….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 subject 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"*[46]

However, in terms of application of these theoretical notions in jurisprudence, tribunals tend to prefer a case-by-case determination, generally not adhering to a pre-determined notion of 'public interest'.

Terminology such as 'police powers' and 'state sovereignty' tend to be associated with this particular criterion, especially in differentiating between a direct and indirect expropriation.[47]

(iii) Compensation

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[45] M. Sornarajah, "The International Law on Foreign Investment" *(1994) at 283, Cambridge University Press. Add to bibliography*

[46] Ian Brownlie, "Public International Law", *Oxford University Press, 6th Edition, 2003 at 509.*

Compensation is the most controversial requirement for the legality of an expropriation. In general, most states have adopted the 'Hull Standard' of 'prompt, adequate and effective' compensation for any taking, which essentially requires a payment of the full market value as compensation. On the other hand, some states have adopted 'appropriate compensation' as sufficient, with varying degrees of benchmarks for compensation. It is argued that the Hull Formula favors investors because it does not take into account factors such as past practices, depletion of natural resources and foreign exchange. The standard of appropriate compensation suggests a lower final payment as a result of the incorporation of these elements.[48]

Another debatable aspect of compensation is identifying the need to compensate in the first place. With the introduction of indirect expropriation, it is difficult to determine which regulatory actions can be qualified as compensable. There are some measures taken in response to criminal or other violations which obviously are not subject to compensation. Here the purpose is clearly public interest and any form of compensation would counter the punitive nature of the taking. This notion is supported in the 1st Protocol of the European Convention on Human Rights which specifically states that 'punitive and tax measures are not to be regarded as violations of the right of property'[49]. Often, this is seen as a typical confiscation under criminal law and can be categorized separately. For example, in the Chile-Colombia IIA, concluded in 2000, Ad Article III limits the protection granted in the agreement to investments, corporeal or incorporeal, the financial backing of which is proved to be legal. In terms of the application of an expropriation provision, this means that the host state may expropriate, or in this case confiscate, a foreign investment without the obligation for compensation due to the illegality of the investment. [50]

However, the main issue is that of non-punitive regulatory measures and how the compensation scheme would apply.

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[47] UNCTAD, Taking of Property. UNCTAD series on issues in international investment agreements (UNCTAD/ITE/IIT/15), UN, 2000, *pg 13.*

[48] *ibid.* pg 26.

[49] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Paris, 20.III.1952
http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm

[50] Colombia Chile BIT 2000, Ad Article III: "1. Nada de lo dispuesto en este Acuerdo obligará a cualquiera de las Partes Contratantes a proteger inversions realizadas con capitals o activos que de conformidad con la legislación de cada Parte Contratante, se determine que provienen de actividades delictivas. 2. Las disposiciones del presente Acuerdo no se aplicarán a asuntos tributarios. "

> *In many states, regulatory structures have been built up to harness the foreign investment to the economic objectives of a host country or to prevent harm to the economy, environment, health, morals or culture of the host country. An issue that could frequently arise…with regard to…these non punitive regulatory measures is the basis of assessment of compensation, if any.*[51]

Although commentators have stressed that the issue of non-compensatory takings is dealt with on a case-by-case basis, some states have chosen to explicitly include restrictions to expropriation clauses within the IIAs in order to preserve their regulatory rights and consequently limit the scope of application of the expropriation clause. A discussion on these restrictions and quasi-reservations is found in section 3.

(iv) Due Process

The due process requirement deals with the right to judicial review of the compensation scheme granted. 'The requirement that the compensation due to a foreign investor should be assessed by an independent host country tribunal is now found in the takings provisions of many bilateral and some regional agreements'[52]. It has been suggested that the requirement of due process be addressed through means other than courts of law, such as including a mechanism for the compensation assessment in the expropriation clause. Nevertheless, the uncertainty surrounding the notion of 'due property' in general international law is also reflected in its application within the framework of expropriation. [53]

3.1 The role of investment treaties

Despite the existence of a body of customary international law, it is interesting to provide a preemptive overview on some investment treaties and their application of the aforementioned notions. In a 2006 UNCTAD study, it was confirmed that

> *Most agreements include the same four requirements for a lawful expropriation, namely public purpose, non discrimination, due process and payment of*

[51] UNCTAD, Taking of Property. UNCTAD series on issues in international investment agreements (UNCTAD/ITE/IIT/15), UN, 2000, pg 15.
[52] *ibid.* pg 16.
[53] *ibid.* pg 31.

compensation. Furthermore most BITs have similar provisions regarding the standard of compensation…. [This] trend contrasts with the variety of means in BITs with respect to the newly emerging issue of indirect expropriations…. Recent investment disputes on this matter have caused some countries, in particular the United States and Canada, to redraft their model BITs.[54]

For example, NAFTA treaty architecture is both similar and different from the general distinction outlined by international law and commentators. It is similar in that it makes a distinction between direct and indirect expropriation, however it does not explicitly adopt the notion of non-compensatory takings, as it requires compensation for both direct and indirect expropriation. Nevertheless, NAFTA tribunals have, in their application, returned to the adoption of non-compensatory takings.

Specifically, there are six main elements in NAFTA Article 1110 on Expropriation[55]:

1. Protection against uncompensated expropriation of investments.
2. Description of expropriation according to criteria determined by international law, implicitly providing for the application of Article 1104 which makes reference to national treatment (art 1102) and most-favored nation treatment (art 1103) through the non-discrimination requirement.
3. An inclusion of measures which extend beyond *de jure* takings.
4. The criterion for the legality of expropriation.
5. Obligation to pay compensation according to the Hull standard.
6. Incorporation of the 'international minimum standard of treatment'.

NAFTA Article 1110: Expropriation Clause

'No Party may directly or indirectly nationalize or expropriate an investment of an investor of another party in it's territory or take a measure tantamount to nationalization or expropriation of such an investment…'[56]

[54] Dugan, Christopher F., Don Wallace Jr., Noah D. Rubins, and Borzu Sabahi. Investor-State Arbitration. Oxford: Oxford University press, 2008, pg 438.
[55] Weiler, Todd. International Investment Law and Arbitration. Cameron, 2005, pg 601.
[56] North American Free Trade Agreement (NAFTA), Dec. 17 1992, Can.-Mex.-US., 32 I.L.M.

In comparison to other investment treaties, NAFTA Article 1110 is considered quite comprehensive, including a detailed elaboration of the basic principles. However, NAFTA introduces three types of expropriation: direct, indirect and measures tantamount to – all of which require compensation.

Argentina-United States BIT

'Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization…..'[57]

The Argentina-United States BIT is quite succinct in comparison, also including the most fundamental elements of expropriation. Nevertheless, in contrast to Article 1110, the text in this instance implies that a measure tantamount to expropriation is a sub category of indirect expropriation.

Another example of a BIT involving the United States concluded in 2004:

U.S Free Trade Agreement with Central America and the Dominican Republic (DR-CAFTA)

'No party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization…'[58]

However, the entirety of the expropriation clause in CAFTA, another free trade agreement, appears to be a condensed, but extremely similar, version of NAFTA Chapter 11, which may suggest that as the number of stakeholders increases, protection mechanisms become even more intricate.

An extremely interesting side note with regard to CAFTA is the replacement of 'measures tantamount to expropriation' with 'measures *equivalent* to expropriation'. It is not clear whether the provision was drafted in a way to accommodate the jurisprudence established under *Pope & Talbot Inc. v. Canada (2000)*, where the tribunal found that the word 'tantamount' meant 'equivalent to', because the Energy Charter (1994) also uses the same terminology. However, one must not underestimate the extent to which case law and precedent may have influenced the evolution of investment treaties.

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[57] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14 1991, art IV(1), 31 I.L.M.

[58] U.S-Costa Rica-Dom. (Aug 5, 2004).
http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA=DR_Final_Texts/Section_Index.html

With regard to an investment treaty such as the Energy Charter, it establishes an expropriation clause almost identical in structure, language and content to the NAFTA expropriation provision.

Energy Charter: Article 13 Expropriation

Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation…[59]

However, the Charter does not explicitly address the issue of direct and indirect expropriation, which may be implicit in the use of the terms 'expropriated' and 'measure having effect equivalent to'.

The Greece-Egypt BIT is an example of an IIA which regroups the four requirements of expropriation in a unique manner[60]:

Greece-Egypt BIT: Article 4 Expropriation

Investments by investors of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party…[61]

This clause is once again reminiscent of several others examined, however the drafting is unique where both 'public interest' and 'due process' are combined in art 4 (a). Additionally, the 'discrimination' requirement is accompanied by a requirement for 'clarity', the significance of which remains obscure.[62] Furthermore, Weiler remarks, 'similar to NAFTA Article 1110, this BIT provision includes compensation for measures tantamount to expropriation. It also groups national treatment and due process of law within the expropriation article'[63].

Overall, NAFTA Chapter 11 remains the most holistic in terms of compensation and the terminology applied in reference to expropriation. Nevertheless a clear trend can be established for investment treaties concluded by the United States with countries such as

[59] Energy Charter Treaty, art. 13 (Dec. 17, 1994), http://www.encharter.org
[60] For the application of this expropriation provision see Annex V below.
[61] Middle East Cement v. Arab Republic of Egypt (ICSID 2002), BIT 1995.
[62] See Middle East Cement v. Arab Republic of Egypt (ICSID 2002), para 139-142. In this case the tribunal concluded that measures tantamount to expropriation had occurred because fair and equitable treatment had not been granted.
[63] Weiler, Todd. International Investment Law and Arbitration . Cameron, 2005, pg. 605.

Singapore[64], Chile[65], Australia[66], Morocco[67], Columbia[68], Peru[69] and Uruguay[70] , which all tend to adopt an approach similar to that of DR-CAFTA. 'Unlike NAFTA Chapter 11, these free trade agreements do not contain the 'tantamount to nationalization or expropriation' language in the article regarding 'expropriation'. They tend to use 'equivalent to expropriation''[71].

The 2001 *Pope & Talbot v Canada* case essentially set influential precedent for the interpretation of 'measures tantamount to', thus narrowing its scope even further:

> *The tribunal is unable to accept the Investor's reading of Article 1110. 'Tantamount' means nothing more than equivalent. Something that is equivalent to something else cannot logically encompass more. No authority cited by the Investor supports a contrary conclusion.*[72]

Since both phrases have been equated with indirect expropriation, in application, their scope will be solely dependent on the tribunal's considerations with regard to indirect expropriation. In general, however, no trend has been distinguished in terms of a response to *Pope & Talbot*, some states did in fact use the phrase 'equivalent to' prior to that judgment.

4. Restriction of Expropriation Clauses

As seen above, depending on the definition of the expropriation, the scope of this clause can be very broad and include a substantial amount of regulatory measures taken by the host State that could affect the investment or property of foreign investor. With the objective of adequately and fully protecting the investor from expropriation, IIAs with a wide international legal requirement of compensation could have the side-effect of reducing legitimate national regulatory activity[73], due to the host State's fear of having to pay compensation arising from the violation of the expropriation clause. This is especially

[64]See Letter from US Trade Representative Robert Zoellick to Singapore Minister for Trade and Industry George Yeo (May 6 2003).
[65] See U.S-Chile Free Trade Agreement, art 10.9, annex 10-A and 10-D (June 2 2003).
[66] See U.S-Australia Free Trade Agreement, art 11.7, annex 11-A and 11-B (March 1 2004).
[67] See U.S-Morocco Free Trade Agreement, art 10.6, annex 10-A and 10-B (June 15 2004)
[68] See U.S-Colombia Free Trade Agreement, art 10.7, annex 10-B (November 22 2006)
[69] See U.S-Peru Free Trade Agreement, art 10.7, annex 10-B (April 12 2006)
[70] See U.S-Uruguay Free Trade Agreement, art 10.7, annex A and B (Nov 5 2005)
[71] Investor-State Arbitration pg 446
[72]Pope & Talbot, Inc. v. Canada (NAFTA Ch. 11 Arb. Trib. June 26, 2000), para 104.
[73] UNCTAD, Taking of Property. UNCTAD series on issues in international investment agreements (UNCTAD/ITE/IIT/15), UN, 2000, p. 41.

relevant when dealing with possible cases of indirect expropriation,[74] since the host State regulation will either be accepted as an act falling under the sovereign competences of the State – and not result in compensation[75] – or will amount to indirect expropriation and, consequently, the foreign investor should receive compensation.[76]

Although it is widely accepted by doctrine and case-law that host States have the right to enact legitimate regulatory acts that affect foreign investors, the understanding regarding which regulations do not result in compensation differs substantially. Therefore, to avoid legal uncertainty, the drafting parties should avoid over-inclusiveness and under-inclusiveness of the expropriation clause in order to strike the appropriate balance between the protection of foreign investors and the host State regulatory activity.[77] Certain treaty mechanisms are available for this purpose and will be analyzed below.

4.1 Definition of expropriation

A first option is to achieve the correct balance through the adoption of the most appropriate definition of expropriation. The two extreme possibilities here are a comprehensive definition, that would maximize the investor protection, and a narrow one, normally designed only to cover direct expropriations and nationalizations.[78] Considering that the second alternative does not include indirect expropriation, the regulatory discretion of the host State will not be limited. The appropriate balance will definitely lie between these two poles.[79]

4.2 Definition of regulatory measures

Another possibility is to include a substantive provision in the IIA to establish the definition of regulatory measures and acknowledge the need of future regulation in the

[74] Dolzer even considers the issue of indirect expropriation as the most important development in state practice. Dolzer. Indirect Expropriation: New Developments?. NYU Environmental Law Journal, 2003, p. 65.

[75] With the view that acts within the sovereign competences might not result in compensation, see Orrego Vicuña. Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society. International Law Forum, 2003, p. 190; and Brownlie. Principles of Public International Law, 2003, p. 209. For case-law, see Tecmed v. Mexico, 29/05/2003, 2004, § 119.

[76] Explaining how regulatory measures might result in indirect expropriation, see Dolzer, Schreuer. Principles of International Investment Law, 2008, p. 109; and Hofmann. Indirect Expropriation. In: Standards of Investment Protection, Reinisch (ed.), 2008, p. 165. For case law, see Santa Elena v. Costa Rica, ISCID, 2000, § 72.

[77] Coe Jr., and Rubins. Regulatory Expropriation and the Tecmed case: Context and Contributions. In: International Investment Law and Arbitration, Weiler (ed.), 2005, p. 641.

[78] UNCTAD, Taking of Property. UNCTAD series on issues in international investment agreements (UNCTAD/ITE/IIT/15), UN, 2000, p. 42-43.

[79] As previously shown, most IIAs opt to include both direct and indirect expropriation in their clauses, however they differ on the content of indirect expropriations and the extent to which these can be differentiated from non-compensable takings. For concrete examples of either type of IIA, see Annex I.

context of an IIA. This would also serve to reinforce and clarify the concept of police powers, which allow the host State to enact regulations that could affect foreign investors without resulting in expropriation.[80] According to such provision, the parties could determine exactly what would be consider as normal regulatory measures, such as: protection of human life and health, protection of the environment, conservation of natural resources, protection of consumers and labor rights, among others measures.[81]

These regulatory measures, when enacted in good faith, would normally not culminate in compensation.[82] The 2004 Canadian model-BIT has adopted the following definition of regulatory measures: "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 to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation."[83]

Recent US and Canadian model-BITs adopted a more advanced approach, by not only reinforcing the police power rule, but also establishing specific criteria to distinguish indirect expropriation from legitimate State regulation.[84] It is worth noting that narrow police powers of the host State are normally defended with the argument that it promotes investment. However, such narrow police powers transfer the regulatory risk to the host State, reducing its excepted benefit from the investment. In case of a very narrow definition of police powers, the excepted benefits for the host State could be lower than its regulatory risks, to a point where the host State would reject certain investment projects.[85]

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[80] Brownlie. Principles of Public International Law, 2003, p. 509.

[81] Mann. Investment Agreements and the Regulatory State: can exceptions clauses create a safe haven for governments?. Issues in International Investment Law, 2007, p. 3.

[82] Examples of this type of clause can be found in: a) article 10(5) of the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (Sohn and Baxter, AJIL, 1961) ("an uncompensated taking of alien property … [resulting from State actions to the] maintenance of public order, health or morality"); b) article 1, §2 of the First Protocol of the European Convention on Human Rights, which reaffirms the "right of a State to enforce such laws as it deems necessary to control the use of property"; c) section 712, comment g, 1986 (Third) Restatement of the Foreign Relations Law of the United States ("… not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police powers of states, if it is not discriminatory…")

[83] 2004 Canadian model-BIT, Annex B.13(1)(c). For a similar provisions in the 2004 US model-BIT, the IISD Model International Agreement on Investment for Sustainable Development and the Energy Charter Treaty, see Annex IV below.

[84] The scope limitation of the expropriation clause is dealt with below.

[85] Aisbett, Karp and McAusland. Regulatory Takings and Environmental Regulation in NAFTA's Chapter 11, 2006, p. 4-5.

4.3 Definition of investment, property rights and investor

Although it does not refer specifically to the expropriation clause, one could also consider to limit the application of this clause, by restricting the scope of the entire IIA. This general restriction could be made by the adoption of a limited definition of investment, property rights and investor.[86] However, this also has the side-effect of reducing the importance and relevance of the IIA.

4.4 Objectives of the IIA in Preamble

Another option to increase legal certainty would be to include in the IIA Preamble or in objective clauses not only the protection of investors, but also the protection of human life and health, the protection of the environment, the incentive to sustainable development, the acknowledgment of the host State's right or duty to regulate, among other objectives.[87] One example can be found in the US-Central America FTA: "CREATE new opportunities for economic and social development in the region; PROTECT, enhance, and enforce basic workers' rights and strengthen their cooperation on labor matters; CREATE new employment opportunities and improve working conditions and living standards in their respective territories; BUILD on their respective international commitments on labor matters; IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters; PROTECT and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories; PRESERVE their flexibility to safeguard the public welfare …"[88]

This would serve as interpretation aid of substantive obligations in eventual future arbitrations and to be used as one more tool for the arbitrators to base their decision on in order to better define the appropriate relationship between foreign investors and host State.

4.5 Scope limitation of indirect expropriation

[86] Considering the objectives of the work focused on expropriation, the adoption of general restrictive definitions and scope in the IIA will not be dealt in detail here. For this topic, see Schlemmer. Investment, Investor, Nationality and Shareholders. In: The Oxford Handbook of International Investment Law, Muchlinski, Ortino and Schreuer (eds.), 2008; and UNCTAD, Taking of Property. UNCTAD series on issues in international investment agreements (UNCTAD/ITE/IIT/15), UN, 2000, p. 36.

[87] Mann. Investment Agreements and the Regulatory State: can exceptions clauses create a safe haven for governments?. Issues in International Investment Law, 2007, p. 7.

[88] For other examples, see Annex IV below.

The IIA drafting parties also have the option of attempting to limit the scope of the expropriation clause, by providing factors that have to be necessarily taken into account when considering a possible indirect expropriation measure. As mentioned above, in addition to defining what could be considered as legitimate regulatory measures, the US and Canadian model BITs provide specific criteria to distinguish indirect expropriation from legitimate State regulation. The 2004 US model-BIT establishes in its Annex B (4)(a): "The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) 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; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action."[89]

This drastically reduces the risk of having normal regulatory measures considered as indirect expropriations.

4.6 General exclusions to the IIA

General exclusion or carve-out clauses to IIAs are normally done through the use of annexes, in which specific sectors, existing measures or future measures are excluded from the obligations of the IIA.[90] Article 8.2 of the 1995 Hong Kong-New Zealand BIT provides an example: "The provisions of this Agreement shall not apply to matters of taxation in the area of either Contracting Party. Such matters shall be governed by the domestic laws of each Contracting Party and the terms of any agreement relating to taxation concluded between the Contracting Parties."

However, as it is the case with the restriction of the definition of investment, property rights and investors, the adoption of a broad general carve-out clause to the IIA would have the side-effect of reducing its importance and relevance to the investment environment of the State. It is interesting to point out that some general exclusion clauses (mostly regarding taxation) will exclude expropriation from its application, *i.e.*, taxation measures are exempt from al other IIA obligations, but still have to comply with the expropriation clause. This is found in Article VIII of the OECD Draft Multilateral Agreement on Investment: "VIII.

[89] For a similar provision in the 2004 Canadian model-BIT, see Annex IV below.

TAXATION - 1. Nothing in this Agreement shall apply to taxation measures except as expressly provided in paragraphs 2 to 5 below. 2. Article ... (Expropriation) shall apply to taxation measures."

4.7 Specific exclusions to the expropriation clause

An option that could help reduce the risk of legitimate regulatory measures being considered as expropriation, while not reducing the importance of the IIA, is the adoption of specific carve-outs to the expropriation clause. In this case, the specific carve-out should be carefully drafted in order not to annul the protection given by the expropriation clause to foreign investors, but to only include legitimate State measures that should not be the base of an expropriation claim, such as certain taxation measures, intellectual property compulsory licensing, human health protection and environmental protection. Article 8(I) of the IISD Model International Agreement on Investment for Sustainable Development brings forth a helpful proposal: "Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide, non-discriminatory regulatory measures taken by a Party that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation under this Article."

These specific exclusions to the expropriation closely resemble clauses regarding the definition of regulatory measures to reinforce police powers of the host State, examined in section 4.2 above. However, the problem with adopting carve-out clauses, be it specific or general, would then be how to safeguard investors against regulatory abuses.[91]

4.8 General exceptions to the IIA

Differently from the carve-out options above, which exclude the measure from the scope of the IIA or expropriation clause, *i.e.* there is no violation, exceptions clauses establish circumstances when a State may violate an obligation of the IIA without any sanction. IIA general exception clauses are usually inspired by GATT article XX, which allows parties to

[90] Mann. Investment Agreements and the Regulatory State: can exceptions clauses create a safe haven for governments?. Issues in International Investment Law, 2007, p. 10.
[91] UNCTAD, Taking of Property. UNCTAD series on issues in international investment agreements (UNCTAD/ITE/IIT/15), UN, 2000, p. 44.

adopt *inter alia* measures necessary to protect public morals or human, animal or plant health or life or relating to the conservation of exhaustible nature resources. A comprehensive example is provided by Article 10.1 of the Canadian model-BIT: "Subject to the requirement that such measures are not 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, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health; (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or (c) for the conservation of living or non-living exhaustible natural resources."[92]

However, this type of clause is still not broadly adopted by IIAs and it is important to point out that the trade law development in case-law regarding general exceptions should not be directly applied to investment law.

4.9 Specific exceptions to the expropriation clause

In cases where the drafting parties cannot agree on an IIA general exception clause, one could also consider the adoption of a specific exception clause only applicable to some IIA obligations, such as those arising from the expropriation clause. These specific exceptions clauses could also follow the GATT article XX model. However, one should bear in mind that it would be very unlikely that the same parties that did not agree upon general exceptions could agree on specific exceptions to the expropriation clause, considering the sensitive nature of expropriation.

Preliminary Conclusions

As evident from this examination of the development of the notions of direct and indirect expropriation, great inconsistencies still remain not only in the general definitions but in their application throughout jurisprudence, resulting in a plethora of expropriation clauses with different levels of protection for investors. This fragmentation creates much confusion for both the investor and the host country, with the necessary level of protection determined only when a case reaches the stage of arbitration. Key issues such as determining the definitions and scope of expropriation and indirect expropriation are still lacking and continue to be debated, aided and abetted by the proliferation of academic discussions.

[92] For other examples, including the one found in the 2002 Korea-Japan BIT that predates the Canadian proposal,

Determining a unified approach towards expropriation issues becomes necessary to provide host states with clear standards in the interest of private investors, and investors the necessary security required for a foreign venture. It seems surprising that despite the benefits which could accrue to all parties involved, that a greater attempt at a unified approach has not been encouraged.

Despite there being no neutral commercial court of compulsory jurisdiction in the international arena, it remains important to establish as much neutrality and credibility within international institutions as possible. With this goal in mind, creating a more consistent standard for expropriation across the board would set up clear guidelines for capital-importing nations in their treatment of foreign investment, and allow foreign investors to invest with more certainty.[93]

In order to aid the understanding of this memo, a series of Annexes was added below. Annex I contains model expropriation clauses of different types, ranging from the simplest to the most complex one presently found. Annex II presents a table in which IIAs where clustered based on the type of expropriation clause used. The evolution in number of agreements over the past 50 years of the four groups is this compared. For this study ca. of 60 IIAs were used, being chosen an equivalent amount of agreements between developed economies[94] and developed economies; developed and developing economies; and developing and developing economies, all distributed evenly around the different regions of the world. Annex III brings a comparative table of different types of expropriation clauses and the adopted methods of restrictions, where is possible to observe an influence of the type of expropriation clause on the amount and type of restrictions adopted. Annex IV lists all examples of different types of restrictions collected from the examined IIAs. Finally, Annex V presents an overview of the case-law regarding different expropriation clauses.

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see Annex IV below.

[93] Edsall, R.D, Indirect Expropriation under NAFTA and DR-CAFTA: Potential inconsistencies in the treatment of state public welfare regulations, Boston University Law Review. Vol 86:931, pg 940.

[94] The list of developed countries was determined by the cross-reference of the IMF advanced economies list and the World Bank high-income economies.

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Starret Housing Corp. v. Iran, 4 Iran-United States Cl. Trib. Rep. 122, 154 (1983).

Tecmed v. Mexico, May 29 2003.

Waste Management Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3, Award 30 April 2004).

Annex I – Model Expropriation Clauses

Model 1: Simple Expropriation

Article XXX: Expropriation

Investments by investors of either Contracting Party shall not be expropriated, except under the following conditions:

a) the measures are taken in the public interest,
b) the measures are not discriminatory
c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation, and
d) the measures are taken in accordance with due process of law.

Model 2: Expropriation with explicit reference to Indirect Expropriation

Article XXX: Expropriation, Nationalisation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory, except:
   (a) for a public purpose;
   (b) on a non-discriminatory basis;
   (c) in accordance with due process of law, and
   (d) on payment of compensation in accordance with paragraphs 2 through 5.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

Model 3: Direct and indirect expropriation with explicit mention of 'measures equivalent to..'

Article XXX: Expropriation, Nationalisation and Compensation

1. No party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization, except,

(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law, and
(d) on payment of compensation in accordance with paragraphs 2 through 5.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

Model 4: Complex expropriation including criteria for indirect expropriation in annex

Article XXX: Expropriation, Nationalisation and Compensation

1.No party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization, except,

(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law, and
(d) on payment of compensation in accordance with paragraphs 2 through 5.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

Annex 1-A: Expropriation

The Parties confirm their shared understanding that:
1. Article XXX is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article XXX addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article XXX is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

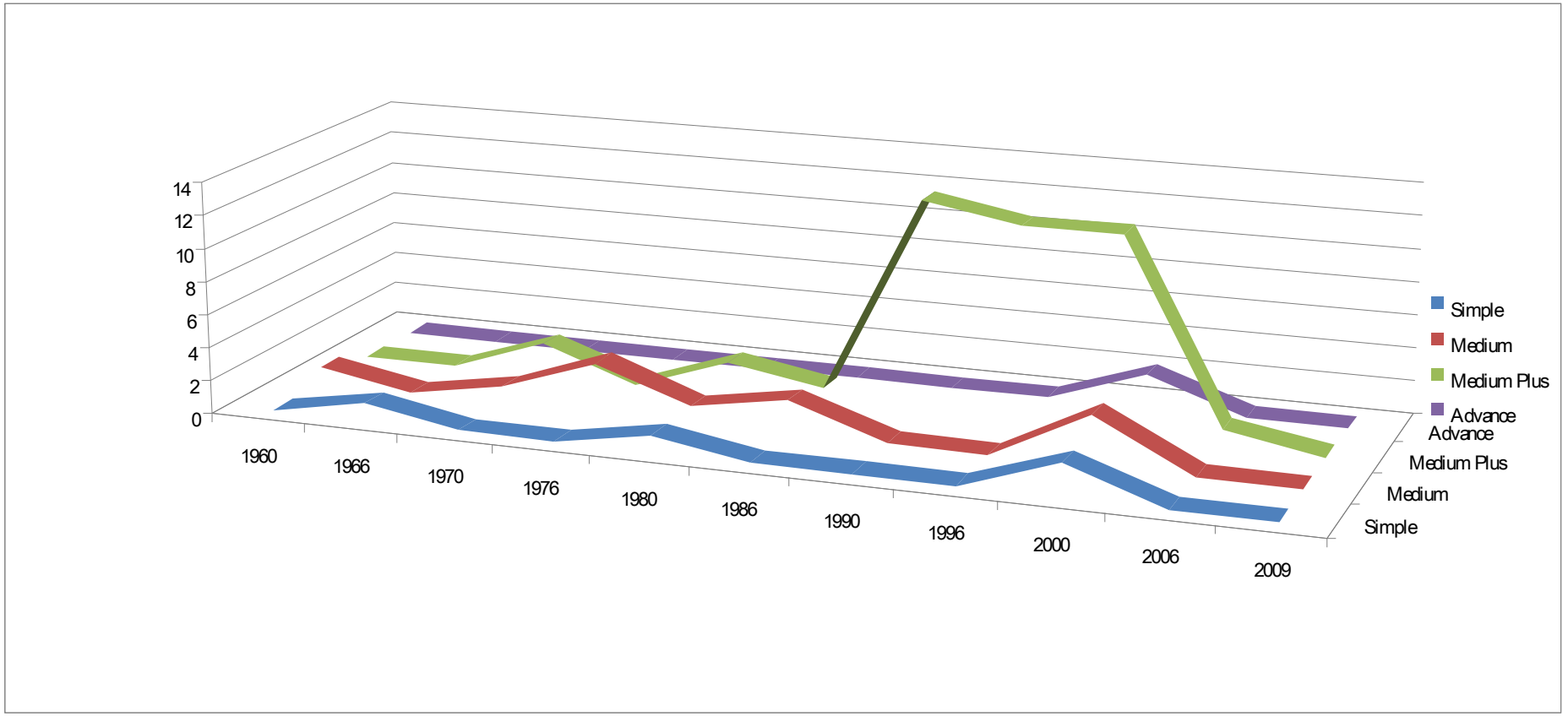
(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by case, fact-based inquiry that considers, among other factors:

(i) 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;

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

(iii) the character of the government action.

Annex II: Timeline of Types of Expropriation Clauses



Simple: Direct expropriation clause; Medium: Expropriation clause with specific mention of Indirect Expropriation; Medium Plus: Expropriation clauses with specific mention of 'measures tantamount to' or 'measures equivalent to' expropriation; Advanced: Expropriation clause with specific mention of Indirect Expropriation, including qualifying criteria.

Annex III: Comparative Table – Type of Expropriation Clause v. Restrictions

	Direct expropriation clause.	**Expropriation clause with specific mention of Indirect Expropriation.**	**Expropriation clauses with specific mention of 'measures tantamount to' or 'measures equivalent to' expropriation**	**Expropriation clause with specific mention of Indirect Expropriation, including qualifying criteria.**
No Restriction	Malta-Italy (1967);	Malta-Switzerland (1965)		
Definition of regulatory measures		Lebanon-Chad (2004) ; IISD Model BIT (2005)	Energy Charter Treaty (1991); Nafta (1994); Korea-Japan (2002); FTAA Draft (2003)	Canada Model BIT (2004); US Model BIT (2004); US-CAFTA (2005)
Definition of investment, property rights and investor	Singapore-Sri Lanka (1980); Jordan-Sudan (2000); Bangladesh-Germany (2001)	France-Singapore (1975) ; Germany-Israel (1976); Malta-France (1976); Switzerland-Singapore (1978) ; France-Israel (1983); Malta–Belgo-Luxembourg Economic Union (1987); Colombia-Chile (2000); Lebanon-Chad (2004); IISD Model BIT (2005)	Germany-Singapore (1973); Malta-Germany (1974); Romania-Senegal (1980); Lesotho-Germany (1982); Australia-China (1988); US-Poland (1990); Energy Charter Treaty (1991); US-Russia (1992); Australia-Czech Republic BIT(1993); Hong Kong-Australia (1993); Hong Kong-Switzerland (1994); NAFTA (1994); Mercosul (1994); Jamaica-Argentina (1994); Finland-Brazil (1995); Kyrgyzstan-Indonesia (1995); Portugal-Sao Tome e Principe (1995) ; Hong Kong-New Zealand (1995); UK-Cuba (1995); Turkey-Iran (1996); Czech Republic-Ireland BIT (1996); Lao-Sweden (1996); Hong Kong-Belgo-Luxembourg Economic Union (1996); Hong Kong -Japan (1997); OECD Draft MAI (1998); Switzerland-United Arab Emirates (1998); New Zealand-Chile (1999); Slovenia-Sweden (1999); Belgo-Luxembourg Economic Union-Slovenia (1999); China-Marshall Islands (1999); Philippines-Pakistan (1999); Ethiopia-Russia (2000); Saudi Arabia-Malaysia (2000); Mexico-Greece (2000); India-	Canada Model BIT (2004); US Model BIT (2004); US-CAFTA (2005)

			Ghana (2000); Austria-Slovenia (2001); Mauritius-Comoros (2001); Oman-Austria (2001); Korea-Japan (2002); Austria-Malta (2002); FTA US-Singapore (2003); Japan-Vietnam (2003); FTAA Draft (2003)	
Objectives of the IIA in Preamble		IISD Model BIT (2005)	Energy Charter Treaty (1991); US-Russia (1992); NAFTA (1994); OECD Draft MAI (1998); Austria-Slovenia (2001); Korea-Japan (2002); Austria-Malta (2002); FTA US-Singapore (2003); Japan-Vietnam (2003)	US Model BIT (2004)
Scope limitation of indirect expropriation				Canada Model BIT (2004); US Model BIT (2004); US-CAFTA (2005)
General exclusions to the IIA	Singapore-Sri Lanka (1980)	Colombia-Chile (2000); IISD Model BIT (2005)	US-Poland (1990); Energy Charter Treaty (1991); US-Russia (1992); Hong Kong-Switzerland (1994); NAFTA (1994); Hong Kong-New Zealand (1995); Czech Republic-Ireland BIT (1996); New Zealand-Chile (1999); Korea-Japan (2002); FTAA Draft (2003)	Canada Model BIT (2004); US Model BIT (2004); US-CAFTA (2005)
Specific exclusions to the expropriation clause		IISD Model BIT (2005)	NAFTA (1994); OECD Draft MAI (1998); FTA US-Singapore (2003); FTAA Draft (2003)	Canada Model BIT (2004); US Model BIT (2004): US-CAFTA (2005)
General exceptions to the IIA		Lebanon-Chad (2004); IISD Model BIT (2005)	Energy Charter Treaty (1991); US-Russia (1992); NAFTA (1994); Hong Kong-New Zealand (1995); OECD Draft MAI (1998); Switzerland-United Arab Emirates (1998); Mauritius-Comoros (2001); Korea-Japan (2002); FTA US-Singapore (2003); Japan-Vietnam (2003); FTAA Draft (2003)	Canada Model BIT (2004)
Specific exceptions to the expropriation clause				

Annex IV – Examples of Restrictions

Definition of regulatory measures:

Energy Charter Treaty (1991): "Article 18: (1) The Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law.
(2) Without affecting the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources.
(3) Each state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimalization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises."

NAFTA (1994): "Article 1114: Environmental Measures … 2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement."

Korea-Japan (2002): "Article 18.1. Notwithstanding any other provisions of this Agreement, a Contracting Party may adopt or maintain prudential measures with respect to financial services, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise providing financial services, to ensure the integrity and stability of its financial system. 2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement, that Contracting Party shall not use such measure as a means of avoiding its obligations."

Korea-Japan (2002): "Article 21. Both Contracting Parties recognise that it is inappropriate to encourage investment by investors of the other Contracting Party by relaxing environmental measures. To this effect each Contracting Party should not waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion in its territory of investments by investors of the other Contracting Party."

FTAA Draft (2003): "Article 18. Commitment Not To Relax Domestic Labor Laws To Attract Investment - 18.1. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as encouragement for the establishment, acquisition, expansion or retention of an investment of an investor in its territory. [18.2. For smaller economies, a commitment not to relax domestic labor laws should be allied with compensating access to the Hemispheric Cooperation Program for the training of workers to make them more productive and the associated enterprises more competitive.]]
[Article 19. Commitment Not To Relax Domestic Environmental Laws To Attract Investment [19.1. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as encouragement for the establishment, acquisition, expansion or retention of an investment of an investor in its territory.] [19.2. For smaller economies, a commitment not to relax domestic environmental laws should be allied with compensating access to the Hemispheric Cooperation Program for the purpose of introducing more modern machinery and industrial practices that would better protect the environment.]]"

Lebanon-Chad (2004): "Art. 8 - Environnement et travail: … 2. Les Parties contractantes réaffirment leurs obligations en tant que membres de l'Organisation internationale du Travail ainsi que leurs engagements en vertu de la Déclaration de l'OIT relative aux principes et droits fondamentaux du travail et de son suivi."

Canada Model BIT (2004): "Article 11- Health, Safety and Environmental Measures: The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement."

Canada Model BIT (2004): "Annex B.13(1)- Expropriation: …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 to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation."

US Model BIT (2004): "Article 12: Investment and Environment: 1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement. 2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

US Model BIT (2004): "Article 13: Investment and Labor - 1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in paragraph 2 as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement. 2. For purposes of this Article, "labor laws" means each Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor; (d) labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."

US Model BIT (2004): "Annex B – Expropriation – 4.(b) 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."

US-CAFTA (2005): "Annex 10-C – Expropriation: 4.(b) Except in rare circumstances, nondiscriminatory 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."

IISD Model BIT (2005): "Article 20: Maintenance of environmental and other standards - The Parties recognize that it is inappropriate to encourage investment by relaxing domestic labour, public health, safety or environmental measures and thus shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment."

IISD Model BIT (2005): "Article 21: Minimum standards for environmental, labour and human rights protection - (A) Recognizing the right of each Party to establish its own level of domestic environmental protection and its own sustainable development policies and priorities, and to adopt or modify its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations. (B) Each Party shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall strive to continue to improve these laws and regulations. (C) All Parties shall have, as a soon as practicable, a domestic environmental impact assessment law and social impact assessment law that meets the minimum standards adopted by the Conference of the Parties on these matters. (D) All Parties shall ensure that their domestic law and policies are consistent with the core labor requirements of the ILO Declaration on Fundamental Principles and Rights of Work, 1998. (E) All parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party and, at a minimum, as soon as practicable with the list of human rights obligations and agreements to be adopted by the first meeting of the Parties."

IISD Model BIT (2005): "Article 25: Inherent rights of states - (A) Host states have, in accordance with the general principles of international law, the right to pursue their own development objectives and priorities. (B) In accordance with customary international law and other general principles of international law, host states have the right to take regulatory or other measures to ensure that development in their territory is consistent with the goals and principles of sustainable development, and with other social and economic policy objectives. (C) Except where the rights of a host state are expressly stated as an exception to the obligations of this Agreement, the pursuit of these rights shall be understood as embodied within a balance of the rights and obligations of investors and investments and host states, as set out in this agreement, and consistent with other norms of customary international law. (D) Bona fide, non-discriminatory, measures taken by a Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement."

IISD Model BIT (2005): "Article 8: Expropriation - (I) Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide, non-discriminatory regulatory measures taken by a Party that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation under this Article."

Objectives of the IIA in Preamble

Energy Charter Treaty (1991): "Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and Recognizing the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes,"

US-Russia (1992): "Recognizing that the development of economic and business ties can contribute to the well-being of the peoples of each Party and promote respect for the internationally recognized rights of working people;…"

NAFTA (1994): "CREATE new employment opportunities and improve working
conditions and living standards in their respective territories; UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation; PRESERVE their flexibility to safeguard the public welfare; PROMOTE sustainable development; STRENGTHEN the development and enforcement of environmental
laws and regulations; and PROTECT, enhance and enforce basic workers' rights;"

OECD Draft MAI (1998): "Recognising that appropriate environmental policies can play a key role in ensuring that economic development, to which investment contributes, is sustainable, and resolving to desiring to implement this agreement in accordance with international environmental law and in a manner consistent with sustainable development, as reflected in the Rio Declaration on Environment and Development and Agenda 21, [including the protection and preservation of the environment and principles of the polluter pays and the precautionary approach]; Renewing their commitment to the Copenhagen Declaration of the World Summit on Social Development and to observance of internationally recognised core labour standards, i.e. freedom of association, the right to organise and bargain collectively, prohibition of forced labour, the elimination of exploitative forms of child labour, and non-discrimination in employment, and noting that the International Labour Organisation is the competent body to set and deal with core labour standards worldwide."

Austria-Slovenia (2001): "Reaffirming their commitment to the observance of internationally recognised labour standards,…"

Korea-Japan (2002): "Recognising that these objectives can be achieved without relaxing health, safety and environmental measures of general application; Recognising the importance of the cooperative relationship between labour and management in promoting investment between both countries;..."

Austria-Malta (2002): "REAFFIRMING their commitment to the observance of internationally recognized labour standards, in striving to achieve the objectives of this Agreement,…"

FTA US-Singapore (2003): "Recognizing that economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development, and that an open and non-discriminatory multilateral trading system can play a major role in achieving sustainable development;… Recognizing that liberalized trade in goods and services will assist the expansion of trade and investment flows, raise the standard of living, and create new employment opportunities in their respective territories; Desiring to expand trade in services on a mutually advantageous basis, under conditions of transparency and progressive liberalization, with the aim of securing an overall balance of rights and obligations, while recognizing the rights of each Party to regulate, and to introduce new regulations, giving due respect to national policy objectives; Reaffirming the importance of pursuing the above in a manner consistent with the protection and enhancement of the environment, including through regional environmental cooperative activities and implementation of multilateral environmental agreements to which they are both parties; and…"

Japan-Vietnam (2003): "Recognizing that these objectives can be achieved without relaxing health, safety and environmental measures of general application;"

US Model BIT (2004): "Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards; … Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;"

IISD Model BIT (2005): "PREAMBLE - Understanding sustainable development as being development that meets the needs of the present without compromising the ability of future generations to meet their own needs, and recognizing the contribution of the 1992 Rio Declaration on Environment and Development, the 2002 World Summit on Sustainable Development and the Millennium Development Goals to our understanding of sustainable development; Affirming the progressive development of international law and policy on the relationships between multinational enterprises and host governments as seen in such international instruments as the ILO Tripartite Declaration on Multinational Enterprises and Social Policy; the OECD Guidelines for Multinational Enterprises; and the United Nations' Norms and Responsibilities of

Transnational Corporations and Other Business Enterprises with Regard to Human Rights; Seeking an overall balance of rights and obligations in international investment between investors, host countries and home countries; and…"

Scope limitation of indirect expropriation

Canada Model BIT (2004): "Annex B.13(1) Expropriation: The Parties confirm their shared understanding that:
a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
i) 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;
ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and
iii) the character of the measure or series of measures;"

US Model BIT (2004): "Annex B - Expropriation - The Parties confirm their shared understanding that:
1. Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) 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; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action."

US-CAFTA (2005): "Annex 10-C – Expropriation: The Parties confirm their shared understanding that:
1. Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 10.7.1 addresses two situations. The first is direct expropriation, where an
investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an
action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
(a) The determination of whether an action or series of actions by a Party, in a
specific fact situation, constitutes an indirect expropriation, requires a case-bycase,
fact-based inquiry that considers, among other factors: (i) 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; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action."

General exclusions to the IIA

Singapore-Sri Lanka (1980): "Art 5 (2) The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party. Such matters shall be governed by any Avoidance of Double Taxation Treaty between the two Contracting Parties and the domestic laws of each Contracting Party."

US-Poland (1990): "Annex - 1. Consistent with Article II, paragraph 1, the United States reserves the right to make or maintain limited exceptions in the sectors or matters it has indicated below: air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; custom house brokers; ownership of real estate; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources;"

Energy Charter Treaty (1991): "ARTICLE 21 TAXATION- (1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency."

US-Russia (1992): "Article II.1. Each Party shall permit and treat investment, and activities associated therewith, on a nondiscriminatory basis, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exception to national treatment shall, except as stated otherwise in the Annex, not be less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country."

US-Russia (1992): "ARTICLE XI.2. The provisions of this Treaty (including Article II) shall not apply to taxes, except as follows. Articles III [on expropriation], IV and VI may apply to taxes imposed by a Party, but only if such taxes either: (a) have an effect equivalent to expropriation under Article III, or affect a Party's obligations under Article IV; or (b) affect a Party's observance and enforcement of the terms of an investment agreement or authorization granted by a Party's foreign investment authority."

Hong Kong-Switzerland (1994): "Article 7 Exceptions - … Nor, while both Contracting Parties recognize the obligation to grant treatment in accordance with Article 3(1) of this Agreement, shall either Contracting Party be obliged to apply such provisions in relation to domestic legislation related wholly or mainly to taxation."

NAFTA (1994): "1101. 3. This Chapter does not apply to Chapter Fourteen (Financial Services) except to the extent specifically provided therein."

NAFTA (1994): "Article 1108: Reservations and Exceptions - 1. Articles 1102, 1103, 1106 and 1107 do not apply to: (a) any existing non-conforming measure that is maintained by: (i) a Party at the federal level, as described in its Schedule to Annex I or III, (ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as described by a Party in its Schedule to Annex I, or (iii) a local government; …."

Hong Kong-New Zealand (1995): "Article 8 – Exceptions: … 2. The provisions of this Agreement shall not apply to matters of taxation in the area of either Contracting Party. Such matters shall be governed by the domestic laws of each Contracting Party and the terms of any agreement relating to taxation concluded between the Contracting Parties…. 4. This Agreement shall not apply to Tokelau unless the Contracting Parties have exchanged notes agreeing to the terms on which this Agreement shall so apply."

Czech Republic-Ireland BIT (1996): "Article 11: Taxation: 1. Nothing in this Agreement shall: (a) affect the rights of either Contracting Party to impose taxes in accordance with its taxation laws;..."

New Zealand-Chile (1999): "ARTICLE8 Exceptions … This Agreement shall not apply to Tokelau unless the Contracting Parties have exchanged notes agreeing to the terms on which this Agreement shall so apply."

Colombia-Chile (2000): "PROTOCOLO- Ad. artículo I..: No obstante lo dispuesto en el numeral 2 de este artículo, los préstamos no se consideran inversión."

Colombia-Chile (2000): "PROTOCOLO- Ad. artículo III..: 1. Nada de lo dispuesto en este Acuerdo obligará a cualquiera de las Partes Contratantes a proteger inversiones realizadas con capitales o activos que de conformidad con la legislación de cada Parte Contratante, se determine que provienen de actividades delictivas. 2.Las disposiciones del presente Acuerdo no se aplicarán a asuntos tributarios."

Korea-Japan (2002): "Article 5: 1. Notwithstanding the provisions of Article 2, paragraph 3 of Article 8, or Article 9, each Contracting Party may maintain any exceptional measure, which exists on the date on which this Agreement comes into force, in the sectors or with respect to the matters specified in Annex □ to this Agreement."

Korea-Japan (2002): "Article 19. 1. Nothing in this Agreement shall apply to taxation measures except as expressly provided in paragraphs 2, 3 and 4 of this Article. 2. Articles 1, 3, 7, 10[on expropriation], 22 and 23 shall apply to taxation measures…."

FTA US-Singapore (2003): "ARTICLE 21.3 : TAXATION - 1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures…. 6. Article 15.15 (Submission of a Claim to Arbitration) shall apply to a taxation measure alleged to be a breach of an investment agreement or an investment authorization. Articles 15.6 (Expropriation) and 15.15 shall apply to a taxation measure alleged to be an expropriation. However, no investor may invoke Article 15.6 as the basis for a claim where it has been determined pursuant to this paragraph that the measure is not an expropriation. An investor that seeks to invoke Article 15.6 with respect to a taxation measure must first refer to the

competent authorities described in paragraph 7, at the time that it gives notice under Article 15.15.2, the issue of whether that taxation measure involves an expropriation. If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 15.15.4."

FTAA Draft (2003): "Art 2.5 - 2.5. This Chapter does not apply to: a) [the reservations of the Parties set out in Annex XX to this Chapter;] b) [measures adopted or maintained by a Party [in relation to financial services] [, pursuant to Chapter XX (Financial Services)] [to the extent they are covered by Chapter XX (Financial Services)];] c) [measures adopted by a Party to limit the participation of the investments of investors of another Party in its territory for reasons of national security or public order;] …e) [investments made with capital or assets of illicit origin.]"

Canada Model BIT (2004): "Article 9 - Reservations and Exceptions: … 2. Articles 3, 4, 6 and 7 shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its schedule to Annex II…."

Canada Model BIT (2004): "Article 16- Taxation Measures: 1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures. … 4. The provisions of Article 13 [on expropriation] shall apply to taxation measures unless the taxation authorities of the Parties, no later than six months after being notified by an investor that the investor disputes a taxation measure, jointly determine that the measure in question is not an expropriation. The investor shall refer the issue of whether a taxation measure is an expropriation for a determination to the taxation authorities of the Parties at the same time that it gives notice under Article 24 (Notice of Intent to Submit a Claim to Arbitration)."

US Model BIT (2004): "Article 14: Non-Conforming Measures- … 2. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II."

US Model BIT (2004): "Article 21: Taxation - 1. Except as provided in this Article, nothing in Section A shall impose obligations with respect to taxation measures. 2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:
(a) the claimant has first referred to the competent tax authorities of both Parties in writing the issue of whether that taxation measure involves an expropriation; and

(b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.

US-CAFTA (2005): "Article 10.13: Non-Conforming Measures - … 2. Articles 10.3, 10.4, 10.9, and 10.10 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II."

IISD Model BIT (2005): "Article 50: Rules for taxation measures (A) Except as set out in this Article, nothing in this Agreement shall apply to taxation measures. … (D) Article 8 shall apply to a taxation measure alleged to be an expropriation. However, no investor may invoke Article 8 as the basis of a claim where it has been determined pursuant to this Paragraph that the measure is not an expropriation. An investor that seeks to invoke Article 8 with respect to a taxation measure must refer to the Executive Director of the Secretariat at the time that it gives its notice of intention to arbitrate under Article 42 the issue of whether that taxation measure involves an expropriation. The Executive Director shall ask the competent authorities of the host state and home state whether they do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, in which case the investor may submit its claim to arbitration, if the other conditions of Article 45 have been fulfilled as well."

IISD Model BIT (2005): "Article 51: General reservations and exceptions - (A) The provisions of this Agreement, except Article 8 [on expropriation], do not apply to any law or other measure of a host state the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by long-term historic discrimination in its territory, provided that such law or other measure is compatible with the requirements of Article 19. …"

<u>Specific exclusions to the expropriation clause</u>

NAFTA (1994): "1110.7. This Article [on expropriation] does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or the revocation, limitation or creation of intellectual property rights to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property)."

OECD Draft MAI (1998): "IX. COUNTRY SPECIFIC EXCEPTIONS - LODGING OF COUNTRY SPECIFIC EXCEPTIONS – A. Articles X (National Treatment), Y (Most Favoured Nation Treatment), Article Z, ..., ... and Article ..., do not apply to:

(a) any existing non-conforming measure as set out by a Contracting Party in its Schedule to Annex A of the Agreement, to the extent that the measure is maintained, continued or promptly renewed in its legal system;…
B. Articles X; Y, Article Z, ...,and Article .,.do not apply to any measure that a Contracting Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex B of the Agreement."

FTA US-Singapore (2003): "15.6.5. This Article [on expropriation] does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter 16 (Intellectual Property Rights) of this Agreement."

FTAA Draft (2003): "[13.6. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights [in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement")], or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with [the TRIPS Agreement] [Chapter XX (Intellectual Property Rights)].]]"

Canada Model BIT (2004): "Article 13- Expropriation: 5. The provisions of this Article shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the WTO Agreement."

US Model BIT (2004): "Article 6: Expropriation and Compensation - 5. This Article [on expropriation] does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement."

US-CAFTA (2005): "Article 10.7: Expropriation and Compensation - … 5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Fifteen (Intellectual Property Rights)."

IISD Model BIT (2005): "Article 8: Expropriation - (G) This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property."

General exceptions to the IIA

Energy Charter Treaty (1991): "ARTICLE 24 EXCEPTIONS - (1) This Article shall not apply to Articles 12, 13 [on expropriation] and 29.
(2) The provisions of this Treaty other than (a) those referred to in paragraph (1); and
(b) with respect to subparagraph (i), Part III of the Treaty shall not preclude any Contracting Party from adopting or enforcing any measure
(i) necessary to protect human, animal or plant life or health;
(ii) essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that (A) all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products; and (B) any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased to exist; or
(iii) designed to benefit Investors who are aboriginal people or socially or economically disadvantaged individuals or groups or their Investments and notified to the Secretariat as such, provided that such measure (A) has no significant impact on that Contracting Party's economy; and (B) does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended, provided that no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties. Such measures shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is strictly necessary to the stated end.
(3) The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:
(a) for the protection of its essential security interests including those
(i) relating to the supply of Energy Materials and Products to a military establishment; or
(ii) taken in time of war, armed conflict or other emergency in international relations;
(b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or

(c) for the maintenance of public order…."

US-Russia (1992): "Article X.1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace of security, or the protection of its own essential security interests."

NAFTA (1994): "1101.4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter."

NAFTA (1994): "Article 1114: Environmental Measures - 1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure, otherwise consistent with this Chapter, that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

Hong Kong-New Zealand (1995): "Article 8 – Exceptions: … 3. The provisions of this Agreement shall not in any way limit the right of either Contracting Party to take measures directed to the protection of its essential interests, or to the protection of public health, or to the prevention of diseases and pests in animals and plants, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination."

OECD Draft MAI (1998): "VI. EXCEPTIONS AND SAFEGUARDS - GENERAL EXCEPTIONS 1. This Article shall not apply to Article IV, 2 and 3 (Expropriation and compensation and protection from strife). 2. Nothing in this Agreement shall be construed:
a. to prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests:
(i) taken in time of war, or armed conflict, or other emergency in international relations;
(ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons of mass destruction;
(iii) relating to the production of arms and ammunition;…
3. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Contracting Parties, or a disguised investment restriction, nothing in this Agreement shall be construed to prevent any Contracting Party from taking any measure necessary for the maintenance of public order….

5. If a Contracting Party (the "requesting Party") has reason to believe that actions or measures taken by another Contracting Party (the "other Party") under this article have been taken solely for economic reasons, or that such actions or measures are not in proportion to the interest being protected, it may request consultations with that other Party in accordance with Article V, B.1 (State-State Consultation Procedures). That other Party shall provide information to the requesting Party regarding the actions or measures taken and the reasons therefor."

OECD Draft MAI (1998): "VII. FINANCIAL SERVICES - PRUDENTIAL MEASURES - 1. Notwithstanding any other provisions of the Agreement, a Contracting Party shall not be prevented from taking prudential measures with respect to financial services, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise providing financial services, or to ensure the integrity and stability of its financial system.
2. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement."

Switzerland-United Arab Emirates (1998): "Art. 11 - Autres règles et engagements particuliers: …(4) Aucune disposition du présent Accord ne sera interprétée comme empêchant une Partie contractante d'entreprendre toute action demandée par la sécurité, l'ordre, la santé ou la moralité public."

Mauritius-Comoros (2001): "Article 12 - Interdictions et Restrictions: Aucune disposition du présent Accord ne pourra être interprétée comme empêchant une Partie Contractante de prendre toute mesure nécessaire à la protection de ses intérêts essentiels en matière de sécurité, ou pour des motifs de santé publique ou de prévention des maladies affectant les animaux et les végétaux."

Korea-Japan (2002): "Article 6.1. Nothing in this Agreement shall be construed so as to derogate from the rights and obligations under international agreements in respect of protection of intellectual property rights to which the Contracting Parties are parties, including the Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, and other international agreements concluded under the auspices of the World Intellectual Property Organization."

Korea-Japan (2002): "Article 16: 1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 11, each Contracting Party may:
(a) take any measure which it considers necessary for the protection of its essential security interests;
(i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or
(ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;

(b) take any measure in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security;
(c) take any measure necessary to protect human, animal or plant life or health; or
(d) take any measure necessary for the maintenance of public order. The public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 11 [on compensation resulting from hostilities or state of emergency], that Contracting Party shall not use such measure as a means of avoiding its obligations.
3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 11, that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of which the measure is taken; (c) legal source or authority of the measure; (d) succinct description of the measure; and (e) motivation or purpose of the measure…"

FTA US-Singapore (2003): "CHAPTER 21: GENERAL AND FINAL PROVISIONS - ARTICLE 21.1 : GENERAL EXCEPTIONS - 1. For purposes of Chapters 2 through 6 (National Treatment and Market Access for Goods, Rules of Origin, Customs Procedures, Textiles, Technical Barriers to Trade), GATT 1994 Article XX and its interpretive notes are incorporated into and made part of this Agreement, mutatis mutandis. The Parties understand that the measures referred to in GATT 1994 Article XX(b) include environmental measures necessary to protect human, animal, or plant life or health, and that GATT 1994 Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.
2. For purposes of Chapters 8, 9, and 14 (Cross Border Trade in Services, Telecommunications, and Electronic Commerce21-1), GATS Article XIV (including its footnotes) is incorporated into and made part of this Agreement, mutatis mutandis.21-2 The Parties understand that the measures referred to in GATS Article XIV(b) include environmental measures necessary to protect human, animal, or plant life or health."

Japan-Vietnam (2003): "Article 15 - 1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 10, each Contracting Party may:
(a) take any measure which it considers necessary for the protection of its essential security interests; (i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;
(b) take any measure in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security;
(c) take any measure necessary to protect human, animal or plant life or health; or

(d) take any measure necessary for the maintenance of public order. The public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 10, that Contracting Party shall not use such measure as a means of avoiding its obligations…."

FTAA Draft (2003): "[2.7. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income or unemployment insurance or social security services, social welfare, public education, public training, health, and child care[, when performed in a manner not inconsistent with this Chapter].]"

FTAA Draft (2003): "Article 17. General Exceptions - [17.1. Any Party may present general exceptions.] [17.1. Among general exceptions, all actions for the protection of international peace and security shall be permitted.]
[17.1. Nothing in this Agreement shall prevent a Party from adopting or enforcing measures it deems necessary to:
a) protect public morality;
b) prevent crime and maintain public order;
c) protect or maintain its essential security interests;
d) protect human, animal and plant life;
e) protect the balance of payments and react to balance of payments difficulties;
f) secure compliance with laws or regulations relating to the prevention of deceptive and fraudulent practices and the effects of a default on contracts;
g) secure compliance with laws relating to taxation;
h) [ensure or guarantee compliance with the penal, labor, tax, and administrative resolutions and judgments;]
i) protect disadvantaged persons/minorities or regions and the interests of smaller economies and countries at a low level of development;
j) secure compliance with laws or regulations relating to the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
k) protect national treasures of artistic, historical, anthropological, paleantological and
archaeological value;
l) give effect to international obligations including treaties on the avoidance of double taxation; and
m) give effect to benefits granted as a result of agreements establishing customs unions, common markets, economic or monetary unions, or similar arrangements.]

[17.1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or do not constitute a disguised restriction on international trade or investment, nothing in this Chapter shall be construed to prevent a Party from adopting or enforcing measures:
a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
b) necessary to protect human, animal or plant life or health; or
c) necessary for the conservation of living or non-living exhaustible natural resources.]
[17.2. Parties shall be permitted to adopt measures necessary for maintaining public order in cases where a genuine threat or act could affect a fundamental societal interest.]"

Lebanon-Chad (2004): "Art. 8 - Environnement et travail: 1. Aucune disposition du présent Accord ne pourra être interprétée comme empêchant une Partie contractante d'adopter, de maintenir ou d'appliquer une mesure qu'elle considère nécessaire pour que les activités d'investissement sur son territoire soient menées d'une manière conforme à la protection de l'environnement. "

Canada Model BIT (2004): "Article 10- General Exceptions: 1. Subject to the requirement that such measures are not 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, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
(a) to protect human, animal or plant life or health;
(b) to ensure compliance with laws and regulations that are not inconsistent
with the provisions of this Agreement; or
(c) for the conservation of living or non-living exhaustible natural resources.
2. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining reasonable measures for prudential reasons, such as:
(a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
(b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
(c) ensuring the integrity and stability of a Party's financial system.
3. Nothing in this Agreement shall apply to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 7 (Performance Requirements) or Article 14 (Transfer of Funds);…"

US-CAFTA (2005): “Article 10.11: Investment and Environment - Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”

IISD Model BIT (2005): “PART 10: GENERAL EXCEPTIONS. Article 49: National security Nothing in this Agreement shall be construed: i) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or ii) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations under the United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”

Annex V – Case-Law Overview for Different Expropriation Clauses

The purpose of this Annex is to provide a general overview of the manner in which various tribunals have interpreted different expropriation clauses. It is provided for reference purposes and includes the relevant expropriation clause, followed by excerpts from various judgments.

NAFTA Chapter 11

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6.

Pope & Talbot v. Canada (NAFTA, 2000)

102. Even accepting (for the purpose of this analysis) the allegations of the Investor concerning diminished profits, the Tribunal concludes that the degree of interference with the Investment's operations due to the Export Control Regime doe not rise to an expropriation (creeping or otherwise) within the meaning of Article 1110. While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner……Indeed, at the hearing the Investor's Counsel conceded, correctly, that under international law, expropriation requires a substantial deprivation….

103.[The Investor] contends that NAFTA goes beyond those customary definitions and interpretations to adopt broader requirements that include under the purview of Article 1110 'measures of general application which have the effect of substantially interfering with the investments of investors of NAFTA Parties. The investors discern this additional requirement because of the use of the phrase 'measure tantamount to….expropriation' in article 1110.

104. The tribunal is unable to accept the Investor's reading of Article 1110. 'Tantamount' means nothing more than equivalent. Something that is equivalent to something else cannot logically encompass more. No authority cited by the Investor supports a contrary conclusion.

Metalclad v. Mexico (ICSID, 2000)

103. Thus, 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 favour 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 or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

104. By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).

105. The Tribunal holds that the exclusive authority for citing and permitting a hazardous waste landfill resides with the Mexican federal government.

S.D Myers Inc v. Canada (NAFTA, 2001)

280. The term "expropriation" in Article 1110 must be interpreted in light of the whole body of state practice, treaties and judicial interpretations of that term in international law cases. In general, the term "expropriation" carries with it the connotation of a "taking" by a governmental-type authority of a person's "property" with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the "taking".

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….the general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA….

283. 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.

285. The primary meaning of the word "tantamount" given by the Oxford English Dictionary is "equivalent". Both words require a tribunal to look at the substance of what has occurred and not only at form. A tribunal… must look at the real interests involved and the purpose and effect of the government measure.

Marvin Feldman v. Mexico (ICSID, 2002)

98. The Article 1110 language is of such generality as to be difficult to apply in specific cases. In the Tribunal's view, the essential determination is whether the actions of the
Mexican government constitute an expropriation or nationalization, or are valid governmental activity…..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 …

100. Most significantly with regard to this case, Article 1110 deals not only with direct takings, but indirect expropriation and measures "tantamount to expropriation," which potentially encompass a variety of government regulatory activity that may significantly interfere with an investor's property rights. The Tribunal deems the scope of both expressions to be functionally equivalent.

101. By their very nature, tax measures, even if they are designed to and have the effect of an expropriation, will be indirect, with an effect that may be tantamount to expropriation. If the measures are implemented over a period of time, they could also be characterized as "creeping," which the Tribunal also believes is not distinct in nature from, and is subsumed by, the terms "indirect" expropriation or "tantamount to expropriation" in Article 1110(1).

Waste Management v. Mexico (ICSID, 2004)

143. It may be noted that Article 1110(1) distinguishes between direct or indirect expropriation on the one hand and measures tantamount to an expropriation on the other. An indirect expropriation is still a taking of property. By contrast where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant.

144. Evidently the phrase "take a measure tantamount to nationalization or expropriation of such an investment" in Article 1110(1) was intended to add to the meaning of the prohibition, over and above the reference to indirect expropriation. Indeed there is some indication that it was intended to have a broad meaning, otherwise it is difficult to see why Article 1110(8) was necessary.

145. Thus there is some textual basis for the Claimant's submission that "the modern definition of 'expropriation' must be broad enough to encompass every course of sovereign conduct that unfairly destroys a foreign investor's contractual rights as an asset".

175. The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum.

Methanex v. United States (NAFTA, 2005)

7. 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.

Greece-Egypt Bilateral Investment Treaty

Article 4: Expropriation

Investments by investors of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except under the following conditions:

a) the measures are taken in the public interest and under due process of law,

b) the measures are clear and not discriminatory, and

c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investments affected immediately before the measures referred to above in this paragraph occurred or became public knowledge and it shall be freely transferable in convertible currencies from the Contracting Party, at the bank rate of exchange applicable on the date used for the determination of value. The compensation shall be transferable without delay and shall include interest until the date of payment."

Middle East Cement vs Arab Republic of Egypt (ICSID, 2002)

139. Next, it has to be examined whether there was a taking of the Poseidon, though, normally, a seizure and auction ordered by the national courts do not qualify as a taking, they can be a "measure the effects of which would be tantamount to expropriation" if they are not taken "under due process of law".

142. Art. 2.2 of the BIT requires that "Investments by investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security, in the territory of the other Contracting Party." This BIT provision must be given particular relevance in view of the special protection granted by Art. 4 against measures "tantamount to expropriation", and in the requirement for "due process of law". Therefore, a matter as important as the seizure and auctioning of a ship of the Claimant should have been notified by a direct communication [to the claimant].

USA-Czech Republic Treaty Concerning the Encouragement and Reciprocal Protection of Investment

Article III: Expropriation

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount in their consequences to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

CME Lauder v Czech Republic (UNICTRAL, 2003)

200. The Bilateral Investment Treaties (hereinafter: "BITs") generally do not define the term of expropriation and nationalization, or any of the other terms denoting similar measures of forced dispossession (“dispossession”, “taking”, “deprivation”, or “privation”). Furthermore, the practice shows that although the various terms may be used either alone or in combination, most often no distinctions have been attempted between the general concept of dispossession and the specific forms thereof. In general, expropriation means the coercive appropriation by the State of private property, usually by means of individual administrative measures. Nationalization involves large-scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain. The concept of indirect (or *“de facto”,* or *“creeping”)* expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralizes the enjoyment of the property. It is generally accepted that a wide variety of measures are susceptible to lead to indirect expropriation, and each case is therefore to be decided on the basis of its attending circumstances.

Spain- Mexico Reciprocal Promotion and Protection of Investments

Article 5: Nationalization and Expropriation

1. The nationalization, expropriation or any other measure of similar characteristics or effects (hereinafter referred to as "expropriation") that may be applied by the authorities of one Contracting Party against the investments in its territory of investors of the other Contracting Party must be applied exclusively for reasons of public interest pursuant to the law, shall in no case be discriminatory and shall require the payment of compensation to the investor or his assign or legal successor in accordance with paragraphs 2 and 3 of this article.
2. Such compensation shall be equivalent to the market value of the expropriated investment immediately before the expropriation occurred or before it was announced or made public, whichever occurs first. The criteria for calculating that value shall be determined in accordance with the applicable legislation in force in the territory of the Contracting Party in which the investment has been made.
3. Such compensation shall be paid without delay, in convertible and freely transferable currency.

Técnicas Medioambientales Tecmed v Mexico (ICSID, 2003)

113. The Agreement does not define the term "expropriation", nor does it establish the measures, actions or behaviors that would be equivalent to an expropriation or that would have similar characteristics. Although formally an expropriation means a forcible taking the Government of tangible or intangible property owned by private persons by means administrative or legislative action to that effect, the term also covers a number situations defined as de facto expropriation, where such actions or laws transfer assets third parties different from the expropriating State or where such laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the Government.

114. Generally, it is understood that the term "…equivalent to expropriation…" "tantamount to expropriation" included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called "indirect expropriation" or "creeping expropriation", as well as to the above-mentioned de facto expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do explicitly express the purpose of depriving one of rights or assets, but actually have effect. Therefore, a difference should be made between creeping expropriation and de facto expropriation, although they are usually included within broader concept of "indirect expropriation" and although both expropriation methods take place by means of a broad number of actions that have to be examined on a case-case basis to conclude if one of such expropriation methods has taken place.

US- Ecuador Bilateral Investment Treaty

Article III (I): Expropriation
Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except: for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment…

Occidental Exploration & Product Co. v. Ecuador (LCIA, 2004)
85. The Tribunal agrees with the Claimant in that expropriation need not involve the transfer of title to a given property, which was the distinctive feature of traditional expropriation under international law. It may of course affect the economic value of an investment. Taxes can result in expropriation as can other types of regulatory measures. Indirect expropriation has significantly increased the number of cases before international arbitral tribunals. It is also noticeable that bilateral investment treaties contain broad definitions of investments that can encompass many kinds of assets.

89. The Tribunal holds that the Respondent in this case did not adopt measures that could be considered as amounting to direct or indirect expropriation. In fact, there has been no deprivation of the use of reasonable expected economic benefit of the investment, let alone measures affecting a significant part of the investment. The criterion of 'substantial deprivation' under international law indentified in *Pope & Talbot* is not present in the instant case. If narrower definitions of expropriation under international law are examined, the finding of expropriation would lie still farther away.