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The Iran-United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation

Maurizio Brunetti*

This essay takes its cue from the recent Interim Award rendered under Chapter 11 of the North American Free Trade Agreement (“NAFTA”)¹ on June 26, 2000 in *Pope & Talbot, Inc v Canada*.² *Pope & Talbot* implied that the awards of the Iran-United States Claims Tribunal concerning expropriation were not relevant to the interpretation of the expropriation provisions of Chapter 11 of NAFTA. My aim here is to explain why, contrary to this suggestion, the precedents of the Iran-United States Claims Tribunal are legitimate and helpful sources of law in NAFTA Chapter 11 disputes.

I.

Pope & Talbot, Inc is a Delaware company that owns a British Columbia wood-products company (“Investment”), which manufactures and sells softwood lumber and exports most of its softwood lumber production to the United States. *Pope & Talbot, Inc* alleged that the way Canada implemented a 1996 Softwood Lumber Agreement (“SLA”) with the United States breached certain obligations under NAFTA Chapter 11, Section A. The SLA established a limit on the free export to the United States of softwood lumber first manufactured, among other places, in British Columbia.

In its pleadings before the arbitral tribunal established under Chapter 11 of NAFTA (“NAFTA tribunal”), *Pope & Talbot, Inc* asserted that Canada’s Export Control Regime implementing the SLA had limited the Investment’s ability to carry out its business of exporting softwood lumber to the United States, thereby expropriating *Pope & Talbot, Inc*’s investment. *Pope & Talbot, Inc* conceded that the Export Control Regime was a “measure not covered by customary international law

* Deputy Secretary-General, Iran-United States Claims Tribunal, The Hague, The Netherlands, writing in his private capacity. The author is grateful to Nancy Combs, legal adviser at the Iran-United States Claims Tribunal, for her helpful comments.

1. 32 ILM 605 (1993).

2. *Pope & Talbot, Inc v Canada*, Interim Award (June 26, 2000) available online at <<http://www.dfait-maeci.gc.ca/tma-nac/nafta-e.asp>> (visited Feb 3, 2001).

definitions or interpretations of the term expropriation”³; however, it argued that the phrase “measure tantamount to expropriation” in NAFTA Chapter 11, Article 1110, paragraph 1,⁴ broadened the customary definitions to include the Export Control Regime. In this sense, Pope & Talbot, Inc continued, this provision was similar to Article II, paragraph 1, of the Claims Settlement Declaration,⁵ which confers on the Iran-United States Claims Tribunal jurisdiction to decide, in addition to claims arising out of “expropriations,” claims arising out of “other measures affecting property rights.”⁶

The NAFTA tribunal denied Pope & Talbot, Inc’s expropriation claim. In reaching this decision, the NAFTA tribunal rejected Pope & Talbot, Inc’s interpretation of the phrase “measure tantamount to expropriation” in NAFTA Article 1110, paragraph 1. In the NAFTA tribunal’s view, “tantamount” meant no more than equivalent, and “[r]eferences to the decisions of the Iran-US Claims Tribunal ignore[d] the fact that that tribunal’s mandate expressly extend[ed] beyond expropriation to include ‘other measures affecting property rights.’”⁷

It is not entirely clear what the NAFTA tribunal meant by the latter statement. If it meant that, because the jurisdiction of the Iran-United States Claims Tribunal over “other measures affecting property rights” extends beyond customary international law of expropriation, its decisions concerning “other measures” represent *lex specialis*—that is, they have no relevance outside the context of that Tribunal—

3. See *Pope & Talbot*, para 94.

4. Article 1110, para 1, of NAFTA provides:

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.

NAFTA at Art 1110, para 1 (cited in note 1).

5. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (“Claims Settlement Declaration”) (Jan 19, 1981), reprinted in 1 Iran-US CTR 9.

Article II, para 1, of the Claims Settlement Declaration provides in relevant part:

An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national’s claim, if such claims and counterclaims . . . arise out of debts, contracts . . . expropriations or other measures affecting property rights.

Claims Settlement Declaration at Art II, para 1.

6. See *Pope & Talbot*, para 94.

7. *Id* at para 104.

then the NAFTA tribunal might have been right.⁸ If, however, it was implying that *all* the decisions of the Iran-United States Claims Tribunal represent *lex specialis*, then the NAFTA tribunal was wrong. As the following survey of the Iran-United States Claims Tribunal's expropriation jurisprudence demonstrates, the Tribunal nearly always relied on customary international law for its conclusions, and its awards have practical relevance to a wide variety of factual situations that will arise under NAFTA. Thus, the Iran-United States Claims Tribunal's jurisprudence with respect to expropriation may be a relevant body of knowledge from which arbitral tribunals established under Chapter 11 of NAFTA may draw.

II.

The Iran-United States Claims Tribunal ("Tribunal") first began deciding claims for takings of property in 1983, and to date it has rendered approximately sixty awards on this subject. Relatively few of those claims have involved a formal expropriation of property, so the bulk of the Tribunal's decisions on takings relates to indirect expropriation.⁹ The Tribunal draws on numerous sources, including customary international law, in deciding cases.¹⁰ In particular, the Tribunal's expropriation decisions have almost always applied customary international law. As a result, and because its awards are published, the Tribunal has contributed "the largest single

8. One could also argue, however, as Pope & Talbot, Inc did, that measures "tantamount" to expropriation can encompass measures of interference with property rights that are less severe than expropriation itself. If that argument were accepted, then the Iran-United States Claims Tribunal's jurisprudence relating to "other measures affecting property rights" could be regarded as relevant to the interpretation of NAFTA Article 1110, para 1. In support of that argument, Pope & Talbot, Inc relied on comments by Dolzer and Stevens, who suggest that treaty provisions that define "measures . . . tantamount to expropriation" to include "impairment . . . of economic value" possibly represent "the broadest scope in investment treaties with respect to indirect expropriation." This applies "insofar as the inclusion of measures that cause the 'impairment . . . of [the] economic value' of an investment, equates expropriation with a host of measures which might not otherwise be considered as such under general international law." Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* 102 (Martinus Nijhoff 1995). The NAFTA tribunal flatly rejected Pope & Talbot, Inc's argument, stating that "measures should be subject to the requirements of international law if they impair the economic value of an investment to a degree that is equivalent to expropriation." *Pope & Talbot*, para 104 n 87.

9. The term "indirect expropriation" as used in this essay also covers concepts such as "creeping expropriation," "de facto taking," and "constructive taking."

10. Article V of the Claims Settlement Declaration provides the Tribunal with maximum discretion in the choice of the applicable law. It states:

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

Claims Settlement Declaration at Art V (cited in note 5).

corpus of precedent in public international law . . . produced by any international claims body.”¹¹

Because the expropriation cases before the Tribunal have presented many different factual situations, the Tribunal has had the opportunity to examine a wide variety of state actions alleged to be indirect expropriations. In addition to the fundamental question of what constitutes a compensable taking under international law, the Tribunal has addressed other important questions, including those relating to the date of a taking, the attributability of expropriatory actions to the state, the standard of compensation, and the valuation of property. It would extend beyond the scope of this essay to discuss all the situations in which the Tribunal addressed the question of state liability for indirect expropriations of property. Rather, this essay examines a limited number of Tribunal decisions that have particular significance to the development of an international law doctrine of indirect expropriation.¹² In all the cases discussed below, the Tribunal relied on customary international law for its conclusions on expropriation.

III.

In an early award, the Tribunal set forth the standard for determining whether an indirect expropriation occurred:

[I]t is recognized *in 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.¹³

In somewhat different terms, and using a perhaps less stringent standard than that of “uselessness,” in a subsequent award (by a different Chamber), the Tribunal stated that a compensable taking occurs under international law “whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.”¹⁴ Later awards relied on these holdings for support.¹⁵

11. Charles N. Brower and Jason D. Brueschke, *The Iran-United States Claims Tribunal* 669 (Martinus Nijhoff 1998).

12. For a comprehensive discussion of the Tribunal’s decisions in expropriation cases, see *id.* at 369–612 (cited in note 11); George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal – An Analysis of the Decisions of the Tribunal* 171-276 (Clarendon 1996); Allahyar Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-US Claims Tribunal* (Martinus Nijhoff 1994); George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 *Am J Intl L* 585 (1994).

13. *Starrett Housing Corp v Iran*, Interlocutory Award No ITL 32-24-1 (Dec 19, 1983), reprinted in 4 *Iran-US CTR* 122, 154 (emphasis added).

14. *Tippetts, Abbott, McCarthy, Stratton v TAMS-AFFA*, Award No 141-7-2 (June 29, 1984), reprinted in 6 *Iran-US CTR* 219, 225 (noting also the principle that a taking of property may occur under

Concerning the question whether the intent of a government to expropriate is a prerequisite for a finding of expropriation under customary international law, the Tribunal, in two early, almost simultaneous awards (by two different Chambers), seemed to embrace two different conclusions. In *Sea-Land Service, Inc*, the Tribunal stated that a “finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-Land’s operation, the effect of which was to deprive Sea-Land of the use and benefit of its investment.”¹⁶ By contrast, in *Tippetts*, the Tribunal said that “[t]he intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.”¹⁷ The Tribunal addressed the question again in an award issued a few years later and endorsed the position taken by *Tippetts*, stating that “a government’s liability to compensate for expropriation of alien property does not depend on proof that the expropriation was intentional.”¹⁸

The Tribunal has held that the fact that a state acted lawfully in accordance with its own laws or was motivated by financial, economic, or social concerns does not give rise, under customary international law, to a defense to an expropriation claim. In *Phelps Dodge*, the Tribunal said:

The Tribunal fully understands the reasons why the Respondent felt compelled to protect its interests through this transfer of management, and the Tribunal understands the financial, economic and social concerns that inspired the law pursuant to which it acted, but those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss.¹⁹

The Tribunal confirmed this approach in subsequent awards. For example, in *Birnbaum*, the Tribunal, quoting *Phelps Dodge*,²⁰ concluded that, “for the purpose of establishing the Respondent’s liability for the deprivation of the Claimant’s ownership rights, it is immaterial whether or not the Plan and Budget Organization may have

international law “through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected”).

15. See, for example, *Birnbaum v Iran*, Award No 549-967-2, para 28 (July 6, 1993), reprinted in 29 Iran-US CTR 260, 267-68; *Payne v Iran*, Award No 245-335-2, para 20 (Aug 8, 1986), reprinted in 12 Iran-US CTR 3, 9; *Phelps Dodge Corp v Iran*, Award No 217-99-2, para 22 (Mar 19, 1986), reprinted in 10 Iran-US CTR 121, 130.
16. *Sea-Land Service, Inc v Iran*, Award No 135-33-1 (June 22, 1984), reprinted in 6 Iran-US CTR 149, 166.
17. *Tippetts*, 6 Iran-US CTR at 225–26. For a discussion of this apparent discrepancy between the two awards, see Aldrich, *Jurisprudence* at 206–7 (cited in note 12); Aldrich, 88 Am J Int L at 603 (cited in note 12); Brower and Brueschke, *Iran-United States Claims Tribunal* at 382–83 (cited in note 11).
18. *Phillips Petroleum Co Iran v Iran*, Award No 425-39-2, para 98 (June 29, 1989), reprinted in 21 Iran-US CTR 79, 115.
19. *Phelps Dodge*, 10 Iran-US CTR at 130, para 22.
20. *Id.*

been justified under the Law of 16 June 1979 in appointing a provisional manager for AFFA.²¹

The Tribunal has considered various allegations of expropriatory state actions. A large number of cases involved the appointment by Iranian government agencies of individuals charged with the supervision or management of Iranian companies in which United States claimants had ownership interests. Almost invariably, the government-appointed manager replaced the original managers installed by the owners. Those appointments, usually termed "provisional" or "temporary," were made pursuant to legislation enacted by the Islamic Republic of Iran for the stated purpose of securing critical industries—thus to protect the interests of both the Iranian workers and the government in the continued operation of certain companies. In many, if not most, of the cases where Iran appointed a person to supervise or manage a company, the Tribunal found that an indirect expropriation had occurred.²² In *Birnbaum*, as in other cases, the Tribunal looked to the following factors in making that determination:

While assumption of control over property by a government—for example, through appointment of provisional managers—does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation *under international law*, "such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral." . . . The Tribunal has previously regarded the appointment of a provisional manager as an "important factor" and a "highly significant indication" in finding a deprivation because of the attendant denial of the owner's right to manage the enterprise. . . . The Tribunal has also held that the temporary nature of an appointment of managers has not precluded a finding of a taking.²³

Thus, in the Tribunal's practice, the mere appointment of a government-manager is not sufficient to warrant a finding that an indirect expropriation occurred under customary international law. What is required is a showing that, through the appointment of the manager, the government asserted such control over the company that the claimant has been deprived of his property interests.²⁴ In *Birnbaum*, for example, the Tribunal also considered the fact that, since the date of the appointment,

21. *Birnbaum*, 29 Iran-US CTR at 270, para 35. See also *Ebrahimi v Iran*, Award No 560-44/46/47-3, para 72 (Oct 12, 1994) (not yet published in the Iran-US CTR series).

22. Consider *Starrett Housing Corp.*, 4 Iran-US CTR 122; *Tippetts*, 6 Iran-US CTR 219; *Sedco, Inc v National Iranian Oil Co*, Interlocutory Award No ITL 55-129-3 (Oct 28, 1985), reprinted in 9 Iran-US CTR 248; *Phelps Dodge*, 10 Iran-US CTR 121; *Payne*, 12 Iran-US CTR 3; *Saghi v Iran*, Award No 544-298-2 (Jan 22, 1993), reprinted in 29 Iran-US CTR 20; *Birnbaum*, 29 Iran-US CTR 260; *Khosrowshahi v Iran*, Award No 558-178-2 (June 30, 1994) (not yet published in the Iran-US CTR series); *Ebrahimi* (cited in note 21). But see *Otis Elevator Co v Iran*, Award No 304-284-2 (Apr 29, 1987), reprinted in 14 Iran-US CTR 283 and *Motorola, Inc v Iran National Airlines Corp*, Award No 373-481-3 (June 28, 1988), reprinted in 19 Iran-US CTR 73 (both awards holding that the appointment of government-managers in the circumstances did not result in an expropriation).

23. *Birnbaum*, 29 Iran-US CTR at 268, para 28 (citations omitted) (emphasis added).

24. See *id* at 267, para 27.

the company had remained under the control of government appointees and that no information on the status or operation of the company had ever been sent to the claimant or to the original partners.²⁵ In the circumstances of that case, it found that the expropriation occurred on the date when the government-appointed manager assumed his duties at the company, four days after his appointment.²⁵ In contrast, in an earlier case, *Sedco, Inc*, the Tribunal found that, in the circumstances, the expropriation of the claimant's interest in an Iranian company had coincided with the appointment by Iran of temporary managers for the company. The Tribunal explained that, when, "as in the instant case, the seizure of control by appointment of 'temporary' managers clearly ripens into an outright taking of title, the date of appointment presumptively should be regarded as the date of taking," and that such presumption becomes conclusive if "it is also found that on the date of the government appointment of 'temporary' managers there is no reasonable prospect of return of control."²⁷ It should be noted that in a number of awards, the Tribunal emphasized the fact that the laws authorizing the appointment of government-managers or supervisors deprived the owners of the targeted companies of significant ownership rights, including the right to manage their properties.²³

The Tribunal has addressed in several awards the question of whether the failure of an Iranian government agency to grant a re-export permit for equipment in Iran owned by a United States contractor constituted an expropriation under customary international law. In *Sedco, Inc*, the Tribunal stated, generally, that "[t]he failure of a party to render contractually required assistance towards exportation could at some point in time ripen into a taking or conversion of the property affected."²² In *Houston Contracting Company*, the Tribunal observed that the claimant carried the burden of proving that "it took all reasonable steps to export the equipment, so as to satisfy the burden of proof to show that the losses suffered by it were incurred as a result of the acts or omissions of [Iran] and not by [the claimant's] own failure to act."²³ In *Seismograph Service Corporation*, the Tribunal held that the imposition of certain conditions upon the re-export of the claimant's property was unwarranted and unreasonable and amounted to a compensable measure affecting property rights, but not to an expropriation because the claimant had maintained a contractual right to sell

25. See id at 269, para 31.

26. See id at 269, para 32.

27. *Sedco, Inc*, 9 Iran-US CTR at 278-79. See also *Payne*, 12 Iran-US CTR at 11, para 25; *Ebrahimi*, Award No 560-44/46/47-3 para 79.

28. See *Birnbaum*, 29 Iran-US CTR at 268, para 29; see also *Saghi*, 29 Iran-US CTR at 45, para. 76; *Khosrowshahi*, Award No 558-178-2 para 25.

29. *Sedco, Inc v National Iranian Oil Co*, Award No 309-129-3, para 21 (July 7, 1987), reprinted in 15 Iran-US CTR 23, 31.

30. *Houston Contracting Co v National Iranian Oil Co*, Award No 378-173-3, para 467 (July 22, 1988), reprinted in 20 Iran-US CTR 3, 124.

the property in Iran.³¹ *Petrolane, Inc* presented a factual situation similar to *Seismograph*, yet the Tribunal reached a quite different conclusion. It held that, by preventing the claimant from re-exporting its equipment, the respondent “deprived the Claimant of the effective use, benefit and control of the equipment . . . in breach of contract, as well as constituting an expropriation for which the Government of Iran bears responsibility.”³² It should be noted that in *Petrolane, Inc*, Chamber Two of the Tribunal cited the Awards in *Sedco, Inc* and *Houston Contracting*, but did not cite Chamber Three’s Award in *Seismograph*.

IV.

In *Pope & Talbot*, Canada seemed to argue that, because the measures it had taken to implement the SLA were cast in the form of regulations, they constituted an exercise of police powers, which, if non-discriminatory, were beyond the reach of the NAFTA rules concerning expropriations. The NAFTA tribunal rejected Canada’s argument, saying that it went too far. It stated that “[r]egulations can indeed be exercised in a way that would constitute creeping expropriation.”³³ It further noted that “Canada’s suggestion that regulations can run afoul of international legal requirements only if discriminatory is inconsistent with the *Restatement*: ‘[A] state is responsible for expropriation of alien property without just compensation even if property of nationals is treated similarly.’”³⁴

Here again the jurisprudence of the Iran-United States Claims Tribunal offers insights. It was previously noted that, in the temporary-manager cases, the Tribunal denied the police power or regulatory defense.³⁵ The Tribunal has also considered whether certain Iranian land-reform legislation resulted in the expropriation, under customary international law, of real property held by dual Iranian-American claimants. In *Karubian*,³⁶ the claimant asserted that certain Iranian urban-land legislation that provided for the cancellation by Iran of the title deeds of *mawat* land—undeveloped land with no prior record of development—along with certain Iranian governmental actions amounted to an expropriation of his real properties. The Tribunal held that the mere existence and binding force of those laws and regulations did not, by themselves, amount to measures expropriating the claimant’s properties

31. See *Seismograph Service Corp v National Iranian Oil Co*, Award No 420-443-3, paras 301-2 (Mar 31, 1989), reprinted in 22 Iran-US CTR 3, 79.

32. *Petrolane, Inc v Iran*, Award No 518-131-2, para 97 (Aug 14, 1991), reprinted in 27 Iran-US CTR 64, 96.

33. *Pope & Talbot* at para 99.

34. *Id* at para 99 n 73, quoting *Restatement (Third) of the Foreign Relations of the United States* § 712, cmt i (1986).

35. See text accompanying notes 19 and 21.

36. *Karubian v Iran*, Award No 569-419-2 (Mar 6, 1996) (not yet published in the Iran-US CTR series).

because there was no evidence of a governmental determination that the claimant's properties were *mawat*.³⁷ Nonetheless, the Tribunal concluded that the interference created by the cumulative effect of the land-reform legislation and related governmental action was of such a degree as to constitute other measures affecting the property rights of the claimant within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration. Consequently, the Tribunal held Iran responsible for damages resulting from these measures.³⁸ The Tribunal noted that the legislation "made all undeveloped or unutilized properties in both urban and rural areas vulnerable to a determination that they were *mawat*. . . . Under the circumstances, [even in the absence of such a determination,] the Claimant would have had difficulties in finding a buyer for his properties."³⁹

In *Mohtadi*,⁴⁰ the claimant alleged that the same Iranian land-reform legislation at issue in *Karubian* effected a "legislative taking" of his real property in Iran. While concluding that the land-reform legislation was not self-executing and did not operate automatically to expropriate his property,⁴¹ the Tribunal nevertheless found that the legislation represented a measure that interfered with the claimant's property rights. Its effect "was to impair the right and real possibility of the Claimant to transfer his property," and thus it was a "measure[] affecting property rights."⁴²

While in *Karubian* and *Mohtadi* the Tribunal found that the claimants had been subjected to "measures affecting property rights," rather than indirect expropriations, those precedents might nonetheless prove to be useful to international tribunals in determining whether specific measures of interference with property rights "impair the economic value of an investment to a degree that is equivalent to expropriation."⁴³ In particular, they can provide useful insight into the methodology that the Tribunal employed in establishing the nature of the legislation at issue in those cases and its impact on the claimants' property rights.

V.

As this essay has shown, in deciding claims arising out of (direct or indirect) expropriation, the Iran-United States Claims Tribunal has consistently applied customary international law. Thus, the Tribunal's decisions on indirect expropriation

37. See *id.* at paras 106–11.

38. See *id.* at para 144.

39. *Id.* at para 143.

40. *Mohtadi v Iran*, Award No 573-271-3 (Dec 2, 1996) (not yet published in the Iran-US CTR series).

41. See *id.* at para 55.

42. See *id.* at paras 68–69. It is clear that the Iranian land-reform legislation at issue in *Karubian* and *Mohtadi*, along with the Iranian legislation at issue in the temporary-manager cases, represented factual circumstances that the Tribunal examined in determining the degree of government interference with the claimants' property rights, so the issue of *lex specialis* does not arise.

43. See note 8.

of property, as *lex generalis*, constitute a significant body of precedent from which other international tribunals, including arbitral tribunals established under Chapter 11 of NAFTA, can draw. There should be no doubt that the Tribunal's expropriation jurisprudence has contributed significantly to the development of a "comprehensive doctrine of indirect expropriation,"⁴⁴ a doctrine still in its infancy.⁴⁵

44. Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID Rev-Foreign Inv L J, 41, 43 (1986).

45. See id at 43; Julie A. Soloway, *NAFTA's Chapter 11 – The Challenge of Private Party Participation*, 16 J Intl Arb 1, 7 (June 1999) ("There is ample jurisprudence on what constitutes direct expropriation, but there is almost a complete absence of a doctrinal basis for deciding what constitutes indirect expropriation.").