Masthead Logo

Global Business & Development Law Journal

Volume 19
Issue 2 *Symposium Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development*

Article 10

1-1-2007

CAFTA-DR and the Iterative Process of Bilateral Investment Treaty Making: Towards a United States Takings Framework for Analyzing International Expropriation Claims

Michael Muse-Fisher

CAFTA-DR and the Iterative Process of Bilateral Investment Treaty Making: Towards a United States Takings Framework for Analyzing International Expropriation Claims

*Michael Muse-Fisher**

TABLE OF CONTENTS

I. INTRODUCTION

The Central American-Dominican Republic Free Trade Agreement ("CAFTA-DR") was approved by Congress and signed by George W. Bush on August 2, 2005.[1] Evident from the preamble and subsequent text is a desire for CAFTA-DR to promote trade and investment among the member countries through a comprehensive and predictable commercial framework.[2] The

---

* J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2007. He would like to thank the members of the editorial board for their input and assistance. He would also like to thank his family for their unending support, and to Lauren Dunlap for helping him to stay focused on the important things in life.

1. Central American-Dominican Republic-United States Free Trade Agreement, Sept. 1, 2005 (not yet ratified), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html. [hereinafter CAFTA-DR]; Press Release, The White House, President Signs CAFTA-DR (Aug. 02, 2005) *available at* http://www.whitehouse.gov/news/releases/2005/08/20050802-2.html (on file with the *Pacific McGeorge Global Business & Development Law Journal*).

2. CAFTA-DR, *supra* note 1, at preamble, art. 10.

proponents of CAFTA-DR, including the Business Coalition for the U.S.-Central American Trade, recognize the importance of predictability as a necessary component for the success of investments between the participating countries.[3] Studies done by the United States International Trade Commission ("USITC") have made claims that CAFTA-DR provides a "secure and predictable framework for U.S. investors operating in the CAFTA-DR countries" without expounding more on the degree of predictability by CAFTA-DR.[4] Yet, this level of predictability may be elusive simply because nothing exactly like CAFTA-DR has ever been addressed by an international tribunal, especially within the framework of expropriation jurisprudence.

Article 10.22 provides a logical starting point in determining how future investor-state tribunals created under CAFTA-DR's Chapter 10 will adjudicate matters regarding investor-state expropriation claims.[5] This section states that when an expropriation claim is submitted, "the tribunal shall decide the issues in dispute in accordance with this [a]greement and applicable rules of international law."[6] In part, this means that a tribunal interpreting the provisions of Chapter 10 must do so in a manner consistent with Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT"), as this is the customary governing law on international treaty interpretation.[7] Both Articles 31 and 32 of the VCLT incorporate an integrated method to treaty interpretation that includes the "objective," "subjective," and "teleological" approach.[8] This integrated method is extremely important, because although deference will be given to the "objective," or plain meaning approach, the CAFTA-DR tribunals will be able to look outside the text at the *travaux preparatoires* (preparatory work) to determine the textual meaning when necessary.[9] *Travaux preparatoires* has been defined as "an omnibus expression which is used rather loosely to indicate all the documents,

3. Jerry Cook, Vice Pres. of Int'l Trademark Ass'n, Address before the Comm. on House Int'l Relations Subcomm. on The W. Hemisphere (Apr. 13, 2005), *in* 2005 WLNR 5772248, and 2005 WLNR 5772245.

4. S.Rep. No. 109-128, at 12 (2005).

5. CAFTA-DR, *supra* note 1, at art. 10.22.

6. *Id.* The author would like to note that "applicable rules of international law" is a loaded term as it encompasses a variety of international agreements including, but not limited to, the International Convention on the Settlement of Investment Disputes ("ICSID"), Inter-American Convention on International Commercial Arbitration, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the United Nations Commission on International Trade Law ("UNCITRAL").

7. Vienna Convention on the Law of Treaties, arts. 31 & 32, 8 I.L.M. 679 (1969) [hereinafter VCLT]. *See also* Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?*, 25 MICH. J. INT'L L. 929, 951 (2004) (noting that "[t]he Vienna Convention on Law of Treaties represents the codification of customary international law and is therefore binding on all [s]tates").

8. REBECCA M.M. WALLACE, INTERNATIONAL LAW 239-240 (4th ed. 2002) (defining the approaches as: "(a) the objective approach—interpretation in accordance with the ordinary use of the words of the treaty; (b) the "subjective" approach—interpretation in accordance with the intention of the parties to the treaty; and (c) the "teleological" approach—interpretation in accordance with the treaty's aims and objectives").

9. *Id.* at 240-241.

such as memoranda, minutes of conferences, and drafts of the treaty under negotiation, for the purpose of interpreting the treaty."[10]

Furthermore, consistent with the World Trade Organization ("WTO") Dispute Settlement Understanding's ("DSU")[11] interpretation of VCLT's Article 32, a tribunal may look to the "historical background against which the treaty was negotiated,"[12] and also, though with a more limited interpretive value, to "the prior practice of only *one* of the parties"[13] when interpreting a treaty such as CAFTA-DR. Since the purpose of treaty interpretation is "to establish the *common* intention of the parties to the treaty," it is possible that the prior practice of only one party may shed light on the agreement reached by all the parties.[14]

CAFTA-DR is a lineal descendant of the North American Free Trade Agreement ("NAFTA").[15] NAFTA's Chapter 11 on expropriation and investor-state tribunals is therefore an invaluable reference tool for interpreting CAFTA-DR's similar provisions.[16] Through the numerous investor-state disputes that have been adjudicated in NAFTA Chapter 11 tribunals,[17] it may be possible to extrapolate how similar disputes will be resolved under CAFTA-DR. This comment seeks to ascertain how investor-state claims will unfold by showing how CAFTA-DR has evolved away from NAFTA's expropriation formula towards an expropriation formula that is more aligned with U.S.' takings jurisprudence.

---

10. LORD MCNAIR, THE LAW OF TREATIES 410 (1961); *see also* ROBERT JENNINGS & ARTHUR WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW 1277 (9th ed. 1992) (defining *travaux preparatoires* as "[t]he record of negotiations preceding the conclusion of a treaty, the minutes of the plenary meetings and of committees of the Conference which adopted a treaty, and so on").

11. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, Apr. 15, 1994, 33 I.L.M. 1125 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

12. WTO, Analytical Index, Dispute Settlement Understanding, art. 3.2, ¶ 23, *available at* http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_01_e.htm#articleIIIB (citing the Appellate Body Report on EC- Computer Equipment ¶¶ 86 & 92) [hereinafter Analytical Index].

13. *Id.* ¶ 38 (citing the Appellate Body Report on EC- Computer Equipment, ¶¶ 93-95).

14. Appellate Body Report on EC- Computer Equipment, ¶¶ 93-95, *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/62ABR.DOC ("The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule the classification practice of the importing Member, in fact, may be of great importance. However, the Panel was mistaken in finding that the classification practice of the United States was *not* relevant.").

15. North American Free Trade Agreement, Dec. 17 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (codified in 19 U.S.C. § 3301-3464 (1993) [hereinafter NAFTA]; Patricia Isela Hansen, *Dispute Settlement in the NAFTA and Beyond*, 40 TEX. INT'L L.J. 417 (2005).

16. *See* NAFTA, *supra* note 15, at art. 1110; *see also* Cook, *supra* note 3.

17. *See, e.g.*, S.D. Myers, Inc. v. Canada, First Partial Award, (NAFTA Trib. 2000), 40 I.L.M. 1408 (2001) [hereinafter S.D. Myers Partial]; Pope & Talbot v. Canada Interim Award, (NAFTA Trib. 2000), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc7.pdf [hereinafter Pope & Talbot]; Methanex Corp. v. United States, Final Award on Jurisdiction and Merits, (NAFTA Trib. 2005), *available at* http://www.state.gov/documents/organization/51052.pdf [hereinafter Methanex Final Award].

Focusing on the interpretation of CAFTA-DR's Chapter 10, the crux of this comment rests on two fronts: one practical and the other theoretical. First and practically speaking, as an offspring of the NAFTA,[18] the CAFTA-DR should be interpreted in light of the textual changes and the evolution of expropriation law since NAFTA's enactment. Second, and more theoretical, the focus will be on the three-part test outlined in Annex 10-C,[19] which is directly taken from U.S. takings jurisprudence,[20] and how it will affect a tribunal's interpretation/ determination of whether an "indirect expropriation"[21] has occurred.

Part II discusses the way in which, textually, CAFTA-DR departs from NAFTA, highlighting the removal of NAFTA's provision "measures tantamount to expropriation"[22] and how this and other changes to CAFTA-DR will limit the scope when determining whether an indirect expropriation has occurred. The ultimate effect of this limitation will likely resolve some issues that have arisen under NAFTA as a result of its potentially expansive view of what constitutes an indirect expropriation.

Part III hypothesizes on the effects of CAFTA-DR's changes concerning when an indirect expropriation has occurred. This section demonstrates how CAFTA-DR has departed from NAFTA towards a more U.S.-type regulatory takings format by means of the three-part test laid out in Annex 10-C. This section will analyze U.S. regulatory takings jurisprudence as a possible means for interpreting the CAFTA-DR.

Part IV concludes with a discussion regarding the extent to which U.S. takings law may be utilized by a CAFTA-DR tribunal to determine the merits of an indirect expropriation claim. It is possible that U.S. takings jurisprudence, though imperfect, may help lead to a more coherent formulation for dealing with indirect expropriation claims. Furthermore, U.S. takings case law may actually find its way into a future CAFTA-DR tribunal's determination as to whether a regulatory action amounts to an indirect expropriation.

---

18. Hansen, *supra* note 15; William F. Jasper, *CAFTA Battle Rages in Congress: the Central American Free Trade Agreement Would Not Only Destroy More U.S. Jobs and Businesses, But Undermine Our Sovereignty*, NEW AM., July 25, 2005, at 1.

19. CAFTA-DR, *supra* note 1, at Annex 10-C.

20. *See, e.g.*, Penn. Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); *see also* Lucas v. South Carolina Costal Council, 505 U.S. 1003 (1992); H.R. REP. NO. 109-182, at 7 (2005), *reprinted in* 2005 U.S.C.C.A.N. 337, 339.

21. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 351-352 (2d ed. 2004) (noting that a creeping or indirect expropriation "cannot be identified through a single principle. The factors that can be isolated are that there is a diminution in the value of the interest of the foreign investor in the assets and that the time period over which this occurs is often longer than necessary for a single act.").

22. NAFTA, *supra* note 15, at art. 1110.

II. TANTAMOUNT TO WHAT? TEXTUAL CHANGES FROM NAFTA TO CAFTA: LIMITING THE SCOPE OF WHAT IS TO BE CONSIDERED AN INDIRECT EXPROPRIATION

As previously stated, CAFTA-DR is an offspring of NAFTA.[23] This becomes evident upon a textual comparison of the two documents. Although almost every chapter of CAFTA-DR evolved from similar provisions in NAFTA, the subsequent discussion is limited solely to their provisions regarding expropriation.[24] As an offspring and not a duplicate, CAFTA-DR is not without variations and changes. The following table highlights some of the major changes between NAFTA and CAFTA-DR:

COMPARATIVE TABLE OF MAJOR DIFFERENCES BETWEEN NAFTA'S CHAPTER 11 AND CAFTA-DR'S CHAPTER 10

NAFTA	CAFTA-DR
Article 1105- Minimum Standard of Treatment 1. General statement of "fair & equitable treatment" as well as "full protection & security." 2. Claims have arisen under NAFTA based on this provision including *Methanex v. United States*.[25] Issues have arisen as to whether "fair and equitable treatment" creates additional substantive rights under NAFTA.[26]	Article 10.5- Minimum Standard of Treatment 1. Clarification what is included under "fair & equitable treatment" and also "full protection & security." 2. Recognition that both "fair & equitable treatment" and also "full protection & security" do not create additional substantive rights. 3. Also includes Annex 10-B.
Article 1105(2). NAFTA quickly mentions protection measures and compensation for investments harmed by armed conflict or civil strife.	Article 10.6- Treatment in Case of Strife 1. CAFTA-DR develops and clarifies upon NAFTA in regards to protection of investments and compensation to investment loses resulting from armed conflict or civil strife. (Quite possibly because Central America has a history of political and internal struggle.)[27]

23. Hansen, *supra* note 15; Jasper, *supra* note 18.

24. NAFTA, *supra* note 15, at art. 1110.

25. Methanex Final Award, *supra* note 17.

26. Courtney C. Kirkman, *Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105*, 34 LAW & POL'Y INT'L BUS. 343, 344 (2002).

27. Washington Office on Latin America, http://www.wola.org/central_america/central_america.htm (last visited Feb. 25, 2006).

Article 1110. Expropriation and Compensation 1. "Tantamount" provision. 2. Elements that are to be included in the valuation of the FMV. 3. Statement that a non-discriminatory measure does not amount to an expropriation solely because it causes a debtor to default. 4. Intellectual property exemption, but without the TRIPS framework.	Article 10.7. Expropriation & Compensation Though this comment goes into a detailed analysis of the changes made to this section, the following is a list of these changes: 1. Removal of "tantamount" and the inclusion of "equivalent." 2. This section does not include criteria for determining Fair Market Value ("FMV"). 3. Intellectual property exemption in accordance with Trade-Related Aspects of Intellectual Property Rights ("TRIPS").[28] 4. Annex 10-C and the three-part test for determining when an indirect expropriation has occurred. Also, the exemption of state actions that are nondiscriminatory and protect legitimate public welfare objectives.
Article 1114. Environmental Measures 1. Makes it inappropriate for a Party to encourage investment by relaxing "health, safety, or environmental measures."	Article 10.11. Investment and Environment 1. Does not include NAFTA's provision that makes it "inappropriate" to encourage investments by relaxing domestic "health, safety, or environmental measures."
Article 1118- Settlement of a Claim through Consultation and Negotiation. 1. Brief statement on the encouragement of disputing parties to first seek settlement outside of the arbitration process.	Article 10.15- Consultation and Negotiation 1. CAFTA-DR appears to encourage consultation and negotiation more so than NAFTA because it goes into the various forms of non-binding procedures allowed.
Nothing directly on point in NAFTA regarding these additions made to CAFTA-DR.	Article 10.20. Conduct of the Arbitration 1. Allows for nondisputing Parties to make oral and written submissions to

28. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, Apr. 15, 1994, 33 I.L.M. 81 (1994).

	the tribunal regarding interpretation of CAFTA-DR. 2. Discusses methods for preliminary objection decisions and includes a provision for awarding *attorney's fees* in relation to the costs of submitting or opposing the objection. 3. Allows for the possibility of an Appellate body, should a later agreement establish one.
Article 1126(13). Consolidation 1. A public registrar must be maintained by the Secretariat regarding all requests and notices of arbitration.	Article 10.21. Transparency of Arbitral Proceedings 1. Must make all aspects of the tribunal's proceedings *public*, including records of the minutes or transcripts of the hearings of the tribunal, all awards, and all pleadings and briefs. 2. The hearings must be open to the public.

One of the more obvious changes that is evident when comparing NAFTA and CAFTA-DR's provisions on expropriation is CAFTA-DR's removal of the language "measure tantamount to nationalization or expropriation."[29] Using the "tantamount" provision as a starting point and supplementing it with other textual modifications to CAFTA-DR, this section will show how these changes demonstrate the unequivocal intent of the CAFTA-DR drafters to limit the scope of what will be considered an "indirect expropriation." Part A discusses the reasons for the inclusion of such broad language in NAFTA. Part B discusses the reasons for both the rewording of the provision "measure tantamount to nationalization or expropriation," and the various additions to the text of CAFTA-DR regarding indirect expropriations.[30] Part C will

29. NAFTA, *supra* note 15, at art. 1110; CAFTA-DR, *supra* note 1, at art. 10.7.

30. CAFTA-DR, *supra* note 1, at ch. 10. The most important change is the addition of the three-part test in Annex 10-C: "The determination of whether an action or series of actions by a [p]arty, 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 [p]arty 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." *Id.* at Annex 10-C. The other major change that will be discussed is the potential for costs and attorney's fees to a party who must defend against a frivolous claim or defense in Article 10.20(6): "When [the tribunal] decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment." *Id.* at art. 10.20(6).

discuss the likely effects of these textual modifications on future investments in Central America, with a primary focus on how the new definition of "indirect expropriation" is to be more narrowly construed.

A. *The Need for Expansive Expropriation Language in NAFTA*

In order to understand the significance of the removal of the provision "measures tantamount to expropriation" from CAFTA-DR's Article 10.7, it is necessary to understand why NAFTA included the provision in the first place.

As arguably the most influential party to NAFTA's creation and implementation, the United States wanted to ensure its private investors adequate protections abroad by including provisions that favored them.[31] Because not all expropriations are direct or formal takings,[32] almost all U.S. bilateral investment treaties ("BITs")[33] prior to NAFTA's inception have included protective measures against "creeping"[34] or "indirect" expropriation by using broad formulations, such as "measures tantamount to expropriation."[35] This broad language was intended to protect investors from a foreign nation's indirect actions that were deleterious to their investments, but which would not have been protected under more express expropriation language.[36]

Furthermore, before NAFTA, international investors in Mexico had limited means of protecting themselves against the possibility of having their investments expropriated or nationalized.[37] Factors that made investors wary of investing in

---

31. SORNARAJAH, *supra* note 21, at 289.

32. Jon A. Stanley, *Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence*, 15 EMORY INT'L L. REV. 349, 361 (2001) ("Formal expropriations occur when a state explicitly affects the legal title of the property, effectively seizing it in an outright manner.").

33. *See* SORNARAJAH, *supra* note 21, at 204-68 (providing a useful discussion of BITs). BITs are a means by which investors of two or more countries can protect their investments in each other's territory. BITs are made on an ad hoc basis, which gives the involved parties the ability to tailor the provisions to their unique specifications. This is quite useful because international "multilaterally acceptable norms" do not yet exist. BITs set out substantive and procedural guidelines, often including international arbitration in the event of an investor-state dispute. *Id.*

34. UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES 85 (1988) [hereinafter U.N. TRANS. CORP.] (quoting the *Starret* case before the Iran-United States Claims Tribunal, which described a creeping expropriation as "measures taken by a [s]tate [that] 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 [s]tate does not purport to have expropriated them and legal title to the property formally remains with the original owner").

35. *Id.*; S.D. Myers Partial, *supra* note 17, at 1440 ¶ 286 (noting that "this tribunal considers that the drafters of the NAFTA intended the word "tantamount" to embrace the concept of so-called "creeping" expropriation," rather than expand the internationally accepted scope of the term expropriation").

36. Jacqueline Granados, *Investor Protection and Foreign Investment under NAFTA Chapter 11: Prospects for the Western Hemisphere under Chapter 17 of FTAA*, 13 CARDOZO J. INT'L & COMP. L. 189, 200 (2005).

37. CARLOS MELCER & BENJAMIN DARCHE, ANALYSIS OF ENVIRONMENTAL INFRASTRUCTURE REQUIREMENTS AND FINANCING GAPS ON THE U.S./MEXICO BORDER FOR THE U.S. COUNCIL OF THE MEXICO-U.S. BUSINESS COMMITTEE WASHINGTON, D.C 31 (1993) [hereinafter MELCER & DARCHE ANALYSIS].

Mexico included the Mexican government's nationalization of the petroleum industry in 1938,[38] and the failure of Mexico to enter into either the Multilateral Investment Guaranty Agency ("MIGA")[39] or the Overseas Private Investment Corporation ("OPIC").[40] In order to increase the flow of investments into Mexico (a major goal of NAFTA), U.S. investors needed the assurance that there would be ample protections in NAFTA against expropriation and naturalization by the Mexican government.[41] The broad language of "measure tantamount to nationalization or expropriation" gave U.S. investors this assurance and hence their support of NAFTA.[42] The language was sufficiently broad to protect investors against future actions by the Mexican government that might have amounted to indirect or "creeping" expropriation. The extent of actions that may be deemed indirect or "creeping" expropriations include the "restructuring of an industry or economy, as well as indirect takings, achieved through oppressive taxation or other governmental restrictions and regulations."[43]

Pro-investor assurances and the need for expansive indirect expropriation protections led to the inclusion of the provision "measure tantamount to nationalization or expropriation" in NAFTA's Article 1110. Of course, as investor-state claims brought under this provision surfaced, this expansive view on what constituted an indirect expropriation began receiving extensive criticism.[44]

---

38. GEORGE W. GRAYSON, THE POLITICS OF MEXICAN OIL 15 (1980).

39. MELCER & DARCHE ANALYSIS, *supra* note 37; *see also* Daniel D. Bradlow, *Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?*, 50 U. KAN. L. REV. 695 (2002) ("[MIGA] provides political risk insurance to qualifying foreign investments in MIGA member states who have agreed that MIGA can operate in their countries. It also provides investment advisory services to member states.").

40. MELCER & DARCHE ANALYSIS, *supra* note 37. *See* JOHN H. BARTON, BART S. FISHER & MICHAEL P. MALLOY, INTERNATIONAL TRADE AND INVESTMENT 1263 (working draft 2006) (providing a generalized discussion of OPIC's insurance system against the risk of expropriation).

41. Jonathan Schlefer, *NAFTA: Another Victory for Charles Darwin*, N.Y. TIMES, Nov. 14, 1993 (explaining that "[t]raditionally, Mexico has not defined property rights in the same way as the United States. . . . Mexico's President, Carlos Salinas de Gortari, has deepened Mexico's deference to property rights. But as NAFTA loomed, American corporations and investors wanted more. They knew that what Mr. Salinas could do, his successors could undo. So they exerted pressure on Mexico to guarantee American-style property rights. The effort succeeded. Under NAFTA, if a signatory country confiscates a business, imposes performance requirements or violates property rights in other ways, the owner can appeal to an international tribunal for damages.").

42. MELCER & DARCHE ANALYSIS, *supra* note 37.

43. Andrew J. Shapren, *NAFTA Chapter 11: A Step Forward in International Trade Law or a Step Backward for Democracy?*, 17 TEMPLE INT'L & COMP. L.J. 323, 328 (2003) (citing Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS. L.J. 475, 520 (2001)).

44. Vicki Been & Joel Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 34 (2003).

B. Rewording the "Tantamount Provision" and Other Changes Made to CAFTA-DR's Expropriation Chapter

Most of the criticism in the United States against NAFTA's broad definition of indirect expropriation in Chapter 11 centers on two main arguments. First, opponents claimed that NAFTA's provisions limited the sovereignty of the countries involved.[45] This view mainly focuses on the belief that allowing investors to recover under such an expansive view of indirect expropriation prevents a host country from regulating in its public's best interest.[46] Secondly, opponents claimed NAFTA gave foreign investors greater rights than those granted to investors and citizens from the United States.[47]

Giving substance to NAFTA opponents' contentions is the fact that a large percentage of investor-state actions have been brought on the grounds that a host state's environmental protective measures "amount to a compensable taking."[48] Two such cases brought before NAFTA tribunals based on claims of breach of Article 1110 are *Ethyl Corporation v. Government of Canada* and *Methanex Corporation v. United States*.[49]

Ethyl Corporation v. Government of Canada resulted from a ban on the importation of methylcylopentadienyl manganese tricarbonyl ("MMT") imposed by the Canadian government in 1997 due to concerns that MMT posed potential health and environment risks.[50] Ethyl Corp., a U.S.-based corporation, claimed in part that Canada's ban on the importation of MMTs was "tantamount to expropriation" under NAFTA Article 1110.[51] Although the case was eventually settled (whereby the Canadian government paid Ethyl approximately U.S. $13 million), many thought that such a claim under Article 1110 "challenge[d] a sovereign's ability to legislate for public purposes," including for health and environmental reasons.[52]

In similar fashion, *Methanex Corp. v. United States* arose from California's ban on the use and sale of MTBE in gasoline.[53] Methanex Corp., a Canadian distributor of methanol (an ingredient used in MTBE), claimed that California's

---

45. Mary Bottari, *NAFTA's Investor "Rights": A Corporate Dream, A Citizen Nightmare*, MULTINATIONAL MONITOR, Apr. 1, 2001, *available at* http://www.corpwatch.org/article.php?id=648.

46. *Id.*

47. Mary Bottari, Lori Wallach, & David Waskow, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy*, PUBLIC CITIZEN, iv, (Sept. 2001), *available at* http://www.citizen.org/publications/release.cfm?ID=7076.

48. SORNARAJAH, *supra* note 21, at 290.

49. Statement of Claim ¶ 21-24, Ethyl Corp. v. Gov't of Canada, (NAFTA Trib. 1997), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/ethyl3.pdf [hereinafter Ethyl Corp. Statement of Claim]; *Methanex Final Award, supra* note 17, at preface ¶ 2.

50. Ethyl Corp. v. Canada, Award on Jurisdiction, 38 I.L.M. 708, 710 (1999).

51. *Id.* at 711.

52. Michael G. Parisi, *Moving Toward Transparency? An Examination of Regulatory Takings in International Law*, 19 EMORY INT'L L. REV. 383, 408 (2005).

53. Methanex Final Award, *supra* note 17, at preface ¶ 1.

ban of MTBE was "tantamount . . . to expropriation" within Article 1110.[54] The Methanex tribunal came down with its final decision in early August 2005, stating that Methanex's "central claim under Article 1110(1) . . . fails."[55] Although the final decision came after CAFTA-DR was created, concerns for such investor-state actions have led countries, like the United States, to favor a more limited definition of what can amount to an indirect expropriation.[56]

The removal of the provision "measures tantamount to nationalization or expropriation" from CAFTA's Chapter 10 happened, ironically, because its usage in NAFTA made the potential scope of what could amount to expropriation *too* broad. Many of the investor-state claims filed under NAFTA's Chapter 11 relied on an extremely expansive definition of the provision "tantamount to nationalization or expropriation."[57] The fact that most of these claims were dismissed on the ground that "tantamount" was not to be read so expansively does not technically preclude a future tribunal from finding differently.[58]

As developed nations like the United States began to find themselves on the receiving end of investor-state claims, a tendency emerged showing a growing desire to limit the scope of what can be considered an indirect expropriation.[59] In August 2002, Congress passed the Bipartisan Trade Promotion Authority Act of 2002[60] ("TPA"), in part to "address concerns relating to the investor-state dispute settlement process" in trade agreements like NAFTA.[61] The TPA also grants President Bush's Administration with "fast track" authority, which expedites the Administration's ability to negotiate future treaties.[62] The TPA now governs how the United States negotiates free trade agreements by means of "principle negotiating objectives."[63] These "principle negotiating objectives" have led to the

---

54. Second Am. Claim at § VII.C ¶ 317, Methanex Corp. v. United States, (Nov. 5, 2002), *available at* http://www.state.gov/documents/organization/15035.pdf.

55. Methanex Final Award, *supra* note 17, at Part IV Ch. D ¶ 15.

56. SORNARAJAH, *supra* note 21, at 356.

57. *See e.g.* S.D. Myers Partial, *supra* note 17, at 1421 ¶ 142; Pope and Talbot, *supra* note 17, ¶ 104; Methanex Final Award, *supra* note 17, at Part II, Ch. D ¶ 28.

58. *See e.g. S.D. Myers Partial*, *supra* note 17, at 1440 ¶ 286. It was stated in the award, after equating "tantamount" to "equivalent," that something that is 'equivalent' to something else cannot logically encompass more." *Id.* (quoting Pope & Talbot, *supra* note 17, ¶ 104). However, NAFTA's art. 1136(1) states that such a decision has *no* binding force outside of the particular case, and therefore does not technically preclude a later tribunal from finding differently. NAFTA, *supra* note 15, at art. 1136(1).

59. SORNARAJAH, *supra* note 21, at 356.

60. 19 U.S.C.A. § 3802 (2002).

61. Press Release, Chuck Grassley, U.S. Senator, Iowa, Bipartisan Trade Promotion Authority Act of 2002 (July 26, 2002), *available at* http://www.grassley.senate.gov/releases/2002/p02r7-26a.htm.

62. Gary Sampliner, *Arbitration of Expropriation Cases Under U.S. Investment Treaties—A Threat to Democracy or the Dog That Didn't Bite?*, 18 ICSID REV.-FOREIGN INV. L.J. 1, 35-36 (2003).

63. *See* Alexandra P. Everhart, Comment, *From NAFTA to CAFTA: Evolution of the Investment Agreement Prototype: Evolving Standards for "Fair and Equitable" Treatment and Expropriation in Regional Trade Agreements*, 15-17 (2004), *available at* www.nacle.org/everhart_complete.doc (on file with *Pacific McGeorge Global Business & Development Law Journal*) (listing the "principal negotiating objectives" of the United States regarding foreign investment as: "(1) to reduce or eliminate barriers to foreign investment; (2) to ensure that "foreign investors in the United States are *not accorded greater substantive rights with respect to*

removal, or rewording, of similar provisions in subsequent U.S. bilateral investment treaties.[64] Such can be seen in the changes made to the text of CAFTA- DR.[65]

The drafters of CAFTA-DR chose to replace the "tantamount" provision with the provision "measures *equivalent* to expropriation or nationalization."[66] At first glance, this change appears to be negligible at best, considering that "equivalent" is used to define "tantamount."[67] However, as stated earlier, many claims filed under NAFTA's Chapter 11 argued that "tantamount" was intended to broaden the scope of what could be considered an indirect expropriation,[68] and it was left up to the individual tribunals to determine otherwise.[69]

In the interim award of *Pope & Talbot v. Canada*, the tribunal first defined "tantamount" as meaning "equivalent" and then went on to say that "something that is equivalent to something else cannot logically encompass more."[70] By replacing "tantamount" with "equivalent," CAFTA-DR eliminates the middle step, usually left to individual NAFTA tribunals, of defining "tantamount" in the sphere of indirect expropriations claims.[71] The term "equivalent," as stated by the tribunal in *Pope & Talbot*, does not broaden the internationally recognized scope of when an indirect expropriation has occurred.[72] Its usage in CAFTA-DR should therefore clarify the ambiguity and potentially expansive definition surrounding NAFTA's "tantamount" provision.

Another change to CAFTA-DR that is not included in NAFTA is the three-part test, found in Annex 10-C, for determining whether an indirect expropriation has occurred.[73] Although a detailed analysis of this test will be discussed later, it

---

investment protections" than U.S. investors in the United States; and (3) "to secure for investors important rights comparable to those that would be available under United States legal principles and practice")(emphasis added). *See also* 19 U.S.C. § 3802(b)(3) (2002).

64. *See, e.g.*, U.S.-Singapore Free Trade Agreement, Singapore-U.S., art. 15.6, Jan. 15, 2003, *available at* www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf; U.S.-Chile Free Trade Agreement, Chile-U.S., art. 10.9, 2003, *available at* www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/assets_upload_file1_4004.pdf.

65. *CAFTA-DR, supra* note 1, at art. 10.7. The removal of the term "tantamount" and the three-part test for determining whether an indirect expropriation has occurred in Annex 10-C shows a desire to limit the broadness of what constitutes an indirect or "creeping" expropriation. *Id.*

66. *Id.* (emphasis added).

67. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1205 (10th ed. 1993).

68. Ethyl Corp. Statement of Claim, *supra* note 49, at ¶ 24; Methanex Final Award, *supra* note 17, part II, Ch.D ¶ 28.

69. *See* S.D. Myers Partial, *supra* note 17, at 1440, ¶ 286; Pope & Talbot, *supra* note 17, ¶ 104.

70. Pope & Talbot, *supra* note 17, ¶ 104.

71. CAFTA-DR, *supra* note 1, at art. 10.7.

72. Pope & Talbot, *supra* note 17, ¶ 104.

73. CAFTA-DR, *supra* note 1, at Annex 10-C. "The determination of whether an action or series of actions by a [p]arty, 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 [p]arty 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." *Id.* at Annex 10-C(4)(a).

is important to note here that similar to the rewording of the "tantamount" provision, the three-part test reflects the fact that CAFTA-DR has improved on the problems that surfaced under NAFTA and the interpretation of CAFTA-DR's provisions on expropriation.[74] This method of treaty interpretation follows the VCLT's Articles 31(3)(c) and 32.[75] Therefore, a future tribunal's interpretation of CAFTA-DR should take into account these evolutionary changes from NAFTA as proof that the drafters intended to limit the scope of an indirect expropriation.[76] By placing parameters on whether an action or series of actions can amount to an indirect expropriation, the three-part test in Annex 10-C demonstrates a commitment to improve upon the problems that have arisen in NAFTA.[77]

Even with the clarity that has been added to CAFTA-DR by means of both the three-part test in Annex 10-C and the rewording of the "tantamount" provision, an additional safeguard has been included to protect against what some felt was an abuse of the arbitration process under NAFTA.[78] With the inclusion of Article 10.20(6), a tribunal may dismiss claims early in the arbitration process and award reasonable costs and attorney's fees for claims that the tribunal determines to be frivolous.[79] Although Article 10.20(6) does not directly relate to CAFTA-DR's protections against expropriation, it indirectly limits the scope of what will be considered an indirect expropriation by penalizing overreaching claims that have, in the past, been permitted under NAFTA.[80]

It is difficult to give credence to the critics of CAFTA-DR who claim that "CAFTA's foreign investor protections are too expansive and would repeat the problems of NAFTA,"[81] when taking into account the changes and additions that have been made to CAFTA-DR. By rewording the "tantamount" provision,

---

74. *See generally* Campbell McLachlan, *The Principle of Systematic Integration and Article 31(3)(C) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 283-284 (2005). In the creation of subsequent BITs in a given subject area, it is inevitable that the resulting texts will share commonalities with those created earlier. *Id.* "The important point is that this everyday reality in the practice of foreign ministries has the inevitable consequence that treaties are developed in an iterative process in which many normative elements are shared. From having been a series of distinct conversations in separate rooms, the process of treaty making is now better seen as akin to a continuous dialogue within an open-plan office. A modern approach to treaty interpretation must adequately reflect this reality." *Id.* at 284.

75. VCLT, *supra* note 7, at art. 31-32.

76. *See generally* McLachlan, *supra* note 74, at 283-84 (2005).

77. H.R. REP. NO. 109-182, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N., 337, 339.

78. *Id.*

79. CAFTA-DR, *supra* note 1, at art. 10.20(6) ("When [the tribunal] decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.").

80. *See generally* H.R. REP. NO. 109-182, at 4.

81. Miguel Bustillo, *Some Fear CAFTA Would Undermine State's Authority*, L.A. TIMES, July 18, 2005, *available at* http://web2.westlaw.com/search/default.wl?rs=WLW5.12&fn=top&db=ALLNEWS&query=CAFTA+%2fP+%22INDIRECT+EXPROPRIATION%22&dups=false&method=TNC&vr=2.0&action=Search&rp=%2fsearch%2fdefault.wl&tr=FADA1F2F-4E6F-40C0-B44E-9611FBFBEE74.

adding the three-part test in Annex 10-C, and including an award for attorney's fees for frivolous claims, the drafters of CAFTA-DR are able to afford investors standard BIT "creeping expropriation" protections,[82] and at the same time limit the potentially expansive view of such expropriations claims under BITs like NAFTA.[83] The CAFTA-DR removes some of the ambiguity that surrounds NAFTA's Chapter 11 by placing a ceiling on what may be considered an indirect expropriation, thereby contributing to the predictability of CAFTA-DR for future investors.

C. *How Changes to CAFTA-DR's Expropriation Chapter Will Affect Investors*

The added predictability that has resulted from the changes and additions made to CAFTA-DR's section on expropriation means more investment security for those entering into the CAFTA-DR markets. These changes may allow a participating government more ability to regulate in favor of its country's best interests—knowing that the likelihood of excessively broad indirect expropriation claims allowed under NAFTA will be lessened.[84] Still, added governmental protections will translate into more security for investors so long as the guidelines for legal recourse are clarified. By establishing clearer guidelines for determining whether an expropriation has occurred, CAFTA-DR allows future investors to structure their investments to take full advantage of the protections offered, without resorting to overreaching claims based on ambiguous provisions.

As set forth in CAFTA's preamble, the parties involved are "resolved to . . . establish *clear* and mutually advantageous rules governing trade [and to] ensure a *predictable* commercial framework for business planning and investment."[85] This appears to be exactly what the drafters accomplished regarding the scope of what will be an indirect expropriation.

---

82. U.N. TRANS. CORP., *supra* note 34, at 85; Antonio R. Parra, *Applicable Substantive Law in ICSID Arbitration Initiated Under Investment Treaties*, ICSID NEWS, Nov. 10 2000, Vol. 17:2, *available at* http://www.worldbank.org/icsid/news/n-17-2-5.htm.

83. SORNARAJAH, *supra* note 21, at 289-90.

84. *See generally* H.R. REP. NO. 109-182, at 4. To emphasize the narrower scope of what constitutes an indirect expropriation under CAFTA-DR as compared to NAFTA, Congress quotes directly from CAFTA-DR's text, stating "DR-CAFTA specifies that nondiscriminatory regulatory actions designed and applied to protect the public welfare do not constitute indirect expropriations "except in rare circumstances." *Id.* The discussion goes further into the other protections offered in CAFTA-DR that were not in NAFTA or other "former FTAs" that give more freedom to host states to regulate in their public's best interest. *Id.*

85. CAFTA-DR, *supra* note 1, at preamble (emphasis added).

III. UNITED STATES TAKINGS JURISPRUDENCE AS A MEANS FOR ADJUDICATING INVESTOR-STATE EXPROPRIATION CLAIMS UNDER CAFTA-DR? A THEORETICAL DISCUSSION[86]

As noted earlier, Annex 10-C of CAFTA-DR incorporates a three-part test for determining whether an indirect expropriation has occurred.[87] The test requires the consideration of: (i) the economic impact of the government action; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.[88] This three-part test is taken directly from *Penn Central Transportation Co. v. City of New York*[89] and was included in CAFTA-DR for the express purpose of making CAFTA-DR's expropriation provisions harmonious with U.S. takings jurisprudence.[90] Yet, as many CAFTA-DR critics have rightly pointed out, "cherry pick[ing] a few legal standards from a single Supreme Court case" cannot adequately cover the entire spectrum of modern U.S. takings law.[91]

The three-part test fails to account for the evolution of regulatory takings that has spanned almost 30 years since *Penn Central* was decided. Moreover, it fails to include other landmark decisions such as *Nollan v. California Costal Comm'n*[92] ("essential nexus" requirement) and *Dolan v. City of Tigard's*[93] ("rough proportionality" requirement). Furthermore, many commentators have stated that *Penn Central's* three-part test is too vague and does not give a precise measure of what "the law" is and how to apply this law.[94] Still, other commentators agree with the factors but believe the Supreme Court should view each in sequence, rather than using the current balancing method.[95] Regardless of these issues, the Court continues to adhere to *Penn Central's* ad hoc, factual

---

86. The terms "indirect expropriation," "indirect takings," and "regulatory takings" are used interchangeably in this section.

87. CAFTA-DR, *supra* note 1, at Annex 10-C.

88. *Id.*

89. 438 U.S. 104 (1978).

90. *See* FINAL ENVIRONMENTAL REVIEW OF THE DOMINICAN REPUBLIC-CENTRAL AMERICA- UNITED STATES FREE TRADE AGREEMENT EXECUTIVE SUMMARY 30 (June 2005), *available at* http://waysandmeans.house.gov/media/pdf/109cong/dr-cafta/EnvrFinalCAFTA-DRReviewprint6-15-05.pdf; *see also* H.R. REP. NO. 109-182, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 337, 339 (noting that CAFTA-DR's provision on expropriation "makes improvements over former FTAs by incorporating standards . . . drawn directly from U.S. Supreme Court decisions").

91. David F. Waskow, Dir. of the Int'l Program Friends of the Earth, Testimony Before the Subcommittee on Commerce, Trade and Consumer Protection of the House Committee on Energy and Commerce 4 (Apr. 28, 2005), *available at* http://www.foe.org/camps/intl/WaskowCAFTATestimony.pdf.

92. 483 U.S. 825 (1987).

93. 512 U.S. 374 (1994).

94. Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679, 691-692 (2005).

95. ROGER CLEGG, ET AL, REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 8 (Roger Clegg ed., 1994).

determination analysis based on the three-part test, rather than relying on any categorical rules for determining when a regulatory taking has occurred.[96]

Since *Penn Central's* three-part test is the current law in the United States for governing regulatory takings, its inclusion in CAFTA-DR becomes apparent.[97] In granting fast-track authority to the President under the TPA of 2002, Congress required CAFTA-DR negotiators to take all steps to "secure for investors important rights comparable to those that would be available under United States legal principles and practice."[98] *Penn Central's* three-part test sufficiently achieves this objective without adding significant volumes of U.S. takings jurisprudence to the text of CAFTA-DR.

The following section looks at each factor of the three-part test as it currently stands in the United States. Within each factor are a host of elements considered by a U.S. court in determining whether a regulation amounts to a taking, but these elements are not readily apparent from the text of the three-part test in CAFTA-DR. By addressing each factor in turn, this section hypothesizes on how these factors will figure into a CAFTA-DR tribunal's decision of an indirect expropriation claim if U.S. takings jurisprudence is actually used. Finally, and most importantly, this section surmises upon the actual usage of the three-part test by CAFTA-DR tribunals.

A. *Factor 1: "Economic Impact of the Government Action"*

The first factor in the *Penn Central* three-part test listed in CAFTA-DR's Annex 10-C is "the economic impact of the government action."[99] Under U.S. takings jurisprudence, this requires a court to look first at the entire parcel (when dealing with real property) rather than its component parts in determining the economic impact of the government action.[100] The entire parcel may be likened to the denominator in a basic division problem, with the portion of the parcel negatively affected by the government regulation as the numerator.[101] By dividing the affected portion by the entire parcel, the total impact of the regulation on the property may be determined.

---

96. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

97. *Id.*

98. 19 U.S.C.A. § 3802(b)(3) (2002).

99. CAFTA-DR, *supra* note 1, at Annex 10-C(4)(a)(i) (stating that "although the fact that an action or series of actions by a [p]arty has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred").

100. *See generally* Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-131 (1978) (holding that the court will not separate the airspace value, the surface value and the subsurface value from the property as a whole when determining whether a taking has occurred, which requires compensation). *See also* Palazzolo v. Rhode Island, 533 U.S. 606, 622-623 (2001) (holding that the upland portion, which was a fraction of the total property, was developable and of sufficient value to avoid the finding of a taking, even though the majority of the property could not be developed on account of the state regulation).

101. John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1536 (1994).

The Court's reliance on the entire-parcel analysis hinges on the belief that unless it is total,[102] the "diminution in property value, *standing alone*, can[not] establish a taking."[103] Therefore, although a component portion of a given parcel may become completely valueless due to government regulation (in *Penn Central* it was the property's airspace), a taking will not be found based solely on this element of the three-part test because the remaining components of that parcel retain some economic value.[104]

The *Penn Central* entire-parcel analysis was framed in the context of real property.[105] However, the Court extended it to personal property in cases such as *Andrus v. Allard*,[106] where a prohibition on the sale of eagle feathers did not amount to a taking because other uses, including the right to possess and transport the feathers, were still permitted.[107] For personal property, the denominator consists of all of the personal property's uses and the numerator consists of the "affected uses." As Justice Brennan stated in *Andrus*, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[108] Since the entire-parcel analysis can apply to both real and personal property, it may be possible to extend the analysis to intangible property as well, at least and insofar as intangible property can be viewed as possessing component parts. If a tribunal is able to analogize intangible property in a way that is similar to its tangible property counterpart, it is possible that the entire analysis could be applied to many, if not all, of the "investments" covered by CAFTA-DR.[109]

It should be noted, however, that there has been considerable criticism regarding the entire-parcel analysis.[110] Much of this criticism focuses on the fact that there is no set method for determining the denominator in the entire-parcel analysis.[111] Under the entire-parcel analysis, a landowner may be left with a

---

102. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

103. *Penn. Cent. Transp. Co.*, 438 U.S. at 131 (emphasis added).

104. *Id.*

105. *Id.* at 130.

106. 444 U.S. 51, 66 (1979).

107. *Id.*

108. *Id.* at 65-66.

109. *See* CAFTA-DR, *supra* note 1, at art. 10.28 (CAFTA-DR covers a broad definition of what is included as an investment, as laid out in Article 10.28).

110. *See generally* Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 190-206 (2004). *See also* Gideon Kanner, *supra* note 94, at 776-79; Palazzolo v. Rhode Island, 533 U.S. 606, 631-32 (2001).

111. *See, e.g.*, Machipongo Land & Coal Co. v. Department of Envtl. Resources, 719 A.2d 19, 26-27 (Pa. Commw. Ct. 1998) ("In attempting to resolve this difficulty, the Courts have addressed the problem of deciding how the denominator is determined in a regulatory takings case, but they have never agreed on the appropriate method for determining that portion of the fraction and have provided little in the way of guidance. Essentially, though, they have all utilized one of the following three approaches: 1) the contiguous land under a common owner approach; 2) the property interest as defined by the regulation; and 3) the multi-factor analysis.").

nominal residue of his former property with the affected part lying idle, yet he is still required to pay taxes based on the lands highest use.[112] Because of the extensive criticism that the entire-parcel analysis has received from both legal and economic scholars, it is quite possible that CAFTA-DR tribunals will avoid adjudicating indirect expropriation claims with such an unclear formulation. However, since a form of the entire-parcel analysis was applied in the NAFTA decision of *Feldman v. Mexico*[113] (which will be discussed later in detail) to personal property in the same fashion as Justice Brennan did in *Andrus v. Allard*,[114] it is quite likely that such a formulation will be utilized by a CAFTA-DR tribunal. In any event, a CAFT-DR tribunal in an indirect expropriation determination will have to look at the economic impact of a government action, and in doing so, will have to define what "it" is that has been impacted. Whether this is accomplished by using the entire-parcel analysis or some other method will be left to the individual tribunal.

Another element of the entire-parcel analysis that was not discussed in *Penn Central* but has been adapted to property by a more recent Court decision is the temporal aspects of a given property.[115] A regulation that temporarily prohibits building on a parcel, for months or even years, will rarely be considered a taking.[116] Though distinctly different from the physical aspects of property, the temporal aspects can be similarly viewed. The Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* stated that a temporary moratorium should not be viewed in isolation in determining whether a taking has resulted.[117] Rather, the entire fee simple should be taken into account as part of a court's analysis, and like the entire-parcel analysis, if the remainder of the fee maintains some value, then it is likely that no taking will be found.[118] No categorical per se rule says a temporary moratorium results in a taking.[119] The determination must be based on the particular circumstances surrounding the moratorium including the other two factors of the three-part test.[120]

The entire-temporal analysis, like the entire-parcel analysis, will likely find its way into a CAFTA-DR tribunal's decision. This type of analysis has already

---

112. Gideon Kanner, *supra* note 94, at 777-78.

113. Feldman v. Mexico, Award, (NAFTA Trib. 2002) ¶152, *available at* http://www.state.gov/documents/organization/16639.pdf [hereinafter Feldman Award].

114. 444 U.S. 51 (1979).

115. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002).

116. *Id.*

117. *Id.*

118. *Id.* (holding that "the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulation at issue and then analyzed whether petitioners were deprived of all economically viable use during each period. The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework."). It is important to note that the moratoria argued by petitioners equaled to a taking of over thirty-two months.

119. *Id.* at 321.

120. *Id.*

been applied by a NAFTA tribunal in *S.D. Myers v. Canada.*[121] In *S.D. Myers*, the tribunal held that Canada's temporary moratorium, prohibiting S.D. Myers from continuing exporting polychlorinated biphenyls ("PCBs") from Canada, did not amount to an indirect expropriation.[122] The line of reasoning relied on by the *S.D. Myers'* tribunal is very similar to the reasoning used in the majority opinion of *Tahoe-Sierra.*[123] Both decisions hold that a temporary moratorium without more cannot be a taking/expropriation.[124] Both decisions also disregard the argument that a moratorium can be viewed in isolation, focusing solely on the time during the regulation in determining whether a compensable taking exists.[125]

Another element of the "economic impact" factor is how "far" the regulation must go in order to amount to a taking.[126] Only in situations where a valid regulation has deprived a property of *all* its value has the U.S. Supreme Court found the "economic impact" factor dispositive in establishing a taking.[127] Recognizing the importance of the government's need to effectively regulate in the public's best interest, the Court held that compensation is not required in many circumstances, even though the regulation deprives the owner of the most profitable use of his or her land.[128] In fact, the Court has consistently recognized that:

> [T]aking challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm.[129]

Two things appear to be decisive for the Court: the character of the government action (discussed later in this comment); and the property maintained *some* economic value even though the intended use of the property by its owner had been frustrated.[130] This type of analysis focuses on the use of real and tangible property and not the broad array of investments covered by CAFTA-

---

121. *S.D. Myers Partial, supra* note 17, at 1440 ¶ 283-87. The tribunal recognized that the eighteen months in which Canada closed its borders to S.D. Myers was only a temporary delay to the gain of an opportunity. *Id.* Canada derived no benefit from the closure and no transfer of property existed, which is comparable to Justice Stevens' majority opinion in Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002).

122. *S.D. Myers Partial, supra* note 17, at 1440 ¶ 283-87.

123. *See e.g., id.*; *see also Tahoe-Sierra Pres. Council*, 535 U.S. at 321.

124. *See e.g. S.D. Myers Partial, supra* note 17, at 1440 ¶ 283-287.

125. *Id.*

126. Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978) (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).

127. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

128. Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 470 (1981); Goldblatt v. Hempstead, 369 U.S. 590, 592-593 (1962).

129. *See Penn. Cent. Transp. Co.*, 438 U.S. at 125 (citing Miller v. Schoene, 276 U.S. 272 (1928)).

130. *See generally* Miller v. Schoene, 276 U.S. 272 (1928); *see also Goldblatt*, 369 U.S. at 592-93.

DR.[131] Only time will determine whether CAFTA-DR tribunals will apply the "economic impact" analysis of the three-part test in the same manner as U.S. courts and to all CAFTA-DR "covered investments."

The NAFTA tribunal's decision regarding the indirect expropriation claim in *Feldman v. Mexico* supports the application of a U.S.-like "economic impact" analysis by a CAFTA-DR tribunal to *all* CAFTA-DR "covered investments."[132] In *Feldman*, the petitioner claimed Mexico had indirectly expropriated his investment, an exportation business known as CEMSA.[133] The petitioner argued that Mexico had indirectly expropriated his investment by refusing to grant him tax-refund benefits he believed was due for the cigarette exportation component of his business.[134] Though the petitioner's exportation business had primarily focused on the exportation of cigarettes from Mexico, his business had retained some value in the exportation of other products, and therefore no indirect expropriation was found.[135] The tribunal stated that "[t]he Claimant is free to pursue other continuing lines of export trading, such as exporting alcoholic beverages, photograph supplies, or other products . . . although he is effectively precluded from exporting cigarettes."[136] The *Feldman* tribunal recognized that the petitioner was able to continue his investment of exporting, though the regulation (i.e., the taxation program) may have frustrated the most profitable use of his exportation business.[137]

Had the *Feldman* tribunal applied the three-part test in Annex 10-C, they would likely have found that the other two factors outweighed the "economic impact" factor and determined that no expropriation could have existed. The tribunal made note of the fact that the regulation was for a valid public purpose[138] (a major component of the "character of the government action" factor), and the assurances the claimant relied on were in direct conflict with Mexico's existing laws (an issue addressed under the "investment backed expectations" factor).[139] Similarly, if the U.S. Supreme Court faced a claim factually analogous to *Feldman,* it would likely analyze the "economic impact" of the regulation in the same manner as the *Feldman* tribunal. The decision by the *Feldman* tribunal regarding indirect expropriation claims therefore demonstrates how the three-part test in Annex 10-C of CAFTA-DR (with a special emphasis on the "economic impact" factor) could be applied in a manner consistent with U.S. takings law and also square with the current international expropriation framework.

---

131. CAFTA-DR, *supra* note 1, at art. 10.7.
132. Feldman Award, *supra* note 113, ¶ 152.
133. *Id.* ¶ 1, 6-23.
134. *Id.*
135. *Id.* ¶ 152.
136. *Id.*
137. *Id.*
138. *Id.* at 136.
139. *Id.* ¶ 148-49.

Though *Feldman* demonstrates how a CAFTA-DR tribunal's decision could square directly with U.S. takings jurisprudence, there is argument to the contrary presented in *Metalclad Corp. v. United Mexican States*.[140] This claim arose out of Mexico's improper refusal to grant a permit to a subsidiary of Metalclad, a U.S. waste-disposal company, to operate a hazardous waste facility, which it had already built in La Pedrera, San Luis Potosi.[141] A part of Metalclad's indirect expropriation claim focused on an ecological decree enacted by San Luis Potosi's governor for the protection of rare cactus in, and around, the area of the waste disposal facility.[142] Though the environmental decree only involved the land, it essentially made the use of the waste disposal facility impossible.[143] Rather than addressing any potential economic value that could be derived from the land on which the waste disposal site sat, the *Metalclad* tribunal simply stated that the ecological decree "in, and of itself, constitute[d] an act tantamount to expropriation."[144]

Had a U.S. court addressed Metalclad's claim under the *Penn Central* three-part test, it is quite likely that the ecological decree would *not* have amounted to a regulatory taking.[145] Under the three-part test, the tribunal would likely have recognized that only those activities that "might involve the discharge of polluting agents on the reserve soil"[146] would be prohibited and therefore other uses for the land might still exist. With such an environmental decree well within the police powers of the government, the expropriation claim would have likely failed under U.S. takings jurisprudence.

A key distinction must be made, however, before completely writing off the *Metalclad* tribunal's decision (focusing solely on their discussion regarding the ecological decree) as contrary to U.S. takings law. The *Metalclad* tribunal correctly limited its focus to Metalclad Corp.'s investment, as NAFTA required it to do.[147] Though the investment involved real property, the investment itself was a waste disposal facility.[148] Consequently, there was no need for the *Metalclad* tribunal to look at alternative uses for the land on which the investment sat

---

140. Metalclad Corp. v. Mexico (NAFTA Trib. 2000) 40 I.L.M. 36 (2001).

141. *Id.* at 37-38.

142. *Id.* at 44-45.

143. *Id.*

144. *Id.* at 51.

145. *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001). The *Palazzolo* court recognized that the property retained some value notwithstanding the regulation, even though the property would not be used as the petitioner intended. *Id.*; *see also* Cat Lazaroff, *Billion Dollar NAFTA Challenge to California MTBE Ban*, ENVT'L NEWS SERVICE, Sept. 11, 2000, *available at* http://www.corpwatch.org/article.php?id=570 (noting that "[i]n a U.S. court, the Metalclad challenge would have failed. Under U.S. law, the state government's action would likely not be considered a taking of the investor's property requiring compensation under the U.S. Constitution, as interpreted by the Supreme Court.").

146. *Metalclad Corp.*, 40 I.L.M. at 50.

147. *See* NAFTA, *supra* note 15, at art. 1110 (stating that "[n]o party may directly or indirectly nationalize or expropriate an *investment* of an investor") (emphasis added).

148. *Metalclad Corp.*, 40 I.L.M. at 36, 37.

because the land was not the investment.[149] Since the deprivation to the investment appeared to be total—Metalclad could no longer operate its waste facility with the environmental decree in place—the tribunal's decision can be reconciled with U.S. case law that holds that a taking will be found when all value has been deprived from the property as a result of a regulation.[150]

To protect a host state from encountering similar issues faced in *Metalclad Corp.* (where a valid environmental regulation could amount to an indirect expropriation because it effectively makes an investment valueless), CAFTA-DR created a catch-all provision to coincide with the three-part test: Annex 10-C(4)(b).[151] Under this provision, only in "rare circumstances" would an environmental decree such as the one in *Metalclad* amounted, "in and of itself," to an indirect expropriation as the *Metalclad* tribunal concluded.[152] Annex 10-C(4)(b) recognizes that a government must be able to effectively regulate for "legitimate public welfare objectives." These "objectives" are no different than the "police powers"[153] recognized by U.S. courts.[154] Since an environmental decree, like the one in *Metalclad*, would fall well within the "police powers" intended by Annex 10-C(4)(b), the regulation, "in and of itself,"[155] could not be grounds for finding an indirect expropriation. It is important to note, however, that since *Metalclad's* investment was deemed economically valueless, the tribunal's decision finding an expropriation was accurate both under NAFTA and U.S. takings jurisprudence.[156]

Because Annex 10-C(4)(b) could potentially have a quelling effect on a tribunal's determination of whether a governmental regulation amounts to an indirect expropriation, it is important to understand how this provision will likely play out in relation to the *Penn Central* three-part test in a tribunal's analysis. The language of Annex 10-C(4)(b) does not clarify the type of regulatory action that will reach this "rare circumstances" level. Yet, the determination of how or when a regulation meets this heightened standard is important because, as U.S. Supreme Court decisions have shown, almost any governmental regulation could effectively fall within this "police powers" category.[157] Rather than viewing

149. *Id.*

150. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

151. CAFTA-DR, *supra* note 1, at Annex 10-C(4)(b) (stating that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a [p]arty that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations").

152. *Id.*; *Metalclad Corp.*, 40 I.L.M. at 51.

153. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471 (2004).

154. *See* Everhart, *supra* note 63, at 26-27.

155. *Metalclad Corp.*, 40 I.L.M. at 51.

156. Sampliner, *supra* note 62, at 21-22.

157. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (holding that "[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."); *see also* Penn. Cent. Transp. Co. v. City of New York, 438 U.S 104, 134 (1978) (holding that the preservation of

Annex 10-C(4)(b) as the determinative factor for deciding whether a valid regulation amounts to an indirect expropriation, it is more likely that the drafters of CAFTA-DR intended Annex 10-C(4)(b) to be analyzed within the three-part test framework. Otherwise, it would effectively make the three-part test superfluous.[158]

Furthermore, as its own separate factor, Annex 10-C(4)(b) would go well beyond U.S. takings jurisprudence in protecting a host state's regulatory practices from being attacked on expropriation grounds. However, including Annex 10-C(4)(b) as part of the three-part test analysis aligns an indirect expropriation determination under CAFTA-DR with U.S. takings laws as the U.S. negotiators intended.[159] An investor-claimant would have the heavy burden of proving that a valid regulation amounted to an indirect expropriation by means of the *Penn Central* three-part test. Yet, the investor-claimant could be meritorious in his expropriation claim, and the tribunal's determination would not be totally arbitrary. Using U.S. takings jurisprudence as a guide, a regulation that "protect[s] legitimate public welfare objectives" and is "nondiscriminatory" may nevertheless equate to an indirect expropriation if it would unfairly "force some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole."[160]

B. Factor 2: "Reasonable Investment-Backed Expectations"

The second factor in the *Penn Central* three-part test listed in CAFTA-DR's Annex 10-C is "the extent to which the government action interferes with distinct, reasonable investment-backed expectations."[161] U.S. courts have recognized that the purpose of this factor is to limit compensation to property owners who can show that their property was purchased in reliance on the non-existence of the challenged regulation.[162] By requiring the "investment-backed expectation" to be *reasonable*, the standard maintains its objectivity.[163]

The "reasonable investment-backed expectations" factor requires a two-part

---

landmarks was seen as well within the police powers of New York because it benefited New Yorkers "economically" and also by "improving the quality of life in the city").

158. The provision of Annex 10-C(4)(b) standing alone as a factor would be arbitrary because it would allow each tribunal to create its own formulation in determining what valid regulation would meet the "rare circumstances" level. Such an exercise of discretion by a tribunal would appear to go against the intention of the drafters who felt it was necessary to include a three-part test to help aid a tribunal in determining the occurrence of an indirect expropriation. It would seem counterintuitive for the drafters to build off of the vagueness surrounding NAFTA by creating an equally vague standard in CAFTA-DR. *See* e.g.151 CONG. REC. D386-01 (Apr. 21, 2005) (debate between Congressman Doggett and Ambassador Allgeier), *available at* http://waysand means.house.gov//hearings.asp?formmode=view&id=3061 [hereinafter Doggett/Allgeier Debate].

159. *Id.*

160. Armstrong v. United States, 364 U.S. 40, 49 (1960).

161. CAFTA-DR, *supra* note 1, at Annex 10-C(4)(a)(ii).

162. Cienega Gardens v. United States, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003).

163. *Id.* at 1346.

analysis. A court must first determine whether the claimant, when purchasing property, had an actual expectation that the property would not be affected by the regulation in question.[164] Once a court makes this fact-based determination and finds that the claimant did have such an expectation, the next step is determining whether such an expectation was reasonable.[165] As stated before, this is an objective standard, requiring a court to interpret what a reasonable person in the claimant's situation would have expected when purchasing the property.[166] U.S. courts have been hesitant to recognize reasonableness in situations where "a party voluntarily enters into a heavily regulated program or contract."[167] Furthermore, a landowner is constrained by regulations that are deemed "background principles" of a state's law of property and nuisance.[168] This means that if the government enacts a new regulation that is consistent with bedrock principles of property law, a claimant will not have reasonable investment-backed expectations counter to the regulation; thus, the claimant will be unable to prove a compensable taking.[169]

A lucid application of the "reasonable investment-backed expectations" factor can be seen in the Court of Appeals Federal Circuit decision in *Cienega Gardens v. United States*.[170] The appellants, various owners of low-income apartments, sued the United States alleging that federal statutes consummated in a taking of their property.[171] In securing mortgages for the construction of these apartments, appellants had entered into a forty-year agreement with the Department of Housing and Urban Development ("HUD").[172] This agreement required the appellants to maintain their apartments for low-income tenants over the duration of the agreement.[173] However, under the agreement, the appellants had the option to prepay their mortgages after twenty years without HUD approval, and in so doing could "remove their property from the federally-assisted low-income housing pool."[174] When the twenty-year mark approached, Congress, fearing the harm that would result to the current tenants if many of the owners prepaid their mortgages, changed the HUD requirements.[175] Under the

164. Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Penn. Coal. Co. v. Mahon, 260 U.S. 393 (1922).

165. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-06 (1984).

166. *Id.*

167. 26 AM. JUR. 2d *Eminent Domain* § 15 (2005) (citing Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211 (1986)).

168. Palazzolo v. Rhode Island, 533 U.S. 606, 629 (2001).

169. *Id.* at 629-30.

170. 331 F.3d 1319 (2003).

171. *Id.* at 1324.

172. *Id.*

173. *Id.* at 1325.

174. *Id.* at 1326.

175. *Id.* (noting that Congress enacted the Emergency Low Income Housing Preservation Act ("ELIHPA") § 202(a)(4) in 1987 based on "findings indicat[ing] that almost 950,000 low-income housing units could soon be lost through mortgage prepayments").

changes adopted, the owners were required to acquire HUD approval to prepay their mortgages even *after* the twenty-year mark, though their mortgage contracts had provisions stating the opposite.[176] They were thus unable to exit the HUD program after twenty years and thereby regain normal ownership rights.[177]

In applying the "reasonable investment-backed expectations" factor, the court noted that the critical question did not focus on the appellant property owners' expectations, but that of "a reasonable developer confronted with the particular circumstances facing the [appellants]."[178] However, the court recognized that appellants' actual expectations of prepayment were important because they would not be "investment-backed" unless they actually relied on them when they entered into the HUD program.[179] Once the court made a factual determination that the appellants entered the program with the expectation of prepaying the mortgage after twenty years without HUD approval, the next step was to determine whether this expectation was reasonable.[180] Since the appellants' expectations were based on a material term of the HUD agreement, they were deemed reasonable.[181] Appellants were therefore meritorious in proving the "reasonable investment-backed expectation*s*" factor of the *Penn Central* three-part test.

A similar application of the U.S. two-part analysis under the "reasonable investment-backed expectations" factor will almost certainly find its way into a CAFTA-DR tribunal's decision because this type of analysis has already been applied by various NAFTA tribunals.[182] Also, the plain meaning of the factor's text requires this analytical format. In order to establish an "investment-backed expectation," the claimant would be required to show that he or she actually had such an expectation, and in order for it to be reasonable, the tribunal would have to look at it from an objective standpoint.

Though couched in different terminology, certain NAFTA decisions have applied an almost identical "investment backed-expectation" two-part analysis under the heading of "reasonably-to-be-expected economic benefit."[183] In *Feldman*, the tribunal applied a two-part analysis in finding that the plaintiff did not have a reasonable investment-backed expectation on which an expropriation claim could be based.[184] In the first part of the analysis, the tribunal recognized that the plaintiff's investment-backed expectation (at least as claimed by the plaintiff) was that he was entitled to the cigarette tax-rebates based on past

176. *Id.*

177. *Id.* at 1327.

178. *Id.* at 1346.

179. *Id.*

180. *Id.* at 1348.

181. *Id.*

182. *See generally* Methanex Final Award, *supra* note 17, at Part IV, Ch. D ¶ 9; *See also* Feldman Award, *supra* note 113, ¶ 148-149.

183. Feldman Award, *supra* note 113, ¶ 148-149; Metalclad Corp., 40 I.L.M. at 50.

184. Feldman Award, *supra* note 113, at ¶ 148-149.

assurances by the Mexican government.[185] However, in determining that these expectations were unreasonable, the tribunal noted that "the Mexican government essentially opposed Claimant's business activities at every step of the way . . . [and] the assurances allegedly relied on by the Claimant were at best ambiguous . . . and largely informal."[186] In reaching its decision, the tribunal distinguished *Metalclad Corp.* by recognizing that the assurances offered by the Mexican government that Metalclad relied on were "definitive, unambiguous and repeated" and were consistent with Mexican law.[187]

Methanex is another important NAFTA tribunal judgment regarding the "reasonable investment-backed expectations," because it emphasizes the effects of a claimant's voluntary entry into a heavily regulated program.[188] The tribunal recognized that when Methanex began selling methanol in California, it had entered into a "political economy in which it was well known, if not notorious," that the government at both the national and state level monitored and often restricted the use of certain chemical compounds.[189] In fact, Methanex had employed its own lobbyists to address these political concerns, and even more telling, the existence of the MTBE market was a result of earlier governmental restrictions on other chemical compounds.[190] Having entered into a heavily-regulated market, Methanex was unable to argue that it did not address the possibility of such a regulation affecting its product when forming its "investment-backed expectations."

It is almost certain that future CAFTA-DR tribunals, in applying the three-part test in Annex 10-C, will rely on the same type of analysis used by U.S. courts when determining an investor's "reasonable investment backed expectations." First, the tribunal must determine the actual expectations that the investor had when entering into the investment for which the expropriation claim is based. Second, the tribunal must apply an objective standard in deciding whether the investor's actual expectation was reasonable. Both the plain language of the "reasonable investment-backed expectations" provision in CAFTA-DR and recent NAFTA tribunal decisions (under the heading "reasonably-to-be-expected economic benefit")[191] support the likelihood that a U.S.-type two-part analysis will be used by CAFTA-DR tribunals. Therefore, it is imperative that investors entering Central America be fully aware of the region's political and economic climate, as well any other factors that could reasonably impact their investments.

---

185. *Id.*
186. *Id.* ¶ 149.
187. *Id.* ¶ 148.
188. Methanex Final Award, *supra* note 17, at Part IV, Ch. D ¶ 9.
189. *Id.*
190. *Id.*
191. Feldman Award, *supra* note 113, ¶ 148-149; *Metalclad Corp.*, 40 I.L.M. at 50.

C. Factor 3: "The Character of the Government Action"

The "character of the government action" factor requires a U.S. court to balance two competing interests in determining whether a governmental regulation amounts to a compensable taking.[192] On one side of the balance is "the liberty interest of the private property owner."[193] Weighed against this is the "[g]overnment's need to protect the public interest through the imposition of the [regulation]."[194] Factors that have been incorporated into this determination include the degree and type of harm created by the property owner's prohibited activity, the social value and location of the prohibited activity, and the ease of preventing the harm caused by the activity.[195] Implicit in this analysis is the recognition that a government must be able to regulate in the best interest of the public.[196] Therefore, not every regulation that causes a diminution in the value of property should require compensation.[197]

Recognizing that the U.S. government could hardly "go on" if compensation were required every time a government regulation diminished a property's value, the Supreme Court has been very deferential towards governmental directives based on legitimate police powers.[198] As shown by the majority opinion in *Penn Central Transportation Co. v. City of New York*, if a regulation can be characterized as promoting "health, safety, morals or general welfare" and is not discriminatory, it will be very difficult for a claimant to successfully establish that the regulation resulted in a compensable taking.[199]

---

192. 26 AM. JUR. 2d *Eminent Domain* § 14 (2005) (citing Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003).

193. *Cienega Gardens*, 331 F.3d at 1338 (citing Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1176 (Fed. Cir. 1994)).

194. *Id.*

195. *See generally* Maritrans. Inc. v. United States, 342 F.3d 1344 (Fed. Cir. 2003).

196. Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

197. *Id.*

198. *Id.*

199. *See id.* at 124-33. The *Penn Central* decision is a perfect example of the deferential treatment that courts give to government regulations that can be characterized as promoting "health, safety, morals or general welfare." In its decision, the Court first determined that the New York Landmark Preservation Law of 1965 was well within the police powers of the state because it promoted the general welfare of New York City. *Id.* at 129. Appellants, owners of the historic Grand Central Terminal, agreed that New York could enact regulations pursuant to landmark protectionism. *Id.* Nevertheless, the appellants claimed they had suffered a taking because the regulation had sufficiently diminished the value of their property. *Id.* at 130-31. They argued that since the regulation was intended to benefit the public, the costs should be born by the public rather than the private property owners whose property had been adversely affected. *Id.* Focusing solely on the *character of the government action* factor, the Court rejected appellant's takings claim because holding otherwise would invalidate all comparable landmark legislation across the country. *Id.* at 131. Furthermore, the regulation was not discriminatory in that it did not arbitrarily grant less favorable treatment to some property and not others. Rather, it was designed to preserve historic buildings wherever they might be found in the city pursuant to a comprehensive plan. *Id.* at 132. The New York Landmark Preservation Law furthered the legitimate goal of "enhanc[ing] the quality of life by preserving the character and desirable aesthetic features of [the] city" and was therefore a valid exercise of New York City's police powers. *Id.* at 129.

Though U.S. courts generally grant deferential treatment to the government, certain governmental actions have been found to tilt the balance in favor of the private property owner regardless of the public interest that might be furthered. These actions can be categorized as infringing on "the most essential sticks in the bundle of rights that are commonly characterized as property"[200] and include: (1) when a regulation amounts to a physical invasion;[201] (2) when a government regulation is so pervasive that it leaves the property economically valueless[202] (though this deals with the "economic impact of the government action," it also can be analyzed under the "character of the government action" factor)[203]; and (3) when a regulation infringes on the property owner's right to transfer.[204] These are the limited situations that can be described as extraordinary circumstances.[205] Outside of the aforementioned "extraordinary circumstances," a court will generally hesitate to characterize a government regulation as a taking if the regulation is exercised under valid governmental police powers.[206]

U.S. courts have developed a broad and comprehensive definition of what may be considered a valid exercise of the police powers. This includes any regulation that promotes "health, safety, morals or [the] general welfare."[207] At the international level, however, a precise authoritative definition of what constitutes a commonly accepted valid exercise of a state's police powers does not currently exist.[208] The absence of clearly defined police powers in international law posits the reason for the inclusion of Annex 10-C(4)(b) in CAFTA-DR.[209] Without an international definition to rely on, the highly developed definition from U.S. takings jurisprudence may have offered a suitable alternative for CAFTA-DR drafters to use.[210] A plain language comparison shows that the text of Annex 10-C(4)(b) has considerable similarities to the "health, safety, morals or general welfare" language used in *Penn Central*.[211] This gives

200. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

201. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982).

202. Lucas v. South Carolina Coastel Council, 505 U.S. 1003 (1992).

203. ROGER CLEGG, ET AL, *supra* note 95, at 50-51.

204. Hodel v. Irving, 481 U.S. 704, 715-16 (1987) (holding that a statute which abrogated the right to devise to one's heirs regardless of the size of the devised portion of the property (much of the property involved was only a very small fraction of the total land) was a taking).

205. Cienega Gardens v. United States, 331 F.3d 1319, 1338-40 (Fed. Cir. 2003).

206. ROGER CLEGG, *supra* note 95, at 48-52.

207. Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124-33 (1978).

208. Sampliner, *supra* note 62, at 21-22.

209. CAFTA-DR, *supra* note 1, at Annex 10-C(4)(b).

210. Sampliner, *supra* note 62, at 10-11. It seems logical that U.S. domestic law could add clarity in defining the police powers because of the "abundance of precedent" found in U.S. takings jurisprudence regarding the police powers. *Id.* As many scholars believe, "such precedent should play a significant role in determining applicable principles of international law." *Id.*

211. CAFTA-DR, *supra* note 1, at Annex 10-C(4)(b) (noting that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a [p]arty that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations").

credence to the argument that Annex 10-C(4)(b) will be incorporated into the *Penn Central* three part-test rather than analyzed as its own distinct factor. Since analysis of the "character of the government action" factor hinges on the recognition of valid police powers,[212] Annex 10-C(4)(b) is necessary to define these police powers in CAFTA-DR, as a result of the lack of any clear definition in international law.

By incorporating the police powers provision of Annex 10-C(4)(b) into the "character of the government action" analysis, CAFTA-DR, similar to U.S. law, grants considerable deference to a host state in determining whether a regulation amounts to an expropriation.[213] Such deference to regulations exercised under valid police powers has already been recognized by the international community, including NAFTA tribunals.[214] For example, the *S.D. Myers* tribunal noted in its first partial award that:

> Expropriations tend to involve the deprivation of ownership rights, regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.[215]

However, the importance of CAFTA-DR in relation to earlier international decisions is that CAFTA-DR codifies and adds clarity to the scope of the deferential treatment granted to the states. Whereas a tribunal decision like the one in *S.D. Myers* would only have persuasive value on a future NAFTA tribunal's determination, a CAFTA-DR tribunal is now *required* to defer to police powers, based on the textual language of CAFTA-DR, in determining whether a regulation amounts to an indirect expropriation.[216] Furthermore, as the CAFTA-DR's language suggests, the type of deferential treatment granted to the states will be similar to, if not the same as, the treatment granted by a U.S. court.

Annex 10-C(4)(b)'s inclusion in the "character of the government action" analysis also requires a CAFTA-DR tribunal to disregard the police powers deference in situations where a government regulation is found to be discriminatory.[217] The same

---

212. *See Penn. Cent. Transp. Co.*, 438 U.S. at 104. Throughout the majority opinion, the Court consistently makes note of the valid police power under which the "New York Landmark Preservation Law" was exercised. *Id.* Had the Court found the regulation not a valid exercise of the state's police power, it is safe to say that the regulation and its effect on the claimant's property would have amounted to a taking. *Id.*

213. CAFTA-DR, *supra* note 1, at Annex 10-C(4)(b). The "[e]xcept in rare circumstances" language underscores the deference that will be given to states when creating regulations under valid police powers. *Id.*

214. Sampliner, *supra* note 62, at 10-11,17-18.

215. *See, e.g., S.D. Myers Partial, supra* note 17, at 1440 ¶ 282.

216. *See* CAFTA-DR, *supra* note 1, at Annex 10-C(4)(b). NAFTA was not bound by earlier international decisions which recognized the police powers deference as these decisions only possessed persuasive value on a NAFTA tribunal's ultimate decision. NAFTA, *supra* note 15, at 1136(1). CAFTA-DR tribunals, on the other hand, are bound by CAFTA-DR's text that expressly mentions this deference. CAFTA-DR, *supra* note 1, at Annex 10-C(4)(b).

217. CAFTA-DR, *supra* note 1, at Annex 10-C(4)(b). The "rare circumstances" exception only applies

type of treatment for discriminatory regulations was mentioned in the Supreme Court's *Penn Central* majority opinion.[218] The importance of non-discriminatory regulations is firmly rooted in modern BITs, including NAFTA.[219] The importance of its inclusion in CAFTA-DR, therefore, is simply that even though a regulation may be found discriminatory, no indirect expropriation will be recognized if the other two factors of the three-part test are lacking. However, a claimant may still be awarded compensation under Articles 10.3 (National Treatment) and/or 10.4 (Most-Favored-Nation Treatment) for discriminatory treatment.[220]

Mimicking U.S. takings jurisprudence, the "character of the government action" factor in CAFTA-DR captures both the deferential treatment granted to a valid exercise of the police powers and also the requirement that the regulation be non-discriminatory. Yet, despite the vague reference of the "[e]xcept in rare circumstances" language in Annex 10-C(4)(b), CAFTA-DR does not directly mention the "extraordinary circumstances" recognized by U.S. courts for regulations that infringe on "the most essential sticks in the bundle of rights that are commonly characterized as property."[221] However, drawing analogies from early international expropriation decisions may help direct a CAFTA-DR tribunal towards the same "extraordinary circumstances" exceptions found in U.S. case law via the "[e]xcept in rare circumstances" language of Annex 10-C(4)(b).

A suitable analogy for the *Lucas v. South Carolina Coastal Council's* categorical per se taking[222] can be seen in the NAFTA tribunal's *Metalclad Corp. v. Mexico* decision.[223] In *Lucas*, the Court first emphasized the complete economic deprivation of petitioner's land as a result of South Carolina's Beachfront Management Act.[224] The Court then went on to hold that when a "regulation denies all economically beneficial or productive use of land" a compensable taking will be found regardless of the "public interest advanced."[225] The *Metalclad Corp.* decision utilized a similar line of reasoning as *Lucas* to come out with the same ultimate conclusion.[226] The *Metalclad* tribunal first noted the complete bar on claimant's landfill operations as a result of the Guadalcazar Ecological Decree.[227] The Tribunal then went on to state that "the motivation or intent of the adoption of the Ecological Decree" need not be considered, as it was "in and of

---

to "nondiscriminatory regulatory actions." *Id.*

218. Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 132 (1978).

219. NAFTA, *supra* note 15. Expropriations are prohibited under NAFTA if they are not found to be conducted in a "non-discriminatory manner." *Id.* at art. 1110.

220. *CAFTA-DR, supra* note 1, at arts. 10.3 & 10.4.

221. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

222. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that regulations that result in a total deprivation of value to a claimant's property amount to a categorical per se taking).

223. *Metalclad Corp.*, 40 I.L.M. at 50-52.

224. *Lucas*, 505 U.S. at 1009.

225. *Id.* at 1015.

226. *Metalclad Corp.*, 40 I.L.M. at 50-52.

227. *Id.* at 51.

itself ... an act tantamount to expropriation." [228] When considering that both U.S. takings law[229] and international expropriation law[230] consistently require compensation for regulations that deprive property of all value, it is almost certain that the same conclusion will be reached under CAFTA-DR. By utilizing the "rare circumstances" exception in Annex 10-C(4)(b) within the "character of the government action" analysis, a future CAFTA-DR tribunal faced with a *Lucas* scenario will likely find a compensable indirect expropriation.[231] Furthermore, following U.S. takings law, such a decision may be reached without weighing the public interest advanced by the regulation.[232]

No NAFTA decisions directly deal with regulations amounting to a physical invasion under *Loretto v. Teleprompter Manhattan CATV Corp.*[233] or with regulations that infringe on an owner's right to transfer under *Hodel v. Irving*.[234] However, there is ample international case law on which a future CAFTA-DR tribunal may rely to reach the same or similar conclusions.[235]

Certain decisions handed down by the U.S.-Iran Claims Tribunal[236] share considerable attributes with the U.S. Supreme Court's decision in *Loretto*.[237] For example, in *Starrett Housing, Corp. v. Iran*, a decree adopted by the Revolutionary Council of Iran required "[t]he selection of [m]anager or [b]oard of [d]irectors or supervisors [to] be done with an official letter of appointment by the ministry concerned[,] ... [where] the previous [m]anagers and others having responsibilities for running that company shall cease to have any authority in the company."[238] The *Starrett* tribunal concluded that:

> the appointment of ... a temporary manager in accordance with [the decree] deprived the shareholders of their right to manage Shah Goli. As a result of these measures the Claimants could no longer exercise their rights to manage Shah Goli and were *deprived of their possibilities of effective use and control of it.*[239]

---

228. *Id.*

229. *See Lucas*, 505 U.S. at 1003; *See also* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987); Hodel v. Virginia Surface Mining & Reclamation Assn., Inc. 452 U.S. 264 (1981).

230. *See e.g.* Biloune v. Ghana Investment Centre, 95 I.L.R. 183 (1993). This case is the international decision on which *Metalclad* based its finding of an indirect expropriation. *Metalclad Corp.*, 40 I.L.M. at 50.

231. CAFTA-DR, *supra* note 1, at Annex 10-C.

232. *Lucas*, 505 U.S. at 1015.

233. 458 U.S. 419 (1982).

234. Hodel v. Irving, 481 U.S. 704, 715-16 (1987).

235. Sampliner, *supra* note 62, at 8-9.

236. *See e.g.* Starrett Housing, Corp. v. Iran, 23 I.L.M. 1090, 1110 (1984); *see also* Phelps Dodge Corp. v. Iran, 25 I.L.M. 619 (1986).

237. 458 U.S. at 419.

238. *Starrett Housing, Corp.*, 23 I.L.M. at 1110.

239. *Id.* at 1116 (1984) (emphasis added).

In *Loretto*, the majority opinion recognized that "government occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation."[240] Whether the *Starrett* decision can be considered a physical occupation is of secondary importance (though the author believes that such an analogy can be drawn).[241] What is important is the recognition by both the U.S. Supreme Court and the *Starrett* tribunal that any action that deprives a claimant of the use and control of all or a portion of his property to a third party requires compensation.

Rather than continue to make a one-to-one correlation between U.S. and international decisions of similar stock, it is important to simply recognize that the "[e]xcept in rare circumstances" language of Annex 10-C(4)(b) should adequately cover the "extraordinary circumstances" found in cases like *Loretto* and *Hodel*. Though there is considerable international case law covering circumstances where the CAFTA-DR "rare circumstances" might be met,[242] the competing interest of the state to adequately regulate under valid police powers should always be addressed by a CAFTA-DR tribunal.[243]

Under the "character of the government action" factor of CAFTA-DR, the general deference to the state as well as the "extraordinary circumstances" identified by U.S. takings jurisprudence will likely find their way into future CAFTA-DR tribunal decisions. Furthermore, it is more than likely that both the scope and means of analyzing indirect expropriation claims under the "*character* of the government action" factor by a CAFTA-DR tribunal will be virtually the same as applied by U.S. courts. This is evident from both a plain language textual comparison between CAFTA-DR's Annex 10-C[244] and U.S. taking jurisprudence,[245] as well as the abundance of similar international case law[246] incorporating the same type of analysis.

IV. CONCLUSION

Even before CAFTA-DR's inception, the similarities between international indirect expropriation law and U.S. regulatory takings jurisprudence had already been recognized by many legal scholars.[247] With the creation of CAFTA-DR and

240. *Loretto*, 458 U.S. at 432 (quoting YMCA v. United States, 395 U.S. 85, 92 (1969)).

241. *Starrett Housing, Corp.*, 23 I.L.M. at 1116 (requiring a property owner to allow a third party access, use, and control of the property, and analogizing that this requirement is no different than forcing a property owner to put a physical object on his property). Both require an unwanted invasion and relinquish the use and control of some or all of the property. *Id.*

242. *See* Sampliner, *supra* note 62, at 8-9 (containing a detailed and thorough list of international decisions which could fall within the "rare circumstances" envisioned by CAFTA-DR's Annex 10-C(4)(b)).

243. *Id.* at 9.

244. CAFTA-DR, *supra* note 1, at Annex 10-C.

245. *See* Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

246. Sampliner, *supra* note 62, at 15.

247. *Id.* at 11 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES

similar U.S. BITs that have incorporated *Penn Central's* three-part test, the similarities become even more evident. Furthermore, substantial international case law has developed from which investor-state tribunals under CAFTA-DR can draw direct analogies to U.S. takings jurisprudence. When considering the inclusion of *Penn Central's* three-part test and the abundance of international case law on point, it is highly likely that future CAFTA-DR tribunal decisions will closely mirror U.S. takings law.

Even more significant is the extreme likelihood that U.S. case law will play a part in a future CAFTA-DR tribunal's determination of whether a regulation amounts to an indirect expropriation. After Congress approved the TPA of 2002,[248] foreign countries involved in negotiations with the United States were put on constructive notice that U.S. negotiators would not budge in their efforts to ensure "standards for expropriation and compensation . . . consistent with United States legal principles and practice."[249] When the other CAFTA-DR countries, apart from the United States, were confronted with the three-part test in Annex 10-C during the negotiation process, it is almost certain that U.S. negotiators would have explained the provisions using the genesis of the test: *Penn Central Transportation Co. v. City of New York,*[250] as well as *Penn Central's* progeny. If memoranda or minutes from these types of discussions are memorialized, it would then seem that U.S. case law could be used to aid interpretation of the three-part test as *travaux preparatoires.*[251] A tribunal will have to find the meaning of the three-part test ambiguous in order to turn to the *travaux preparatoires.*[252] However, considering the amount of case law that has been passed down by U.S. courts in an effort to determine the scope and meaning of *Penn Central's* three-part test, it is unlikely that a single CAFTA-DR tribunal will be able to do so on its own.

The most extreme application of U.S. case law by a CAFTA-DR tribunal would be a direct cite to a U.S. Supreme Court case in the tribunal's decision. Though the domestic law of one country is rarely used in international decisions, it may be employed.[253] A perfect example of U.S. case law being applied by an

---

§ 712, Reporters' Note 6 (1987), that "[i]n general, the line [drawn between compensable and non-compensable regulatory actions] in international law is similar to that drawn in United States jurisprudence for purposes of the Fifth and Fourteenth Amendments to the Constitution").

248. 19 U.S.C. § 3802 (2004).

249. 19 U.S.C. § 3802 (b)(3)(D) (2004).

250. *Penn. Cent. Transp. Co.*, 438 U.S. at 104.

251. MCNAIR, *supra* note 10, at 410.

252. *See* VCLT, *supra* note 7, at art. 32 (stating that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty . . . when the in [sic] the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure").

253. *See* Statute of the International Court of Justice ("ICJ") Art. 38, June 26, 1945, 59 Stat. 1055, U.N.T.S. No. 993. The Statute of the ICJ identifies the generally-accepted sources of international law. *Id.* These include: "(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59,

international tribunal can be seen in the *Trail Smelter Arbitration Tribunal* decision of 1939 between the governments of the United States and Canada.[254] In its holding, the tribunal stated that "[we have] been mindful at all times of the principle of law which is set forth by the United States courts . . . particularly by the United States Supreme Court in Parchment Company v. Paterson Parchment Paper Company (1931) 282 U.S. 555."[255] It may be that a CAFTA-DR tribunal, when faced with an indirect expropriation claim factually similar to an earlier U.S. Supreme Court regulatory takings decision, will find the Court's analysis highly persuasive and will reference it in its decision. The abundance of regulatory takings case law in the United States makes this a definite possibility.[256] However, whether a CAFTA-DR tribunal will resort to U.S. Supreme Court case law in an indirect expropriation determination will depend on the tribunal deciding the claim.

Finally, it is important to note that any U.S. case law used by a CAFTA-DR tribunal must have been in existence prior to the conclusion of CAFTA-DR's negotiations. As the term *travaux preparatoires* connotes, only those materials used in the preparation of the treaty may be used.[257] Therefore, anything that subsequently came into existence after the treaty's conclusion, by definition, may not be used.[258] As a result, if in the future the Court decides to abandon *Penn Central* and the three-part test, CAFTA-DR would still be bound by the test's current application. Unless, of course, all the CAFTA-DR parties subsequently agree to the new formulation.[259]

As Justice O'Connor once noted "[t]he *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules."[260] Though CAFTA-DR tribunals may find the application of the three-part test equally vexing, the abundance of international

---

judicial decisions and teachings *of the most highly qualified publicists of the various nations*, as subsidiary means for the determination of rules of law." *Id.* (emphasis added); see also Analytical Index, *supra* note 12, ¶ 24.

254. Trail Smelter Arbitration (U.S. v. Canada), 33 AM. J. INT'L L. 182 (1939).

255. *Id.* at 193.

256. *See, e.g.*, Sampliner, *supra* note 62, at 11 (noting that "because of the comparative abundance of precedent under domestic legal systems, such precedent should play a significant role in determining applicable principles of international law" (citing R. Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID REV.–FILJ 41, 59 (1986))).

257. *See* VCLT, *supra* note 7, at art. 32 (stating that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty . . . when the in [sic] the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure").

258. *Id.*

259. *See id.* at art. 31 (stating that "[t]he context, for the purpose of the interpretation of a treaty shall compromise, in addition to the text . . . any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions"). *See also CAFTA-DR, supra* note 1, at art. 10.22 ("A decision of the Commission declaring its interpretation of this Agreement under Article 19.1.3(c) shall be binding on a tribunal established under this Section").

260. *See e.g.* Palazzolo v. Rhode Island, 533 U.S. 606, 617-618 (2001) (O'Connor, J., concurring).

and domestic case law on point should significantly aid their analysis. Furthermore, even though the three-part test may be confusing at times, its inclusion in CAFTA-DR not only narrows the scope of what may be considered an indirect expropriation under NAFTA, but also it creates a framework "for expropriation and compensation . . . consistent with United States legal principles and practice."[261]

261. 19 U.S.C. § 3802 (b)(3)(D) (2004).

* * *