Petroleum Business Review, Vol. 5, No. 4, pp. 01–10, Fall 2021

Indirect Expropriation in the Petroleum Industry: The Response of International Arbitrations

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ARTICLE INFO

Keywords:
Claims tribunal
Indirect
Investment law international
Expropriation, international
Petroleum agreements Iran-us
NAFTA

Received: 24 March 2021

Revised: 14 June 2021

Accepted: 03 July 2021

DOI:10.22050/PBR.2021.278306.1176

ABSTRACT

The present article aims to argue indirect expropriation in international petroleum agreements and analyze the response of international arbitrations. In particular, international arbitral awards by the Iran–US claims tribunal, the Yukos case as an energy charter treaty arbitration, and certain North American Free Trade Agreement cases have been examined. The recent trend shows that taking foreign investors' property may occur not only through legislation or nationalization but also by indirect methods that can have the same effect as direct expropriation. Indirect expropriation does not necessarily require the transfer of legal title from the international oil company to the host state. Hence, it is difficult to distinguish between legitimate regulation and measures that are tantamount to expropriation with the payment of compensation. Identifying an indirect expropriation is complex and depends upon the examination of the legitimate expectations of the investor concerning the enjoyment of its investment. Host governments may employ different methods to achieve what amounts to direct taking, but without acknowledging it as such, to avoid legal consequences of expropriation and then payment of compensation.

1. Introduction

Taking over takes place where the host state does not obtain the expected benefits and, through expropriation, seeks to restore the contractual equilibrium. As a result of the host government's taking, the deprivation of the foreign investor of its property rights occurs. The distinction between direct and indirect expropriation is recognized by the nature of the interference with the investor's property. The examination of international arbitrations as to direct expropriation indicates that a compulsory transfer of the legal rights of foreign investor ownership to the government or a third party by sovereign powers constitutes direct expropriation (Younesi, 2021). If the governmental measures have the effect of depriving the foreign investor of the enjoyment of their property even where the legal title to the property is not affected, then indirect expropriation has taken place. Such actions may result in state responsibility, and if it is the case, the government is obliged to pay compensation to the foreign investor whose property rights are affected by those measures.

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The recent trend shows that foreign property may occur through legislation or nationalization and indirect methods that can have the same effect as direct expropriation (Aldrich, 1994, p.585). Host governments employ different methods for achieving what amounts to direct taking, but without acknowledging it as such, to avoid legal consequences of expropriation and then payment of compensation. The legal focus is on shifting from the host state's taking of tangible property to the new methods used indirectly by states, which may have the same effect as direct taking in international investment law. Host governments using indirect methods will raise the question of what measure is tantamount to expropriation and how such solid methods should form a compensable taking (Dolzer, 1986, p.41). For instance, in some indirect takings, the foreign investor remains the official owner, but the empty name of ownership remains in reality. International oil companies have filed several disputes before international tribunals based on indirect expropriation (Hober, 2003, p.378).

In addition, due to the enactment of numerous economic regulations and the privatization of public ownership, indirect expropriation has recently become more prominent. Hence, this study analyzes the behavior of host states, in particular, their actions in terms of indirect expropriation. In order to achieve these objectives, we discuss the relevant terminology, the measures available to host states for indirect expropriation, distinguishing factors as to expropriation and indirect expropriation (creeping, regulatory expropriation), and various types of measures amounting to expropriation and examining the response of the petroleum arbitral practice to this particular area.

2. Terminology

All investment treaties have a provision about expropriation. International petroleum investment agreements and bilateral investment treaties (BITs) do not usually define the essential concepts and terms such as direct and indirect expropriation. "Indirect", "regulatory", "creeping", "de facto" expropriations are used interchangeably, but a definition of these concepts and what kinds of governmental measures may constitute direct and indirect expropriation remain unclear.[2] The literature examination and the above investment treaties indicate the diversity of terms such as "de facto", "wealth deprivation", and "creeping" expropriation for indirect expropriation.

Creeping expropriation is defined as a series of measures that the host government takes through which it deprives the foreign investor of property. Any of them might be permissible but, in total, will result in expropriation with the payment of compensation (UNCTAD, 2005, p.41). In an indirect expropriation, the foreign private property is not seized directly. However, the distinction is blurred in practice, as most de facto expropriations have creeping and indirect aspects. The exercise of regulatory powers such as tax regime or environmental measures may reduce the economic value of the investor's property without affecting the legal title. It is called regulatory taking. The use of other terms in investment treaties such as "tantamount to expropriation", "similar to", and "direct or indirect" guarantees that creeping expropriation is referred to in the expropriation provisions (Lowenfeld, 2003). International oil companies may experience an additional risk of regulatory measures due to the nature of the oil and gas projects. International energy investments surround these risks from the beginning and over the contract's life. The concept of regulatory risk will be examined under the definitions presented by the Organization for Economic Cooperation and Development (OECD) and legal scholars. The OECD has introduced it as the risk of non-payment on an export contract or project due to action taken by the importer's host government. Such action may include intervention to prevent the transfer of payments, cancellation of a license, or events that prevent the exporter from performing under the supply contract or the buyer from making payment (OECD, 2004).

Commeuax has defined it as the risk that laws of a country will unexpectedly change to the investor's detriment after the investor has invested capital in the country, thereby reducing the value of an individual's investment (Commeuax, 1998). In a similar vein, regulatory risk in the energy industry is described as the possibility that oil company investment will be expropriated or unilaterally changed by the foreign government to the detriment of the oil company (Boulos, 2008, p.3).

The notion of indirect expropriation plays a vital role in international petroleum investment agreements, yet the notion has not been subjected to any sustained analysis in the petroleum law literature. There have been

[2] Article 1110 of NAFTA; Article 13 of ECT.

some studies regarding indirect taking under international law. Nevertheless, the study of the mentioned notion in the petroleum literature and focusing on the analysis of arbitral awards is unprecedented. Detriment after the investor has invested capital in the country, reducing the value of an individual's investment (Commeuax, 1998). In a similar vein, regulatory risk in the energy industry is described as the possibility that oil company investment will be expropriated or unilaterally changed by the foreign government to the detriment of the oil company (Boulos, 2008, p. 3).

The notion of indirect expropriation plays an essential role in international petroleum investment agreements, yet the notion has not been subjected to any sustained analysis in the petroleum law literature. There have been some studies regarding indirect taking under international law. Nevertheless, the study of the mentioned notion in the petroleum literature and focusing on the analysis of arbitral awards is unprecedented.[3]

3. The host government's devices for indirect expropriation

The occurrence of direct expropriation is easy to identify by exploring the existence of tangible property of the investor. Direct expropriations will have customarily taken place because of an explicit national policy measure and on a specific date. However, the identification of indirect expropriation is very complex and depends upon the examination of the legitimate expectations of the investor concerning the enjoyment of its investment.

Direct taking may occur through a specific taking, nationalization, and taking of an economic sector or industry. Nonetheless, indirect taking is more complicated because of the use of sophisticated techniques, which are less evident in terms of constituting what amounts to an expropriation by the government (Shanks, 1986, p. 417). These techniques are recognized as compensable by the arbitral tribunals. They can be in the form of excessive taxation, forced sale of alien property, management control over the investment, discriminatory administrative decrees, and unreasonable interference with the property rights of foreign investors. The host state's method to effectuate what will amount to indirect expropriation may be in the form of a series of actions and in a combination of other measures. Indeed, such actions are not always independent of each other and only become expropriator if applied with other compensable techniques. Indirect expropriation arises from host states' measures and may include interference in the right of management, abusive taxation, and forced transfer of shares (UNCTAD, 2004, p.238).

The measures mentioned above are not exhaustive, and the host government may interfere with the property rights of the foreign investor by different actions. However, the combined effect of this is to reduce the value of the investment. Therefore, increasing tax or abusive taxation, imposition of some restrictions on foreign investors' rights, and changes in regulations are the most important approaches to indirect expropriation. The UNCTAD has introduced a definition for expropriation where a measure that does not directly take property has the same impact by depriving the owner of the substantial benefits of the property (UNCTAD, 2005, p. 21).

Increases in tax or setting new tax regimes or environmental regulations might be described as those discriminatory and regulatory measures. For instance, different investment arbitral awards have examined the notion of abusive taxation in the energy industry. Examples are Philips Petroleum versus Iran, Sedco versus Iran, and the Revere Copper case. This trend is growing by increasing taxes and royalties or setting new tax regimes, especially in Latin America. The host state may change environmental regulations over the life of petroleum projects. This can create an investment dispute. Indeed, the host state may change environmental regulations on a discriminatory basis to limit petroleum investment. This regulation change and, hence, the financial balance can lead to expropriation. The foreign investor's compliance with these standards imposes extra costs on him, which can seriously affect the economic value of the investment.

However, a general agreement is that host states are not required to pay compensation for economic disadvantages resulting from legitimate regulation. In order to identify whether the host state's action is compensable, it is helpful to consider the host government's action on a case-by-case basis and define

[3] For more details see, Mouri (1994); Younesi (2021); Geiger (2003) and L. Yves (2004); Reinisch (2008); OECD (2004).

"taking" according to bilateral and multilateral treaties (Price, 2001, p. 2).

4. The legal test in distinguishing between an indirect expropriation and non-compensable regulatory measures

The ability of a host state to interfere in property rights is essential for the efficient functioning of the state, and, hence, it is predictable that a state has the power to interfere so (Wagner, 1999, p. 465). Nonetheless, the question is how to distinguish between a compensable indirect expropriation and a legitimate regulation (which is not compensable) by states.

Indirect expropriation does not necessarily require the transfer of legal title from the international oil company to the host state. Hence, it is difficult to distinguish between legitimate regulation and measures, which are tantamount to expropriation with the payment of compensation. There is no mechanical test in its determination (Paulsson and Douglas, 2004, p. 145). The international arbitral tribunals and the legal scholars have not yet agreed on a perfect formula to define measures that cross the line between legitimate regulation and compensable interference. It is neither feasible nor workable.

Furthermore, international law does not present a clear and comprehensive solution to this problem (Geiger, 2003, p. 100). Although the governmental measures, which affect international oil companies' property rights, are broad to be categorized within a formula, it will probably be best to consider the specific facts of a case, contractual terms of the investment agreement, the severity of the interference, and other surrounding circumstances to determine whether a state's action is tantamount to expropriation. It is better to have a deep understanding by a case-by-case analysis of the measures under international law that do not give rise to responsibility and the payment of compensation to answer what types of governmental measures constitute indirect expropriation.

In the ICSID case, Generation Ukraine Inc. versus Ukraine, the tribunal held that identifying an indirect expropriation depends on the specific facts of a grievance. The tribunal added that there is no mechanical test for this purpose. In a similar vein, a case-by-case, fact-based inquiry is provided by some BITs.[4]

The examination of the arbitral practice on indirect expropriation indicates that two different approaches were taken to identify indirect expropriation: (i) the sole effect and (ii) the purpose doctrine.

4.1. The sole effect doctrine

The first approach examines the effect of state measures on the ability of the investor to enjoy its property rights. In this approach, the effect of the action is the determining factor in identifying a taking. Indeed, this approach in specifying the borderline between an indirect expropriation, and a non-compensable (legitimate) regulation looks at the effect of measures and the degree of interference with an international investment project (Reinisch, 2008). This approach, which examines the severity of those measures that affected the foreign investor, is known as the "sole effect" doctrine. The interference must be substantial and deprive the foreign investor of most investments benefit. In addition, the deprivation must be permanent or for a substantial period (S.D.Myers Arbitration, 2001).

In the Metalclad Corporation, the US firm (investor) had obtained permission from the government to construct and operate a facility to dispose of hazardous waste and spent 20 million dollars for its construction. The tribunal decided that indirect expropriation had taken place. The foreign investor had obtained all required licenses to develop a hazardous waste landfill. However, when the investment had been made, the host government began to withdraw the permissions. The tribunal held that covert or incidental interference with the use of property that deprives the owner is expropriation (Metalclad Corp. versus the United Mexican States, 2000). Indeed, the host government's measure substantially affected the international investor's property rights, and the foreign investor could no longer use its capital for the intended aims. Several different arbitral tribunals have followed this formula in determining expropriation (Methanex Corp. versus the United States, 2005).

In Tippets versus TAMS-AFFA, the new government of Iran, after the revolution, designated a new manager for the investment in 1979. The foreign investor filed a case for its 50% interest in a joint venture (JV) by an Iranian company before the Iran–US claims tribunal. The claimant alleged that the JV did not provide him with a project status report and did not reply to any of the

[4] Canadian Model BIT, (2004), Annex B 13(1)(b), available at http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf, March 2021.

claimant's inquiries. The tribunal did not find an expropriation because the claimant could participate in the management by making decisions and signing cheques (TAMS-AFFA, p. 225–6).

In Occidental Exploration and Production Company versus the Republic of Ecuador, the host state had refused to reimburse value-added tax on purchases concerning the exploration activities of Occidental Exploration and Production Company. The company, therefore, alleged that expropriation occurred. In this case, the tribunal took the same approach like the one taken in the Metalclad. The tribunal found that the host government's action contradicted fair and equitable treatment. Nonetheless, the tribunal decided that the host state's action did not substantially deprive Occidental Company of its financial benefits and, hence, it would not constitute indirect expropriation.

4.2. The purpose doctrine

The second approach to distinguishing between a regulative measure and an expropriator action is to examine the intention of the host government. This is known as the "purpose doctrine". This approach focuses on the purpose of the state measure, but it does not ignore the effect of the action on the investor. Indeed, the state measure's severity and effect are not the sole requirements, and another condition is still required. Commentators and international awards have not generally accepted this approach probably because it would be a difficult task to prove the intention of the host state for expropriation of the international investor's property (Fortier and Drymer, 2004, p. 313).

The arbitrators in the Tippetts case stated that the tribunal does not need to determine the intent of the government of Iran, and compensation does not depend on proof that expropriation was intentional. In Philips Petroleum, the tribunal awarded that the liability of the government for payment of compensation in the event of expropriation was not dependent on the intention of the state. The tribunal in the case of S.D. Myers versus Canada followed and applied the purpose approach and concluded that the tribunal must look at the genuine interest involved and the purpose and effect of the government measure.

The above analysis argues two different avenues in determining whether a host state's measure might be characterized as an indirect expropriation or a legitimate regulation. Although the sole effect approach is not a conclusive test, this approach is widely accepted.

One of the critical factors in determining whether taking has occurred is the disappointment of legitimate expectation by the government's measure. The examination of the arbitral cases indicates that if a governmental measure frustrates the legitimate expectation of the foreign investor created based on reasonable reliance on the host government's undertakings, compensation for the affecting measure is required. Indeed, contractual commitments with the host state that will not exercise its administrative or legislative powers to terminate or alter the contractual arrangements constitute a legitimate expectation for the investor. The arbitral tribunals and legal scholars generally accept that reducing the investment value, per se, will not give rise to the payment of compensation. All investments include risks, and not every problem experienced by the foreign investor can be regarded as an indirect expropriation.

5. Case studies

5.1. The energy charter treaty arbitration, Yukos versus Russia

The significance of the ad hoc arbitration between Yukos and Russia, which was decided according to the Energy Charter Treaty, makes it necessary to examine the case in greater detail.

In Yukos versus Russia, the tribunal held that while Russia did not explicitly expropriate Yukos, its measures had an effect equivalent to expropriation. Yukos was established as a joint-stock company in 1993 and had operations in the petroleum industry. Yukos had three production subsidiaries, Yuganskneftegaz (YNG), Samaraneftegaz, and Tomskneft, and it was the largest petroleum company in Russia and one of the world's top 10 petroleum companies in 2002. The Russian government, in July 2003, initiated a series of measures adversely affecting claimants' investments in Yukos, resulting in Yukos being declared bankrupt in August 2006.

In November 2007, Yukos' assets were nationalized, and two Russian state-owned companies, Rosneft and Gazprom, acquired the remaining assets. Amongst the governmental measures which allegedly violated the ECT provisions were the criminal prosecution of the company and its management. In July 2003, the Russian government initiated a series of criminal investigations. It was argued on behalf of Yukos that these actions amounted to harassment and intimidation and "severely hampered" the functioning of Yukos as a business. It also made up the primary motive for nationalizing Yukos' assets.

Between July and October 2003, three key Yukos officers were arrested. Mikhail Khodorkovsky, CEO of Yukos and supporter of Russian opposition parties, Platon Lebedev, the director of the claimants' Yukos Universal and Hulley, and Vasily Shakhovsky, the president of Yukos-Moscow, were charged with crimes of fraud, embezzlement, forgery, and tax evasion (Yukos Interim Award, paras. 48–50). As a result of these arrests, other high-ranking Yukos executives fled Russia. The claimants argued that the harassment of Yukos' executives and these measures taken by Russia breached Article 10 (fair and equitable requirement) and resulted in the expropriation of the claimants' investment in Yukos in violation of Article 13(1) of the ECT.

The claimants alleged that the Russian Federation failed to satisfy any of the four requirements set out in Article 13(1) ECT in terms of expropriation. The expropriation was not in the public interest; it was discriminatory and carried out without due process of law and not accompanied by the payment of compensation. Under the applicable international law standards, the actions of the Russian Federation, in their totality, constitute an expropriation of the claimants' investments in breach of Article 13(1) ECT, for which compensation is due.

The tribunal discussed the basic requirements of a lawful expropriation under Article 13(1) of the ECT. Concerning the public interest condition, the tribunal did not find that expropriation of Yukos was in the public interest. The tribunal held that whether the destruction of Russia's leading oil company and the largest taxpayer was in the public interest is questionable. The tribunal added it was in the interest of the largest state-owned oil company, Rosneft, which took over the principal assets of Yukos virtually cost-free (para. 1581).

Regarding the requirement of non-discriminatory treatment, the tribunal considered that Yukos's treatment, compared to the treatment of other Russian oil companies that benefited from low-tax jurisdictions, might have been discriminatory. As to the due process of law condition, the tribunal did not accept that expropriation of Yukos was carried out under due process of law due to the harsh treatment accorded to executives and counsel of Yukos. The tribunal then examined the requirement of payment of compensation. The tribunal held that expropriation of Yukos was not accompanied by the payment of prompt, adequate, and effective compensation or, in fact, any compensation at all. The tribunal established the respondent's liability and held that claimants were entitled to compensation for expropriation.

5.2. The NAFTA tribunal's cases

The analysis of the NAFTA provision concerning expropriation shows that whenever the property is taken, compensation must be paid for both direct and indirect expropriation. Following NAFTA's text, this requirement will be applied regardless of the method of taking or the reason behind a taking. The NAFTA tribunals have examined several claims about the host government measures, alleged to be expropriation.

Pope and Talbot, Inc. versus Government of Canada examined the meaning of expropriation. The tribunal noted that the term "expropriation" means both direct and indirect expropriation under the NAFTA provisions. It also concluded that Article 1110 involves non-discriminatory regulation as to the exercise of the government's police power. The tribunal held that regulations could indeed be characterized in a way that would constitute creeping expropriation. Indeed, much-creeping expropriation could be conducted by regulation. The tribunal found that there must be a substantial deprivation to regard the state act as a compensable expropriation. In addition, the tribunal added that the foreign investor's access to the US softwood lumber market has made up the property rights, which NAFTA protected. The tribunal concluded that Canada's temporary imposition of its quota regime did not qualify as substantial deprivation.

In another case, Feldman versus Mexico, the claimant alleged that Mexico's decision not to provide rebates of taxes paid by the investor for the cigarette exports from Mexico formed a creeping expropriation. The tribunal found that the legal arguments against a finding of expropriation were more persuasive. The tribunal added that Mexico had a long-lasting tax policy against the operation of such businesses. The tribunal concluded that not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business is an expropriation under Article 1110 (Feldman arbitration, para. 112).

5.3. Iran–US claims tribunal's cases

Almost all international petroleum arbitrations that have discussed indirect expropriation were relevant to Iran's nationalization of the petroleum industry. In Amoco versus Iran, Amoco and National Petrochemical Company of Iran (NPC) concluded the "Khemco agreement". They agreed to establish a joint venture on a 50%–50% capital (Khemco). The purpose of Khemco was to install and operate a natural gas production plant on an Iranian Island (Kharg) in the Persian Gulf. Civil unrest in Iran and the events of the Iranian revolution hampered petroleum production in late 1978. Amoco removed its expatriate personnel from Iran in late 1978. In May 1979, Amoco was informed by Iranian officials that foreign employees could not return, and NPC was ready to purchase Amoco's share in the joint venture. The managing director of the JV informed the claimant that all sales of the petroleum products must be made by the National Iranian Oil Company (NIOC) and NPC. The Iranian petroleum minister then informed Amoco that a special commission nullified the Khemco agreement in 1980.

The claimant alleged that its shares in Khemco were expropriated, and the date of 1 August 1979 should be regarded as the expropriation date. The tribunal observed that Amoco's rights and interests, including its shares in Khemco, were expropriated through a process starting in April 1979 and completed by the special commission's decision on 24 December 1980. The tribunal also noted that the value of the claimant's interests should be calculated since 31 July 1979. Judge Aldrich stated that by making this date the date of valuation, the tribunal implicitly accepted this date as the effective date of taking. Hence, Amoco was justified in being deprived of its property rights under the Khemco agreement. The tribunal refused the allegation that expropriation due to the absence of compensation provisions before enacting the Single Article Act was unlawful (Amoco arbitration, p.290).

In Philips Petroleum Co. Iran, versus Iran, the parties signed the joint structure agreement (JSA) in 1965. It was concluded between the National Iranian Oil Company as the "first party" and Philips Petroleum Company Iran and several companies collectively referred to as the "second party". The purpose of the JSA was exploration and exploitation of the petroleum resources of an offshore area in the Persian Gulf. Under Articles 5 and 6 of the JSA, the parties had established a joint-stock operating company, Iranian Marine International Oil Company (IMINCO), to carry out all operations under the JSA. The JSA in Article 6 provided that each party would have half of the stock of IMINCO and the right to appoint half of the board of directors. The second party and NIOC had the right of the oil lifted from IMINCO's field. IMINCO ceased production in December 1978 due to the events after the revolution and workers' strike on Lavan Island that had prevented oil loading on tankers. When in March 1979 production started, the claimant was not permitted to lift its share of IMINCO.

Further, NIOC, in violation of the JSA on 11 August 1979, unilaterally removed the general manager of IMINCO and replaced him with a committee to execute the affairs of the affiliated companies. In addition, a sub-committee had been formed to deal with the involved companies in the JSA to terminate the existing contracts with the second party and negotiate new contracts with the second party. Shortly after, in September 1979, NIOC informed the claimant that the JSA should be regarded as terminated. The tribunal argued that the effect of measures on the investor determines whether an expropriation has occurred. Therefore, expropriation does not need to be intentional to state liability. The tribunal found that Philips, by a series of concrete actions, had been deprived of its property (Philips arbitration, p. 95–115)

The above analysis established that the tribunal had to deal with two main issues about taking. The first was when the claimant was deprived of property rights and whether a compensable taking had taken place or not. The second was the determination of the date of taking. In determining whether a taking has occurred, the tribunal had to specify whether the parties had mutually agreed to terminate the contract or whether Iran had taken the property rights. The tribunal determined the date of taking when the reasonable prospect of returning to the contractual arrangements might not be seen. The tribunal awarded compensation.

In another case, Mobil Oil Iran, Inc. versus Iran, the claimants were members of the group of oil companies, "The Consortium", which worked on behalf of the National Iranian Oil Company on the onshore Iranian oil industry. Under the Sale and Purchase Agreement 1973 (SPA), the claimants had purchased crude oil from NIOC. After the revolution, NIOC sent a letter to the consortium expressing that the NIOC considered the SPA inoperative and that expatriate personnel would be replaced. The parties initiated negotiation, but the process was suspended in 1979. The special commission on 5 September 1981 repudiated the SPA and declared it void. Mobil Oil alleged that Iran had expropriated the claimant's contractual rights established under the SPA. However, the tribunal observed that both parties had mutually agreed not to revive the agreement and start negotiation for formal termination of the agreement and settle the related issues about the termination. Accordingly, the tribunal found that it did not constitute expropriation and rejected the claimant's allegations (Mobil Oil arbitration, p. 45)

In Sedco Inc. versus National Iranian Oil Company, the claimant, an American drilling contractor (Sedco), owned 50% share of the Iranian Drilling Company (Sediran) and had controlled its operation in Iran. The claimant contended that a creeping expropriation took its shares in the Sediran Company. Iran promulgated the law of the Protection and Development of Iranian Industries in 1980. According to Article 1, Clause C, the nationalization of factories and companies that received substantial loans from the government and their debts exceeded their net assets was permitted. On 2 August 1980, Iran, by applying Clause C of the law for the Protection and Development of Iranian Industries, transferred shares of Sedco in Sediran to the government. Iran argued that the application of Clause C could not be regarded as taking because Sediran was an Iranian legal entity with nothing but large amounts of debt and that Clause C is somehow to be assimilated to a law enacted to cover Iranian companies in the state of bankruptcy (Sedco arbitration, p. 273). Additionally, Iran in November 1979 appointed three provisional directors to Sediran's original administration. The claimant asserted that the actual taking of shares was earlier than the date of promulgation of this law.

The respondent argued that there was no liability for the transfer of shares further to the enactment of Article 1, Clause C. Nevertheless, the tribunal did not accept this argument, and the tribunal had considered the other factors in finding expropriation. The tribunal found that appointing a manager was a significant indication of expropriation because the owner was deprived of his/her right to manage the enterprise. The tribunal added that the appointment of temporary managers and, consequently taking the control, constituted an outright taking of title, and therefore the date of appointment was the date of taking. Furthermore, the tribunal held that the choice of the date of appointment of managers as the date of taking was because there were no prospects for Sedco to return to control Sediran, and since that date, the government of Iran became the chief architect of Sediran fortunes (Sedco arbitration, 275–279).

To sum up, the appointment of temporary managers gives rise to a deprivation of participation rights in the central and management of the company and denial of access to the company's funds; then, this will result in expropriation. The arbitral tribunals examine affecting measures of shareholder's rights, such as the right to participate in the management process.

6. Conclusions

Direct taking may occur through a specific taking, nationalization, and taking of an economic sector or industry. Nonetheless, indirect taking is more complicated because of the use of sophisticated techniques, which are less evident in terms of constituting what amounts to an expropriation by the government. If the governmental measures have the effect of depriving the foreign investor of the enjoyment of their property even where the legal title to the property is not affected, indirect expropriation has taken place.

Various measures might constitute indirect expropriation, such as abusive taxation, environmental issues, and regulation about licenses. The discussions highlighted the investor's right to effective control over enjoyment, use, and disposition of the property rights. Expropriation may occur when the governments deprive the investor of property rights without transferring title or physical occupation. There is no mechanical test in determining expropriation, and it depends on all circumstances and facts of each case. The distinction between legitimate regulative measures, which are non-compensable, and expropriator measures has remained challenging. The examination of the arbitral practice on indirect expropriation indicates that two different approaches were taken to identify indirect expropriation: (i) the sole effect and (ii) the purpose doctrine. The first approach examines the effect of state measures on the ability of the investor to enjoy its property rights. In this approach, the effect of the action is the determining factor in identifying a taking. The second approach for distinguishing between a regulative measure and an expropriator action is to examine the intention of the host government. This approach focuses on the purpose of the state measure, but it does not ignore the effect of the action on the investor. Indeed, the severity and effect of the state measure are not the sole requirements, and another condition is still required. The analysis of cases and related literature shows that a lawful regulatory measure must be non-discriminatory and non-arbitrary.

Indeed, indirect expropriation will affect the property's value and economic profits and result in investment disputes. Regulations generally will not have a sufficiently severe and adverse impact on investment to amount to indirect expropriation. Bilateral investment treaties have promoted the international protection of investors. Nearly 2,000 of these BITs have now been concluded. These treaties give investors of one party a direct right of action, through arbitration, against the other country's government in the event of a violation of various provisions designed to protect investors, extending beyond the prohibition on expropriation under customary international law. Investment protection treaties and customary international law may obligate host states to protect foreign investments such that any expropriation must be done on rare occasions and for public purposes. In light of the above, it is in the interest of the foreign investors to assess the investment environment of the host state and its legal and regulatory framework before investing. The stable legal framework may considerably reduce the risk of indirect expropriation and investment disputes.

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