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

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ABSTRACT

The present article aims to argue indirect expropriation in international petroleum agreements and to analyse 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 of foreign investors' property may take place not only through legislation or nationalisation but also by indirect methods that can have the same effect as direct expropriation. Indirect expropriation does not necessarily require transfer of legal title from the international oil company to the host state. Hence, it is difficult to make a distinction between legitimate regulation and measures, which are tantamount to expropriation with the payment of compensation. The identification of an indirect expropriation is complex and depends upon the examination of the legitimate expectations of the investor concerning 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, deprivation of the foreign investor of its property rights occurs. The distinction between direct and indirect expropriation is recognised 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 to a third party by sovereign powers constitutes direct expropriation

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(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 that whose property rights are affected by those measures.

The recent trend shows that taking of foreign property may take place not only through legislation or nationalisation but also by indirect methods that can have the same effect as direct expropriation (Aldrich, 1994, p.585). Host governments employ different methods for achieve 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 in this article 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. Indirect methods are being used by host governments will raise the question of what measure is tantamount to expropriation and how strong should such methods be to form a compensable taking (Dolzer, 1986, p.41). For instance, in some indirect takings, the foreign investor remains as the official owner, but in reality, what remains is the empty name of ownership. International oil companies have filed several disputes before international tribunals on the basis of indirect expropriation (Hober, 2003, p.378).

In addition, due to the enactment of numerous economic regulations, and the privatisation of public ownership indirect expropriation has recently become more prominent. Hence, this study analyses the behaviour 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 an indirect expropriation, distinguishing factors as to expropriation and indirect expropriation (creeping, regulatory expropriation), and various types of measures amounting to expropriation and also 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 BITs do not usually offer a definition of the important concepts and terms such as direct and indirect expropriation. 'Indirect expropriation', 'regulatory', 'creeping', 'de facto' expropriation are used interchangeably but a definition of these concepts and what kinds of governmental measures may constitute direct and indirect expropriation remains unclear.[2] The examination of the literature and the above investment treaties indicate diversity of terms such as 'de facto', 'wealth deprivation', and 'creeping expropriation' for indirect expropriation.

Creeping expropriation defined as a series of measures that the host government takes through which it deprives the foreign investor from 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, in practice the distinction is blurred, as most of de facto expropriations have both 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', 'direct or indirect' is to guarantee 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. These risks are surrounded in international energy investments from the beginning and over the life of the contract. The concept of regulatory risk would be examined under the definitions presented by the Organisation 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 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 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

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

expropriated, or unilaterally changed by the foreign government to the detriment of the oil company (Boulos, 2008, p.3).

The notion of the indirect expropriation plays an important role in international petroleum investment agreements, yet the notion has not been subjected to any sustained analysis in the petroleum law literature. There has been some studies regarding indirect taking under international law, nevertheless, the study of the said notion in the petroleum literature and with a focus on the analysis of arbitral awards is unprecedented. detriment after the investor has invested capital in the country, thereby reducing the value of 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 the indirect expropriation plays an important role in international petroleum investment agreements, yet the notion has not been subjected to any sustained analysis in the petroleum law literature. There has been some studies regarding indirect taking under international law, nevertheless, the study of the said notion in the petroleum literature and with a focus 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 normally taken place because of an explicit national policy measure and on a specific date. However, the identification of an indirect expropriation is very complex and depends upon the examination of the legitimate expectations of the investor concerning enjoyment of its investment.

Direct taking may take place through a specific taking, nationalisation and taking of an economic sector or industry. Nonetheless, indirect taking is more complicated because of the use of sophisticated techniques, which are less obvious in terms of constituting what amounts to expropriation by the government (Shanks, 1986, p.417). These techniques are recognised as compensable by the arbitral tribunals and can be in the form of excessive taxation, forced sale of alien property, management control over the investment, discriminatory administrative decrees, and an unreasonable interference with 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 combination of other measures. Indeed, such actions are not always independent of each other and only become expropriatory 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 aforementioned measures are not exhaustive and the host government may interfere with the property rights of the foreign investor by different actions. However, the common effect of this is to reduce the value of the investment. Therefore, increasing tax or abusive taxation, imposition of some restrictions on foreign investor's 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. Philips Petroleum v. Iran, Sedco v. Iran and the Revere Copper case are some examples. This trend is growing by increasing taxes, 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 the petroleum investment. This change of regulation and, hence, financial balance could lead to an expropriation. The foreign investor's compliance with these standards imposes extra costs to him. This could seriously affect the economic value of the investment.

However, there is a general agreement that host states are not required to pay compensation for economic

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

disadvantage resulting from legitimate regulation. In order to identify whether the host state's action is compensable, it is useful to consider the host government's action on a case-by-case basis and to define '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 an efficient functioning of the state and, hence, it is predictable that a state has the power to so interfere (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 transfer of legal title from the international oil company to the host state. Hence, it is difficult to make a distinction between legitimate regulation and measures, which are tantamount to expropriation with the payment of compensation. It is because there is no mechanical test in its determination (Paulsson & Douglas, 2004, p.145). The international arbitral tribunals and the legal scholars have not yet agreed on a perfect formula to define such measures that cross the line between a legitimate regulation and a 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 categorised within a formula, it will probably be best to consider the specific facts of a case, contractual terms of the investment agreement, severity of interference and other surrounding circumstances to determine whether a state's action is tantamount to expropriation. To answer the question of what types of governmental measures constitute indirect expropriation, it is better to have a deep understanding by a case-by-case analysis of the measures that under international law do not give rise to responsibility and the payment of compensation.

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

Examination of the arbitral practice on indirect expropriation indicates that two different approaches were taken for identification of indirect expropriation. These are: (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 action is the determining factor to identify a taking. Indeed, this approach in specifying the border line 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 'sole effect' doctrine. The interference must be substantial and deprive the foreign investor of most of the investments benefit. In addition, the deprivation must be permanent or for a substantial period of time (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 for the disposal 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 for the development of a hazardous waste landfill. However, when the investment had been made the host government began to withdraw the permissions. The tribunal held covert or incidental interference with the use of property which has the effect of depriving the owner is expropriation (Metalclad Corp. v. United Mexican States, 2000). Indeed, host government's measure substantially affected the international investor's property rights and the foreign investor was no longer able to use its capital for the intended aims. This formula has been followed by several different arbitral tribunals in the determination of expropriation (Methanex Corp. v. United States, 2005).

In Tippets v. 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

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

for its 50% interest in a joint venture by an Iranian company before the Iran-US Claims Tribunal. The claimant alleged that the J.V did not provide him with status report of the project and did not reply to any of the claimant's inquiries. Because the claimant could participate in the management by making decisions and signing cheques, the tribunal did not find an expropriation (TAMS-AFFA, p.225-6).

In Occidental Exploration and Production Co. v. Republic of Ecuador, the host state had refused to reimburse value added tax on purchases concerning the exploration activities of Occidental company. The company therefore alleged that expropriation occurred. In this case, the Tribunal took the same approach as the one taken in the Metalclad. The Tribunal found that the host government's action was in contradiction of 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 for distinguishing between a regulative measure and an expropriatory action is to examine the intention of the host government. This is known as 'purpose doctrine'. This approach focuses on the purpose of the state measure but it does not ignore the effect of action on the investor. Indeed, the severity and the effect of the state measure is not the sole requirement and another condition is still required. This approach has not generally been accepted by commentators and international awards, 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 & 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 also 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 v. Canada followed and applied the purpose approach and reached this conclusion that Tribunal must look at the real interest involved and the purpose and effect of the government measure.

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

One of the important factors in the determination of whether or not a taking has occurred is disappointment of legitimate expectation by the government's measure. Examination of the arbitral cases indicates that if a governmental measure frustrates the legitimate expectation of the foreign investor that is created on the basis of a 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 seek to exercise its administrative or legislative powers to terminate or alter the contractual arrangements constitute a legitimate expectation for the investor. It is generally accepted by the arbitral tribunals and legal scholars that reduction of the investment value, per se, will not give rise to 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. Case study (i): the energy charter treaty arbitration, yukos v. 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 v Russia, the Tribunal held that whilst Russia did not explicitly expropriate Yukos, its measures had an affect equivalent to expropriation. Yukos was a company 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. It was the largest petroleum company in Russia and one of the world's top ten 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 nationalised 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, a series of criminal investigations were initiated by the Russian government, and it was argued on behalf of Yukos that all of these actions amounted to harassment and intimidation, that they 'severely hampered' the functioning of Yukos as a business. It also made up the main motive for nationalisation of Yukos' assets.

Between July and October 2003, three key Yukos officers were arrested. Mr. Mikhail Khodorkovsky, CEO of Yukos and supporter of Russian opposition parties, Mr. Platon Lebedev, Director of the claimants Yukos Universal and Hulley, and Mr. Vasily Shakhovsky, President of Yukos-Moscow were charged of 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 an expropriation of the claimants' investment in Yukos in violation of Article 13(1) of the ECT.

In terms of expropriation, the claimants alleged that the Russian Federation failed to satisfy any of the four requirements set out in Article 13(1) ECT. The expropriation was not in the public interest, it was discriminatory, and it was 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. In relation to the public interest condition, the Tribunal did not find that expropriation of Yukos was in the public interest. The Tribunal held that the issue whether the destruction of Russia's leading oil company and 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 which also benefited from low-tax jurisdictions might have been discriminatory. As to 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 liability of the respondent and held that claimants were entitled to compensation for expropriation.

5.2. Case studies (ii): 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. In accordance with the 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 in relation to the host government measures, which were alleged to be expropriation.

Pope and Talbot, Inc. v. Government of Canada, examined the meaning of expropriation. The tribunal noted that under the NAFTA provisions, the term of 'expropriation' means both direct and indirect expropriation. It also concluded that Article 1110 involves non-discriminatory regulation as to the exercise of government's police power. The tribunal held that regulations can indeed be characterised 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 were protected by the NAFTA. The tribunal reached the conclusion that Canada's temporary imposition of its quota regime did not qualify as substantial deprivation.

In another case, Feldman v. 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. Case studies (iii): the iran-us claims tribunal's cases

Almost all international petroleum arbitrations that have discussed indirect expropriation were relevant to Iran's nationalisation of the petroleum industry. In Amoco v. Iran, Amoco and National Petrochemical Company of Iran (NPC) concluded the 'Khemco agreement'. They agreed to establish a joint venture on a fifty-fifty 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 back 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 minister of petroleum then informed Amoco that the Khemco agreement was nullified by the Special Commission in 1980.

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

In Philips Petroleum Co. Iran, v. Iran the parties signed the Joint Structure Agreement (JSA) in 1965. It was concluded between the National Iranian Oil Company (NIOC) as the 'First Party' and Philips Petroleum Company Iran and a number of 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, namely, 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 the production in December 1978 due to the events subsequent to the revolution and workers strikes on Lavan Island that had prevented loading of oil 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 by 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 to 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 bring about the 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 in relation to 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 determination of the date of taking. In determination of 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. v. Iran, the claimants were members of the group of oil companies, 'The Consortium' which worked on behalf of the National Iranian Oil Company (NIOC) on the onshore Iranian oil industry. The claimants under the Sale and Purchase Agreement 1973 (SPA) had purchased crude oil from NIOC. Thereafter 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 to start negotiation for formal termination of the agreement and settle the related issues about the termination. Accordingly, the tribunal found it did not constitute expropriation and rejected the claimant's allegations (Mobil Oil arbitration, p.45)

In Sedco Inc. v. National Iranian Oil Company (NIOC), 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 its shares in the Sediran Company were taken by a creeping expropriation. Iran promulgated the law of the Protection and Development of Iranian Industries in 1980. According to Article 1, Clause C, nationalisation of factories and companies that received substantial loans from the government and their debts exceed their net assets was permitted. On 2 August 1980, Iran by the application of Clause C of the law for the Protection and Development of Iranian Industries, transferred shares of Sedco in Sediran to the government. Iran argued the application of Clause C cannot be regarded as a 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 that is enacted to cover Iranian companies in state of bankruptcy (Sedco arbitration, p.273). Additionally, Iran in November 1979 appointed three provisional directors to Sediran 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 transfer of shares further to the enactment of Article 1, Clause C. Nevertheless, the tribunal did not accept this argument. Nevertheless, the tribunal had taken into account the other factors in finding expropriation. The tribunal found that the appointment of a manager was a significant indication of expropriation because the owner was deprived of its right to manage the enterprise. The tribunal added that the appointment of temporary managers and in consequence taking the control constituted 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, it seems where the appointment of temporary managers gives rise to deprivation of participation rights in the central and management of the company and denial of access to funds of the company, then this will result in expropriation. The arbitral tribunals examine affecting measures of shareholder's rights, such as right to participate in the management process.

6.Conclusion

Direct taking may take place through a specific taking, nationalisation and taking of an economic sector or industry. Nonetheless, indirect taking is more complicated because of the use of sophisticated techniques, which are less obvious in terms of constituting what amounts to 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 then indirect expropriation has taken place.

There are various measures which might constitute indirect expropriation, such as, abusive taxation, environmental issues and regulation in relation to 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 its property rights without transfer of title or physical occupation. There is no mechanical test in the determination of expropriation and it is dependent on all circumstances and facts of each case. The distinction between legitimate regulative measures which are non-compensable, and expropriatory measures has remained difficult. Examination of the arbitral practice on indirect expropriation indicates that two different approaches were taken for identification of indirect expropriation. These are: (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 action is the determining factor to identify a taking. The second approach for distinguishing between a regulative measure and an expropriatory 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 action on the investor. Indeed, the severity and the effect of the state measure is not the sole requirement and another condition is still required. The analysis of cases and related literature show that a lawful regulatory measure must be non-discriminatory and non-arbitrary. Indeed, indirect expropriation would affect the value of property and economic profits and may result in investment disputes. Regulations generally will not have sufficiently serious and adverse impact on an investment as to amount to an indirect expropriation. Bilateral investment treaties (BIT), has 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 government of the other country in the event of a violation of various provisions designed to protect investors, which extend 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 in rare occasions and for public purpose. 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 making an investment. The stable legal framework may considerably reduce the risk of indirect expropriation and investment disputes.

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