2002

Regulatory Takings: The International Law Perspective

Barry Appleton

COLLOQUIUM ARTICLES

REGULATORY TAKINGS: THE INTERNATIONAL LAW PERSPECTIVE

BARRY APPLETON*

INTRODUCTION

The connection between Americans and private property rights is fundamental. Whenever governmental acts interfere with private property rights, controversy ensues. Revolutionary America considered British sequestering of private property a serious matter of complaint, and this connection with property endures in contemporary America.

In a modern regulatory state, interferences with private property are legion and are expected. Within the United States legal system, constitutional amendments and judicial strictures have established a flexible system that compensates property holders whose rights have been seriously affected by government regulation.

The U.S. Constitution contains specific protections against uncompensated takings in the Fifth and Fourteenth Amendments. This same level of constitutional protection for private property does not exist in other states. In Mexico, while there is a

* Barry Appleton, LL.B., LL.M., Managing Partner of Appleton & Associates International Lawyers in Washington, D.C. and Toronto, Canada and the author of NAVIGATING NAFTA (1994). Mr. Appleton is a member of the bars of Ontario, New York State, the District of Columbia and the U.S. Court of International Trade and has acted as counsel on a number of international investor-state arbitration matters, including the *Ethyl* arbitration, the *Pope & Talbot* arbitration and the *S.D. Myers* arbitration. The author wishes to thank his colleagues at Appleton & Associates International Lawyers for their assistance in reviewing this paper. This Article is based upon Mr. Appleton's participation in the Colloquium on Regulatory Expropriations in International Law sponsored by New York University School of Law's Center on Environmental and Land Use Law and the New York University Environmental Law Journal on April 26-27, 2002. This paper contains Mr. Appleton's personal observations and these observations should not necessarily be considered to constitute the position of any of Mr. Appleton's clients.

constitutional right to property,[1] the level of compensation can depend on the purpose of the taking.[2] In some of the most developed democratic market economies, there is no constitutional protection for property at all. Both the United Kingdom and Canada have no constitutional protection that requires government compensation for forced takings.[3]

Even before the term "globalization" was first used, American investors were exporting capital and American concepts about the protection of private property abroad. However, these American precepts about property protection are not universally shared within legislative regimes of other countries. To bridge this gap, and to enhance the attractiveness of international investment, international agreements regularly include provisions which require compensation upon acts of expropriation.

Concerns have arisen as to whether the carefully constructed system of domestic takings jurisprudence can somehow be undone through the resort to international law obligations requiring compensation for expropriation. At its very heart, this controversy has one simple question—do international agreements give better rights for compensation to foreign investors under international law than Americans receive under domestic law?

I
THE DOMESTIC U.S. LAW DEBATE

Domestic U.S. law has long struggled with a balancing of the constitutional protection of property with the needs of government to disturb these rights. The Fifth and Fourteenth Amendments recognize that private property can be taken by governmental action and that compensation must be paid for such disturbance. Years of subsequent litigation have created an architecture to American takings law that would likely surprise the founding fathers in its complexity. Non-absolute takings can constitute a taking under U.S. law. In *Pennsylvania Coal Co.* v. *Mahon*, the U.S. Supreme Court recognized that governmental action that does not encroach or occupy property can still constitute a taking if the

---

[1] MEX. CONST. tit. I, ch. I, art. 27.

[2] ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 393-395 (2002).

[3] However, there are statutory regimes that do require compensation at varying rates for governmental takings in either country.

effect on the property is sufficient.[4]

U.S. regulatory takings jurisprudence took form in the often-cited U.S. Supreme Court decision in *Penn Central Transportation Co. v. New York City*.[5] In this decision over the effect of New York City zoning regulations, the U.S. Supreme Court found that a pre-existing regulatory framework meant that citizens have no reasonable expectation of freedom from government regulation.[6] The Supreme Court found that where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking may nonetheless occur, dependent on a number of factors, including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.[7] Under U.S. law, regulations that fall short of absolute takings can still attract compensation if the harm is substantial enough. In order to be sure, the court must make "*ad-hoc*, factual inquiries" and then make a decision based on the particular circumstances of the case.[8]

In *Lucas v. South Carolina Coastal Council*, the Supreme Court spoke to the ripeness necessary for courts to find sufficient interference with property rights in the case of a regulatory taking.[9] The Court established that for there to be compensation in the case of a regulatory taking, there must be deprivation of all economic benefit of the property.[10] Under the *Lucas* rule, if there was some other use available for the property, there was no compensable taking.

The U.S. Supreme Court has ruled on the nature of takings in a number of recent decisions. In *Palazzalo v. Rhode Island*, the Supreme Court recognized that partial regulatory takings could be compensable.[11] One concurring opinion in that case stated that in order to come to a decision about regulatory takings, the courts

---

[4] Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Of course, this does not mean that all valid zoning and land use regulations constitute takings, but unreasonable interference with property will be a taking.

[5] 438 U.S. 104 (1978).

[6] *Id.* at 124-25.

[7] *Id.* at 124.

[8] *Id.*

[9] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[10] *Id.* at 1019.

[11] Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

should make a "careful examination and weighing of all the relevant circumstances."[12]

The Supreme Court's vigor in protecting property rights was contained in its later decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, where the court examined the issue of whether a temporary interference with rights constituted a taking.[13] In its decision, the Court attempted to lay out basic ground rules regarding regulatory takings. Justice Stevens, for the Court, wrote:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way–often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.[14]

Thus, the U.S. Supreme Court has been able to establish that the rules regarding physical takings do not easily apply to situations of regulatory takings. The decisions establish that regulatory takings cases require the court to look to the impact of the regulation and to establish the existence of a substantial impact.

In its most simple form, it is possible to conclude that while U.S. domestic law establishes that the right to compensation in the case of government expropriations is qualified, governments will act in what they expect to be the public interest and courts will determine whether and to what extent disturbances of private

---

[12] *Id.* at 636 (O'Connor, J., concurring).

[13] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 1470 (2002).

[14] *Id.* at 1479 (citations omitted).

rights are compensable. The level of disturbance will have a direct impact on the level of compensation, and disturbances that do not create substantial harm will not create damages for technical expropriations.

It is important to note that U.S. takings jurisprudence is entirely *sui generis* to the United States. Other democratic market economies do not share the rich American tapestry of constitutional takings jurisprudence. As a result, it is not surprising to find that the American experience regarding takings is not replicated within other domestic legal regimes.

II
INTERNATIONAL LAW APPROACHES

It has been a longstanding objective of American foreign policy to ensure that there is a respect for private property held by Americans in foreign states and that compensation be paid if expropriation occurs. For example, U.S. Secretary of State Cordell Hull set out the Hull Formula when dealing with Mexican expropriations of American property in 1938.[15] In his correspondence with the Government of Mexico, the Secretary of State laid out the longstanding principles of American policy in this area. Secretary Hull established the American view that upon the expropriation of propriety, a foreign government owed an investor "the right of prompt and just compensation."[16] He expanded this basic international law notion—which was later termed the Hull Formula—to include "adequate, effective, and prompt payment for the properties seized."[17]

Given the pluralistic approaches to the protection of private property in cases of expropriation, international law has developed its own jurisprudence to ensure that investments made by foreign investors are protected in the case of governmental takings.

International agreements, like the North American Free Trade Agreement (NAFTA),[18] contain specific compensation

---

[15] *See generally* 3 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 653-61 (1942).

[16] Letter from Cordell Hull, U.S. Secretary of State, to the Mexican Ambassador to the United States (July 21, 1938), *quoted in id.* at 657.

[17] Letter from Cordell Hull, U.S. Secretary of State, to the Mexican Government (August 22, 1938), *quoted in id.* at 658.

[18] North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 612

requirements in the case of an expropriation. NAFTA Article 1110 sets out a process which requires NAFTA Parties to pay compensation to investors of other NAFTA Parties whose investments have been expropriated.[19] The requirement for compensation under NAFTA Article 1110 is absolute. If there is a finding of expropriation, then there must be fair market compensation in the manner explicitly set out in accordance with the terms of the article.

NAFTA does not define expropriation. Customary international law is used to define whether a taking has occurred. NAFTA does clarify the extent of compensation; however, this textual expression seems to have codified the existing international law position, which requires the payment of fair market value for property.[20] A longstanding international debate about the meaning of expropriation[21] has been rekindled by the NAFTA compensation requirement. This international law debate has been centered not on the issue of outright takings by governments, which must be considered to be a well settled issue of international law, but on those regulatory mechanisms used by governments that can deprive private property owners of the benefits of that property.

Under international law, the term "expropriation" refers to an act by which governmental authority is used to deny some benefit of property. For there to be an expropriation, it is necessary to establish that a government has interfered unreasonably with the use of private property.[22] This unreasonable interference principle was recognized in the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which states:

> [a] "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the

---

[hereinafter NAFTA].

[19] *Id.* art. 1110, 32 I.L.M. at 641-42.

[20] *Id.*

[21] *See, e.g.*, G.C. Christie, *What Constitutes a Taking of Property Under International Law?*, 1962 BRIT. Y.B. INT'L L. 307; Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, *in* 176 RECUEIL DES COURS 259 (1982); Burns H. Weston, *"Constructive Takings" Under International Law: A Modest Foray into the Problem of "Creeping Expropriation"*, 16 VA. J. INT'L L. 103 (1976).

[22] *See, e.g.*, Harza Eng'g Co. v. Iran, 1 Iran-U.S. Cl. Trib. Rep. 499, 504 (1982).

> use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.[23]

International judicial officials have found both that deprivation constitutes a taking[24] and that there is no longer any distinction between direct, indirect or creeping expropriations.[25] This definition and application of expropriation in international law are consistent with the U.S. legal position contained in a comment to section 712 of the *Third Restatement of the Foreign Relations Law of the United States*, which states:

> Subsection (1) [establishing state responsibility under international law for a taking by the state of the property of a national of another state] applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation"). A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory.[26]

Similar views have been taken by other international tribunals.[27] The International Centre for Settlement of Investment Disputes (ICSID)[28] Investor-State Tribunal in *Compañía del*

---

[23] Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L LAW 545, 553 (1961) (Article 10(3)(a) of the draft convention).

[24] *See* ITT Indus. v. Iran, 2 Iran-U.S. Cl. Trib. Rep. 348, 350-352 (1983).

[25] Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Eng'rs of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219, 255-56 (1984) (Shafeiei, Comments on Not Signing Award) (explaining that a deprivation or taking of property may occur through interference by a state in the use or enjoyment of a property, even where legal title to the property is not affected).

[26] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. g (1986).

[27] A similar interpretation of expropriation was also confirmed in *Biloune v. Ghana Investments Centre*, 95 INT'L L. REP. 183, 209-210 (1989), where an international tribunal determined that no distinction should be drawn between direct and creeping expropriations.

[28] More information on ISCID and its activities is available at http://www.worldbank.org/icsid.

Desarrollo de Santa Elena, S.A. v. Costa Rica held that "[t]here is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property."[29]

Both NAFTA and international law permit expropriations to occur as long as governments observe four fundamental conditions: (a) that the property is taken for a public purpose; (b) that the expropriation is conducted in a non-discriminatory fashion; (c) that the expropriation is in accordance with international law; and (d) that compensation is paid.[30]

International law is violated, and the duty to compensate is triggered, whenever an expropriation occurs that is not for a public purpose, is discriminatory, or violates principles of international law, including due process.[31] In each of these circumstances, international law provides that compensation must be paid.

The most controversial issue arising from the NAFTA expropriation provisions is the compensation requirement for measures tantamount to expropriation. This phrase has been the subject of considerable debate in international investment law as to whether its inclusion actually extends the customary international law meaning of expropriation or merely fits into existing jurisprudence.

NAFTA does not limit the ability of governments to protect the public by taking expropriatory action, even in the use of its "police power." However, even in cases where property is taken for some bona fide exercise of the police power by the state, NAFTA Article 1110 requires a government to pay full

---

[29] Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica, Final Award ¶ 77 (ICSID Case No. ARB/96/1, Feb. 17, 2000), 15 ICSID Rev.–FOREIGN INV. L.J. 169, 194 (2000), *available at* http://www.worldbank.org/icsid/cases/awards.htm.

[30] *See* NAFTA, *supra* note 18, art. 1110, 32 I.L.M. at 641-42.

[31] NAFTA specifies how compensation is calculated. NAFTA Article 1110(2) states:

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

Id.

compensation to an affected foreign investor.[32]

Several NAFTA investor-state tribunals have considered the effect of government measures which were alleged to constitute expropriations. As a result of these decisions, there is now greater understanding of the meaning of this seemingly undefined term.

The NAFTA investor-state tribunal in *Pope & Talbot, Inc. v. Government of Canada* was the first to examine the meaning of this term.[33] The Tribunal concluded that the term "expropriation" in NAFTA covered direct and indirect takings.[34] As a result, the term "measure tantamount to expropriation" did not extend the meaning of this broad coverage of the expropriation obligation.[35] The term "tantamount" was interpreted as meaning "equivalent" to expropriation.[36] Following the well established international case law, the Tribunal found that there must be a substantial deprivation before a governmental act becomes a compensable expropriation.[37] While the Investor's access to the U.S. softwood lumber market constituted a property right protected by the NAFTA, Canada's temporary imposition of its quota regime did not qualify as a substantial deprivation, according to the Tribunal.[38]

The *Metalclad* decision,[39] released subsequent to the *Pope & Talbot* Interim Award, came to a different conclusion. The *Metalclad* Tribunal concluded that the re-designation of the investor's waste recycling facility as an ecological preserve for rare cacti constituted an act tantamount to expropriation, as the facility could not operate at all.[40] The Tribunal held that:

> expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host

---

[32] *See* LOWENFELD, *supra* note 2, at 476-80 (canvassing several recent NAFTA decisions, which establish that regulation using the police power may constitute an expropriation under Article 1110).

[33] Pope & Talbot, Inc. v. Government of Canada, Interim Award (June 26, 2000), http://www.appletonlaw.com.

[34] *Id.* ¶ 99.

[35] *Id.* ¶¶ 99-104.

[36] *Id.* ¶ 104.

[37] *Id.* ¶ 102.

[38] *Id.*

[39] Metalclad Corp. v. United Mexican States, Award (ICSID (Additional Facility) Case No. ARB (AF)/97/1, Aug. 30, 2000), 16 ICSID REV. – FOREIGN INV. L.J. 168 (2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/metalcladCorp-en.asp.

[40] *Id.* ¶ 111, 16 ICSID REV. – FOREIGN INV. L.J. at 197.

> State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[41]

Nowhere in the Tribunal's reasons did they explain why they used the term "tantamount to expropriation" rather than "expropriation" to cover the actions of Mexico, which would equally apply. What appears to have occurred in *Metalclad* was a finding of fact that Mexico's activities clearly constituted a deprivation of property, described variously as expropriation, measures tantamount to expropriation, and a violation of international law.

Finally in *S.D. Myers, Inc. v. Government of Canada*, a third NAFTA investor-state tribunal has maintained this controversy.[42] The *S.D. Myers* claim considered the impact upon an American polychlorinated biphenyl (PCB) remediation company of a temporary export ban on PCB waste from Canada to the United States. The Tribunal found that this was not an environmentally related ban but a poorly disguised trade measure targeted against U.S. firms.[43] Furthermore, the export ban was inconsistent with Canada's existing international environmental law commitments under the Canada–U.S. Transboundary Agreement on Hazardous Waste and the Basel Convention.[44] While the NAFTA Tribunal ruled against Canada for its discriminatory and unfair treatment to the U.S. investor, it did not find that there was any expropriation. The Tribunal adopted the decision in *Pope & Talbot* while not addressing the *Metalclad* finding at all. The *S.D. Myers* Tribunal stated:

> [t]he Interim Order and the Final Order were regulatory acts that imposed restrictions on [S.D. Myers]. The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out

---

[41] *Id.* ¶ 103, 16 ICSID REV. – FOREIGN INV. L.J. at 195.

[42] S.D. Myers, Inc. v. Government of Canada, Partial Award ¶ 286 (Nov. 13, 2000), 40 I.L.M. 1408, 1440, *available at* http://www.dfait-maeci.gc.ca/tna-nac/SDM-e.asp (citing with approval the *Pope & Talbot* Tribunal's view that the word "tantamount" embraced the concept of so-called "creeping expropriation").

[43] *See id.* ¶¶ 193-95, 40 I.L.M. at 1428.

[44] *Id.* ¶¶ 103-07, 40 I.L.M. at 1416-17.

that possibility.

> 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.[45]

While the NAFTA case law appears to provide two conflicting approaches to the outer ranges of expropriation, the findings demonstrate a unified approach. The *Metalclad* decision held that the investor's deprivation was a measure tantamount to expropriation. The *Pope & Talbot* decision provides that whenever a tribunal makes a factual finding of substantial deprivation, then there will be an expropriation. Both of these decisions came to a similar conclusion on the state of the law: a government action that deprives a property holder sufficiently is an expropriation.

Following the established practice of international law, both tribunals required that this harm be based on a finding of fact by the tribunal. Only "substantial" or "significant" deprivations, rather than temporary ones, seem to be recognized by tribunals as expropriations at this time. As a result of these decisions, it is clear that the customary international law understanding of expropriation has been followed by these NAFTA tribunals.

A finding that a government has engaged in expropriation is inherently pejorative. International tribunals have attempted to avoid findings of uncompensated expropriation in cases when other breaches of international law could be found.[46] In order to avoid making findings of expropriation over "technical breaches" of the law, NAFTA tribunals have adopted a test that is inherently subjective. Like the domestic tests adopted by U.S. courts, the international test is fundamentally based on the assessment by the trier of fact of the seriousness of the situation. This does not mean that all activity that is unfair or discriminatory or otherwise faulty will constitute an expropriation—indeed, the *S.D. Myers* and *Pope & Talbot* Tribunals both illustrated that unfair and discriminatory

---

[45] *Id.* ¶¶ 281-282, 40 I.L.M. at 1440.

[46] *See, e.g., id.* ¶¶ 287-88, 301, 40 I.L.M. at 1440, 1442 (finding no expropriation, but holding that there had been a breach of other articles of NAFTA Chapter 11).

conduct in itself does not warrant a finding of expropriation. However, substantial interference with property rights by governmental action will constitute an expropriation. In each and every case, the international tribunal is forced to consider the fundamental issue of whether or not the interference with the investment was "substantial."

"A ROSE BY ANY OTHER NAME WOULD SMELL AS SWEET": CONCLUSIONS AND COMPARISONS ON THE U.S. AND INTERNATIONAL APPROACHES

The definition of expropriation has been neither defined nor shaped by NAFTA. It is a definition that has been developed and accepted by national governments over the last hundred years. It is because of this pre-existing international law commitment that was already owed by all the NAFTA governments to each other (and to the nationals of all other countries) that NAFTA did not permit any exceptions or reservations to be made to the expropriation obligation.

The principles of international expropriation law owe much to U.S. foreign policy. However, the decisions of international tribunals on the meaning of expropriation are not decisions made by U.S. courts. The findings of international tribunals are based on international jurisprudence, not the domestic case law of any one country. Given their divergent antecedents, it is surprising to find that there is so much commonality in the decisions and findings of international tribunals and the U.S. Supreme Court on the issue of regulatory takings. While the two areas of law have developed from different legal traditions, they are more marked by their similarities than by their differences. Perhaps this commonality stems from the fact that in both systems, judges are attempting to reconcile the pervasive nature of regulation in modern regulatory economies with the offsetting entrenched protections for property rights set out in their respective legal frameworks.

Basic principles of fairness underscore American common law and international law. Domestic courts have supported some government actions which have deprived property owners of their property in cases where courts have found this to be fair. Under domestic law, such owners may not receive full market value for the value of their taken property. Indeed, in some circumstances, property owners may not receive any compensation at all.

International law makes no distinction about the bona fide public policy purpose of a taking. It makes no difference from an international law perspective whether a taking be for environmental protection, public health or military purposes. Indeed, international law presumes that every governmental taking will be for a public policy purpose—but international law guarantees compensation. Customary international law details full and fair compensation. NAFTA details an explicit standard of compensation which is set at fair market value at the time of the taking.

International tribunals have now had to consider the issues of ripeness, temporary restriction and the difference between absolute and regulatory takings. The findings of domestic and international courts can be compared in the following table:

ISSUE	INTERNATIONAL	DOMESTIC
Ripeness	*S.D. Myers* - 18 month ban was not ripe	*Pennsylvania Coal, Tahoe-Sierra*
Substantial Harm	*Pope & Talbot* - regulatory regime did not cause substantial harm	*Lucas, Tahoe-Sierra, Penn Central*
Absolute v. Regulatory Taking	*Metalclad* - interference was absolute	*Penn Central, Palazzolo*

International and U.S. law rules regarding direct takings are virtually identical. For regulatory takings, it is intriguing that international tribunals have come to essentially similar conclusions as U.S. domestic courts. In each case, the international tribunal has come to a conclusion that is similar to the U.S. domestic law.

From the table, it is clear that many of the "cutting-edge" issues of regulatory takings that have been considered by the U.S. Supreme Court have been answered in similar fashion by international tribunals. Physical takings will always require fair market compensation. Regulatory takings that are substantial and ripe enough to convince a judge that there is real and lasting harm will impose an obligation for compensation under both domestic and international law.

Do foreign investors obtain greater substantial rights under NAFTA and other bilateral investment treaties than under U.S. law? The simple answer is no. While investor rights differ from domestic U.S. rights, they are in fact very similar in substantive effect.

In essence, expropriation is in the eye of the beholder, but an international tribunal will not easily come to a finding of expropriation against a national government in the absence of a substantial amount of harm. Holders of property, whether they be governed by domestic or international law, might seek an absolute right to compensation to deal with all government interferences with their property. International law, like its domestic counterpart, does not provide an absolute right to compensation, but in serious cases of loss caused by governmental action, international law does provide a specific and powerful compensation remedy. Whether it is called expropriation under international law or regulatory takings under U.S. law, there is little difference in legal approach between these two different systems. In essence, whether the rose is red or yellow, it still smells as sweet under either legal regime.