Substantive Obligations:
Investment Treaty Law and Review of
Different Treaty Models

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Promotion of Investments

Swiss-Uruguay BIT Article 2

Promotion, Admission

(1) Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investment in accordance with its law. The Contracting Parties recognize each other’s right not to allow economic activities for reason of public security and order, public health or morality, as well as activities which by law are reserved to their own investors.
Promotion of Investments

Swiss-Uruguay BIT Article 2

Promotion, Admission

(2) When a Contracting Party shall have admitted, according to its law, an investment on its territory, it shall grant the necessary permits in connection with such an investment and with the carrying out of licensing agreement and contracts for technical, commercial or administrative assistance. Each contracting party shall, whenever needed, endeavor to issue the necessary authorizations concerning the activities of consultants and other qualified persons of foreign nationality.
Promotion of Investments

“Article 2(1) pertains to the admission of an investment while Article 2(2) relates to the post-admission phase.”

Philip Morris et al. v. Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), ¶ 164
Promotion of Investments

“Consistent with the Preamble of the BIT, ‘promotion’ of investments refers to the Contracting States’ duty to create the conditions for the flowing of investments by nationals of one State into the territory of the other State . . . ‘promotion’ is a continuing duty that the Contracting States have accepted in order to foster investments both by creating favourable conditions for their flowing into each other’s territory and, once investments have been made, by ensuring their protection and by granting the necessary permits and authorizations concerning the activities to be carried out by investors.”

Philip Morris et al. v. Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), ¶ 168
Promotion of Investments

“As the ordinary meaning of the word indicates, ‘admission’ is the act by which each State, having verified the conformity of the proposed investments with internal legislation, allows them to be made in its territory, thus accepting that they are protected investments for purposes of the BIT. Thus, Article 2(2) relates to the post-admission stage, as made clear by its initial words: “When a Contracting Party shall have admitted, according to its law, an investment on its territory,…’”

Philip Morris et al. v. Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), ¶ 169
Promotion of Investments

“Article 2(1) is concerned solely with admission, although it is subject to the subsequent regulation of investments in ways consistent with the BIT.”

Philip Morris et al. v. Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), ¶ 174
Promotion of Investments

Italy-Lebanon BIT

ARTICLE 2
PROMOTION AND PROTECTION OF INVESTMENTS

(1) Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

(2) Each Contracting Party, in accordance with its laws and regulations, shall allow the investor to engage top managerial and technical personnel of his choice, regardless of nationality and grant the related permits.
Promotion of Investments

Italy-Lebanon BIT

ARTICLE 2
PROMOTION AND PROTECTION OF INVESTMENTS

(3) Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments. In particular, each Contracting Party or its competent authorities shall issue the necessary permits mentioned in paragraph 2 of this Article.

(4) Each Contracting Party shall create and maintain, in its territory favorable economic and legal conditions in order to ensure the effective application of this Agreement.
Promotion of Investments

“The parties have discussed whether Article 2.1 of the Treaty, which obliges Lebanon to ‘promote’ investments, imposes upon Lebanon an obligation of due diligence, as argued by Toto. Even if ‘due diligence’ were to be required, Toto has not submitted evidence that Lebanon had not behaved in a diligent way.”

Toto Costruzioni Generali S.P.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Award (June 7, 2012), ¶ 187
Promotion of Investments

Canada-Czech BIT

Article II Promotion of Investment

(1) Each Contracting Party shall encourage the creation of favorable conditions for investors of the other Contracting Party to make investments in its territory.

(2) Subject to its laws and regulations, each Contacting Party shall admit investments of investors of the other Contracting Party.
Promotion of Investments

Canada-Czech BIT

Article II Promotion of Investment

(3) This agreement shall not preclude either Contracting Party from prescribing laws and regulations in connection with the establishment of a new business enterprise or the acquisition or sale of a business enterprise in its territory, provided that such laws and regulations are applied equally to all foreign investors. Decisions taken in conformity with such laws and regulations shall not be subject to the provisions of Articles IX [investor-State dispute settlement] or XI [State-State dispute settlement] of this Agreement.
Promotion of Investments

“Articles II(1) and (2) refer to the admission of investments and Article II(3) refers to the enactment of laws in connection with the establishment or acquisition of a business enterprise. Article III outlines the protections that apply to investments that have already been established . . . . Article II(1) does not create an obligation with respect to existing investments that would be enforceable against the Contracting Parties.”

Frontier Petroleum Services Ltd. v. The Czech Republic (UNCITRAL), Award (Nov. 12, 2010), ¶ 245
Promotion of Investments

“[I]t is Claimant’s position that Article II(1) can be regarded as reinforcing, if not broadening, the scope of the fair and equitable treatment standard. Claimant asserts that two fundamental obligations arise from the application of Articles II(1) and III(1) to the facts of the present dispute: first, Respondent must encourage the creation of favourable conditions for investment and honour any legitimate expectation generated thereby; second, Respondent must exercise due diligence in maintaining a transparent, stable and predictable investment climate.”

Frontier Petroleum Services Ltd. v. The Czech Republic (UNCITRAL), Award (Nov. 12, 2010), ¶ 274
Promotion of Investments

“[T]here is no basis in the text of the BIT to conclude that Article II(1) broadens the fair and equitable treatment clause of Article II(1).”

Frontier Petroleum Services Ltd. v. The Czech Republic (UNCITRAL), Award (12 November 2010), ¶ 283
Promotion of Investments

Australia-India BIT

Article 3 Promotion and protection of investments

1. Each Contracting Party shall encourage and promote favourable conditions for investors of the other Contracting Party to make investments in its territory. Each Contracting Party shall admit such investments in accordance with its laws and investment policies applicable from time to time.

2. Investments or investors of each Contracting Party shall at all times be accorded fair and equitable treatment.

3. A Contracting Party shall, subject to its laws, accord within its territory protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments.
Promotion of Investments

“As construed by [the claimant], Article 3(1) requires each of the Contracting Parties to take concrete, positive steps in the interests of investors generally. It says, on the facts of this case, that this gives rise, at the very least, to three obligations on the part of India:

(a) to create a suitable governance framework for supervising the action of state-owned corporations, including Coal India, in their dealings with foreign investors;
(b) to ensure that its arbitration laws are administered in line with India's New York Convention obligations; and
(c) to take steps to reduce the backlog of cases in its courts, given the prospect that such backlog must necessarily have significant effect on domestic and international businesses, including investors, as defined under the BIT.”

White Industries Australia Limited v. Republic of India, UNCITRAL, Award (Nov. 30, 2011), ¶ 9.2.1
Promotion of Investments

“As construed by India, Article 3(1) provides for two general obligations. These are:

(a) First, a pre-establishment obligation (i.e., prior to the admission of the investment), which requires the Contracting Parties to ‘encourage and promote favourable conditions’ for investors; and

(b) Second, an obligation on each Contracting State to ‘admit’ investments by ‘investors’ of the other Contracting Party (in accordance with its laws and investment policies applicable from time-to-time).”

White Industries Australia Limited v. Republic of India, UNCITRAL, Award (Nov. 30, 2011), ¶ 9.2.3
Promotion of Investments

“[C]ommentators seem to agree that [provisions obligating States to encourage and promote favorable conditions for investment] do not give rise to substantive rights . . . The Tribunal is inclined to agree with India’s position that the pre-establishment obligations set out in the first sentence in Article 3(1) of the BIT lack sufficient content to be treated as a stand-alone, positive commitment giving rise to substantive rights.”

White Industries Australia Limited v. Republic of India, UNCITRAL, Award (Nov. 30, 2011), ¶ 9.2.12
Promotion of Investments

“[T]he Tribunal is satisfied that the language used in Article 3(1) is far too general to support the three specific obligations contended for by [the claimant].”

White Industries Australia Limited v. Republic of India, UNCITRAL, Award (Nov. 30, 2011), ¶9.2.12
Fair and Equitable Treatment

China-Netherlands BIT

Article 3 Treatment of Investment

1. Investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party. Investments of the investors of either Contracting Party shall enjoy the constant protection and security in the territory of the other Contracting Party.

1. Neither Contracting Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.
Fair and Equitable Treatment

NAFTA Article 1105

Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
Fair and Equitable Treatment

Claimant Arguments:

- NAFTA Article 1105 “applies to any treatment that is not itself ‘fair’ and ‘equitable.’”  
  (ADF Group v. United States)

- NAFTA Article 1105 obligates the NAFTA Parties to “provide treatment that is both procedurally and substantively fair.”  
  (Thunderbird v. Mexico)

ADF Group v. United States, ICSID Case No. ARB(AF)/00/1, Claimant’s Memorial (Aug. 1, 2001), ¶ 243
Fair and Equitable Treatment

Pope & Talbot v. Canada

“[T]he Tribunal interprets Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be ‘egregious,’ ‘outrageous’ or ‘shocking,’ or otherwise extraordinary.”

Pope & Talbot v. Canada, Award on the Merits of Phase 2 (Apr. 10, 2001), ¶ 118
Fair and Equitable Treatment

S.D. Myers v. Canada

“[A] majority of the Tribunal determines that on the facts of this particular case the breach of Article 1102 essentially establishes a breach of Article 1105 as well.”

S.D. Myers, Inc. v. Canada, UNCITRAL, Partial Award (Nov. 13, 2000) ¶ 266
Fair and Equitable Treatment

NAFTA Free Trade Commission Interpretation

B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).
Fair and Equitable Treatment

China-Korea-Japan Investment Agreement

Article 5 General Treatment of Investments

1. Each Contracting Party shall accord to investments of investors of another Contracting Party fair and equitable treatment and full protection and security. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond any reasonable and appropriate standard of treatment accorded in accordance with generally accepted rules of international law. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not ipso facto establish that there has been a breach of this paragraph.
Fair and Equitable Treatment

ASEAN-China Investment Agreement

Article 7 Treatment of Investment

1. Each Party shall accord to investments of investors of another Party fair and equitable treatment and full protection and security.

2. For greater certainty:
   (a) fair and equitable treatment refers to the obligation of each Party not to deny justice in any legal or administrative proceedings; and
   (b) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the investment of investors of another Party.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, shall not establish that there has been a breach of this Article.
Fair and Equitable Treatment

ASEAN-Australia-New Zealand Free Trade Agreement

Chapter 11 Article 6 Treatment of Investment

1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security.

2. For greater certainty:
   (a) fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings;
   (b) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the covered investment; and
   (c) the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
Fair and Equitable Treatment

Korea-United States Free Trade Agreement
Chapter 11 Article 5 Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
   (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
   (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 11.5 and Annex 11-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.
National Treatment

China-Netherlands BIT

Article 3 Treatment of Investment

3. Each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favourable than that accorded to investments and activities by its own investors or investors of any third State.
National Treatment

NAFTA Free Trade Agreement

Article 1102 National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
National Treatment

NAFTA Free Trade Agreement

Article 1102 National Treatment

Claimant argument:

Article 1102 accords protection to NAFTA investors “wherever their investment has been made in the [NAFTA] Free Trade Area.”

National Treatment

Korea-United States Free Trade Agreement

ARTICLE 11.3 NATIONAL TREATMENT

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
National Treatment

China – Canada BIT

ARTICLE 6 National Treatment

1. Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.

2. Each Contracting Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.
“The United States and China recognize that a Bilateral Investment Treaty (BIT) that sets high standards, including openness, non-discrimination, and transparency, would be important to both sides, and welcome the progress made in the BIT negotiations to date. The two sides reaffirm their shared commitment to enhance openness, accord fair and equitable treatment, and contribute to the reduction or elimination of discriminatory practices and market barriers. After nine rounds of technical discussions, China is to enter into substantive BIT negotiations with the United States. The BIT will provide national treatment at all phases of investment, including market access (‘pre-establishment’), and be negotiated under a ‘negative list’ approach.”

Joint U.S.-China Economic Track Fact Sheet of the Fifth Meeting of the U.S.-China Strategic and Economic Dialogue (July 12, 2013)
National Treatment

“While each case involved its own facts, tribunals have assigned important weight to ‘like legal requirements’ in determining whether there were ‘like circumstances.’ The ADF tribunal thus emphasized that both the claimant and its U.S. competitors were subject to the same U.S. ‘Buy America’ provisions. Pope & Talbot found that the relevant comparators were lumber exporters subject to the same restrictive legal regime as the claimant, so there was no denial of national treatment if exporters in other unregulated provinces were not so limited. Feldman v. Mexico found the relevant comparators for purposes of MFN analysis to be a limited group of cigarette exporters subject to the same legal requirements as the claimant. The Methanex tribunal (citing Pope & Talbot) emphasized the importance of assuring that purported comparators face similar regulatory requirements. Looking at the question from the other direction, UPS v. Canada found a key difference between the parties there to be that Canada Post was subject to legal requirements under national law and international postal agreements that did not affect UPS.

The reasoning of these cases shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103.”

Grand River Enterprises v. United States, UNCITRAL, Award ¶¶ 166-167 (Jan. 12, 2011)
National Treatment

NAFTA Free Trade Agreement

Article 1102 National Treatment

Claimant argument:

“There is simply no room in the language of [Article 1102] for reading-in the requirement for an investor to either prove that the measures according less favorable treatment were imposed on the basis of his or her nationality; or to demonstrate that the impact of the measures fell disproportionately on investors of his or her nationality as opposed to those of the host state[.]”

Grand River Enterprises v. United States, UNCITRAL, Claimants’ Memorial (July 10, 2008) ¶ 239
National Treatment

NAFTA Free Trade Agreement

Article 1102 National Treatment

Respondent argument:

“Claimants assert that Article 1102 does not require a showing of discrimination on the basis of nationality because that would in turn require a showing of discriminatory intent. To the contrary, the requirement to show discrimination on the basis of nationality under Article 1102 does not require a showing of discriminatory intent. Rather, a Claimant must establish that a measure either on its face, or as applied, favors nationals over non-nationals.”

Grand River Enterprises v. United States, UNCITRAL, United States Rejoinder (May 13, 2009), p. 67
National Treatment

NAFTA Free Trade Agreement

Article 1102 National Treatment

“The Respondent contended that in order to make out a claim of violation of Articles 1102 . . . a claimant must make some showing that the alleged difference in treatment was on account of or related to a foreign investor’s nationality, citing similar statements to this effect made by all three NAFTA parties in previous NAFTA proceedings. As noted above, the Claimants disagreed, believing that Article 1102 . . . do[es] not require such a showing. However, given that there has been no showing that the disputed enforcement measures have subjected Arthur Montour to treatment less favorable than that accorded the appropriate domestic comparator, regardless of his nationality, the Tribunal need not consider this issue or make any decisions in this regard.”

Grand River Enterprises v. United States, UNCITRAL, Award (Jan. 12, 2011), ¶ 171
Most-Favored-Nation Treatment

China-Canada BIT

Article 5 Most-Favoured-Nation Treatment

1. Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Contracting Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

2. Each Contracting Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Contracting Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

3. For greater certainty, the “treatment” referred to in paragraphs 1 and 2 of this Article does not encompass the dispute resolution mechanisms, such as those in Part C, in other international investment treaties and other trade agreements.
Most-Favored-Nation Treatment

Argentina-Italy BIT

Article 3 National Treatment and Most-Favored Nation Provisions

1. Each Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to all other matters regulated by this Agreement, a treatment that is no less favorable than that accorded to its own investors or investors from third-party countries.
Most-Favored-Nation Treatment

Impregilo v. Argentina

“[T]here is a massive volume of case-law which indicates that, at least when there is an MFN clause applying to ‘all matters’ regulated in the BIT, more favorable dispute settlement clauses in other BITs will be incorporated.”

Most-Favored-Nation Treatment

Impregilo v. Argentina

“[A]n MFN clause can only concern the rights that an investor can enjoy, it cannot modify the fundamental conditions for the enjoyment of such rights, in other words, the insuperable conditions of access to the rights granted in the BIT.”

Expropriation

China – Netherlands BIT

Article 5 Expropriation

1. Neither Contracting Party shall expropriate, nationalise or take other similar measures (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met:

a) the expropriation is done in the public interest and under domestic legal procedures;

b) the expropriation is not discriminatory or contrary to any undertaking which the Contracting Party, which takes such measures, may have given;
Expropriation

China – Netherlands BIT

Article 5 Expropriation

1. Neither Contracting Party shall expropriate, nationalise or take other similar measures (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met:

   c) the expropriation is done against compensation. Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation measures were taken. The fair market value shall not reflect any change in value because the expropriation had become publicly known earlier. It shall include interest at the prevailing commercial rate from the date the expropriation was done until the date of payment and shall, in order to be effective for the affected investors, be paid and made transferable, without delay to the country designated by the investor concerned and in the currency of the country of the affected investor, or in any freely convertible currency accepted by the affected investor.
Expropriation

NAFTA Free Trade Agreement

Article 1110 Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

(a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.
Expropriation

NAFTA Free Trade Agreement

Article 1110 Expropriation and Compensation

2. Compensation 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.

3. Compensation shall be paid without delay and be fully realizable.
Expropriation

Metalclad v. Mexico

“[E]xpropriation 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 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.”

Metalclad Corp v. Mexico, Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶ 103.
Expropriation

Metalclad v. Mexico

“By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).”

Metalclad Corp v. Mexico, Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶ 104.
Expropriation

Korea-United States Free Trade Agreement

Article 11.6 Expropriation and Compensation

Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except:
(a) for a public purpose;
(b) in a non-discriminatory manner;
(c) on payment of prompt, adequate, and effective compensation; and
(d) in accordance with due process of law and Article 11.5.1 through 11.5.3.

2. The compensation referred to in paragraph 1(c) shall:
(a) be paid without delay;
(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation);
(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
(d) be fully realizable and freely transferable.
The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment.

2. Article 11.6.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 11.6.1 is indirect expropriation, where an action or a series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or a series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including:

(i) the economic impact of the government action, although the fact that an action or a series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations;18 and
(iii) the character of the government action, including its objectives and context. Relevant considerations could include whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest.
Expropriation

Korea-United States Free Trade Agreement

Annex 11-B Expropriation

(b) Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.