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Commentary

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Background

On August 30, 2019, the Indonesian government announced a ban on exports of nickel ore effective January 1, 2020. The measure was put in place in order to promote the processing of nickel ore domestically, and to preserve the raw ore for Indonesia's stainless steel and nickel pig iron ("NPI") production industries. Aside from the prohibition on exports of nickel, Indonesia also introduced certain domestic processing requirements for nickel, iron ore, chromium, and coal; domestic marketing obligations for nickel and coal products; and other related measures.

Following the announcement, nickel prices in world markets surged by over 8%, the highest one-day price increase (and the highest resulting price) in over three years. This was not surprising, given the fact that Indonesia is the largest producer of nickel in the world. However, the move by the Indonesian government also resulted in a complaint from the European Union ("EU") being filed on November 22, 2019 pursuant to the General Agreement on Tariffs and Trade 1994 ("GATT"), among others; the United States requested to join the consultations with the EU and Indonesia on December 6, 2019. The EU's complaint was pursuant to Article XI:1 of the GATT 1994, which states:

> "No prohibitions or restrictions other than duties, taxes or other charges,

> whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

This is not the first or only example of interference by a country's government in the business operations of companies operating locally in its jurisdiction. In March 2017, the government of Tanzania placed a ban on the export of minerals including gold, copper, nickel and silver, with the aim to ensure that materials mined in the country would be further processed locally instead of exported in their raw form. The action resulted in share prices plummeting for many publicly traded foreign companies holding mining projects in Tanzania following the announcement. For example, the share price of Barrick TZ Limited (formerly known as Acacia Mining Plc), the largest of the public companies with mines in Tanzania, dropped over 15% during the course of March 2017. This was despite the fact that the price of gold dipped during March 2017 but recovered to its starting price by the end of the month.

The reaction of economic markets to restrictive government measures is widely observed. In this article, we examine the reasons therefor, and discuss the value-economic implications of government action on foreign-owned companies operating under the jurisdiction of that government, and how investors might approach valuing investments in such countries following such measures.

Foreign Direct Investment And Reasons For Their Loss Of Value

Foreign direct investment – or the cross-border investment of funds by a resident in one economy into an enterprise that is resident in a different economy with the objective of establishing a lasting interest in that enterprise – accounted for over $1.5 trillion in investment monies made in 2019 worldwide. When a foreign investor owns an business enterprise, such as a mining project, that is subject to government action, the value of its investment can be impacted due to the following reasons:

I. Loss of access to world markets;
II. Discounted pricing of materials sold locally;
III. Increased perceived risk of the investment;
IV. Changes in trade parity, resulting in global price impacts;
V. Weakened competitive position of local com panies; and,
VI. Diminished access to financial capital.

Each of these is discussed in detail, as follows.

I. Loss Of Access To World Markets

The most obvious outcome of the aforementioned government measures is a loss of access to customers in world markets outside the country of production. This results in a direct loss of revenue and net profits (earnings), and can sometimes result in losses for development- or early production-stage projects which continue to incur high capital costs to develop the mine for production without the ability to recoup those costs through sales to diverse markets. Such losses of revenue or profit generally persist over an extended period of time which, at best, results in losses to an investment's annual profits, and at worst results in losses of the entire investment to bankruptcy or forced sale.

Local demand (and undoubtedly manufacturing or processing capacity) likely does not offset that lost from world markets, which would result in a company stockpiling ore for future sale; this increases the uncertainty associated with the sale price obtainable for that ore at a future date and introduces additional risk into the business, which we discuss further below.

In assessing the value of a business post-government action, under a discounted cash flow (DCF) method, which is a commonly used valuation technique whereby the value of a company is determined by calculating the present value of forecasted future cash flows, a loss of access to markets results in the diminution of expected future cash flows resulting in a loss of value at a present date.

II Discounted Pricing

Another impact on the company's revenue following government action is a potential decrease in product prices obtainable from sales to local customers. As mentioned above, an excess of supply such as that following an export ban puts downward pressure on prices for a company's commodity, thereby also reducing net revenues earned, forecasted future cash flows, and a lower DCF value of the investment.

III. Increased Risk

The third impact of market interference by governments is an increased perceived risk associated with the investment, given the occurrence of a supposedly unexpected government action.

As mentioned above, additional risk may be specific to a certain cash flow associated with the business, such as the risk of price fluctuations for future sales of ore stockpiled due to lower demand. It may also arise from more general uncertainty that stems from political volatility or the potential for further measures impacting the business.

Risk is factored into a DCF by two means: [1] adjusting the forecasted future cash flows impacted by the risk; or [2] adding a premium to the discount rate, which is applied to all future net cash flows. The former may be achieved, where reliable data exists, by calculating probabilistic expected future net cash flows under various scenarios and determining the average expected future cash flows on that basis. The latter can be achieved through the use of a country risk premium ("CRP"), a well-known input into the discount rate which is calculated, again where reliable data exists, using country-specific data or data for countries which have experienced similar government actions. Both methods generally result in a reduction of value derived from the DCF for the investment.

IV. Changes In Trade Parity, Resulting In Global Price Impacts

In many cases, one country's government action can have effects on world markets, such as the case of Indonesia which is the world's top exporter of the product (nickel) banned for export. While impacts on markets are separate from the company-specific impacts discussed above, they nevertheless have a value-economic impact on the subject company operating in the country due to the potential long-term nature of such changes on the macroeconomy.

Specific government action may be temporary or short-term in nature; however, wider influences tend to last longer, which would further impact the expected future cash flows or the discount rate in a DCF valuation. Similarly, a wider macroeconomic reaction would impact the value of all companies in a specific industry, such as the extractive metal ore industry, which would in turn affect the fair market value in a potential sale of the subject investment (generally observed when conducting market-based approaches to valuation, such as the comparable public company multiples or comparable transactions analyses).

V. Weakened Competitive Position Of Local Companies

A fifth potential impact to companies subject to government action is a weakened ability to compete following the action, as compared with companies in the same industry operating in other countries not subject to similar restrictions. A loss or weakening of competitive ability results directly in a loss of revenue and earnings, and indirectly in a loss of future market share. While this is less significant for commodities, governments may impose additional restrictions such as hefty tariffs, duties or taxes following the lifting of a ban, or may introduce performance measures concurrently requiring companies to perform further processing or other costly activities, which continue to impact the ability of a company to remain competitive. Calculating a precise amount in respect of a weakened competitive position as a result of the measures can be a challenging but achievable exercise.

VI. Diminished Access To Financial Capital (Debt And Equity)

Finally, given many of the direct impacts of government action discussed above such as reduced revenues and net profits and higher risk, companies may face new challenges with raising additional capital. Traditional sources such as banks may be unwilling to finance projects' capital requirements on account of missed covenants or weak financial ratios; companies may be forced to access less traditional and therefore more expensive sources of capital, such as venture capital or syndicated debt, which in turn are linked to more restrictive practices for the business and higher costs of capital. Increasing the cost of capital for a company in turn further increases the discount rate applicable to that company, which reduces value.

Investment Protection: Regimes And Remedies

Government actions such as Indonesia's and Tanzania's bans on exports appear increasingly common.

Regulation of a specific industry or economic sector is a sovereign prerogative freely wielded by all countries and subnational entities. Just because regulation and government action are inevitable, however, does not mean that their consequences are certain or that they are permanent or that there is no redress. Indeed, there are various paths an affected investor may pursue to remedy the harm caused by government action, whether such action is in the form of a clear-cut direct expropriation, or a less clear—and by consequence, more pernicious—sequence of acts tending to decimate the value of an investment. They are the following: (i) domestic litigation; (ii) trade remedies, to the extent they are available; and (iii) investment arbitration.

Domestic Litigation: Domestic litigation can be an effective tool for challenging regulatory measures. However, three key points militate against exclusively availing of a country's judicial system to seek redress for harms caused by the country or its subnational entities' lawfully imposed regulations. First, judicial decisions, whether on jurisdictional or procedural issues, or on the merits of an action, are more often than not subject to appellate review and reversal, leading to delays and exceedingly long proceedings. Second, local courts and administrations can be more susceptible to the influence of domestic political and economic actors. Third, unless an expropriation has occurred or vested rights exist, a government action such as a regulation can often only be challenged on the basis that its creation and implementation were unlawful, and the best result an interested party can expect is the abrogation of a given regulation. Of course, where an expropriation has occurred, the situation is different, and most legal systems will give an affected investor the right to demand immediate compensation for the government's expropriation of its investment. What constitutes an investment under domestic law may nonetheless prove unhelpful to an affected investor seeking redress for progressive regulations.

Trade Remedies: Trade remedies such as dispute settlement before the World Trade Organization can also be an effective means of disputing regulatory measures, however, the only participants involved in WTO litigations are the member governments of the World Trade Organization, so there is no direct recourse or remedy available to an affected party before this international body. Accordingly, these remedies are particularly effective when an entire industry is involved, as it is more likely a state will espouse a claim when an entire industry lobbies for action than when a single investor is involved. However, the main limitation of trade remedies is that, at best, they can result in the abrogation of trade restrictive regulations or the imposition of new, less restrictive regulations.

Investment Arbitration: Investment arbitration is often the best means of seeking recourse for the destructive effects of domestic regulation on the investments of foreign investors in any given jurisdiction. Investment arbitration offers investors, whether they are individuals or corporations, a direct recourse to challenge the consistency of a state or its subnational entities' acts and omissions with international law. Moreover, rather than being limited to the potential abrogation of regulations, or restitution, investment arbitration offers the possibility of recovering monetary damages. For enterprises engaged in the extractive industry, the availability of monetary damages is critical, considering that investments such as mines, beneficiation plants, ports, roadways, and other large infrastructure undertakings are neither liquid nor movable, and are generally not subject to repurposing. Accordingly, they cannot be redeployed to an alternate jurisdiction or for a different purpose. One additional characteristic of investment arbitration that makes it an attractive means of dispute resolution is that the international law standards of protection enforced in the investment arbitration context are capacious and protect investors from a broad array of state acts, including those outlined above.

The Investment Arbitration Regime

Investment arbitration is not available to everyone. It is contractual in nature and only available through the operation of a treaty, or concession contract, providing for investment arbitration and other forms of alternative dispute resolution. Fortunately, though, as of 2020 there are more than 2,500 bilateral and multilateral treaties in force with investment provisions. Indonesia alone has entered into more than 40 bilateral investment treaties, 26 of which are in force today, and 19 multilateral treaties with investment provisions. By and large, all of these treaties provide for some form of investment arbitration.

To avail itself of the right to arbitrate and seek redress for a state's actions, however, a party must meet certain requirements. First and foremost among these are the requirement that the party seeking to commence an arbitration qualify as an "investor" under the relevant treaty, and that its assets or projects in-country qualify as an "investment." If these gateway requirements are not met under any treaty, then arbitration is not a viable option.

A savvy investor must minimize the risk of investing in any country. Indeed, even the traditionally law-abiding countries succumb to nationalistic impulses (Canada, the United States, Poland, the Czech Republic, and Spain, all figure in the top 20 most common respondent states in the investment arbitration sphere), and resource nationalism has been at the core of many of the largest investment arbitrations in the past few decades. In other words, a country's reputation for respecting the rule of law does not mean that an investor can forego caution.

The best explanation for why this is the case is found in the concept of the *obsolescing bargain*. Under the obsolescing bargain model, developed by Prof. Raymond Vernon in 1971, "the initial bargain favors the investor, but relative bargaining power shifts to the host country government over time as the investor's assets are transformed into 'hostages.' Once bargaining power shifts from the investor to the host country, the government is in the position to impose additional conditions on the investor, ranging from higher taxes to complete expropriation of assets." This happens everywhere, and participants in the extractive industries have the most to lose from this occurring to them.

Nationality Planning

The dangers arising from the obsolescence of a bargain can be protected against through careful nationality planning. Nationality planning, or "investment structuring," is the process by which an investor planning an investment in a foreign country evaluates all of the investment treaties of that country to determine which treaties offer the most protection, and structures its investment to secure the greatest protection. This process is typically undertaken in conjunction with structuring the party's investment for tax purposes, and a host State offering both tax efficiency and robust investment treaty protection is selected to channel the investment, typically by incorporating a special purpose vehicle. As part of the nationality planning exercise, a party should consider two important factors:

First, as noted above, to avail of the investment arbitration regime, a party must qualify as an "investor." As an example of what this means, the definition of "investor" under the Denmark-Indonesia bilateral investment treaty is the following:

> "The term 'investor' means:
>
> a. in respect of the Republic of Indonesia
>
> i. Any natural person having the nationality of the Republic of Indonesia; or
>
> ii. Any legal person constituted under the law of the Republic of Indonesia.
>
> b. in respect of the Kingdom of Denmark
>
> i. Any natural person who is a national of the Kingdom of Denmark in accordance with its laws; or
>
> ii. Any legal entity such as a company, corporation, firm, partnership, business association, institution or organization, incorporated or constituted in accordance with the laws and regulations of the Kingdom of Denmark and having its registered office or central administration or principal place of business within the jurisdiction of the Kingdom of Denmark, and whether or not for profit and whether its liabilities are limited or not."

Second, nationality planning should be carried out carefully and in advance of the making of the investment. Where nationality planning is carried out after the making of an investment, and in particular once a dispute with the host country is "foreseeable", what at one point was a fair risk mitigation strategy can easily be interpreted as an abuse of the investment arbitration regime and denominated "treaty shopping." To avoid even the semblance of "treaty shopping", and the jurisdictional consequences it entails, a party should plan its nationality early on, taking into account the bilateral investment treaties available at the time of investment. The risk of government action is always real, and its consequences can lead to the demise of an investment. The benefit of nationality planning is that it allows investors to rely on international law liability and compensation standards, and recoup the value of the investment itself when it has been taken away or regulated into the ground.

Standards Of Protection

The value-depleting consequences of domestic regulation identified in the first half of this article can be protected against through investment arbitration. As discussed above, domestic regulations such as those implemented by Indonesia and Tanzania can result in the following:

I. Loss of access to world markets;
II. Discounted pricing of materials sold locally;
III. Increased perceived risk of the investment;
IV. Changes in trade parity, resulting in global price impacts;
V. Weakened competitive position of local com panies; and,
VI. Diminished access to financial capital.

The most effective way to secure the economic and legal conditions prevailing at the time an investment is made is by entering into a stabilization agreement. There are two types of stabilization agreements: fiscal and legal/regulatory. Fiscal stabilization agreements relate to taxes, royalties, and other duties. Legal stabilization agreements are broader in nature and relate to laws and regulations governing any element of the investment project. Each of these types can be subcategorized into freezing agreements and equilibrium agreements. Under a freezing agreement, the state undertakes not to change any element of the legal or fiscal framework pertaining to an investment. Under an equilibrium agreement, the state retains its right to regulate, but undertakes to negotiate in good faith to restore the investor to the economic position it was in prior to the implementation of the unfavorable laws and/or regulations by the host country. In cases where stabilization agreements are not available, investors may still seek recourse pursuant to individual provisions and standards of protection set forth in bilateral investment agreements. Investment treaties such as those entered into by Indonesia and Tanzania can contain the following types of provisions, each of which may affect the countries' ability to impose export restrictions or local content requirements:

- Non-discrimination obligations in the form of National Treatment and Most-Favored Nation provisions;
- Restrictions on capital transfers; and
- Pre-establishment protections preventing host countries from forcing investors to transfer technology to local firms, or to reinvest a certain amount of money in the host country.

The bilateral investment treaty entered into by Tanzania and Canada is a good example of this. Article 9.1 of the Tanzania-Canada bilateral investment treaty, titled "Performance Requirements" states as follows:

> A Party may not impose the following requirements in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> (a) to export a given level or percentage of a good or service;
> (b) to achieve a given level or percentage of domestic content;
> (c) to purchase, use or accord a preference to a good produced or service provided in its territory, or to purchase a good or service from a person in its territory;
> (d) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with that investment;
> (e) to restrict sales of a good or service in its territory that the investment produces or provides by relating those sales to the volume or value of its exports or foreign exchange earnings;
> (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory; or
> (g) to supply exclusively from the territory of the Party a good that the investment produces or a service it provides to a specific regional market or to the world market."

These provisions can operate to prevent a host country from implementing regulations like those enacted by Indonesia and Tanzania. Even in cases in which they do not serve as deterrents, they nonetheless can be used as the basis for finding a country liable for breaching its international obligations. Separately, bilateral investment treaties and multilateral treaties compel countries to accord investors and investments "fair and equitable treatment" as well as "full protection and security." These treaties also prohibit host countries from nationalizing, expropriating, or subjecting foreign investments to measures having effects equivalent to nationalization or expropriation, except against prompt, adequate, and effective compensation. In the case of export restrictions and local content requirements, the most viable claims available are for indirect expropriation, and for breach of the fair and equitable treatment standard.

Indirect Expropriation Claims

Indirect expropriation has been defined by the United Nations Conference on Trade and Development (UNCTAD) as "total or near-total deprivation of an investment but without a formal transfer of title or outright seizure." This type of expropriation may arise when a government measure "although not on its face effecting a transfer of property, results in the foreign investor being deprived of its property, or its benefits." One of the seminal descriptions of indirect expropriation, posited by G.C. Christie in 1962, is that "a State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention, and . . . even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them."

These concepts are well-defined and widely recognized in international jurisprudence. For example, in *Starrett Housing v. Iran*, the Iran-United States Claims Tribunal observed:

> [I]t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.

Similarly, the Iran-U.S. Claims Tribunal held in *Tippets v. Iran*:

> A deprivation or taking of property may occur under international law through interference by a State in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.
>
> While assumption of control over property by a government does not automatically and immediately justify a conclusion that property has been taken by the government . . . such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.

More recent decisions have clarified the standards articulated in *Starrett* and *Tippetts*, ultimately concluding, as the *Enkev v. Poland* tribunal did, that:

> [T]he accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for indirect expropriation, taking or deprivation, consistently albeit in different terms, the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or their virtual annihilation and effective neutralization.

Assuming the regulations enacted by Indonesia had the effect of substantially, radically, severely, devastatingly or fundamentally depriving investors of their rights, or their virtual annihilation and effective neutralization, a case for indirect expropriation could be viable.

Fair and Equitable Treatment Claims

Separately, an investor could claim protection pursuant to the fair and equitable treatment standard. The FET standard is generally intended to ensure "treatment in an even-handed and just manner, conducive to fostering the promotion and protection of foreign investment and stimulating private initiative."

The tribunal in *Walter Bau v. Thailand* described the scope of the FET standard as follows:

> The general standard of "fair and equitable treatment" . . . comprises a number of different components, which have been elaborated and developed in previous arbitrations in response to specific fact situations. . . . In so far as they are relevant to the dispute here, these separate components may be distilled as follows:
>
> — Protection of legitimate expectations: the purpose of fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment, as long as these expectations are reasonable and legitimate and have been relied upon by the investor to make the investment.
>
> — Good faith: the standard includes the general principle recognised in international law that the contracting parties must act in good faith, although bad faith on the part of the state is not required for its violation.
>
> — Transparency, consistency, non-discrimination: the standard also implies that the conduct of the State must be transparent, consistent and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary.

Underlying these various protections is the concept that the "stability" of a host state's legal framework is desirable and that investments should be treated consistently and transparently over time. As the *LG&E* tribunal explained, "the fair and equitable standard consists of the host State's consistent and transparent behaviour, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework."

None of the consequences outlined in the first half of this article stem from consistent transparent behaviour or a stable and predictable legal framework. As such, it is possible that the behaviour giving rise to these consequences could constitute a breach of Indonesia and Tanzania's international obligations.

Conclusion

The issues discussed in the first half of this submission are only some of the many that can arise following interference by a government in global trade and investment, which generally serve to lower the value of a foreign investor's business. An investor should understand the potential risks in any economy in which it chooses to invest; indeed, there is an argument often made that government interference in certain jurisdictions should not impact the value of a business as the value should have already factored in the potential for such measures. The reality is that this will depend on the facts available in the public domain regarding the specific country and government, and even that may not be certain over time given changes in government representation and policies. Understanding the drivers of value will help an investor determine what was known or knowable at the time of making its investment, as well as the implications of unforeseen government action on its investment. No level of due diligence can predict the future, however, especially for high value, long term investments such as those in the extractive industries. For those cases, it is critical not only to understand the drivers of value, but also to understand and be well acquainted with the many investment protection strategies available to investors. In that same vein, it is essential that investors are familiar with the international legal regimes for the protection of foreign investors and investments. When all else fails, it is only through the operation of these regimes that investors can effectively seek redress for the harm caused to them and to their investments by host states.

Endnotes

1. World Trade Organization (WTO), Indonesia – Measures Related to Raw Materials, November 22, 2019.

2. Capital IQ: day close price for nickel on the London Metal Exchange (LME).

3. US Geological Survey (USGS), Nickel Commodity Summary 2019.

4. General Agreement on Tariffs and Trade 1947, Article XI.

5. US Department of Commerce, International Trade Administration, Tanzania – Mining.

6. Based on market capitalization as of the end of 2017.

7. Capital IQ: difference between the last sale price on March 31, 2017 versus March 1, 2017.

8. Capital IQ: day close commodity price for gold, March 1 to 31, 2017.

9. Organisation for Economic Co-operation and Development, World 2019 total inward financial flows.

10. United Nations Conference on Trade and Development (UNCTAD), International Investment Agreements: Indonesia, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/countries/97/indonesia.

11. H.G. Burnett, L.-A. Bret, Arbitration of International Mining Disputes – Law & Practice 37 (Oxford, 2017); *see also* Raymond Vernon, *Sovereignty at Bay* (Basic 1971); Raymond Vernon, "Long-Run Trends in Concession Contracts" in *Proceedings of the American Society of International Law* (Basic, 1967).

12. Agreement Between the Government of the Republic of Indonesia and the Government of the Kingdom of Denmark Concerning the Promotion and Protection of Investments, Art. 1(3).

13. *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009), ¶ 113; *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (Jun. 1, 2012), ¶ 2.96-2.99 (defining foreseeable as "as a very high probability and not merely a possible controversy.").

14. S. Lutrell & A. Murphy, *Stabilization Provisions in Long-Term Mining Agreements*, in The Guide to Mining Arbitrations, *available at* https://globalarbitrationreview.com/chapter/1194142/stabilisation-provisions-in-long-term-mining-agreements.

15. *Ibid.*

16. *bid.*

17. *bid.*

18. Agreement Between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments, Art. 9.1.

19. Expropriation, UNCTAD Series on Issues in International Investment Agreements II, at 7 (2012).

20. Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties – Standards of Treatment, at 323 (2009).

21. W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 2004 Faculty Scholarship Series 115, 116 (2004).

22. L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, Or Caveat Investor*, 19(2) ICSID Review 293, 297 (2004) (noting that "BITs and multilateral trade and investment accords commonly . . . refer[] to concepts such as 'indirect expropriation,' 'de facto expropriation,' 'constructive expropriation,' 'measures equivalent to expropriation,' measures tantamount to expropriation' or 'measures having an effect equivalent to expropriation'").

23. *Starrett Housing Corp. v. Islamic Republic of Iran*, Interlocutory Award No. ITL 32-24-1, 19 Dec. 1983, ¶ 66.

24. *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2, 29 June 1984, ¶¶ 21-22.

25. *Enkev Beheer P.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 Apr. 2014, ¶ 344.

26. *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2017, ¶ 290; *see also Murphy Exploration and Production Company International v. Republic of Ecuador [II]*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 206 (articulating that "the function of the FET clause in investment treaties is broadly the same: it ensures the stability and predictability of the legal and business framework in the State party subject to any qualifications otherwise established by the treaty and under international law").

27. *Walter Bau AG v. Thailand*, UNCITRAL Ad Hoc Tribunal, Award, 1 July 2009, ¶ 11.5, (citing *Biwater Gauff (Tanzania) LTD., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 602. Each of these key protections has been repeatedly recognized by other arbitral tribunals and highly respected academics. *See, e.g.*, M. Kinnear, *The Fair and Equitable Treatment Standard*, in Investment Treaty Law, Current Issues III, Remedies in International Investment Law – Emerging Jurisprudence of International Investment Law 223-26 (A.K. Bjorkulnd et al. eds., 2009); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 154; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006 ("*LG&E* Decision on Liability"), ¶¶ 126-131; *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 538; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 Aug. 2009, ¶ 178.

28. *LG&E* Decision on Liability, ¶ 131. ■

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