

Indirect Expropriation and One Belt One Road Initiative: A Pivotal Issue for the Implementation of China's Refreshed Strategy for Foreign Investment

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China's OBOR Initiative charts a path for trade and investment cooperation between China and States along the OBOR. Indirect expropriation stands as a crucial issue for the successful implementation of the OBOR initiative. This mainly owes to the large size of investment projects and investment funds, scant regulation of indirect expropriation in the IIAs signed between China and OBOR States, and the diverse political and economic environments of these many States. This article examines the definition and identification standards of indirect expropriation under OBOR IIAs. It will also reveal that indirect expropriation is poorly defined and insufficiently identified in most agreements. It is argued that OBOR IIAs should be revised to regulate indirect expropriation in such three aspects as preambular declaration of host State regulatory freedom, definitional clarity of indirect expropriation, and guidance for its identification. This approach would facilitate a more stable investment environment and contribute to the success of the OBOR initiative.

Keywords: Indirect Expropriation, OBOR, IIAs, BITs, Foreign Investment

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1. Introduction: Expropriation

A perennial concern of foreign investors is expropriation. It is whether the potential for the property rights in their investments would be taken by host State governments or otherwise substantially devalued by the effect of host State regulatory measures. Expropriation not only remains a principal challenge to foreign investment, but also is a well-established topic in international law.¹ A foreign investment may be expropriated either directly or indirectly. Direct expropriation is “usually open and deliberate, with the State engaging in outright seizure of foreign-owned facilities or mandating an obligatory transfer of title.”² Conversely, indirect expropriation can occur in far more complex or obscure circumstances where foreign investors are unable to benefit from their investments even though their legal titles to their investments remains intact.³ Direct expropriation was the focus of early examination during the post-colonialism era from the early 1960s. At that time, there were frequent nationalizations that were “intended to regain control of national economies from the companies of the erstwhile colonial powers.”⁴ Compensation for foreign investors was the central issue debated in the period from 1960 to 1990.⁵

It is now rare for host States to adopt measures that obviously constitute direct expropriation.⁶ Today, expropriation continues to occur indirectly. As a more common and disincentive to foreign investment than direct expropriation,⁷ it has replaced direct expropriation⁸ as a focal point on both theoretical and practical levels.⁹ Martin Domke presciently foreshadowed this evolution of host State behavior in 1961:

An outright transfer of title may no longer constitute the foremost type of ‘taking’ property in the technique of modern nationalization. There are various other means of ... ‘guised’ nationalization through regulations of foreign governments.¹⁰

There are two principal reasons to explain why direct expropriation by host States now rarely occurs. First, international investment law has evolved to entitle foreign investors to potentially significant compensation payable by host States where foreign investments have been expropriated. Second, a host State measure that constitutes direct expropriation will bring unfavorable publicity and risk that

foreign investors will move their business to other States.¹¹

Indirect expropriation generally involves “total or near-total deprivation of an investment but without a formal transfer of title or outright seizure.”¹² In contrast with direct expropriation, the definition of indirect expropriation is unclear and its identification in individual factual circumstance is difficult. This is largely because the ostensible intention of the host State’s activity is to regulate domestic matters in the ordinary course of legal reform and business management rather than to expropriate foreign investments. International investment agreements (“IIAs”) and arbitral awards generally have been unable to articulate a clear and universally accepted definition of indirect expropriation or an approach to identify its occurrence and thus to distinguish it from non-compensable legitimate State regulatory measures. Host States and foreign investors remain uncertain regarding when indirect expropriation occurs. This dilemma inhibits the maximization of foreign investment and contributes to fracturing of international investment law.

The primary purpose of this research is to examine the emergence of China’s One Belt One Road (“OBOR”) strategy and the importance of enhancing clarity of indirect expropriation for its success. This paper is composed of five parts including an Introduction and a Conclusion. Part two will examine the OBOR and Regulating Indirect Expropriation. Part three will investigate indirect expropriation under the IIAs between China and OBOR States. Part four will refine the Regulation of Indirect Expropriation under the IIAs between China and the OBOR States.

2. The OBOR and Regulating Indirect Expropriation

The OBOR consists of both the “Silk Road Economic Belt” and the “21st-Century Maritime Silk Road” which were proposed by Chinese President Xi Jinping in 2013.¹³ Such grand project combining land and sea has received high praise in and out of China as a milestone of the Xi Jinping doctrine.¹⁴ On March 28, 2015 the National Development and Reform Commission of China formally introduced the OBOR with its “Vision and Actions on Jointly Building the Silk Road Economic Belt and 21st Century Maritime Silk Road” (hereinafter OBOR Visions and

Actions).¹⁵ The OBOR connects China with 64 States; 11 in South East Asia, seven in South Asia, 11 in Central and Western Asia, 15 in the Middle East and Africa and 20 in Central and Eastern Europe.¹⁶ These States have a combined population of approximately 4.6 billion, which is over 60 percent of the world population and one-third of the world GDP (USD 2.1 trillion).¹⁷ China founded the Asia Infrastructure Investment Bank (“AIIB”) with start-up funds of USD 40 billion to support it.¹⁸

In the implementation of the OBOR Initiative, foreign investment plays a vital role.¹⁹ China’s Ministry of Commerce provides that Chinese enterprises have invested USD 14.82 billion in 49 States along the OBOR, who have established 1752 enterprises and invested USD 6.49 billion in China in 2015.²⁰ From January to September 2016, China invested USD 11.12 billion in 51 OBOR States.²¹

There are, however, three risks of indirect expropriation of foreign investments in the OBOR States. The first risk is due to the predominant type of foreign investment. As most OBOR States do not have highly advanced infrastructure, infrastructure construction investment is a priority area.²² However, this type of investment projects normally involves high-level funding and takes a long time to be completed. Because these circumstances pose a high risk of indirect expropriation, foreign investors favor stable political environments and secure legal protections.

Second, political and social environments vary among the OBOR States. Some States have experienced rapid political changes, severely impacting Chinese investments and creating risks for future investments. The Chinese Myitsone dam project investment in Myanmar, totaling USD 3.6 billion, was suspended by Myanmar’s President Thein Sein for the political transformation in 2011.²³ Similarly, in Sri Lanka, China’s largest investment, totaling USD 1.4 billion for Colombo port, was initially halted by the new government in 2015.²⁴

Third, with regard to the legal protection against indirect expropriation, indirect expropriation has not been well defined or regulated as in most bilateral investment treaties (“BITs”) or Free Trade Agreements (“FTAs”). It leaves host States and foreign investors exposed to legal unpredictability.

3. Indirect Expropriation under the IIAs between China and OBOR States

China has signed BITs with 50 of the 64 OBOR States (Annex Table 1). All the BITs have either explicitly mentioned or implied the recognition of indirect expropriation (Annex Type A or Type B), with the exception of China-Bulgaria BIT that only refers to expropriation in general terms,²⁵ However, it remains possible to argue that the term ‘expropriation’ can be interpreted broadly to cover direct and indirect expropriation. China has signed three FTAs since 2000 with ASEAN, Pakistan and Singapore. (Annex Table 2) Each of these FTAs provides brief mention of indirect expropriation.

A. Definition of Indirect Expropriation in IIAs between China and the OBOR States

Two main approaches of defining indirect expropriation have been adopted in IIAs signed between China and the OBOR States. The first one takes direct expropriation as a benchmark and defines indirect expropriation in a general way. This approach is used in 48 BITs and all three FTAs. Common expressions used in referring to indirect expropriation include “measures having effect equivalent to expropriation” and “similar measures (to direct expropriation).” These terms are uncertain as to what extent certain measures would be recognized as ‘similar’ measures, or to what degree the effect on foreign investment would be considered as ‘equivalent to’ direct expropriation.

The second approach is to define and illustrate indirect expropriation with more specificity. However, this approach has so far been adopted only in two recent BITs with India in 2006 and Uzbekistan in 2011 (revised BIT). They include a general provision on expropriation by referring to one of the expressions listed in the first approach. Yet, they also include a detailed definition and explanation of direct and indirect expropriation either in the form of an attached annex or protocol, or in the same provision of expropriation. Article 5(1) of the China-India BIT first generally indicates indirect expropriation as “measures having effect equivalent to expropriation.” Then, in the Protocol to the China-India BIT, Ad. Article 5 provides a detailed definition of indirect expropriation:

A measure of expropriation includes, apart from direct expropriation or nationalization through formal transfer of title or outright seizure, *a measure or series of measures taken intentionally by a Party to create a situation whereby the investment of an investor may be rendered substantially unproductive and incapable of yielding a return without a formal transfer of title or outright seizure.* [Emphasis added.]

This provides an effective response to the residual problem of the first approach by illustrating the ‘effect’ element in detail. In essence, the adverse impact needs to be ‘substantial’ on foreign investment and be able to make foreign investors ‘incapable’ of benefitting from their investment.

The revised China-Uzbekistan BIT is the only IIA among them (50 BITs and 3 FTAs) that incorporates the phrase ‘indirect expropriation’ into the expropriation provision. Article 6 (1) provides explicitly that indirect expropriation means “measures the effects of which would be equivalent to expropriation or nationalization.” Unlike the China-India BIT, this provision does not include further explanation of this definition. Nevertheless, it provides guidance for identifying indirect expropriation that makes it stand out among all the IIAs signed between China and the OBOR States.

B. Identification of Indirect Expropriation under the IIAs between China and the OBOR States

1. The ‘Sole Effect’ Doctrine

As has been shown in the previous part, most of the IIAs between China and the other OBOR States do not include detailed definitions of indirect expropriation, let alone any further instructions on the identification of indirect expropriation. This ‘light touch’ approach focuses on the ‘effect’ of host State measures as indirect expropriation; those measures must have an equivalent effect to direct expropriation.²⁶ This is not unique for these IIAs, however. The expropriation provisions in these IIAs normally followed or mirrored those in the IIAs signed by other large investor States before the emergence of the 2004 US Model BIT.²⁷ In practice, due to the lack of detailed guidance in IIAs, arbitral tribunals’ interpretations became influential. Arbitral tribunals have enjoyed considerable discretion because of the vagueness of investment agreements. They have tended

to take an investor-friendly approach to protect the interests of foreign investors.²⁸

The pattern of IIAs did not basically pay much attention to indirect expropriation but rather focus on protection to foreign investments. It might be due in part to ‘neoliberalism’ gradually permeated into international law on foreign investment when developed countries invested heavily in developing countries.²⁹ The idea of inflexible or absolute investment protection took root.³⁰ In practice, many arbitral tribunals³¹ have invoked Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”)³² when they interpreted the general and vague provisions of indirect expropriation. Article 31 provides that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”³³ In terms of the ‘ordinary meaning’ requirement, as the reference to indirect expropriation in these IIAs mainly focuses on the ‘effect’ element, arbitral tribunals have thus followed this direction by recognizing it as the most important or decisive criterion in identifying indirect expropriation.

Preambles in early IIAs usually bear the idea of aiming to protect, promote and facilitate foreign investment. The preamble in the China-Cambodia BIT recognizes that “the reciprocal encouragement, promotion and protection of such investments will be conducive to stimulating business initiative of the investors” and aims to “create favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party.”³⁴ This treaty should thus be interpreted in favor of foreign investment protection. Combining the two interpretation requirements under the VCLT, it was reasonable for many arbitral tribunals to take the ‘effect’ of host States’ measures on foreign investments as the primary and decisive factor to be considered in ascertaining indirect expropriation under those early IIAs.³⁵ Regulatory measures would be considered indirect expropriation that requires compensation provided the interference of the host State’s measure caused severe adverse effect on the foreign investment.³⁶ This would be the case irrespective of any other circumstances such as the purpose of the host States or the public interest aiming to be pursued. This approach led to expansive identification of indirect expropriation. This prioritized private interests of foreign investors and placed less weight on the public interests of host States to regulate legitimate domestic matters. Professor Dolzer referred to this approach as the ‘sole effect’ approach, which implies an extremely investor-friendly standard.³⁷

2. The 'Police Powers' Doctrine

The 'police-powers' doctrine articulates the principle that host States "have the right, indeed the duty, to regulate"³⁸ domestic affairs. It derives from the principle of State sovereignty. The Third Restatement of Foreign Relations Law of the United States provides that a State "is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action that is commonly accepted as within the police power of States."³⁹ The 'police powers' doctrine was gradually incorporated into IIAs with the emergence of profoundly different global political and economic patterns. Recently, former capital-importing countries began to invest even in former capital-exporting countries, some of whom even became involved in indirect-expropriation-related cases as defendants rather than plaintiffs.⁴⁰ The 2008 global financial crisis led regulators in many parts of the world to revise their regulatory rights and responsibilities. The entrenched ideology of neoliberalism and the consequent principle of inflexible investment protection encountered objections from host States and non-governmental organizations ("NGOs"). NGOs argued that absolute investment protection is a substantial hindrance to public interests such as the protection of human rights and the environment.⁴¹ Against this background, the identification of indirect expropriation evolved into a contraction phase. This is aptly described by one part of the arbitral award of *Feldman v Mexico*:

The ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.⁴²

The 2004 US Model BIT⁴³ exemplifies the 'police powers' doctrine in identifying

indirect expropriation and has had far-reaching influence on subsequent IIAs in other parts of the world. Article 4 of Annex B provides guidance for identifying indirect expropriation and stands as a clear repudiation of the ‘sole effects’ doctrine. It provides that: “An action or 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.”⁴⁴ The economic impact of the government action can only serve as one of the elements that need to be considered in determining whether an action or series of actions by a host State would constitute indirect expropriation. According to Article 4(a), there are two other factors that need to be taken into consideration. They are “the extent to which the government action interferes with distinct, reasonable investment-backed expectations” and “the character of the government action.” However, the BIT does not present further illustration of these elements.

Another breakthrough embedded in the 2004 US Model BIT is that it provides some measures to differentiate indirect expropriation that requires compensation from legitimate State regulatory measures that do not require compensation. Article 4 (b) of Annex B of the 2004 US Model BIT provides:

Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

The 2006 China-India BIT⁴⁵ and the 2011 China-Uzbekistan BIT⁴⁶ absorbed the essence of the 2004 US Model BIT in solving the problems of identifying indirect expropriation and making a distinction between compensable indirect expropriation and non-compensable State regulatory measures. They have also addressed these problems in greater detail. First, they provide further interpretation to the elements listed in the 2004 US Model BIT. *E.g.*, the China-Uzbekistan BIT limits the scope of the “investment-backed expectations” by requiring that “such expectation arises from the specific commitments made by one Contracting Party to the investors of the other Contracting Party.”⁴⁷ As for the element of the character of the government action, both BITs also require consideration of whether host State measures were reasonably taken for public interest purposes.⁴⁸ Second, in addition to including the three elements listed in the 2004 US Model

BIT, both have added the element of considering the extent to which the host State's measures are discriminatory in scope or application over foreign investors and investments.⁴⁹ Third, the China-Uzbekistan BIT has applied a new approach in tackling the identification and distinction problems, the proportionality doctrine.

3. The 'Proportionality' Doctrine

The 'proportionality' doctrine resembles the 'police powers' doctrine inasmuch as they take both interests of foreign investors and host States into consideration in determining whether host State measures constitute indirect expropriation. The two doctrines differ in that the proportionality doctrine works further as a complementary standard to reassess and readjust each case at a final stage and aims to help arbitral tribunals to come to more rational conclusions. Except in rare circumstances, host State regulatory measures for non-discriminatory and legitimate public interests will not be recognized as indirect expropriation under the 'police powers' doctrine. However, such measures may constitute indirect expropriation if the proportionality doctrine is applied when the measures are disproportionate⁵⁰ to the aims that host States want to achieve.

The 2011 China-Uzbekistan BIT is the only BIT that has adopted the proportionality doctrine among all the IIAs signed between China and the OBOR States. It requires consideration of whether host State measures are appropriate for the purpose of expropriation in identifying indirect expropriation.⁵¹ Moreover, it delineates the "rare or exceptional circumstances" that would not be considered as exceptions to indirect expropriation.⁵² According to Article 6(3) of the China-Uzbekistan BIT, "the measures adopted severely surpassing the necessity of maintaining corresponding reasonable public welfare" will be considered as the foresaid exceptional circumstances. This is consistent with the proportionality doctrine that balances means and end⁵³ and demands host State measures to be necessary and appropriate to be justified as non-compensable State regulatory measures.

4. Refining the Regulation of Indirect Expropriation under the IIAs between China and the OBOR States

The unfolding OBOR initiatives open a window of opportunity for China to press for further reform and opening up and to participate actively as a dual-role party on the OBOR trade and investment arena. Chinese enterprises will contribute to more large-scale projects and make more investments in the OBOR States. China will also receive more investments from them. Advanced and up-to-date legal protection should be sought as an inevitable move to guarantee the smooth implementation of the OBOR strategy. Foreign investment involves two conflicting interests: the private interests of foreign investors and the public interests of host States. This tension escalates in indirect expropriation, while it was not well regulated in most of IIAs between China and the OBOR States. This has led to legal uncertainty and unpredictability in foreign investment. Proposals are now suggested for refining the outdated regulation of indirect expropriation for the current and future IIAs between China and the OBOR States.

The promotion and protection of foreign investment is no longer the sole priority in investment agreements. More attention is being paid to the protection of public interests in host States. This phenomenon can be explained from three perspectives. In terms of host States, first, protecting their legitimate regulatory right is vital at the domestic level and is indispensable to meet its international obligations⁵⁴ in pursuit of ‘sustainable development.’ The UNCTAD 2015 Investment Policy Framework for Sustainable Development⁵⁵ pointed out that “mobilizing investment and ensuring that it contributes to sustainable development is a priority for all countries”⁵⁶ and “new generation investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment.”⁵⁷ In 2015, the UN Member States reached a ‘groundbreaking agreement’ of the Addis Ababa Action Agenda in the Third United Nations Financing for Development Conference. It provides “a foundation for implementing the global sustainable development agenda that world leaders are expected to adopt...”⁵⁸ The Agenda has explicitly addressed:

The goal of protecting and encouraging investment should not affect our ability to pursue public policy objectives. We will endeavor to craft trade and investment agreements with appropriate safeguards so as not to constrain domestic policies and regulation in the public interest.⁵⁹

Second, foreign investors are advised to bear corporate social responsibility (“CSR”),⁶⁰ while investing in host States.

When foreign investors operate business in host States, they become economic members of host States. Hence, they have responsibility to observe their legal obligations and minimize any harm on the environment, society and human rights and to make contributions to the general development of host States.⁶¹ Moreover, the OECD Guidelines for Multinational Enterprises pointed out that foreign investors “have the opportunity to implement best practice policies for sustainable development that seek to ensure coherence between social, economic and environmental objectives.”⁶² Supporting CSR could bring benefit to foreign investors by awarding them good reputation and making them disciplined and welcomed in the long term.

Third, with regards to foreign investments, it is worth noting that property is “a social institution that serves social functions.”⁶³ Property rights cannot be absolute. They should be used in compliance with legitimate rules and for the sake of public interests.

5. Conclusion

This article has proposed revising suggestions to the regulation of indirect expropriation in IIAs in three aspects. First, as has been examined in the previous section, the preamble in each IIA plays a vital role in understanding and interpreting each provision because it sets up the general objective and ideology of each IIA. The existing foreign-investment-favored idea embedded in most IIAs should be updated to preserve host States’ right and flexibility and to regulate for legitimate policy objectives, thereby achieving a balanced way to regulate as well as promoting foreign investments. States may also choose to include CSR clauses in the preambles to help develop a sustainable society.⁶⁴

Second, the simple and generic way of defining indirect expropriation in

expropriation provisions under most IIAs should be amended. The author would recommend that, of the two main defining approaches examined, the second approach be more appropriate. This is because it provides a detailed definition of indirect expropriation by specifying the ‘effect’ of host State measures on foreign investments. In summary, three indispensable elements should be included in the definition of indirect expropriation: (1) indirect expropriation should be caused by measures or a series of measures that are attributed to a host State;⁶⁵ (2) indirect expropriation occurs without formal transfer of title or outright seizure of foreign investments; and (3) such State measures severely or substantially interfere with the investments of foreign investors, with an effect equivalent to direct expropriation. In this regard, investors are unable to use, enjoy or dispose of their investments.

Third, guidance should be provided of how to identify indirect expropriation in order to distinguish it from non-compensable State regulatory measures. Just two of the 53 IIAs signed between China and other OBOR States have included such guidance. The lacuna existing in the rest of the IIAs should be filled in at this juncture. Of the three main doctrines regarding indirect expropriation, it is argued that the balanced approach of ‘police powers’ or ‘proportionality’ should be adopted. The vital role of the ‘effect’ element is not questioned by any of the three doctrines. The ‘police powers’ doctrine and the ‘proportionality’ doctrine differ from the ‘sole effect’ doctrine in that they do not put the ‘effect’ element as the decisive factor. Rather, they place the ‘effect’ element into a broader framework requiring a balance with other elements.⁶⁶

Annex

‘Indirect Expropriation’ under Expropriation Provisions in IIAs between China and the OBOR States

Type A: “Neither Contracting Party shall expropriate, nationalize or take *similar measures* against investments of investors of the other Contracting Party...” and other similar expressions.

Type B: “Investment of investors of either Contracting Party shall not be nationalized, expropriated or subjected to *measures having effect equivalent to nationalization or expropriation* in the territory of the other Contracting Party...” and other similar expressions.

Table 1: BITs between China and the OBOR States⁶⁷

No.	OBOR States	Year	“Indirect Expropriation” under Expropriation Provision
South East Asia			
1	Cambodia	1996	Type A (Article 4)
2	Indonesia	1994	Type B (Article 6)
3	Laos	1993	Type A (Article 4)
4	Malaysia	1988	Type B (Article 5)
5	Myanmar	2001	Type A (Article 4)
6	Philippines	1992	Type A (Article 4)
7	Singapore	1985	Type B (Article 6)
8	Thailand	1985	Type A (Article 5)
9	Vietnam	1992	Type A (Article 4)
10	Timor-Leste		NO BIT
11	Brunei		NO BIT
South Asia			
12	India	2006	<p>Article 5: (1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation...</p> <p>Protocol to the Agreement With regard to the interpretation of expropriation under Article 5, the Contracting Parties confirm their shared understanding that :</p> <p>1. A measure of expropriation includes, apart from direct expropriation or nationalization through formal transfer of title or outright seizure, a measure or series of measures taken intentionally by a Party to create a situation whereby the investment of an investor may be rendered substantially unproductive and incapable of yielding a return without a formal transfer of title or outright seizure.</p> <p>2. The determination of whether a measure or a series of measures of a Party in a specific situation, constitute measures as outlined in paragraph 1 above requires a case by case, fact based inquiry that considers, among other factors:</p>

12	India	2006	<p>i. the economic impact of the measure or a series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that expropriation or nationalization, has occurred;</p> <p>ii. the extent to which the measures are discriminatory either in scope or in application with respect to a Party or an investor or an enterprise;</p> <p>iii. the extent to which the measures or series of measures interfere with distinct, reasonable, investment-backed expectations;</p> <p>iv. the character and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention to expropriate.</p> <p>3. Except in rare circumstances, non-discriminatory regulatory measures adopted by a Contracting Party in pursuit of public interest, including measures pursuant to awards of general application rendered by judicial bodies, do not constitute indirect expropriation or nationalization.</p>
13	Pakistan	1989	Type A (Article 4)
14	Sri Lanka	1986	Type B (Article 6)
15	Bangladesh		NO BIT
16	Bhutan		NO BIT
17	Maldives		NO BIT
18	Nepal		NO BIT
Central and Western Asia			
19	Armenia	1992	Type A (Article 4)
20	Azerbaijan	1994	Type A (Article 4)
21	Georgia	1993	Type A (Article 4)
22	Iran	2000	Type A (Article 6)
23	Kazakhstan	1992	Type A (Article 4)
24	Kyrgyzstan	1992	Type A (Article 4)
25	Mongolia	1991	Type B (Article 4)
26	Tajikistan	1993	Type A (Article 4)

27	Turkmenistan	1992	Type B (Article 4)
28	Uzbekistan	1992	Type B (Article 4)
		2011	<p>Article 6</p> <p>1. Neither Contracting Party shall expropriate, nationalize or take any other measure the effects of which would be equivalent to expropriation or nationalization... "Measure the effects of which would be equivalent to expropriation or nationalization" means indirect expropriation.</p> <p>2. The determination of whether a measure or a series of measures of one Contracting Party constitutes indirect expropriation in Paragraph 1 requires a case-by-case, fact-based inquiry that considers, among other factors:</p> <ul style="list-style-type: none"> (a) the economic influence of a measure or a series of measures, although the fact that a measure or a series of measures of the Contracting Party has an adverse effect on the economic value of investments, standing alone, does not establish that an indirect expropriation has occurred; (b) the extent to which the measure or the series of measures grant discrimination in scope or application over investors and associated investments of the other Contracting Party; (c) the extent to which the measure or the series of measures cause damage to reasonable investment expectation of investors of the other Contracting Party: such expectation arises from the specific commitments made by one Contracting Party to the investors of the other Contracting Party; (d) the character and purpose of a measure and a series of measures, whether it is adopted for the purpose of public interest in good faith, and whether it is in appropriation to the purpose of expropriation. <p>3. Except in exceptional circumstances, such as the measures adopted severely surpassing the necessity of maintaining corresponding reasonable public welfare, non-discriminatory regulatory measures adopted by one Contracting Party for the purpose of legitimate public welfare, such as public health, safety and environment, do not constitute indirect expropriation.</p>

	Afghanistan		NO BIT
Middle East and Africa			
	Bahrain	1999	Type A (Article 4)
	Egypt	1994	Type A (Article 4)
	Israel	1995	Type B (Article 5)
	Kuwait	1985	Type A (Article 5)
	Lebanon	1996	Type A (Article 4)
	Oman	1995	Type B (Article 4)
	Qatar	1999	Type A (Article 4)
	Saudi Arabia	1996	Type A (Article 4)
	Syrian Arab Republic	1996	Type A (Article 4)
	Turkey	1990	Type B (Article 3)
	United Arab Emirates	1993	Type B (Article 6)
	Yemen	1998	Type B (Article 4)
	Palestine		NO BIT
	Jordan		NO BIT
	Iraq		NO BIT
Central and Eastern Europe			
	Albania	1993	Type A (Article 4)
	Belarus	1993	Type A (Article 4)
	Bulgaria	1989	general expropriation provision (Article 4)
	Croatia	1993	Type A (Article 4)
	Czech Republic	1991	Type A (Article 4)
	Estonia	1993	Type A (Article 4)
	Hungary	1991	Type A (Article 4)
	Lithuania	1993	Type A (Article 4)
	Macedonia	1997	Type B (Article 4)
	Moldova	1992	Type A (Article 4)
	Poland	1988	Type A (Article 4)
	Romania	1994	Type A (Article 4)
	Russia	2006	Type A (Article 4)
	Slovakia	1991	Type A (Article 4)
	Slovenia	1993	Type A (Article 4)

	Ukraine	1992	Type A (Article 4)
	Serbia		NO BIT
	Montenegro		NO BIT
	Latvia		NO BIT
	Bosnia & Herzegovina		NO BIT

Table 2 FTAs between China and OBOR States⁶⁸

No.	OBOR States	Year	“Indirect Expropriation” under Expropriation Provision
1	China-ASEAN (10 countries: Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, Vietnam)	The Agreement on Investment was signed in 2009.	Type A (Article 8)
2	Pakistan	2006	Type A (Article 49)
3	Singapore	2008	Type A (Article 84)

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3. The tribunal in *Starrett v. Iran* determined that indirect expropriation could occur due to unreasonable interference with foreign investments. The tribunal held: “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.” See *Starrett v. Iran* (1983) 4 Iran-US CTR 122, 154.
4. M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 363 (3d. ed. 2010).
5. *Supra* note 1, at 91.
6. Nevertheless, there are some examples of direct expropriations. See M. Arostegui, *Venezuelan Nationalization Continuing*, *WASH. TIMES*, May 12, 2009, available at <http://www>.

- washingtontimes.com/news/2009/may/12/nationalization-continuing/?page=all. See also B. Friedrich, Arnd RüDiger von Pezold et al. v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, July 28, 2015, available at http://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf (all last visited on Feb. 7, 2017).
7. *Supra* note 1, at 151.
 8. See “Indirect Expropriation” and the “Right to Regulate” in *International Investment Law*, OECD Working Papers on International Investment, 2004/04, at 2, available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf (last visited on Feb. 7, 2017).
 9. See, e.g., V. Heiskanen, *The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8 J. WORLD INV. & TRADE 215 (2007).
 10. M. Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law*, 55 AM. J. INT’L L. 588-9 (1961).
 11. *Supra* note 1, at 151.
 12. UN, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, EXPROPRIATION: A SEQUEL (2012), available at http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (last visited on Feb. 7, 2017).
 13. JINPING XI, THE GOVERNANCE OF CHINA 习近平谈治国理政289 (2014).
 14. In the Keynote Speech by Chinese Foreign Minister Wang Yi for the 17th “Lanting Forum” 共建“一带一路”，再创丝路辉煌—外交部长王毅在第十七届“蓝厅论坛”上的致辞, Aug. 3, 2016, available at http://www.fmprc.gov.cn/web/ziliao_674904/zyjh_674906/t1386726.shtml (last visited on Feb. 7, 2017). Wang mentioned that: “More than 70 countries and international and regional organizations have expressed their willingness to support and take part in the construction of OBOR ... 34 States and international organizations have signed inter-governmental cooperation agreements on jointly building OBOR...”
 15. National Development and Reform Commission, Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, available at http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html (last visited on Feb. 7, 2017).
 16. See The Belt and Road Initiative: Country Profiles, available at <http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/The-Belt-and-Road-Initiative-Country-Profiles/obor/en/1/1X000000/1X0A3610.htm> (last visited on Feb. 7, 2017). The OBOR Visions and Actions declares: “The Initiative is open for cooperation. It covers, but is not limited to, the area of the ancient Silk Road. It is open to all States, and international and regional organizations for engagement, so that the results of the concerted efforts will benefit wider areas.” For the purpose of this paper, the main research scope is narrowed to the 64 States listed above.
 17. See, e.g., ‘OBOR’ Expects to Conduct New Global Economic Circulation “一带一路”有望构建新的全球经济大循环, available at http://news.xinhuanet.com/politics/2016-04/12/c_128886997.htm; B. Hofman, China’s One Belt One Road Initiative: What We Know thus Far, Apr. 12, 2015, World Bank, available at <http://blogs.worldbank.org/eastasiapacific/>

- china-one-belt-one-road-initiative-what-we-know-thus-far (last visited on Feb. 7, 2017).
18. See ‘OBOR’: Radical Innovation of State Strategy “一带一路”: 国家战略的重大创新, available at http://news.xinhuanet.com/world/2016-09/07/c_129272136.htm (last visited on Feb. 7, 2017).
 19. The OBOR Visions and Actions points out: “Investment ... is a major task in building the OBOR. We should strive to improve investment ... facilitation, and remove investment ... barriers for the creation of a sound business environment within the region and in all related States.”
 20. See Economic and Trade Cooperation with OBOR States in 2015 [2015年与“一带一路”相关国家经贸合作情况], available at <http://fec.mofcom.gov.cn/article/fwydy1/tjsj/201601/20160101239838.shtml> (last visited on Feb. 7, 2017).
 21. See Investment Cooperation with OBOR States from January to September 2016 2016年1-9月我对“一带一路”相关国家投资合作情况, available at <http://fec.mofcom.gov.cn/article/fwydy1/tjsj/201610/20161001411972.shtml>. As of January 19, 2017, the PRC Ministry of Commerce maintained that throughout the year 2016, Chinese corporations invested USD14.53 billion in 53 OBOR States, available at <http://fec.mofcom.gov.cn/article/fwydy1/tjsj/201701/20170102504239.shtml> (all last visited on Feb. 7, 2017).
 22. *Supra* note 19. (“Cooperation Priorities” in the OBOR Visions and Actions)
 23. T. Fuller, *Myanmar Backs Down, Suspending Dam Project*, N.Y. TIMES, Sept. 30 2011, available at <http://www.nytimes.com/2011/10/01/world/asia/myanmar-suspends-construction-of-controversial-dam.html> (last visited on Feb. 7, 2017).
 24. See *Sri Lanka Officially Informs Chinese Investors of Resuming Construction of Colombo Port City Project*, Mar.14 2016, SL Time, ColomboPage News Desk, Sri Lanka, available at http://www.colombopage.com/archive_16A/Mar14_1457965417CH.php (last visited on 11 Feb., 2017).
 25. China-Bulgaria BIT art. 4. It provides: “Either Contracting State may, for public interest, expropriate or nationalize (hereinafter expropriation) investment of investors of the other Contracting State in its territory...,” available at <http://tfs.mofcom.gov.cn/aarticle/h/au/201002/20100206774517.html> (last visited on Feb. 7, 2017).
 26. See ‘Type A’ and ‘Type B’ in the Annex attached.
 27. U.K.-Singapore BIT (1975) art. 5, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2261>. It states: “Investments of nationals or companies of either Contracting Party shall not be nationalised. expropriated or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party...” See also Argentina-United States of America BIT (1991) art. IV, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127> (all last visited on Feb. 7, 2017). It provides: “Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (expropriation-)...”

28. *See, e.g.*, *Tippets v. Iran* (1984), *Biloune v. Ghana Investment Centre* (1989); *Southern Pacific Properties v. Arab Republic of Egypt* (1992); *Compañía ia del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (2000).
29. M. SORNARAJAH, *RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 9 (2015).
30. *Id.*
31. In *Seimens v. Argentina, e.g.*, the Tribunal stated: “Both parties have based their arguments on the interpretation of the Treaty in accordance with article 31(1) of the Vienna Convention. This Article provides that a treaty be ‘interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.’ The Tribunal will adhere to these rules of interpretation in considering the disputed provisions of the Treaty.” *See also* *AAPL v. Sri Lanka*; *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*; *Enron v. Argentina*; *Salini v. Jordan*; *Plama v. Bulgaria*.
32. 1155 U.N.T.S. 331. Opened for signature on January 20, 1980 and entered into force January 27, 198.
33. *Id.* art. 31.
34. China-Cambodia BIT, *available at* <http://tfs.mofcom.gov.cn/aarticle/h/at/201002/20100206778910.html> (last visited on Feb. 7, 2017).
35. The tribunal in *Suez v. Argentina* held that: “Each of the BIT articles ... specifically refers to the ‘effects’ of an expropriation measure and thus affirms the importance of evaluating the effects of a measure on the investment in determining whether an expropriation has taken place.” *See Suez v Argentina*, ICSID Case No. ARB/03/19, Award, ¶ 133 (July 30, 2010), *available at* <http://www.italaw.com/documents/SuezVivendiAWGDecisiononLiability.pdf> (last visited on Feb. 7, 2017).
36. *Supra* note 8.
37. R. Dolzer, *Indirect Expropriation: New Developments?*, 11 N.Y.U. ENVTL. L. J. 79 (2002).
38. L. Fortier & S. Drymer, *Indirect Expropriation in the Law of International Investment: I know it When I See It, or Caveat Investor*, 13 ASIA PAC. L. REV. 290 (2005).
39. Restatement (Third) of Foreign Relations Law of the United States, ¶ 712, (ALI ed., 1987).
40. *See, e.g.*, *Merrill & Ring Forestry v. Canada*, *Methanex Corporation v. United States of America*.
41. *Supra* note 29, at 1.
42. *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 103 (Dec.16, 2002), *available at* <http://www.italaw.com/sites/default/files/case-documents/ita0319.pdf> (last visited on Feb. 7, 2017).
43. 2004 US Model BIT, *available at* <http://www.state.gov/documents/organization/117601.pdf> (last visited on Feb. 7, 2017).
44. *Id.* annex B, art. 4(a).

45. China-India BIT (2006), *available at* <http://tfs.mofcom.gov.cn/aarticle/h/at/201002/20100206778944.html> (last visited on Feb. 7, 2017).
46. China-Uzbekistan BIT (2011), *available at* <http://tfs.mofcom.gov.cn/article/h/au/201111/20111107819511.shtml> (last visited on Feb. 7, 2017).
47. *Id.*, art. 6(2).
48. Protocol to the China-India BIT(2006) Ad art. 5(2)(iv). It lists “the character and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention to expropriate.” *See* China-Uzbekistan BIT(2011) art. 6(2)(c). It lists “the character and purpose of a measure and a series of measures, whether it is adopted for the purpose of public interest in good faith, and whether it is in appropriation to the purpose of expropriation.”
49. *Id.* Ad art. 5(2)(ii). It provides “the extent to which the measures are discriminatory either in scope or in application with respect to a Party or an investor or an enterprise.” *See also* China-Uzbekistan BIT (2011) art.6. It provides “the extent to which the measure or the series of measures grant discrimination in scope or application over investors and associated investments of the other Contracting Party.”
50. A.REINISCH (ED.), STANDARDS OF INVESTMENT PROTECTION 163 (2008). He provides: “The notion of proportionality recognizes that when the property owner carries too big a burden in comparison to the aim which the State tries to achieve, the measure at issue must be deemed to be disproportionate.”
51. China-Uzbekistan BIT(2011) art. 6(2)(c). It lists “the character and purpose of a measure and a series of measures, whether it is adopted for the purpose of public interest in good faith, and whether it is in appropriation to the purpose of expropriation.”
52. *Supra* note 43. The 2004 US Model BIT just provides “except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.” But it fails to explain those rare circumstances.
53. J. Delbrück, *Proportionality*, in 3 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (B. Rudolf ed., 1983).
54. S. NIKIÉMA, BEST PRACTICES: INDIRECT EXPROPRIATION 4 (IISD, 2012), *available at* http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf (last visited on Feb. 7, 2017). It provides: “A State may be bound to protect a forest, regulate the cross-border transportation of hazardous waste, impose stricter polluted water recycling standards or increase the level of social security contributions that companies are required to pay on behalf of their employees, as a result of its international obligations.”
55. The UNCTAD 2015 Investment Policy Framework for Sustainable Development, *available at* http://investmentpolicyhub.unctad.org/Upload/Documents/INVESTMENT%20POLICY%20FRAMEWORK%202015%20WEB_VERSION.pdf (last visited on Feb. 7, 2017).

56. *Id.*, at 3.
57. *Id.*
58. Countries Reach Historic Agreement to Generate Financing for New Sustainable Development Agenda, Press Release, Third International Conference, Financing for Development (2015), available at <http://www.un.org/esa/ffd/ffd3/press-release/countries-reach-historic-agreement.html> (last visited on Feb. 7, 2017).
59. Addis Ababa Action Agenda of the Third International Conference on Financing for Development, ¶ 91, available at http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf (last visited on Feb. 7, 2017).
60. CSR can be defined as a concept that addresses the social, environmental and economic consequences of the activities of corporations, including their supply and value chains. CSR initiatives seek mechanisms to ensure corporations can be held accountable for these consequences, on the basis of internationally agreed standards and principles. See M. STICHELE & S. BENNEKOM, INVESTMENT AGREEMENTS AND CORPORATE SOCIAL RESPONSIBILITY (CSR): CONTRADICTIONS, INCENTIVES AND POLICY OPTIONS 2 (2005), available at http://www.coc-runder-tisch.de/news/news_feb2006/somo_invest_2005_NL.pdf (last visited on Feb. 7, 2017).
61. K. VON MOLTKE, A MODEL INTERNATIONAL INVESTMENT AGREEMENT FOR THE PROMOTION OF SUSTAINABLE DEVELOPMENT 16 (IISD, 2004), available at http://www.iisd.org/sites/default/files/publications/trade_model_inv.pdf (last visited on Feb. 7, 2017).
62. See OECD Guidelines for Multinational Enterprises, available at <http://www.oecd.org/corporate/mne/1922428.pdf> (last visited on Feb. 7, 2017).
63. A. Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. 27 (2005).
64. In the standard BIT text of the Netherlands, there are some CSR clauses in the preamble.
65. See, e.g., *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, Judgment, 1989 I.C.J. 15, 71 (July 20). In this case, the Court rejected the takings argument based on its view that the foreign company had become bankrupt not because of actions of the host State, but because of its own poor financial situation.
66. *Supra* note 29, at 90.
67. PRC Department of Treaty and Law of Ministry of Commerce, the official website of Bilateral Investment Treaty of China, available at <http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml> (last visited on Feb. 7, 2017).
68. See China FTA Network, available at <http://fta.mofcom.gov.cn/english> (last visited on Feb. 7, 2017).

