

**2006 AALS Workshop  
Integrating Transnational Legal Perspectives  
Into the First Year Curriculum**

**Property Panel  
Teaching Transnational Perspectives on Expropriation**

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**Outline**

**I. Introduction**

This presentation introduces a teaching module that compares U.S. takings jurisprudence with approaches to expropriation in a transnational context. The module exemplifies how transnational and international materials could be integrated into the standard topics covered in a first year Property course.

The presentation's structure follows the format of a class session using the module. An appendix to this outline contains the teaching module.

**II. Overview of Transnational Perspectives on Expropriation**

The module begins by engaging U.S. takings jurisprudence in comparative context.

**A. U.S. Takings Jurisprudence**

The standard Property course includes an introduction to the Fifth Amendment's prohibition on governmental takings without just compensation. It explores both physical invasions and regulatory takings.

**B. Comparative Perspectives on Expropriation**

Issues of expropriation are not unique to the U.S. takings context. An exploration of expropriation in cases raising transnational legal issues provides a perspective from which to understand and evaluate the U.S. the takings jurisprudence.

**III. Examples of Expropriation in Transnational Cases**

The module includes three examples of expropriation questions raised in a transnational context. These cases engage issues of what constitutes a governmental taking, the extent of the procedural protections against expropriation, and when such governmental behavior is acceptable. The

module could be used in its entirety, or any of the individual cases within it could be used individually.

#### **A. U.S. Supreme Court – Foreign Sovereign Immunities Act**

*Republic of Austria v. Altmann*, 541 U.S. 677 (2004), serves as the first example. Excerpts from the Supreme Court and Ninth Circuit opinions in the case explore the expropriation exception to foreign sovereign immunity.

#### **B. Inter-American Commission on Human Rights – American Declaration of the Rights and Duties of Man**

*Mary and Carrie Dann v. United States*, Case 11.140, Report No. 113/01, Inter-Am. C.H.R. (2001), serves as the second example. An excerpt from the case focuses on the Inter-American protections for the property rights of indigenous peoples in the specific context of an expropriation claim at the intersection of U.S. takings and Indian law.

#### **C. North American Free Trade Agreement – Arbitration Pursuant to Chapter 11**

*Methanex Corporation v. United States of America*, Final Award of Tribunal on Jurisdiction and Merits (2005), serves as the third example. An excerpt from the tribunal's decision engages whether California's ban on the chemical MTBE is "tantamount" to expropriation.

#### **IV. Topics for Discussion**

The module includes discussion questions that explore the specific cases, as well as larger conceptual issues. The class dialogue based on them could range from comparative conceptions of expropriation to forum choice issues. The current version of the questions presumes that students will be reading all three sets of excerpts, but the questions could be tailored easily for a class focusing on a portion of the reading.

#### **V. Break-Out Exercise**

This class session might end with a small group exercise followed by large group debriefing of the exercise. The draft module includes an exercise in which students work for the Office of the Legal Advisor and must compare U.S. takings jurisprudence with other approaches to addressing expropriation.

#### **VI. Concluding Reflections**

The presentation concludes by drawing from this module to consider the benefits and challenges of using transnational materials in a standard first year course.

**Appendix – Teaching Module**  
**Transnational Perspectives on Expropriation**

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The U.S. takings jurisprudence grapples with when a government can expropriate property and how it must compensate the former owners. These issues do not arise only in the context of U.S. domestic law. Domestic courts and international tribunals around the world have faced similar issues, and have come to a range of conclusions.

The following cases provide examples of expropriation questions raised in a transnational context. As such, they serve as a useful point of comparison for exploring when and how the government may take private property.

**I. U.S. Supreme Court – Foreign Sovereign Immunities Act**

The U.S. Supreme Court has recently engaged issues of foreign expropriation in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). Although the opinion primarily focused on the retroactivity of the Foreign Sovereign Immunities Act, it also acknowledged the value of the expropriation exception to the Act. This exception prevents foreign states from claiming immunity when the issue involves “property taken in violation of international law,” 28 U.S.C. § 1605(a)(3). Consider the following excerpt from the opinion:

REPUBLIC OF AUSTRIA V. ALTMANN  
541 U.S. 677 (1980)

Justice STEVENS delivered the opinion of the court.

In 1998 an Austrian journalist, granted access to the Austrian Gallery's archives, discovered evidence that certain valuable works in the Gallery's collection had not been donated by their rightful owners but had been seized by the Nazis or expropriated by the Austrian Republic after World War II. The journalist provided some of that evidence to respondent, who in turn filed this action to recover possession of six Gustav Klimt paintings. Prior to the Nazi invasion of Austria, the paintings had hung in the palatial Vienna home of respondent's uncle, Ferdinand Bloch-Bauer, a

Czechoslovakian Jew and patron of the arts. Respondent claims ownership of the paintings under a will executed by her uncle after he fled Austria in 1938. She alleges that the Gallery obtained possession of the paintings through wrongful conduct in the years during and after World War II.

The defendants (petitioners here)--the Republic of Austria and the Austrian Gallery (Gallery), an instrumentality of the Republic--filed a motion to dismiss the complaint asserting, among other defenses, a claim of sovereign immunity. The District Court denied the motion, 142 F.Supp.2d 1187 (C.D.Cal.2001), and the Court of Appeals affirmed, 317 F.3d 954 (C.A.9 2002), as amended, 327 F.3d 1246 (2003). We granted certiorari limited to the question whether the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. § 1602 *et seq.*, which grants foreign states immunity from the jurisdiction of federal and state courts but expressly exempts certain cases, including "cases ... in which rights in property taken in violation of international law are in issue," § 1605(a)(3), applies to claims that, like respondent's, are based on conduct that occurred before the Act's enactment, and even before the United States adopted the so-called "restrictive theory" of sovereign immunity in 1952. 539 U.S. 987, 124 S.Ct. 46, 156 L.Ed.2d 703 (2003). . . .

### III

. . . In 1976 Congress . . . [enacted] the FSIA, a comprehensive statute containing a "set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Id.*, at 488, 103 S.Ct. 1962. The Act "codifies, as a matter of federal law, the restrictive theory of sovereign immunity," *ibid.*, and transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch. The preamble states that "henceforth" both federal and state courts should decide claims of sovereign immunity in conformity with the Act's principles. 28 U.S.C. §1602.

The Act itself grants federal courts jurisdiction over civil actions against foreign states, § 1330 (a), [\[FN12\]](#) and over diversity actions in which a foreign state is the plaintiff, § 1332(a)(4); it contains venue and removal provisions, §§ 1391(f), 1441(d); it prescribes the procedures for obtaining personal jurisdiction over a foreign state, §1330(b); and it governs the extent to which a state's property may be subject to attachment or execution, §§ 1609-1611. Finally, the Act carves out certain exceptions to its general grant of immunity, including the expropriation exception on which respondent's complaint relies. See *supra*, at 2245-2246, and n. 5.

These exceptions are central to the Act's functioning: "At the threshold of every action in a district court against a foreign state, ... the court must satisfy itself that one of the exceptions applies," as "subject-matter jurisdiction in any such action depends" on that application. *Verlinden*, 461 U.S., at 493–94, 103 S.Ct. 1962.

[FN12](#). The Act defines the term "foreign state" to include a state's political subdivisions, agencies, and instrumentalities. 28 U.S.C. § 1603(a).

Although the U.S. Supreme Court opinion focused on the issue of retroactivity, the Ninth Circuit Court of Appeals opinion in the case addressed the substantive issue of expropriation more directly. The following is an excerpt from the Ninth Circuit opinion that analyzes the expropriation exception to the Foreign Sovereign Immunities Act.

ALTMANN V. REPUBLIC OF AUSTRIA  
317 F.3d 954 (2002)

WARDLAW, Circuit Judge:

....

The FSIA's expropriation exception to immunity provides that: A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case ... (3) in which rights in property taken in violation of international law are in issue and ... that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States....

28 U.S.C. § 1605(a). This exception to foreign sovereign immunity "is based upon the general presumption that states abide by international law and, hence, violations of international law are not 'sovereign' acts." *West*, 807 F.2d at 826; H.R. Rep. No. 94-1487, at 14, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613 ("[T]he central premise of the bill [is that] decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law."); *see also* *Trajano v. Marcos (In re Estate of Marcos Human Rights Litig.)*, 978 F.2d 493, 497–98 (9th Cir.1992) ("Congress intended the FSIA to be consistent with international law...."). For guidance regarding the norms against takings in violation of international law, we may look to court decisions, United States law, the work of jurists, and the usage of nations. *See Siderman de Blake*, 965 F.2d at 714–15; *West*, 807 F.2d at 831 n. 10. Nevertheless, we recognize that "[a]t the jurisdictional stage, we need not decide whether the taking actually

violated international law; as long as a 'claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of our jurisdiction.' " *Siderman de Blake*, 965 F.2d at 711 (quoting *West*, 807 F.2d at 826).

The facts alleged by Altmann fall squarely within the expropriation exception to sovereign immunity. There is no question but that "rights in property" are in issue. The Austrian Republic and Gallery insist on Adele's will as the basis for their legal ownership of the Klimt paintings. Altmann, as a true heir and as a representative of other heirs, asserts the will has no such legal effect and the documents unearthed in 1998 revealed that fact to the current Austrian government and to the Austrian Gallery, which nevertheless have retained possession of the paintings without payment therefor.

The next question is whether the property in issue was taken in violation of international law. To constitute a valid taking under international law three predicates must exist. First, "[v]alid expropriations must always serve a public purpose." *West*, 807 F.2d at 831. Second, "aliens [must] not be discriminated against or singled out for regulation by the state." *Id.* at 832. Finally, "[a]n otherwise valid taking is illegal without the payment of just compensation." *Id.* (relying on reports from the Foreign Claims Settlement Commission, international law journals, the *Restatement (Second) of Foreign Relations Law of the United States*, and federal case law). To fall into this exception, the plaintiff cannot be a citizen of the defendant country at the time of the expropriation, because " '[e]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.' " *Siderman de Blake*, 965 F.2d at 711 (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir.1990)).

The facts of record, which in this procedural posture we must take as true, show that the Klimt paintings have been wrongfully and discriminatorily appropriated in violation of international law. The Nazis did not even pretend to take the Klimt paintings for a public purpose; instead, Dr. Fuehrer sold them for personal gain or exchanged them to supplement his private collection. In addition, their taking appears discriminatory. Altmann is a Jewish refugee, now a United States citizen, who is a descendant of a Czech family whose property was looted by the Nazis because of their religious heritage. According to Altmann, despite convening a Committee to evaluate expropriation claims and return stolen artwork, the Austrian government intentionally intervened to thwart a fair and impartial vote on the restitution of the Klimt paintings. Further, the Austrian government has not yet returned the paintings to Altmann

and her family or justly compensated them for the value of the paintings. [\[FN4\]](#) Without compensation, this taking cannot be valid. *See West*, 807 F.2d at 832.

[FN4.](#) Austria now claims the Altmann family itself later donated the paintings in exchange for export permits on other artwork returned to the family after World War II. Altmann argues this practice was illegal, as the Austrian government later found, and thus any purported "donation" was legally void. Because this dispute is a mixed factual and legal question, it cannot be resolved on appeal and is best left for the trial court.

## **II. Inter-American Commission on Human Rights – American Declaration of the Rights and Duties of Man**

The Inter-American Commission on Human Rights hears claims of human rights violations brought against nation-states who are members of the Organization of American States. A petition on behalf of Marie and Carrie Dann, members of the Western Shoshone indigenous people, included claims that the United States had expropriated their property in violation of international law. The following is an excerpt from the Commission's report in this case.

MARY AND CARRIE DANN V. UNITED STATES  
Case 11.140, Report No. 113/01, Inter-Am. C.H.R. (2001)  
[footnotes omitted]

....

100. According to the observations of both the Petitioners and the State in this matter, the Western Shoshone "people" or "nation" constitutes a collective of individuals of native descent who have traditionally occupied the vast and arid territory of approximately 24,000,000 acres that is now primarily the state of Nevada in the United States. There appears to be no dispute between the parties as to the indigenous status of the Western Shoshone or of their historical occupation and use of this territory and its resources. Moreover, the parties agree that at some point the Western Shoshone had title to this territory as their ancestral lands. Rather, in the Commission's estimation, the point of contention in this case involves the question of whether any or all of those property rights subsist and the proper method of determining and respecting any such rights. . . .

103. In terms of the relation of the Western Shoshone to their ancestral lands, the Petitioners have contended the existence of a system of aboriginal land title that has historically been communal in nature and

based upon land and resource use patterns. These patterns have been influenced by the fact that the Western Shoshone bands live in sparsely populated communities located far from each other in the vast territory and that in order to sustain themselves, bands have hunted, fished, and raised cattle and horses, and engaged in commerce with their neighbors. The State has not specifically contested this characterization of the Western Shoshone's traditional occupation and use of their ancestral lands.

104. With respect to the Dann family in particular, the parties have indicated that the Danns live on a ranch on Dann band land close to the small rural community of Crescent Valley, Nevada, where they raise livestock. Their ranch is the Danns' sole means of support, as they raise their own food and all of their needs are met by the sale of livestock, goods and produce to neighboring Western Shoshone and to non-Indians. The parties have also indicated that the Dann band is not among the federally-chartered Western Shoshone tribes with which the United States government maintains official relations. There appears to be no dispute, however, that the Dann band, and the Dann sisters themselves, are considered a part of the Western Shoshone people who have traditionally occupied a particular region of the Western Shoshone ancestral territory, and as such share in the history and status of the Western Shoshone as an aboriginal people. Similarly, the Petitioners have claimed, and the State has not contested, that the Dann family has traditionally occupied and used a region broader than their individual ranch and that this constitutes part of the Dann Band land. . . .

### **3. Procedural History of the Western Shoshone and Dann Land Claims**

. . . .

115. According to the information before the Commission, in 1951 the Temoak Band on behalf of the "Western Shoshone Identifiable Group" filed a claim with the ICC against the United States based upon the United States having taken a vast expanse of Western Shoshone ancestral territory in Nevada and California. The claim alleged that from time to time the federal government had extinguished the Western Shoshone's title by confiscation.

116. In 1962, the ICC found that the Western Shoshone Tribe had held aboriginal title to a total of 24,396,403 acres in Nevada, and that their title to most of this land was extinguished over an unspecified period of time by gradual encroachment of both the federal government and third

parties. In 1966, the Temoak claimants and the government agreed to stipulate an average extinguishment date of July 1, 1872 in order to determine the amount of compensation due, and the ICC agreed upon the date. Subsequently in 1977 the ICC completed the compensation phase of the proceeding and awarded the Western Shoshone with \$26 million in compensation. This finding was based on the value of the property at the time of the alleged extinguishment, \$.10 to \$.15 per acre, without interest. In 1979 the Court of Claims affirmed this award on appeal.

117. In 1974, however, a group of Western Shoshone including the Danns attempted to intervene in the ICC process in order to remove a portion of the 24,000,000 acres of Western Shoshone property from the pending process. This included the lands that were the subject of the separate trespass action by the United States against the Danns in the federal courts. The interveners argued that any lands to which they claimed aboriginal title, including lands which they continued to occupy and use, should be excluded from the determination of the final award. The ICC rejected the intervention and that ruling was affirmed by the Court of Claims, which viewed the attempted intervention as an intra-tribal disagreement over the proper litigation strategy.

118. In 1975 and 1976, the Temoak Band dismissed their attorney and adopted a position similar to that of the Danns, namely that aboriginal title to the lands in question had never been extinguished and that the Band's previous attorney had not presented them with the choice of whether to include all of the ancestral lands in the claim or to assert that title to a portion of the lands was not extinguished. Accordingly, they attempted to stay the proceedings in the ICC and before the Court of Claims to further address this issue. However, the ICC denied the stay and entered a final judgment, and on appeal the Court of Claims affirmed the ICC's ruling on the basis that it was too late for the Temoak Band to change their litigation strategy.

119. In December 1979 the Clerk of the Court of Claims certified the Commission's award to the U.S. General Accounting Office, which automatically appropriated the amount of the award and deposited it for the tribe in an interest-bearing trust account in the Treasury of the United States. According to the most recent information before the Commission this award has not yet been paid out, although a bill was introduced before Congress in mid-2000 to authorize the Secretary of the Interior to make a per capital distribution of the funds.

120. Outside of the process before the ICC, in 1974 the United States brought an action in trespass in the federal courts against the Danns, in relation to grazing that the Danns had undertaken without a permit in the Northeast corner of Nevada. In response to the action, the Danns argued that the land had been in their possession and the possession of their ancestors since time immemorial and that their aboriginal title in the property precluded the State from requiring grazing permits.

121. The U.S. District Court rejected the Danns' argument, on the basis that the Danns' aboriginal title in the property had been extinguished by the collateral claims process before the ICC and that the United States had acquired all twenty-two million acres of Western Shoshone land through the estoppel effect of the ICC's 1962 judgment. On appeal, the Ninth Circuit Court of Appeals reversed the District Court decision and remanded the matter back, on the basis that the extinguishment issue had not been litigated or decided in the ICC proceedings. On remand, the District Court held in 1980 that aboriginal title in the land in issue was extinguished when the final ICC award was certified for payment, and on further appeal the Ninth Circuit in a 1983 judgment once again reversed the District Court, reiterating its previous holding that the Dann band was not estopped from raising aboriginal title as a defense because the issue of extinguishment of title had not actually been litigated before the ICC. Moreover, the Court held that the title of the Western Shoshone had never been extinguished by prior application of public land laws or by the creation of a Western Shoshone reservation because in the Court's view these actions did not evince a clear indication of congressional intent to extinguish aboriginal title.

122. On further review by the U.S. Supreme Court, the Ninth Circuit decision was reversed, on the basis that "payment" of the award could be taken to have occurred when the monies were appropriated to the U.S. Treasury and thus to have discharged all claims and demands involving the Western Shoshone land claim. On this basis, the U.S. Supreme Court determined that the Danns were estopped from raising aboriginal title as a defense to the U.S. trespass action.

123. The matter was once again remanded to the District Court and on further appeal to the Ninth Circuit, it was finally decided by that Court that the U.S. Supreme Court's finding of preclusion was decisive on precluding the issue of aboriginal title collectively and accordingly accepted the ICC's determination of July 1, 1872 as the appropriate date for the extinguishment of Western Shoshone land rights. In reaching this conclusion, the Court stated:

**It is true that the taking was not actually litigated...**but the payment of the claim award establishes conclusively that a taking occurred. From the claims litigation, we can only conclude that the taking occurred in the later part of the nineteenth century. [emphasis added] . . . .

**D. Application of International Human Rights Norms and Principles in the Circumstances of Mary and Carrie Dann**

133. Among the provisions of the American Declaration which are alleged to have been violated by the State in the present case are Articles II, XVIII and XXIII, which read as follows:

Article II. Right to equality before the law

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

Article XVIII – Right to a fair trial

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XXIII – Right to property

Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

134. As noted above, the Commission has accepted based upon the observations of the parties that the Western Shoshone are an indigenous people who are acknowledged as historically having had ownership, use and occupation of the Western Shoshone ancestral lands. In addition, the Dann sisters are accepted as members of the Western Shoshone people. Accordingly, their claims in the present case, relating as they do to their potential interests in the Western Shoshone ancestral lands, should be determined in the context of the foregoing principles of indigenous human rights law.

135. In the context of the procedural history in the Dann case outlined above, two factual issues of particular significance to the issues

raised in this case appear to be the subject of conflicting submissions by the parties and require determination by the Commission based upon the record before it.

136. First, the Petitioners contend that the Danns did not authorize or participate in the ICC claim submitted by the Temoak Band before the ICC, and that when they and several other bands subsequently sought to intervene in the proceedings, they were unsuccessful. The State submits conversely that throughout the proceedings before the ICC the Western Shoshone were kept fully apprised through regular meetings held with members of the tribe. The only such meetings specifically referred to by the State, however, were meetings convened by the attorney for the Temoak Band in 1965, 14 years after the ICC proceedings commenced and 3 years after the ICC issued its extinguishment finding. In the absence of evidence to the contrary the Commission accepts that the Danns did not play an full or effective role in retaining, authorizing or instructing the Western Shoshone claimants in the ICC process.

137. In addition, there appears to be some conflict between the parties' position as to whether the persistence of Western Shoshone title to all of part of its ancestral territory was the subject of litigation and determination by the ICC. Based upon the record before it, the Commission finds that the determination as to whether and to what extent Western Shoshone title may have been extinguished was not based upon a judicial evaluation of pertinent evidence, but rather was based upon apparently arbitrary stipulations as between the U.S. government and the Temoak Band regarding the extent and timing of the loss of indigenous title to the entirety of the Western Shoshone ancestral lands. In reaching this conclusion, the Commission has considered in particular the 1983 judgment of the U.S. Court of Appeals for the Ninth Circuit in which that Court concluded on the evidence available that Western Shoshone title had not been extinguished. In this respect, the Ninth Circuit was the only judicial body to review the substance of the ICC's finding of "extinguishment" of Western Shoshone title, but its findings were reversed by the U.S. Supreme Court without consideration of the merits of the Ninth Circuit's findings on this point. This effectively left the issue of title to Western Shoshone lands without definitive substantive adjudication by the U.S. courts.

138. In evaluating the Petitioners' claims in light of these evidentiary findings, the Commission first wishes to expressly recognize and acknowledge that the State, through the development and implementation of the Indian Claims Commission process, has taken

significant measures to recognize and account for the historic deprivations suffered by indigenous communities living within the United States and commends the State for this initiative. As both the Petitioners and the State have recognized, this process provided a more efficient solution to the sovereign immunity bar to Indian land claims under U.S. law and extended to indigenous communities certain benefits relating to claims to their ancestral lands that were not available to other citizens, such as extended limitation periods for claims.

139. Upon evaluating these processes in the facts as disclosed by the record in this case, however, the Commission concludes that these processes were not sufficient to comply with contemporary international human rights norms, principles and standards that govern the determination of indigenous property interests.

140. The Commission first considers that Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the case of the Danns, however, the record indicates that the land claim issue was pursued by one band of the Western Shoshone people which no apparent mandate from the other Western Shoshone bands or members. There is also no evidence on the record that appropriate consultations were held within the Western Shoshone at the time that certain significant determinations were made. This includes in particular the ICC's finding that the entirety of the Western Shoshone interest in their ancestral lands, which interests affect the Danns, was extinguished at some point in the past.

141. To the contrary, despite the fact that it became clear at the time of the Danns' request to intervene that the collective interest in the Western Shoshone territory may not have been properly served through the proceedings pursued by the Temoak Band, the courts ultimately did not take measures to address the substance of these objections but rather dismissed them based upon the expediency of the ICC processes. In the Commission's opinion and in the context of the present case, this was not sufficient in order for the State to fulfill its particular obligation to ensure that the status of the Western Shoshone traditional lands was determined

through a process of informed and mutual consent on the part of the Western Shoshone people as a whole.

142. The insufficiency of this process was augmented by the fact that, on the evidence, the issue of extinguishment was not litigated before or determined by the ICC, in that the ICC did not conduct an independent review of historical and other evidence to determine as a matter of fact whether the Western Shoshone properly claimed title to all or some of their traditional lands. Rather, the ICC determination was based upon an agreement between the State and the purported Western Shoshone representatives as to the extent and timing of the extinguishment. In light of the contentions by the Danns that they have continued to occupy and use at least portions of the Western Shoshone ancestral lands, and in light of the findings by the Ninth Circuit Court of Appeals as to the merits of the ICC's extinguishment finding, it cannot be said that the Danns' claims to property rights in the Western Shoshone ancestral lands were determined through an effective and fair process in compliance with the norms and principles under Articles XVIII and XXIII of the American Declaration.

143. Further, the Commission concludes that to the extent the State has asserted as against the Danns title in the property in issue based upon the ICC proceedings, the Danns have not been afforded their right to equal protection of the law under Article II of the American Declaration. The notion of equality before the law set forth in the Declaration relates to the application of substantive rights and to the protection to be given to them in the case of acts by the State or others. Further, Article II, while not prohibiting all distinctions in treatment in the enjoyment of protected rights and freedoms, requires at base that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought.

144. The record before the Commission indicates that under prevailing common law in the United States, including the Fifth Amendment to the U.S. Constitution, the taking of property by the government ordinarily requires a valid public purpose and the entitlement of owners to notice, just compensation, and judicial review. In the present case, however, the Commission cannot find that the same prerequisites have been extended to the Danns in regard to the determination of their property claims to the Western Shoshone ancestral lands, and no proper justification for the distinction in their treatment has

been established by the State. In particular, as concluded above, any property rights that the Danns may have asserted to the Western Shoshone ancestral lands were held by the ICC to have been “extinguished” through proceedings in which the Danns were not effectively represented and where the circumstances of this alleged extinguishment were never actually litigated nor the merits of the finding finally reviewed by the courts. And while compensation for this extinguishment was awarded by the ICC, the value of compensation was calculated based upon an average extinguishment date that does not on the record appear to bear any relevant connection to the issue of whether and to what extent all or part of Western Shoshone title in their traditional lands, including that of the Danns, may no longer subsist. Further, the Commission understands that the amount of compensation awarded for the alleged encroachment upon Western Shoshone ancestral lands did not include an award of interest from the date of the alleged extinguishment to the date of the ICC decision, thus leaving the Western Shoshone uncompensated for the cost of the alleged taking of their property during this period.

145. All of these circumstances suggest that the Danns have not been afforded equal treatment under the law respecting the determination of their property interests in the Western Shoshone ancestral lands, contrary to Article II of the Declaration. While the State has suggested that the extinguishment of Western Shoshone title was justified by the need to encourage settlement and agricultural developments in the western United States, the Commission does not consider that this can justify the broad manner in which the State has purported to extinguish indigenous claims, including those of the Danns, in the entirety of the Western Shoshone territory. In the Commission’s view, this is particularly apparent in light of evidence that the Danns and other Western Shoshone have at least until recently continued to occupy and use regions of the territory that the State now claims as its own.

## V. CONCLUSIONS

146. The Commission wishes to emphasize that it is not for this tribunal in the circumstances of the present case to determine whether and to what extent the Danns may properly claim a subsisting right to property in the Western Shoshone ancestral lands. This issue involves complex issues of law and fact that are more appropriately left to the State for determination through those legal processes it may consider suitable for that purpose. These processes must, however, conform with the norms and principles under the American Declaration applicable to the

determination of indigenous property rights as elucidated in this report. This requires in particular that the Danns be afforded resort to the courts for the protection of their property rights, in conditions of equality and in a manner that considers both the collective and individual nature of the property rights that the Danns may claim in the Western Shoshone ancestral lands. The process must also allow for the Danns' full and informed participation in the determination of their claims to property rights in the Western Shoshone ancestral lands.

147. Based upon the foregoing analysis, the Commission hereby concludes that the State has failed to ensure the Danns' right to property under conditions of equality contrary to Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands.

### **III. North American Free Trade Agreement – Arbitration Pursuant to Chapter 11**

Several corporations have raised claims under Chapter 11 of the North American Free Trade Agreement [NAFTA] regarding the impact of environmental regulations on their businesses. Article 1110 of NAFTA protects investors of one state party from direct or indirect expropriation by any of the other state parties. The following is an excerpt from the resolution of a claim brought by the Methanex corporation alleging that the California ban on the chemical MTBE is "tantamount" to an expropriation of its property.

#### METHANEX CORPORATION V. UNITED STATES OF AMERICA

Final Award of Tribunal on Jurisdiction and Merits (2005)

[footnotes omitted]

#### **PART IV - CHAPTER D ARTICLE 1110 NAFTA**

....

##### **(2) METHANEX'S CASE ON BREACH OF ARTICLE 1110 NAFTA**

2. In summary, Methanex claims that a substantial portion of its investments, including its share of the California and wider US oxygenate markets, was taken by a discriminatory measure and handed to the US domestic ethanol industry. It submits that this was "tantamount . . . to expropriation" within Article 1110. It also submits that the various exceptions listed in Article 1110 have been met, i.e. the US measures were not intended to serve a public purpose, were not in accordance with due process of law and Article 1105, and that no compensation has been paid.

3. In its Second Amended Statement of Claim, Methanex's argument under Article 1110 is again commendably concise. Indeed, after reproducing the pertinent parts of Article 1110, Methanex makes its case that the California ban was expropriatory in four short paragraphs, which merit citation:

"317. . . . First, a substantial portion of Methanex's investments, including its share of the California and larger U.S. oxygenate market were taken by facially discriminatory measures and handed over to the domestic ethanol industry. Such a taking is at a minimum "tantamount . . . to expropriation" under the plain language of Article 1110.

318. Second, these measures were not intended to serve a "public purpose" as is required by Article 1110(a), but rather were primarily a mechanism for seizing Methanex's, Methanex U.S.' and Methanex Fortier's share of the California oxygenate market and handing it directly to the domestic ethanol industry.

319. Third, the discriminatory nature of the measures fail to meet the requirement of Article 1110 (c) that they comply with "due process of law and Article 1105(1)."

320. Finally, Methanex has not been compensated for the harms it has suffered as a result of these measures."

By its Amended Statement of Defense, the USA responded that Methanex had failed to establish in detail what investments had been taken and that allegations that the US measures, which it contends were not expropriatory, negatively impacted upon its investments fail to establish a taking. In its Reply, Methanex argued that intentionally discriminatory regulations are not exempt from liability for expropriation and that, in this case, California's ban did expropriate its investments. In its Rejoinder, the USA contended that Methanex has never proved that its assets were expropriated and argued that the ban was not expropriatory.

4. At the main hearing in June 2004, Methanex also relied on the definition of expropriation under NAFTA decided by the tribunal in the *Metalclad* case, to the effect that: "*... expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host 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 of reasonably-to-be-expected*

*economic benefit of property even if not necessarily to the obvious benefit of the Host state."*

5. Methanex claims that California took Methanex's share of the California market and gave this to the ethanol industry, which amounted to a significant deprivation. Methanex also relies on the definition of investment in Article 1139(g) NAFTA, which includes a reference to intangible property, to support its contention that customer base, market share and goodwill may constitute investments which are the subject of an expropriation claim. In addition, Methanex relies, inter alia, on the NAFTA awards in the *Pope & Talbot* and *S.D. Myers* cases as instances where NAFTA tribunals have recognised that market share is an investment capable of supporting an expropriation claim under Article 1110 NAFTA.

### **(3) THE TRIBUNAL'S DECISION REGARDING ARTICLE 1110 NAFTA**

6. In this case, there is no expropriation decree or a creeping expropriation. Nor was there a "taking" in the sense of any property of Methanex being seized and transferred, in a single or a series of actions, to California or its designees. Insofar as Methanex can make a claim under Article 1110(1), it is not a claim for nationalization or expropriation, simpliciter, but for "measures tantamount to expropriation". Thus, Methanex must establish that the California ban was tantamount to expropriation, within the meaning of Article 1110 NAFTA.

7. In the Tribunal's view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

8. As the arbitration tribunal decided in *Revere Copper & Brass, Inc. v. OPIC* :

"We regard these principles as particularly applicable where the question is, as here, whether actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with

undertakings and assurances given in good faith to such aliens as an inducement to their making the investments affected by the action.”

And in *Waste Management v. Mexico*, the tribunal stated, with respect to the “minimum standard of fair and equitable treatment”, that “in applying this standard it is relevant that the treatment is in breach of *representations made by the host State which were reasonably relied upon by the claimant*”.

9. No such commitments were given to Methanex. Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process. Methanex appreciated that the process of regulation in the United States involved wide participation of industry groups, non-governmental organizations, academics and other individuals, many of these actors deploying lobbyists. Methanex itself deployed lobbyists. Mr Wright, Methanex’s witness, described himself as the government relations officer of the company.

10. Methanex entered the United States market aware of and actively participating in this process. It did not enter the United States market because of special representations made to it. Hence this case is not like *Revere*, where specific commitments respecting restraints on certain future regulatory actions were made to induce investors to enter a market and then those commitments were not honoured.

11. Methanex has alleged that the process by which the California ban was enacted was “corrupted” by contributions from ADM to then-Lieutenant Governor, later Governor Davis. But, as noted in Chapter III B, political contributions to candidates for office in the United States are not prohibited and there is no indication in the record, still less any allegation from Methanex, that ADM’s contributions were in violation of the law or that Mr Davis behaved in violation of the law in this regard.

12. As Governor, Mr Davis followed the protocol established in California Senate Bill 521; there is no indication in the record that he varied from it in any way. Indeed, on the evidence adduced before this Tribunal, it would have been extraordinary if he had made a different decision. The terms of

Governor Davis's Executive Order and subsequent action by the state of California are inconsistent with Methanex's contention that the California ban was designed to transfer the gasoline oxygenate market to ethanol.

13. As against the public record, Methanex has developed a conspiratorial thesis, principally based on the general character of some of ADM's principal officers, a statement purportedly made by Senator Burton (which is supported only by unreliable hearsay), and an allegedly "secret" dinner which ADM hosted for Mr Davis. This thesis has already been considered in Chapter III B above. The first two bases do not lead the Tribunal to draw any appropriate, relevant conclusions, and Methanex has been unable to prove its suspicions about the dinner, an event which looms centrally in its thesis.

14. Methanex acknowledges that none of its submissions is conclusive and that its own conclusions are perforce inferential. Here, as so often elsewhere in its case, it urges the Tribunal to resort to inference. Inference is an appropriate mode of decision in circumstances in which firmer evidence is unavailable. But in the present case, where the time-line of California Senate legislation, scientific study, public hearing, executive order and initiatives to secure an oxygenate waiver are all objectively confirmed, the argument for resorting to inference as a way of reaching a conclusion inconsistent with the objective evidence is untenable. The behaviour of the California Government as a whole is inconsistent with Methanex's hypothesis.

15. For reasons elaborated here and earlier in this Award, the Tribunal concludes that the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process. Hence, Methanex's central claim under Article 1110(1) of expropriation under one of the three forms of action in that provision fails. From the standpoint of international law, the California ban was a lawful regulation and not an expropriation.

16. Nor has Methanex established that the California ban manifested any of the features associated with expropriation. In *Feldman v. Mexico*, the tribunal held that:

"... the regulatory action has not deprived the Claimant of control of his company, . . . interfered directly in the internal operations . . . or displaced the Claimant as the controlling shareholder. The claimant is free to pursue other continuing lines of business activity . . . . Of course, he was effectively precluded from exporting cigarettes . . . . However, this does not amount to Claimant's deprivation of control of his company."

Methanex claims that it lost customer base, goodwill and market share. The USA contends that none of these qualify as investments under Article 1139 and hence are not compensable.

17. The USA is correct that Article 1139 does not mention the items claimed by Methanex. But in *Pope & Talbot Inc. v. Canada*, the tribunal held that “the Investor’s access to the U.S. market is a property interest subject to protection under Article 1110”. Certainly, the restrictive notion of property as a material “thing” is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing. In the view of the Tribunal, items such as goodwill and market share may, as Professor White wrote, “constitute [] an element of the value of an enterprise and as such may have been covered by some of the compensation payments”. Hence in a comprehensive taking, these items may figure in valuation. But it is difficult to see how they might stand alone, in a case like the one before the Tribunal.

18. For all the above reasons, the Tribunal decides that Methanex’s claim under Article 1110 NAFTA fails.

### DISCUSSION QUESTIONS

1. How do these three conceptions of expropriation compare with the takings cases that you have studied? What are the main similarities and differences?
2. According to the 9th Circuit opinion in *Altmann*, what is the standard for a valid taking under international law? How does this standard compare with the one for a valid taking under U.S. law?
3. How does the Inter-American Commission report interweave regional international law with U.S. domestic takings jurisprudence? To what extent do the *Danns* have a case under U.S. domestic takings jurisprudence based on the Commission’s reasoning? What do you think the likelihood of success would be?
4. Compare the argument that Methanex makes in the NAFTA Chapter 11 arbitration with the jurisprudence that you have studied on regulatory takings. Would a U.S. domestic law takings analysis approach the claim of expropriation through the MTBE regulation in a similar manner?

5. Each of these opinions occurs in the context of a different type of decision-maker. To what extent does the approach taken in each setting reflect differences among courts, commissions, and arbitral tribunals? How binding is each of these decisions? If you were representing a petitioner or respondent in an expropriation case and had a choice of forum, which type of tribunal would you prefer?
6. To what extent are decisions by international tribunals useful as persuasive authority for a court approaching a novel takings issue? Has reading these cases influenced your perspective on how U.S. courts should be addressing expropriation?
7. In light of these cases, when should governmental behavior be considered an invalid taking? What should be the range of appropriate remedies and compensation for valid and invalid takings?

### **BREAK-OUT EXERCISE**

Break the class down into groups of three students. Then, assign the students the following hypothetical situation.

You are working in the Office of the Legal Advisor in the U.S. Department of State. The Legal Advisor has just been confronted with a difficult situation involving expropriation. To assist with a strategy to engage this situation, the Legal Advisor has asked you to compare the U.S. takings jurisprudence with other approaches to addressing expropriation. Based on this comparison, what should be viewed as constituting expropriation? When should governmental takings be considered valid?