Indirect Expropriation: Conceptual Realignments?

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At a time when national policies concerning international economic relations are increasingly characterized by concepts aiming at structural adjustment, good governance and export-led growth, and when many countries find themselves in fierce competition for foreign direct investment, the era of straightforward formal expropriations of alien property seems to have come to an end. At the same time, however, the need for protecting certain public goods, be it in the areas of social cohesion or environmental protection, remains on the agenda of most, if not all, political actors. Against this backdrop, it does not seem unreasonable to assume that pressure on national governments – open or disguised – to protect domestic industries, the environment, or public health may encourage governments to regulate foreign investment, in itself or as part of the general economy, so drastically that foreign investors may be inclined to raise claims of indirect expropriation. The precise definition of what constitutes an expropriation is thus likely to continue to engender legal debates and disputes. This is even more so considering the growing number of bilateral investment treaties (“BITs”).

Before turning to takings clauses in the modern treaty context and relevant customary law, it will be noted that modern BITs typically include general clauses such as “fair and equitable treatment”, “full and constant protection” and “national treatment”. While highly relevant and possibly overlapping in the context of indirect expropriation, the scope and precise substance of these broad rules in the very specific context of protection of foreign investments is rather difficult to clarify and is likely to evolve in a casuistic manner. During the mid-1980s, the relevant issues were said to be highly uncertain.¹ As a number of pronouncements by arbitral tribunals have since been added to the stock of relevant cases, one might have hoped for a greater sense of clarity.² Unfortunately, such clarity does not appear to have emerged.

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² It is widely assumed, both in the business and legal community, that the international takings doctrine is in disarray, that the jurisprudence is inconsistent and that results are rarely predictable. The notion is notoriously underlined, for instance, by the impressive
One prominent aspect of questions of indirect expropriation is the role, if any, that the purpose and circumstances of a particular governmental action can play in the legal assessment of whether expropriation has occurred. At the outset, it is useful in this context to point to the various efforts that have been made in the past by prominent institutions and authors to modify or restate the rules of international law as they have evolved. These efforts can and should serve as a starting point in any discussion of whether or not an expropriation can be said to have occurred. As will be seen, however, these statements do not give a clear answer either. Some of the most representative of these attempts deserve to be quoted in full length inasmuch as they reflect past jurisprudence and scholarly opinion.

As early as 1961, the so-called Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, drafted by Professors Sohn and Baxter, assumed a taking to have occurred in the case of any “unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.”

Prior to this Draft, the codification of the relevant principles in the First Protocol of the European Convention on Human Rights in 1952 was based upon three distinct broad principles:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

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3 See also Dolzer, Indirect Expropriations: New Developments? 11 NYU Env. L. J. p. 64 (2002).
4 Article 10, para. 3 (a); the Draft Convention is reproduced in 55 AJIL pp. 545, 553 (1961).
5 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Mar. 20, 1952, art. 1, 213 U.N.T.S. 262, 262. The European Court of Human Rights has interpreted this text in a number of decisions. The basic approach was laid down by the Court in Sporrong and Lönnroth (Judgement of 23 Sept.