

Indirect Expropriation in International Law : Approaches to Reconcile Contemporary Conflicting Interests of Foreign Investors and Host States

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(国際法における間接収用：外国投資家と投資受入国の間における現代的な対立利益を調整するためのアプローチ)

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論 文 内 容 の 要 旨

Expropriation is a major and enduring topic in foreign investment law. It seeks to address conflict between the interest of foreign investors to protect the financial value of their investments and the right of host States to regulate domestic affairs. Expropriation can occur direct and indirectly. Expropriation in the foreign investment context now occurs almost exclusively in the form of indirect expropriation. International investment law has developed to establish a clear definition and identification standard for direct expropriation, yet the determination of indirect expropriation remains contentious and a conundrum, especially in circumstances where States' regulatory measures are enacted for public welfare objectives.

This thesis examines the vexing problem of determining indirect expropriation in the context of modern expectations that States regulate across an array of public interest topics, including social, environmental, safety but also extending to cultural protection and....It seeks to identify the most appropriate approach for identifying indirect expropriation and enable clear demarcation between State measures that amount to impermissible indirect expropriation and those that are non-compensable because they legitimately regulate matters of public interest.

The thesis first examines the definition of indirect expropriation in selected legal instruments, international investment agreements ("IIAs") and arbitral awards. It then considers the central problem of how to determine whether a host State's action triggers an indirect expropriation claim for compensation or constitute a non-compensable regulatory measure. Two approaches for identifying indirect expropriation in IIAs and arbitral practice are examined. It is argued that the dominant one-dimensional "sole effect" approach is no longer appropriate for application in modern indirect expropriation disputes. Examination is then given to the multi-dimensional "police powers" approach which appears in modern IIAs and arbitral practice.

However, it is argued that the "police powers" approach warrants further improvement in terms of clarifying the requisite identification elements and delimiting the boundaries of non-compensable State's regulatory measures. It is submitted that the principle of proportionality be incorporated in the identifying process to achieve a fair and impartial result.

It is now commonly asserted that a host State's non-discriminatory measure that is designed and applied for the protection of legitimate public welfare objectives, such as "public health, safety and environment", does not constitute indirect expropriation. Examination is then conducted with regards to whether the justifiable exceptional grounds can be extended to cover "public morals" and "cultural diversity", as foreshadowed by the European Union. The thesis presents a revised standard for identifying indirect expropriation which can be included in IIAs. It aims to balance foreign investor and host State interests in the context of modern regulation expectations.