New Developments in Indirect Expropriation

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Traditional Focus of Expropriation Law

A) Legality of expropriation
• Property may not be expropriated except for
  – a public purpose
  – on a non-discriminatory basis
  – in accordance with due process of law and
  – against compensation.

B) Level of compensation
• Hull formula: “no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore” or
• merely “appropriate” compensation UN GA Res 1803 (XVII) 1962 and 3171 (XXVIII) 1973
Legality of Expropriations

• “A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as “expropriation”) except:
  – a) for a purpose which is in the public interest,
  – b) on a non-discriminatory basis,
  – c) in accordance with due process of law, and
  – d) accompanied by payment of prompt, adequate and effective compensation.”

• 1998 Draft MAI = typical BIT provision
Arbitral Practice

• The expropriation “was not for a *bona fide* public purpose, was discriminatory and was not accompanied by an offer of appropriate compensation.”

• *Liberian Eastern Timber Corporation v Liberia*, ICSID Case No ARB/83/2, Award 1986.
Arbitral Practice

• “In the Tribunal’s opinion, a treaty requirement for “public interest” requires some genuine interest of the public. If mere reference to “public interest” can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.”

• *ADC v. Hungary*, ICSID Award 2006, para. 432.
Expropriation – Types

- Expropriation = taking against compensation
- Nationalization = large-scale takings
- Confiscation = taking without compensation
- Creeping expropriation = constructive taking = indirect expropriation
Prohibition of Expropriation

- No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except [...] 
- Article 1110 NAFTA
Prohibition of Expropriation

• 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment
• IV EXPROPRIATION AND UNILATERAL ALTERATIONS OR TERMINATION OF CONTRACTS
• “1. A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except …”
Creeping expropriation

• “This type of expropriation does not necessarily take place gradually or stealthily — the term “creeping” refers only to a type of indirect expropriation — and may be carried out through a single action, through a series of actions in a short period of time or through simultaneous actions. Therefore, a difference should be made between creeping expropriation and de facto expropriation, although they are usually included within the broader concept of “indirect expropriation” and although both expropriation methods may take place by means of a broad number of actions that have to be examined on a case-by-case basis to conclude if one of such expropriation methods has taken place.”

• Tecmed v. Mexico, ICSID Add. Facility 2003, para 114.
Sole effects doctrine

“While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.”

Intensity of interference

• “… there must be some form of deprivation of the investor in the control of the investment, the management of day-to-day-operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part.”

• *PSEG v. Turkey*, ICSID 2007, para. 278.
Intensity of interference

• “The Tribunal is not persuaded that any such extreme forms of interference took place in this case. Many things were wrongly handled, but none could be considered to amount to regulatory expropriation. The rights that were affected one way or the other, including the Claimants’ legitimate expectation, have indeed resulted in a finding of breach of the standard of fair and equitable treatment, yet none of the measures adopted envisaged the taking of property, which is still the essence of expropriation, even indirect expropriation.”

• *PSEG v. Turkey*, ICSID 2007, para. 279.
Irrelevance of purposes

“Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.”

Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, Award, 17 February 2000
Actual Findings of Expropriation

• Disproportionate tax increases
  – *In the Matter of Revere Copper v. OPIC*, Award 1978

• Arrest and expulsion of an investor or other persons who play key roles in the investment
  – *Biloune and others v. Ghana*, UNCITRAL *ad hoc* Tribunal, Award 1989
  – *Benvenuti & Bonfant v. Congo*, ICSID Case No. ARB/77/2, Award 1980
Actual Findings of Expropriation

• Replacement of the owner’s management by government imposed managers

• Revocation of a free zone permit
  – *Goetz and Others v. Burundi*, ICSID Award, 1998
  – *Middle East Cement Shipping v. Egypt*, ICSID Award, 2002
Actual Findings of Expropriation

• Revocation of an operating license

• Denial of a construction permit contrary to prior assurances
  – *Metalclad v. Mexico*, ICSID Award, 2000
Regulatory Action or Regulatory Expropriation

• “[...] international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered “permissible” and “commonly accepted” as falling within the police or regulatory power of States and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.”

• *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL Partial Award, 2006, para. 263
Methanex and Saluka approach

“[…] 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.”

Methanex Corporation v. United States of America, NAFTA Arbitral Tribunal, Final Award, 2005, IV D para.7.
“It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.”

*Saluka*, para. 255.
“[…] the Californian ban was made for a
- public purpose, was
- non-discriminatory, and was accomplished by
- due process, […]
from the standpoint of international law, it was a lawful regulation and not an expropriation.”

*Methanex*, IV D para. 15.
The Result

Does the new case-law provide a useful reaffirmation of regulatory powers

or

does it effectively terminate the protection against indirect expropriation?