Investor-state dispute settlement and its impact on International Investment Law

OC - (ILA-14166) - JUDICIAL EXPROPRIATIONS IN INTERNATIONAL INVESTMENT LAW – A TALE OF AMBIGUOUS TREATIES AND ASSERTIVE TRIBUNALS

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Abstract

Judicial Expropriations in International Investment law – A Tale of Ambiguous Treaties and Assertive Tribunals

A decade ago, judicial expropriations transitioned from a rough start in investment arbitration as 'phenomena' pleaded by over-creative investors, to full-fledged violations of investment protection standards recognized by a variety of arbitration tribunals. The impact of investor-state dispute settlement on the development of this field can hardly be understated.

This progress in clarifying and recognizing the concept of judicial expropriations is not only owed to assertive investment tribunals. After all, the investment protection standards they seek to enforce are derived from investment treaties, which – due to their equal application of protection standards to all government branches as organs of the contracting party – fail to provide specific guidelines with respect to expropriations effected by national courts. In the past, the vast majority of decisions holding states liable for mistreating foreign property arose out of measures taken by the legislative or executive branch. However, with an increasing number of investors claiming to have been expropriated by a state's judiciary, it was left to arbitration tribunals to clarify legal guidelines for a expropriatory acts of the judiciary, which are seemingly not excluded by the general treaty language, but have also not received much judicial attention otherwise.

The structural and regulatory differences under which the distinct branches operate may not be sufficiently accommodated by the universally formulated protection standards. In the long-standing BIT tradition, the legality of a taking has usually been measured by four factors, one of which is the payment of adequate compensation. Although this criterion seemingly applies to all state organs, their direct application appears rather difficult when it comes to expropriation by courts: Are we to measure the lawfulness of a judicial expropriation by the compensation offered? This would lead to the paradox of requiring courts to compensate for judgments that were intended to cure a legal imbalance in their own right.

There are at least 16 investment arbitration awards explicitly dealing with claims of judicial expropriations, and this paper aims to discuss their role in elevating judicial expropriations from a theoretic notion to a judicially clarified legal standard. In doing so, the paper will commence its discussion of awards from the landmark decision in Saipem v. Bangladesh as the founding stone of judicial expropriations in investment law, and move on to subsequent tribunals confirming its finding. It will become evident that while some of these tribunals have done so without much discussion or thought, others, such as Tatneft v. Ukraine or Eli Lilly v. Canada, have further developed the concept by discussing elements of the expropriation test in detail. At the same time, however, caution is warranted. There seems to be considerable confusion as to the requirements for a well-founded claim of judicial expropriation. The paper will discuss, for instance, the difficult question whether the unlawfulness of a judicial expropriation can only be derived from a denial of justice in the classic sense, or whether any type of procedural or substantive violation of international law may incur the illegality of a taking. This will in turn have consequences for whether the 'exhaustion of local remedies' rule, which forms a substantive requirement to a denial of justice, will be applicable to claims of judicial expropriations.

Regardless of the still existing confusion, this paper will outline the important contribution of ISDS to the definition and application of a standard on judicial expropriations, making the judicial 'phenomenon' a legitimate claim in investment law.

Palavras-chave : expropriation, national courts, investment arbitration