Indirect Expropriation in International Law

Sebastián López Escarcena
Lecturer in International Law, Pontificia Universidad Católica de Chile

LEUVEN GLOBAL GOVERNANCE

Edward Elgar
Cheltenham, UK • Northampton, MA, USA
Indirect expropriation in international law

4.1.1 Defining property and expropriation 85
4.1.2 Other measures affecting property rights 87
4.2 The problem of indirect takings 90
4.2.1 Constitutive acts 91
4.2.2 Claims that were rejected 93
4.3 Conditions of legality and their consequence 95
4.3.1 The effect or impact of the measure 96
4.3.2 Compensation and its standard 99
4.4 Conclusion 102

5. Bilateral treaties and international awards 112
5.1 FCN’s failure, BIT’s success 113
5.1.1 Ad hoc investment treaties 114
5.1.2 Lawful takings under BITs 117
5.2 Aiming at the case-law 119
5.2.1 The expropriation of investments 120
5.2.2 Early claims before arbitral panels 123
5.3 The question of intent 125
5.3.1 Exceptions to an approach 126
5.3.2 Conforming to a trend? 129
5.4 Conclusion 133

6. Takings in multilateral treaties 147
6.1 Doctrine and soft-law 148
6.1.1 First attempts to address expropriation 149
6.1.2 Guidelines for a lack of agreement 153
6.2 Investment chapters of EIAs and the fall of MAI 157
6.2.1 NAFTA and other plurilateral treaties 158
6.2.2 A good idea wrongly executed 162
6.3 The case-law of FTAs and ECT 165
6.3.1 Early NAFTA awards 165
6.3.2 In a current state of flux 170
6.4 Conclusion 173

7. The applicable standard 184
7.1 A restless jurisprudence 185
7.1.1 Replacing the minimum for a maximum 186
7.1.2 GAL theory and the proportionality test 190
7.2 Explaining an approach 195
7.2.1 On public purpose 196
7.2.2 Substantial and permanent deprivation 200
## Contents

7.3 Investment treaties and the rule of law 203  
7.3.1 Aliens under international law 205  
7.3.2 Expectations and governance 208  
7.4 Conclusion 211  

8. Conclusion 225  

**Bibliography** 229  
**Index** 249