9 Extrinsic the illegality requirement from judicial expropriation

Martin Jarrett

9.1 The recurring problem of the international reviewability of judicial conduct

The question of the international reviewability of judicial conduct is an old one. During the 1930 Hague Codification Conference, the Egyptian delegate, Abdel Hamid Badaoui Pacha, commented:

But is the judicial power under any international obligation whatever, apart from the obligation not to commit a denial of justice? In my opinion there is no other obligation. The obligation to ensure an effective administration of justice or the prohibition of a denial of justice is an obligation which is essentially international in character. It is the only obligation incumbent upon the judicial power.

The pushback against this restrictive view of international responsibility for judicial conduct was immediate. Other delegates emphasized that as judicial organs were state organs, they were as capable as any other organ of breaching international obligations. This is the expansive view of international responsibility for

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2 For an overview of the history, see Jan Paulsson, Denial of Justice in International Law 2–3 (2005).

3 Freeman sources the origins of the debate to the 1930 Hague Codification Conference, see Alwyn Freeman, International Responsibility of States for Denial of Justice 40–41 (1970).


5 See id. 1530 (British delegation), 1532 (Italian delegation), 1538 (French delegation), 1539–1540 (Estonian delegation), and 1541 (Spanish delegation).

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judicial conduct. And whether it prevails over the restrictive view is more than a
dothetical battle. For if the expansive view prevails, then investor rights expand,
with a corresponding contraction in the regulatory competence of domestic
courts.

9.1.1 The significance of the problem in international investment law

The controversy over the doctrinal soundness of the restrictive view or expansive
view could have become a footnote in international law. The rise of international
vestment law ensured that it would not meet this fate. As domestic courts take
various decisions affecting the value of investments, the controversy has inevita-
larly arisen in multiple investor-state arbitrations, most particularly as regards the
question of whether judicial conduct can be expropriatory. At least formally, the expansive view has attracted the most subscriptions by arbitral tribunals. But it does not enjoy universal support. And, in the context of a broader movement attempting to curtail the ambit of investor rights in international investment law, the restrictive view has gained a new lease of life. In the recent investor-state arbitrations where judicial expropriation has been alleged,

6 See Jan Paulsson, Denial of Justice in International Law 2-3 (2005).
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expropriation on proof of denial of justice, thereby rendering the distinction between them mean-
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although no citations to arbitral awards were provided, see Johanne Cox, Expropriation in Invest-
ment Treaty Arbitration para. 9.02 (2019).
9 Staar Eiendom, EBO Invest and Rox Holding v. Republic of Latvia, ICSID Case No. ARB/16/38,
Award para. 513 (February 28, 2020); Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17,
Excerpts of the Award para. 707 (July 9, 2018); Eli Lilly and Company v. The Government of
Canada, UNCTRAL, ICSID Case No. UNCIT/14/2, Final Award para. 221 (March 16, 2017).

The arbitral tribunal explicitly qualified its comments on the international responsi-
bility of states’ judicial arms as obiter; Guranti Kazza LLP v. Turkmenistan, ICSID Case No.
ARB/10/20, Award para. 365 (December 19, 2016); Swistoon DOO Skopje v. The Former Yugo-
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A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award para. 702 (July 29, 2008);,
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the prosecutor, notwithstanding that such an action fell outside the applicable limitation period.19 Additionally, the restitution of the legal situation between the investor and the city of Kiev did not include a reimbursement of the sale prices to the investor, although the award indicates that the pursuit of these amounts remained open to it.20

Among other claims,21 the investor launched claims based on denial of justice and expropriation. None succeeded.22 Most interestingly for present purposes, the arbitral tribunal recognized the idea of judicial expropriation,23 but it severely curtailed its application when it, citing other arbitral tribunals, defined its substantive content as follows:24

In order to avoid a situation whereby any title annulment would constitute indirect expropriation or a measure tantamount to expropriation, it is therefore necessary to ascertain whether an additional element of procedural illegality or denial of justice was present. Only then may a judicial decision be qualified as a measure constituting or amounting to expropriation.

Notwithstanding how uncomfortable the arbitral tribunal felt about it,25 and coupled with the earlier finding of no denial of justice,26 this definition entailed the failure of the investor's claim based on judicial expropriation.27

9.1.2 Making the case for judicial expropriation

But this unsatisfactory28 decision was unnecessary. On the contrary, a finding of expropriation should have followed from these facts. To prove that conclusion, the first step is a reevaluation of the arbitral tribunal's conception of expropriation. This first step is completed in the second section below. Rather than containing the first step is a reevaluation of the arbitral tribunal's conception of expropriation,29 but it severely curtailed its application when it, citing other arbitral tribunals, defined its substantive content as follows:30

As noted above,31 the factor explaining the arbitral tribunal's decision in Krederi v. Ukraine was the inclusion of a "procedural illegality or denial of justice" legal element. This is a legal element evaluating the quality of conduct. A prime example of such a legal element is negligence. In the same way that negligence describes conduct as falling below a standard of care32 denial of justice describes judicial conduct that "shocks a sense of judicial propriety."33 With the inclusion of this legal element in the standard on expropriation, it means that judicial conduct itself must be wrongful before state liability can be accrued under this standard. Here lies the doctrinal error.34 For state liability to accrue under the standard on expropriation,35 there should be no qualitative evaluation of the relevant conduct, whether executive, legislative, or judicial.

9.2 The core of expropriation: causation

As noted above,36 the factor explaining the arbitral tribunal's decision in Krederi v. Ukraine was the inclusion of a "procedural illegality or denial of justice" legal element. This is a legal element evaluating the quality of conduct. A prime example of such a legal element is negligence. In the same way that negligence describes conduct as falling below a standard of care37 denial of justice describes judicial conduct that "shocks a sense of judicial propriety." With the inclusion of this legal element in the standard on expropriation, it means that judicial conduct itself must be wrongful before state liability can be accrued under this standard. Here lies the doctrinal error.38 For state liability to accrue under the standard on expropriation,39 there should be no qualitative evaluation of the relevant conduct, whether executive, legislative, or judicial.

9.2.1 Excluding legal elements evaluating the quality of state conduct from expropriation

This exclusion is apparently counter-intuitive. Looking at the usual formulation of the standard on expropriation in investment treaties, it is filled with legal elements become causative if it changes the law. That conclusion invites an examination of the meaning of judicially effected changes to the law. That examination is the business of Section 9.3 below. While the definition of judicially effected changes to the law limits the circumstances in which a finding of judicial expropriation can be made, there will be protests against this conception of judicial expropriation. The two most likely objections will be that this conception: (1) amounts to international substantive review of domestic judicial decisions; and (2) opens the litigation floodgates for investor claims to pour through. With the rebuke of these objections in Section 9.4, a defeasible, and doctrinally appealing, new conception of judicial expropriation is introduced into the jurisprudence.

29 See the end of Section 9.1.1.
32 Although as explained in Section 9.2.1, the defenses admissible to defend a breach of the rule on expropriation do evaluate state conduct and, via these defenses, a state might be relieved of any liability for its initial breach.
ARTICLE 7
Expropriation and Compensation

(1) Neither Contracting Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) the investments of investors of the other Contracting Party unless the expropriation is:

(a) for a public purpose;
(b) carried out on a non-discriminatory basis;
(c) in accordance with due process of law; and
(d) accompanied by payment of prompt, adequate and effective compensation

(4) Non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriation, except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith.

Properly deconstructed, these provisions, along with their brethren in other investment treaties, create three rules, which are:

Standard on Expropriation
Rule 1 – Rule on Expropriation
A state must not directly or indirectly cause:
(i) an investor’s loss of title over; or
(ii) the complete or substantial devaluation of an investment, within its territory, belonging to an investor of another contracting state.

Rule 2 – Lawful Direct Expropriation
(a) If a state breaches Rule 1 through a direct cause (“direct expropriation”), it is a partial defence if its breach was:
(i) for a public policy;
(ii) non-discriminatory;
(iii) accords with due process; and
(iv) accompanied by an offer to pay fair market value for the relevant investment.
(b) If a state successfully pleads the defence in Rule 2(a), the liability for its breach of Rule 1 is limited to the fair market value of the relevant investment before such breach.

Rule 3 – Police Powers Defence
If a state breaches Rule 1 through an indirect cause (“indirect expropriation”), it is a complete defence if its breach was:
(i) non-discriminatory;
(ii) for a legitimate public welfare objective;
(iii) proportionate.

Following this conception of the standard on expropriation, it comprises one liability-creating rule, devoid of any legal elements on the quality of the state conduct, and two defenses reducing and eliminating, respectively, any liability arising via a breach of this first rule. The legal elements evaluating the quality of the state conduct in question are located in these two defenses.

But merely because the legal elements can be distributed in this way does not mean that they should be distributed as so. The question of whether a legal element should find its way into a liability-creating rule or a defense ultimately hangs on whether it is a necessary ingredient for creating the minimum degree of harm that should attract legal consequences. The crime of sexual assault can aptly illustrate this theory. Simply formulated, the rule creating criminal liability for the core offense of sexual assault reads as follows:

Rule on Criminal Liability for Sexual Assault
A person must not have sex with another person without the consent that other person.

Out of this one rule, two other rules might be created:

Rules on Criminal Liability for Sexual Assault
Rule 1 – Criminal Liability for Sexual Assault
A person must not have sex with another person.

Rule 2 – Defence of Consent to Sex
If a person breaches Rule 1, then it is a complete defence if the other person consented to the relevant sexual activity.

34 Agreement for the Promotion and Protection of Investment between the Government of the Republic of Austria and the Government of the Kyrgyz Republic (signed: April 22, 2016) Art 7 (author’s emphasis).
35 James Goudkamp, Tort Law Defences para. 2.3 (2013).
36 For an overview of this idea, see Kenneth Campbell, Offence and Defence, in Criminal Law and Justice: Essays from the WC. Hart Workshop, 1986 73 (Ian Dennis ed., 1987).
To most eyes, redistributing the legal elements on sexual assault to create a separate defense based on consent is strange. And there is good reason for this feeling. In most societies, the mere act of having sex is not harmful. But when that act is without consent, then a minimum degree of harmfulness is reached, thereby attracting criminal liability. Applying this theory to the standard on expropriation, the question is: what is the minimum degree of harm necessary to give rise to legal consequences?

It is submitted that the minimum degree of harmfulness is reached when state conduct causes either, one, a loss of title over or, two, a complete or substantial devaluation of an investment. Three reasons inform this submission. First, looking at the structure of usual formulation of the standard on expropriation, the legal consequence of paying compensation arises regardless of whether the expropriation is lawful, because it fulfills the requirements of Rule 2 above, or unlawful, because it fails to fulfill these requirements. As legal consequences of this nature usually arise after the performance of some wrongful conduct, this suggests that the occurrence of a bare expropriation, devoid of any evaluation of the wrongfulness of the relevant state conduct, attracts legal liability.

Second, these consequences are particularly grave, meaning that no other legal elements need to be added to their occurrence to achieve a minimum degree of harm. By contrast, other staple investment protection standards merely require that some investment harm be caused by the state conduct to claim compensation. With these other investment protection standards, reaching the minimum degree of harm requires proof of additional legal elements focused on the quality of the conduct in question, such as arbitrariness and discrimination or its fairness.

The third reason justifying the creation of liability solely on account of state conduct causing one of these consequences is the risk of conflating other investment protection standards with expropriation. Although some arbitral awards indicate that conflating between investment protection standards is inevitable, it should not be so easily admitted because it presumably defies the drafter's intention, thereby breaching the surplusage canon on interpretation, as defined by Scalia and Garner.

If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred.

This risk materialized in Krederi v. Ukraine. By filling the content of judicial expropriation with denial of justice, the arbitral tribunal made these two concepts practically indistinguishable; in other words, when there is a denial of justice, then there is judicial expropriation, and vice versa. Any protest to the effect that "judicial expropriation distinguishes itself because the degree of harm must be greater than that required for denial of justice" should not be given much weight. As the costs involved in filing a claim in investor-state arbitration are prohibitive, most claims can only be financially justified if the investment in question has no or very little value after the relevant state conduct. Accordingly, in most cases where an investor bases its claim on denial of justice, its investment will be valueless, as has to be the case for any claim based on expropriation. The conclusion is that the idea of judicial expropriation espoused by the arbitral tribunal in Krederi v. Ukraine, and various other arbitral tribunals, is a near clone of denial of justice, albeit with a steroid-injected harm legal element.

37 In the Western world, one of the best examples of a general prohibition on sexual activity came from Catholicism, which from the 14th century forbade sex, unless for the purpose of procreation; see further Karen Terry, What is a Sex Crime?, in The Oxford Handbook of Sex Offences and Sex Offenders 4 (Teela Sanders ed., 2017).
38 Marcia Baron, Gender Issues in the Criminal Law, in The Oxford Handbook of Philosophy of Criminal Law 367 (John Deigh and David Dolinko eds., 2011).
42 See Johanne Cox, Expropriation in Investment Treaty Arbitration para. 10.01 (2019).
44 The invocation of this statutory canon is made with cognizing of the problem of blindingly elevating canons of domestic law to international law, see Michael Wachter, Uniformity Versus Specialization (2): A Uniform Regime or Treaty Interpretation?, in Research Handbook on the Law of Treaties 402 (Christian Tams and Antonios Tzanakopoulos eds., 2014). However, this principle is well-recognized with respect to treaties, see Stephan Schwebel, May Preparatory Work be Used to Correct Rather Than Confirm the "Clear" Meaning of a Treaty Provision?, in Theory of International Law at the Threshold of the 21st Century 545–546 (Jerzy Makarczyk ed., 1996).
46 As explained in Section 9.2.1, the relevant harm for a finding of expropriation is graver than the harm required for a finding of denial of justice.
49 See Section 9.2.1 for details on the relevant facts to satisfy the consequence legal element in the rule on expropriation.
50 The other arbitral tribunals explicitly or implicitly endorsing the view that judicial expropriation includes an element of denial of justice or some other procedurally illegality include Staud Eiendom, EBO Invest, and Ron Holding v. Republic of Latvia, ICSID Case No. ARB/16/38, Award
9.2.2 Understanding the importance of causation in expropriation

Accepting this theory, generating liability under the standard on expropriation merely requires causally linking state conduct to a loss of title over or a complete or substantial devaluation of an investment. Although some cases will pose some challenging questions on whether one of these consequences has occurred, in most cases it should be readily apparent. Proving a causal connection will invariably be more difficult. The meaning of the word “cause” is the most elusive in the English language. But as a starting foundation, it can be non-controversially submitted that a cause is a change agent; in other words, it is some event changing a situation, such as the investor’s title over an investment. Recognizing this event will be simple in some cases, such as when the state’s army marches into the investor’s offices and takes control of the levers of its investment activities.

But most modern expropriations are not Suez-style. They are rather effected via changes to the law. Lawmaking is not a power reserved for the legislature. The other two branches of government equally engage in lawmaking, which introduces the idea that:

Judicial expropriation occurs if a court makes a law causing a loss of title over or a complete or substantial devaluation of an investment.

For this conception of judicial expropriation to enjoy broad acceptance, clarity on the meaning of “adjudicative lawmaking” is necessary, meaning that the question for the next section is: what is the meaning of “adjudicative lawmaking”?

9.3 The meaning of adjudicative lawmaking

To narrow the scope of this task, a starting strategy is to define what adjudicative lawmaking is not. And what it is not is “applying the law.”

53 As most dramatically exemplified by the Nasser-led Egyptian expropriation of the Suez Canal. For further details on this expropriation, see Howard Dooley, Great Britain’s “Last Battle” in the Middle East: Notes on Cabinet Planning during the Suez Crisis of 1956, 11 The International History Review 486–493 (1989).
57 Aside from being a classic case of English property law, the other reason why this case is used is because it is the type of case that generates fear of recognizing judicial expropriation without a legal element for evaluating the relevant judicial conduct, see, for example, Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Excerpts of the Award para. 713 (July 9, 2018).
59 Id. 131.
60 This is an ancient cause of action in English law, the modern incarnation of which is the tort for the conversion of goods, see: Elizabeth Martin and Jonathan Law eds, Oxford Dictionary of Law 548 (2006) (def. of “trover”).
9.3.1.2 The case of J. A. Pye Ltd v. Graham

In other cases where courts apply existing law, they will confirm that title over an asset has transferred from one person to another. These cases smell of expropriation. One such case is J. A. Pye Ltd v. Graham.

There, the plaintiffs owned agricultural land near Thatcham, UK. In 1983, the defendant concluded a rental contract over this land with the plaintiffs. When this contract expired on December 31, 1983, the defendant continued to use the land, without the permission of the plaintiffs. In April 1998, the defendant brought an action to recover the land.

The action failed on account of the controversial doctrine on adverse possession. Forming part of that doctrine is a rule that claims to recover land cannot be brought more than 12 years after the date that the defendant takes adverse possession of the relevant land. In summary, adverse possession means overt acts of ownership by the defendant without the permission of the owner and with the latter's constructive knowledge. As the defendant took possession on January 1, 1984, the plaintiffs ultimately failed on account of this rule. But worse was to come for the plaintiffs. Pursuant to section 75(1) of the Land Registration Act 2002, the defendant applied to have title over the land transferred to him, as was his right.

More than confirming that one person always had a better title than another, as in Armory v. Delamiere, this decision apparently transfers ownership from one person to another. But this decision transferred nothing. Applying the doctrine on adverse possession, the court found that the law created by the UK Parliament had already transferred title to the defendant on January 1, 1996, and its decision gave curial recognition to that transfer.

But even that parliamentary act was not expropriatory. And, contrary to the reasoning of the European Court of Human Rights, this conclusion does not need to rest on the “fair balance” exception found in Article 1 of Protocol 1 of the European Convention on Human Rights. There was a simpler explanation: the UK did not cause the plaintiff’s loss of title. Expropriation arises when state conduct causes either a loss of title or the complete or substantial devaluation of an investment. In this case, causal responsibility lies at the feet of the plaintiffs. It was deprived of its land, but the rule activating that legal consequence rested on the fulfillment of a factual predicate, namely the defendant’s adverse possession for a period exceeding 12 years. The plaintiffs could have ejected the defendant at any time. They failed to undertake this simple action. There should be no sympathy for them for this failing.

Further, this idea of pinning causal responsibility on investors for deprivations of investments for failing to satisfy the factual predicates of allegedly expropriatory rules is finding traction in international investment law. In some recent investment arbitrations involving alleged judicial expropriations, arbitral tribunals have held the investors’ conduct activated the allegedly expropriatory laws that the courts gave effect to. Finally, once it is appreciated how investors’ failure to comply with laws might mean that they cause the deprivation of their investments, this also eliminates the need to carve out a special exception to the rule on expropriation for laws transferring criminally acquired assets to the state.

If these laws are in effect before the investor invests, the obligation lies on the investor to comply and, in the case of non-compliance, there is no ground for a claim based on expropriation.

9.3.1.3 The relevance of applying the law in cases of expropriation

What this theory posits is that only the creation of the doctrine on adverse possession was causative, as opposed to its application and enforcement. As the latter process practically effects the consequence in question and is more proximate to it, it is seemingly a more potent cause than the former. But the latter is not a cause at all. And the reason supporting that conclusion is that, for a person to perform a causative act, an element of voluntariness is necessary; in other words, only voluntary conduct is generally recognized as causative in law. In legal systems grounded in the rule of law, the enforcement of a decision resulting from the application of law cannot be voluntary on account of the congruence requirement.
found in the formal rule of law. For this purpose, judges and other court officers act as functionaries of the law. The voluntariness, and hence blameworthiness, lies in the act of creating the relevant law. But acting as a functionary of the law can assume relevance to the standard on expropriation. As noted in section 9.2.1 above, the partial defense of lawful expropriation contains a legal element examining the propriety of the expropriatory process. If that process involves a court, then its conduct will become relevant via this route. The conclusion is that the process of applying the law can reduce liability, but it cannot create it because it is not causative.

9.3.2 Clarifying the law = adjudicative lawmaking
This theory has a limitation: applying the law is not always functionary in nature. In that process where adjudicators feed facts into a body of rules, they sometimes find that their algorithm is incomplete. This discovery necessitates clarifying the content of existing law by adjudicators. This process is adjudicative lawmaking. And as a form of lawmaking, this process is potentially expropriatory.

This conclusion will provoke some consternation, particularly beginning with the question: how can applying the law be distinguished from clarifying the law? Admittedly, the distinction between these two processes is one of degree. But there is a distinction. For whereas applying the law involves subsuming facts within reasonably settled definitions of legal elements, clarifying the law entails the elucidation of ambiguous or vague legal elements. As an example of these processes, consider the following rule:

Rule – Pet Welfare
Any person who is engaged in the business of trading pets for profit must ensure that any pet under his or her supervision receives adequate welfare.

In a case involving a dog, the determination that a dog is a “pet” is applying the law because dog falls within the usual definitional boundaries of “pet.” “Adequate welfare” is another question. This is a vague legal element. When a court determines that it entails that puppies should, for example, receive certain injections within the first six months of their lives, this determination clarifies the legal element.

81 Although the arbitral tribunal in Eli Lilly v. Canada ultimately avoided the question on whether judicial conduct can constitute expropriation, see Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award para. 220 (March 16, 2017). But in explaining its avoidance, it noted that it subscribed to the principled position that the judicial organ is as capable as any other organ of breaching an investment protection standard, see Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award paras. 221, 223 (March 16, 2017). Additionally, the idea that “dramatic change to the law” can amount to a denial of justice finds no grounding in the jurisprudence, thereby indicating that this legal element forms part of the standard on (judicial) expropriation.
83 Id. paras. 77, 78.
84 Id. paras. 78, 91.
85 Id. paras. 82 (for the Zyprexa patent), 93 (for the Strattera patent).
86 Id. paras. 329-330.
87 Id. para. 328.
88 Id. para. 337.
89 Id. para. 389 (for the claim based on judicial expropriation (see n. 80 above for further explanation on why this claim should be viewed as one for judicial expropriation, even though the arbitral tribunal did not label it as such), para. 442 (for the claim based on the investment protection standard on arbitrary and discriminatory measures).
90 Id. para. 337.

9.3.3 Changing the law = adjudicative lawmaking
Another form of adjudicative lawmaking is changing the law. The expropriatory potential of changing the law is on firmer doctrinal ground, as explained by the arbitral tribunal in Eli Lilly v. Canada.

The Parties agree that a fundamental question before this Tribunal is whether there was a “dramatic” change in the [interpretation of the] utility requirement in [Canadian patent law]. Claimant has confirmed that it must succeed on this issue to prevail in this arbitration.

Given that its potential expropriatory effect is less controversial, this section focuses on the question: what amounts to “changing the law”? The most common manner of changing the law is changing a court-established precedent. This occurred in Eli Lilly v. Canada. There, Canada registered patents for the benefit of the investor in 1998. In 2011, in the context of litigation concerning their validity, these patents were invalidated. The reason for the invalidation was that the investor could not have soundly predicted their utility at the time of its application. Prior to 2002, the proof of a patent’s utility could follow the application for it, but the decision in Apotex v. Wellcome Foundation limited the submission of such proof to the time of the application.

The investor failed to establish a treaty breach on these facts. Although the arbitral tribunal admitted that the effect of the decision in Apotex v. Wellcome Foundation was to change the existing precedent, it added that more was needed.
than merely changing the law. That “more” was a dramatic change to the law. This new precedent did not reach that degree of change.

9.4 Defending the idea of judicial expropriation via adjudicative lawmakers

This requirement for a dramatic change in the law has no doctrinal grounding. The suspicion is that this “dramatic” requirement is a product of fear, specifically a fear that the recognition of judicial expropriation will open the floodgates on expropriation-based claims in investor-state arbitrations.

9.4.1 Countering the floodgates objection

Starting with direct expropriations, there is no requirement that any legislative change dramatically affects the existing legal framework for the relevant investment. And nor should there be any such requirement. As detailed in section 9.2.1, what makes expropriatory conduct harmful is the consequence it produces, not the quality or nature of that conduct. To illustrate this point, and with reference to the facts of Eli Lilly v. Canada, imagine that the existing law read as follows:

Application for Patents

Section 27 (1)
The Commissioner shall grant a patent for an invention to the inventor or the inventor’s legal representative if an application for the patent in Canada is filed in accordance with this Act and all other requirements for the issuance of a patent under this Act are met.

Interpretation

Section 2
In this Act, except as otherwise provided:

Invention means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter.

Useful means an art, process, manufacture or composition of matter that, judged according to the relevant information supplied at any time, can be demonstrated or soundly predicted to produce an effect specified by the applicant.

The Parliament of Canada subsequently amends the definition of “useful” as follows:

Useful means an art, process, manufacture or composition of matter that, judged according to the relevant information supplied in the patent application, can be demonstrated or soundly predicted to produce an effect specified by the applicant.

Any argument that this amendment is only a minor change would not find a receptive audience. And there is no apparent reason why this lack of receptivity should change if the same amendment is effected by the judicial arm. Moreover, as states begin to appreciate the greater immunity that their judicial arms enjoy under international investment law, they will coordinate to shift the performance of potentially wrongful conduct to them.

Moving onto indirect expropriations, there are two substantive barriers that will make proving them challenging. The first is marshaling the evidence to prove a complete or substantial devaluation of the investment in question. In cases where the allegedly expropriatory conduct merely raises the investor’s costs, the arbitral jurisprudence shows that any residual profitability will mean that the threshold of substantial devaluation cannot be crossed. The second barrier is states’ option of pleading the police powers defense. As formulated in Section 9.2.1 above, the police powers defense operates as a complete defense, in respect of indirect expropriations, if state conduct non-discriminately and proportionately pursues a legitimate public welfare objective. As a defense, the onus lies on the state to adduce the evidence to prove it. But this onus can be easily discharged where there is scientific evidence behind the state conduct in question. Following the lead of the arbitral tribunal in Philip Morris v. Uruguay, states may rely on the

96 This definition has been designed to reflect how Canadian courts interpreted the word “useful,” see: Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award paras. 336–337 (March 16, 2017).

97 As explained in Section 9.5.1, Ukraine sought to cast its judicial arm as the author of its actions in Krederi v. Ukraine for the purpose of taking advantage of this greater deference judicial arms in international investment law.

98 The case best illustrating this point is Burlington v. Ecuador. Even the imposition of a 99% tax on projected profits was not expropriatory because the investment maintained some “capacity to generate a commercial return,” see Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability para. 456 (December 14, 2012). For the dissenting opinion on this point, see Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Dissenting Opinion of Arbitrator Orrego Vicuña para. 23–27 (November 8, 2012).
9.4.2. Judicial expropriation ≠ international substantive review

A more substantive problem afflicts the application of the police powers defense in cases of judicial expropriation. For when an arbitral tribunal applies this defense, it makes value judgments on the content of the law causing the expropriation; for example, when applying the four-stage proportionality test, the “necessity” stage evaluates whether there was another less-intrusive state measure for achieving the legitimate public welfare. Making these judgments looks worryingly like conducting substantive reviews of domestic judicial decisions, which has always served as the theoretical justification for limiting international responsibility of judicial conduct to denial of justice.

In arbitral awards considering the international responsibility of the judicial arm, there is an omnipresent statement: adjudicating on such international responsibility cannot amount to substantive review of domestic judicial decisions. This rule is sacred. And it should be treated as such. If international adjudicative bodies begin to act as appellate courts on questions of domestic law, they risk compromising the legitimacy of domestic courts.

But applying the police powers defense and conducting a substantive review of a domestic judicial decision are two different processes. With respect to the first process, the question is:

Is the law, created by the adjudicative lawmaking, a non-discriminate and proportionate way to achieve the legitimate objective it seeks?

99 In that case, the relevant state conduct involved legislating for the implementation of certain tobacco-control measures. As these measures were recommended by the World Health Organization, they were presumed to be a proportionate response to a public health concern, see Philip Morris Brands S.A.R.L, Philip Morris Products S.A. and Abal Hermosas S.A. v Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award para. 396 (July 8, 2016).


101 See League of Nations, Conference for the Codification of International law: Volume IV (Minutes of the Third Committee) 1529 (Shabtai Rosenne ed., 1975). For a modern regurgitation of the argument, see Eli Lilly and Company v. the Government of Canada, UNCTRAL, ICSID Case No. UNCIT/14/2, Final Award para. 208 (March 16, 2017).

102 Johanne Cox, Expropriation in Investment Treaty Arbitration para. 9.02 (2019). See, for example, Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Excerpts of the Award para. 449 (July 9, 2018); Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Final Award para. 80 (March 28, 2008); Loesoen Group, Inc. and Raymond L. Loesoen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award para. 242 (June 26, 2003); and Robert Azizian, Kenneth Davitian, & Ellen Baco v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award para. 99 (November 1, 1999).

103 Jan Paulsson, Denial of Justice in International Law 73 (2005).


9.5 Doctrinal clarity at the price of regulatory sovereignty?

Contrary to the fear that its recognition would entail a flood of investor-state arbitrations, this conception of judicial expropriation could rarely serve as the basis of a claim. But this is a perverse sales strategy. Fortunately, this conception offers more to its subscribers.

9.5.1 Dispelling the fear of judicial expropriation through doctrinal clarity

For this purpose, a return is made to the investor-state arbitration that was originally discussed, Krederi v. Ukraine. In section 1.2, a promise was made: a solution for avoiding the “unsatisfactory” finding of no expropriation would be laid out. The time for making good on that promise has come. Delivering can begin by reverting back to a central doctrinal tenet, that the core of expropriatory conduct

By contrast, the basic question for substantive review asks: Is the decision the correct one under the applicable substantive law?

As this question examines the inferior court judge’s understanding of the law, as opposed to evaluating the merits of any adjudicative lawmaking, there is no overlap. But that is not a response to the objection that, when courts exercise their lawmaking function, they still become subject to the police powers defense. To that objection, two observations can be made.

First, the core of proportionality is more procedural than substantive. Although it defines what constitutes a legitimate public welfare objective, its definition is so broad that any beneficial outcome for a society, as opposed to those holding governmental power over a society, should fall within it. Its focus is on how such an outcome should be legally effected. As previously noted with respect to the application of the necessity legal element, that process can involve an evaluation of the content of the relevant law. But that evaluation does not impose new law on domestic courts. It rather examines whether any infringement of fundamental rights created by the law could be alleviated, all the while respecting that, in marginal cases, states should have the benefit of the principle of deference.

Second, the legislative arm is subject to the same dictates if it seeks to rely on the police powers defense. The judicial arm is not a sacred cow – consistency demands that it must be subject to the same standard.
is causation, a process occurring when there is lawmaking.\textsuperscript{109} The evidence indicates that the Ukrainian courts did not engage in adjudicative lawmaking, thereby discounting any possibility of judicial expropriation. As for the investor, it could not have avoided the application of this law, it had no causal role in the story.\textsuperscript{110}

Causal responsibility lay with the legislative arm and the enactment of the law used by the prosecutor to unwind the transactions between the investor and the City of Kiev. But the prosecutor and the courts still had roles in this expropriatory play, particularly as regards the due process requirement for lawful expropriation. No firm conclusions can be made on whether the curial processes satisfied this requirement, although the available evidence suggests that this requirement was not met. For although the arbitral tribunal concluded that these processes did not amount to a denial of justice, the degree of impropriety for a finding of denial of justice is graver than the degree of impropriety for failing to satisfy the due process requirement attaching to the standard on expropriation.\textsuperscript{111} And there are numerous counts on which the Ukrainian courts could have failed to satisfy this requirement, most particularly the unreasoned extension of the limitation period for the prosecutor’s action against the investor.\textsuperscript{112} Coupled with the non-payment of compensation, the tentative conclusion must be that Ukraine should have been liable for unlawful expropriation.

Yet Ukraine avoided this fate. And its method for achieving this outcome was casting its courts as the authors of any potential state responsibility.\textsuperscript{113} After the arbitral tribunal accepted this casting, Ukraine then milked the sacred cow of judicial absence on judicial expropriation. The main theoretical contribution of this chapter has been to elucidate this doctrine. When adopted, it will classify non-expropriatory because that conduct usually involves merely applying the law. Adjudicative lawmaking is another story. But even when a court engages in adjudicative lawmaking, it will be a rare case when it breaches the standard. The conclusion is, paraphrasing President Franklin Roosevelt, the only thing we have to fear about judicial expropriation is the fear of it.

\subsection*{9.5.2 Compromising regulatory sovereignty through doctrinal clarity?}

But in dispelling the fear of judicial expropriation, has a new avenue for compromising regulatory sovereignty been opened? If “compromising” means moving the jurisprudential pendulum in favor of protecting investor rights in cases involving judicial conduct, then the answer must be “yes.”

For the pro-state camp, this outcome will be lamentable. And seemingly anticipating this dissatisfaction, an accusation could be leveled that they are being appeased, particularly through reassurances that the number of judicial expropriations will be limited. No such interpretation should be made. This chapter takes ownership of opening the avenue of judicial expropriation. In those cases where judicial conduct directly causes loss of an investment, then the state should pay compensation. For indirect expropriations, judicial conduct should be subject to the police powers defense. It tests the quality of reasoning underlying adjudicative lawmaking. Given that adjudicators should be high priests of reason, this examination should be no cause for concern.

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