

Legal Analysis of the Examples and Date of Challenges in the Creeping Expropriation of Foreign Investors

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Abstract

advantage of their institution's ownership is de-vested in the indirect expropriation. The provision of a criterion for identifying examples of creeping expropriation and its history is associated with the rule of mental approaches. This criterion has been able to make the government in the field of national services concerned about defining their actions as examples of creeping expropriation, and on the other hand, face the investors with problems regarding the impossibility of assessing the treatment areas and future state regulation and guaranteeing their

Today, creating opportunities and competition have a special place in introducing opportunities to attract foreign investors in economic and developmental policies of countries. The most important issue in attracting and retaining foreign investors is to provide legal guarantees to the investor in terms of protecting property and compensation in the assumption of expropriation. The host government, by citation of national laws, behaves in a way that an investor's desire to take

other. As an example, the most important sources of law should be sought in the form of governments, cordial treaties, bilateral or multilateral agreement, attracting and encouraging foreign investment, and arbitration and attracting foreign investment. International arbitrary authorities, in the absence of a precise and comprehensive definition of expropriation and confiscation of investment treaties, indicate International law, with an approach to the practice of governments, international treaties and judicial interpretations, such as the interpretation of Iran and the United States of America Court's arbitrary decisions, arbitration judgment arising from bilateral investment treaties, NAFTA¹ Arbitrary decisions, International Centre for Settlement of Investment Disputes (ICSID) Arbitrary decisions, national judicial decisions, and similar matters.

Regardless of the compensation that is the post-expropriation assumption, the fundamental question is about expropriation in a creeping way, because many times it occurs under the influence of national regulations and unwritten rules. The mental

rights. This research, with the analysis of investment rights and international regulations, first examines "the legal shortcomings" and presents some suggestions to fix the shortcomings in the end.

Keywords: Creeping Expropriation, Foreign Investor, Host Government, Compensation, Capital.

Introduction

Expropriation, and hence the compensation, are always accompanied by capital, investment, and investment acceptor. In this regard, the standards for the detection of expropriation and its compensation methods, and the date and criteria for identifying actions leading to expropriation is one of the most challenging issues. Expropriation is, directly and indirectly, a function of government intervention and in many non-interventional areas of government. Identification criteria of creeping expropriation examples and securing the rights of an investor have complexities in terms of the interference of mental approaches in identifying instances on the one hand and the diversity of resources on the

discuss the exact definition of the time of creeping expropriation, which can be important in many ways.

Expropriation from Concept to Type

The most important question that comes to mind is that how and when the expropriation takes place. When the government intervenes in the property of foreigners, including the nationalization, acquisition of property and the seizure and confiscation of property, it can be said that expropriation is primarily realized. In this regard, the purpose of this dispossession may be to pursue legitimate aims such as public interest and benefits, on the basis of which, in the form of their assignment, governments are subject to expropriation, and it is mentioned as part of an economic or social agenda². Even legitimacy of expropriation in national law is different compare with International law³. Among these methods, it is possible that governments go beyond direct methods such as seizure and confiscation in a way that in which the owner or investor has faced challenges that would rather to escape. Obviously, it is effective on

approaches in determining the example acts of dispossession and the history of expropriation (intent and action) which is effective in compensation are the issue of analysis of this article.

This article is a part of legal research that using qualitative research methodology that seek the answer and suggestion of the proper expropriation in the investment context. The process starts with phenomenology assessment on how the concept of expropriation of investment contract. The explanatory on the history, concept, and standards of expropriation will answer the hypothesis that legal shortcoming in Investment Regulation and standards. Hypothesis of this research is that; there are possibility on current legislations to protect investors rights. Therefore, in this research, initially in general structure explaining of expropriation in terms of its concepts and practices and analyzing the expropriation in an indirect way of investor and its foundation will be indicated. Then creeping expropriation will be discussed in the legitimacy and shortcomings and its challenges mirror. Finally, we will

property would be impossible. It is said that this type of expropriation is merely "in the form of the transfer of ownership and its reference, that in the direct expropriation, Government possesses it by acquiring foreigners' properties, but in the indirect expropriation, in contrast to the direct ownership that the state possesses, the ownership is not necessarily transferred to the state⁵. It might be said that the regulation concerning indirect shall be created to give protection to investors. Regarding the condition which "fall outside formal and obvious infringement" of investor's rights, Arbitrators and judges must be looked at "the substance of the measure and not its form".⁶

Indirect expropriation is not easily identifiable due to a variety of instances since it involves actions from an investment acceptor state that causes it to constrain the investor. This limitation causes the investor's ownership to be shaken and, on this basis, the issue of indirect dispossession and its pursuit of the state responsibility and compensation to be presented⁷.

the degree of ownership and also will cause the owner of the property to give up because it won't be cost effective for him to continue the situation and It will not be possible, in general, to obtain their property rights over possessions. In many cases, in the context of the legitimacy of expropriation, it should be said that to defend national interests and prevent the exploitation which is one of the indicators for the expropriation of foreign investment comes into action, in which the creeping expropriation in a manner comparable to direct expropriation comes less to the mind. Here it is necessary to state this important point that direct expropriation is a type of dispossession which government decides to intervene in a formal manner to conduct expropriation, and the indirect expropriation is the one that is referred as the creeping⁴.

In indirect expropriation, the host state has constantly behaved with national law, which has led to the exclusion of the investor from the use of his ownership entity. It would not be affordable for him to continue the situation, and in general, possessing and obtaining ownership rights to the

field of economic behavioral regulation, should be noted as what measures or acts are considered as expropriation and its separation from those measures that are not expropriation. Although the conscience of International law and its conventions, the law of treaties and arbitration decisions, it has tried to provide indicators for the creation of standards, this effort is good but not enough.

Expropriation in Iran and International Legal System and its Subsequent Challenges

What is consistent with both legal systems is the limitation of expropriation and its exceptions and obligations after dispossession. It is discussed in expropriation, to follow the theory of public benefit and its preferences on the acquisition individual right by considering the principle of not to be retroactive. Governments are trusteeship of collective benefits, but paying attention to individual rights in the area of compensation is a matter of immediate concern. Base on this, the theory of non-responsibility of governments has been replaced by the responsibility of governments

Due to the variety of measures and complex and hidden features of these actions in a variety of behavioral forms, the introduction of indicators and criteria for identifying creeping expropriations and determining its date is facing the difficulty in the legal world.⁸ In the other words, the subjective form of the criterion is one of the factors that contribute to this discussion. The subjective approach of this criterion has been able to influence the institutionalization of the rights of the investor to its ownership in such a way that the investor cannot assess the areas of behavior and future of government regulation, and therefore the risk of the actions of the investor is high, and transactions and deals will be function of these shortcomings. The investor in compensation and indemnification by the host government also faces uncertainty because there is no transparency on how much compensation can be claimed, or how long it would take for him to be able to demand it. In this regard, one of the main challenges of expropriation is, in particular, a creeping type is its examples and its time or date. Accordingly, expropriation is one of the behavioral approaches that, in the

In addition to the multilateral treaties mentioned above, bilateral treaties on foreign investment protection also contain provisions on expropriation and seizure. But what matters is that which one of host government actions is an example of creeping expropriation, because after dispossessing, by the legal disagreements that are on the one hand arguing Obligation to perform contractual obligations and, on the other hand, the rights of the parties to payment and non-payment of compensation and the exact date of dispossession. Among other things, the rights of third parties, which can also have human rights dimensions, include the right to work, salary and other employment rights.¹⁰

Analysis of Expropriation from Examples to the History of Shortcomings and Standards

In this discussion, while explaining and illustrating some examples of it, we will look at the challenges of the standards of creeping expropriation and, in addition, the history of this expropriation, according to the state's intentions and the difficulty of obtaining it. Initially, we will discuss

nowadays. (Article 11 of the Iranian Law on Civil Liability, adopted in 1339, the liability of the Government in respect of damages to legal persons, except for the cases arising from the exercise of sovereignty is accepted- Civil Responsibility Law article 11). Also, in accordance with Article 137 of the Constitution compensation in both systems follows two theories of general interest and government responsibility⁹.

The draft of multilateral treaties on investment set up by the Organization for Economic Co-operation and Development, declares that: A Contracting Party shall not, directly or indirectly, investment conducted in the territory of its own country incurred by the investors of the other Contracting Party, Confiscate or nationalize, or encounter action or actions that have equivalent effects except:

- a) With the aim of doing it in regard to the public interest
- b) In the non-discriminatory form
- c) Consistent with the legal processes
- d) Along with immediate, adequate and effective compensation

expropriation occurs when a state pursues its goal by pursuing similar results to direct expropriation through regulations and supervisory measures during a period of time. For example, in *Feldman v. Mexico*,¹² the court discussed whether tax regulations would lead to creeping expropriation. In *Feldman's* file, the American claim made a cigarette remarketing in Mexico. The Mexican government exposed direct taxes for cigarettes, but after being squeezed by domestic producers of cigarettes, they then revised the tax to discount cigarette manufacturers, but virtual vendors, such as resellers, were not complaining of this exemption or rebate. However, the Mexican government subsequently imposed a reduction of \$ 25 million on its resale penalty, which is not considered to be a creeping expropriation tax regulation. Because they are seeking to achieve similar results (directly) with tax and designed regulatory measures. *Feldman's* court decided not to consider this action as a creeping expropriation because, firstly, "normal commercial issues are not examples of expropriation, secondly NAFTA, and the common international law, do not oblige

the implications of its examples and challenges of it in terms of its standards, then date, and ultimately compensation.

The definition of direct expropriation nowadays is less challenging in term if its definition and methods. In accordance with international investment regulations, direct expropriation is considered as a benchmark (law or regulation) of a country that is dispossessed from a foreign investor in favor of a state. In contrast to the above definition, creeping or indirect expropriation is faced with the difficulties that this lack of definition has caused serious damage to the investor-investors since any internal regulation can be considered as creeping expropriation examples¹¹.

Of course, it is imperative that creeping expropriation does not necessarily take place through a state act; rather, it can be an example of the development of regulatory or supervisory inspections, even if a different segment of this development is independent of expropriation. But the overall effect of these actions can ultimately be on the surface of expropriation. In general, creeping

to claim the indirect claim as the basis of his claim for arbitration. Should a court of arbitration consider the adoption of these rules as an indirect expropriation, and the question that arises is to reimburse the losses in its entirety? Despite the fact that its investment in the assumption on non-legislation of this law was unlikely to be possible to harm public health? Will there be serious harm to the public health in the event of an accident if the law is not passed, or if an accident could occur, could it lead to disaster? Is the host respondent country in such a situation of the same standard of compensation for a country that decides to nationalize the foreign investor's investment?

In addition, it should be noted that, in the direct expropriation, the host government gains economic profits. In fact, the transfer of ownership to the public is more than private ownership, a result of enriching the state. In such circumstances, it is true that the state must pay for what it has done. However, through indirect action, the government typically does not obtain the financial benefit of the desired size. It may even reduce tax revenue by closing a business or

governments to issue export permission for cigarettes. Thirdly, the tax provisions in this case do not guarantee the right of export to them for selling Cigarette, and fourthly, the plaintiff's investments remain in his control, and there is no example of expropriation. Here are some examples of cases to illustrate the matter:

The first case involves a Uruguayan Law for Cigarette packaging that provides health warnings at 80 percentages of packets on the front and back of the package and therefore reduces the space of the logos. Philip Morris, after announcing the ICSID for arbitration, prior to the announcement of the ICSID, has withdrawn its investment indirectly. The second case concerns an amendment to German legislation on atomic energy by the German parliament in 2011 to accelerate the abandonment of nuclear energy by 2022 following the Fukushima nuclear disaster.

In May 2012, Swedish energy company Vattenfall, in response to the closure of two Vattenfall nuclear power plants, requested an appeal against Germany¹³. Vattenfall is likely

led to owner loses the property and limitation of ownership. The Court in *Starrett Housing Corp. v. The Government of the Islamic Republic of Iran*¹⁵ has raised the test as an interference in cases whether the rights of investors have been undermined. In *Tippetts v. TAMS-AFFA*¹⁶ the court announced that indirect expropriation occurs when the investor "was deprived of basic property rights, and it seems that the exclusion is not merely seasonal. Expropriation, for example, the *Tecmed* court stated that the government's action, if it is "irreplaceable and permanent", is an expropriation case. But in front of that, we have a decision on the *Wena Hotels*, which considers temporary expropriation - one-year-old, of it example. As it has been recognized in relation to the expropriation of property, the dispossession of part of the investment is also again an instance of creeping expropriation. (S.D. Meyers).¹⁷

The researchers have divided the various standards used by arbitration tribunals into two general categories for the identification of indirect expropriations: (i) analyzing

reducing product consumption. Therefore, the issue of compensation for indirect expropriation is also questionable, and it raises the challenge of when an expropriation has happened. To this dispossession, for the government which has had no benefit other than deleting harms to public services, how can it be considered as a creeping expropriation and with which source to fund it?

Here, there is a radical attitude that discusses ownership precedence, and that it is enough to limit and expropriate. "The state is responsible for the expropriation of property ... when it ... is illegally dispossessed or with an unpleasant interruption or delay, it is difficult for the investor to benefit from the property. For example, in *Tecnicas Medioambientales Tecmed SA v. United Mexican States*¹⁴ The court announced that acts are examples of indirect expropriation. When the investor "was fundamentally deprived of the economic use and enjoyment of its investments, in *Pope & Talbot v. Canada*, it was examined whether the interventions were to the extent that

which referred to the determination of the date of the confiscation regarding qualifications, is indicative of the fact that eligibility is also the criterion of that date.

Accordingly, it refers to the fact that, on condition that the Tribunal has jurisdiction to hear the cause of the case before January 19, 1981, it is based on this basis. If expropriation commenced in 1980 and continued until 1981, it should be determined precisely when the confiscation is located to determine whether it is within the jurisdiction of the Court¹⁸. In this regard, the "standard court" may be set up when a person is practically not at the time when the owner is unable to operate. It may be possible to discontinue the date of the intervention or the installation of a manager, in which case the Philips Dodge case - the Bank of Industries and Mines of Iran and the Iranian Bank and Sikab Company.¹⁹

It is necessary to refer to the description that passed to determine the date if the value of the investment changes over time, the selected date expropriation becomes very important because it sets the maximum or minimum amount of investment for

the effect of government action on the investor and (ii) analyzing the purpose of government action, that to a large extent, they are different. Accordingly, after discussing the dispossession, the discussion of date is the intention of dispossession, which is the mental approach that I will discuss as follows.

Reference Date

The reference date is necessary for two reasons. On the one hand, the value of an investment over time can be different, especially when the court changes to the market account and market value. On the other hand, the rate of interest may vary considerably depending on the date of the selected reference. In addition, "what might be considered as a criterion in defining and clarifying the investor's ownership of property is historically precious in value before dispossession. " Presumably, "in which the services have been exempted, or the market has been in more demand or other words of deed until today as examples of value in that society, but today it is considered counter-worth. In this connection, the judgment of the *Iran-United States Arbitration Court*,

investment should be based on: "In the fair market value of the investment or income allocated immediately before expropriation or as soon as the general knowledge of each one, in addition, the majority of BITs believe that the calculation of compensation "makes no change in value occurrence, because the alleged violation is known."²¹

Conclusion and Recommendation

The clear point is that legal practices and procedures mentioned different standards, but there is every effort to provide identification standards for creeping expropriation. It is important to note that the challenging issue against these identification standards of expropriation is not merely for "expropriation", after it has been resolved, it is sometimes said that compensation for damages in the creeping expropriation is regarding the government objectives, for example, benevolent and national health goals are debatable.

The controversial topic that was the subject of this article was in terms of legal approach, what action is a creeping expropriation, because the discussion of the dispossession date

compensation. Recently, the court ruled that it was appropriate for expropriation to set any date between the date of formal dispossession and the date of payment, which would allow the investor to receive the amount for the compensation, and makes him entitled to "effective use" of the property. Therefore, in *Marion v Reinhard Unglaube*²⁰ in the case of direct abuse of several plots of land in a few years after placing the piece in an environmentally protected area, Costa Rica, the Court stated that the value of the land market can be determined on the date assessed, and also refers to the date of direct expropriation. But in the same case, it refers to creeping expropriation when the investment has been damaged by the accumulation of state measures over time and it's unbalanced.

This means a gradual misuse, which is also a "creeping expropriation", and the date must be defined from a given effective time. According to the date of payment of compensation in BITs, the value of compensation must be calculated in the period before or after the date of expropriation. Therefore, Section 6.1 of the BIT of Canada and Lebanon states that the value of an

Given the ambiguity of current standards, it is possible to reduce the information gap by admitting the complexity of creeping-style expropriation in the case of its examples to the "self-regulatory" approach in the field of capital and foreign investment law with the contract mechanism and protect it. Thus maintaining and supporting capital, investor, and investment, in the case of compensation, and after clarification of date criteria, it can be taken into account when the ability of the investor's profitability is eliminated or weakened by regulation or regulatory and control measures.

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can be identified somewhat after the dispossession instances, but the subjective approach has led to the explanation of instances of creeping expropriation in attracting foreign investment, the host government should be placed among the door of responsibility so that it does not face transparency in the legal nature of its actions. For example, the law for public health may lead to instances of creeping expropriation or, supposedly, "the exclusion of bankruptcy rules and regulations from the foreign investor, the process differences of some exemptions sometimes" used to protect citizenship and national services is considered by the national legislator as example of creeping expropriation. From a legal point of view, these concerns lead us to the fact that in creeping expropriation, states in the real world, are more concerned about the sovereignty of the mental approach, since, according to the diversity of sources of investment rights, civil liability may also be compensated from the area investors face both the domestic environment with the lack of services and the inability to maximize utility as an agent.

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