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The Iran–United States Claims Tribunal: Revisiting Indirect Expropriation in International Investment Law

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Abstract

Indirect expropriation remains a contentious and challenging issue in both theory and practice. From the late 20th century into the 21st, the central conflict in international investment law lies between sovereignty and the protection of private property. The deepening of economic and trade globalization has given rise to a renewed form of "Calvoism," placing foreign investors' interests in host states under increasingly complex circumstances. The Iran-United States Claims Tribunal was the first case to spur international research on indirect expropriation. The debate over whether losses to foreign investors should be borne by governments or private parties established an efficient paradigm for resolution and offers instructive insights on attributing responsibility. However, the paradigm for addressing indirect expropriation remains largely monolithic. In the current era of faltering globalization, indirect expropriation requires fresh reassessment.

Keywords

International Investment Law, Indirect expropriation, Calvoism, Iran-United States claims tribunal (IUSCT), globalization

1. The Iran-United States Claims Tribunal's Determination of Expropriation Allegation

The Iran-United States Claims Tribunal (IUSCT), established in 1983, differs from other ad hoc arbitral tribunals due to its unique context arising from Iran's political transformation and the multiple disputes with the United States. Under the mediation of Algeria, the two parties reached the Algiers Accords, which comprised three agreements: the General Declaration, the Claims Settlement Declaration, and the Undertakings. Excluding the majority of private claims, among the 77 intergovernmental compensation cases resolved by the Tribunal, a substantial number involved indirect expropriation

(Iran-United States Claims Tribunal, Case No. 98 Chamber Two, Harza Engineering Company v. Islamic Republic of Iran, Award No. 19-98-2).

1.1 Tribunal's Definition and Manifestations of Expropriation

The Tribunal distinguishes its terminology for "expropriation" from common usage. It prefers the term "deprivation" over "taking", the latter corresponding to the academic concept of expropriation, under which the State acquires private property for public purposes and pays compensation. Although largely synonymous, "taking" may imply that the State has acquired something of value, which is not accurate in cases of indirect expropriation. Indirect expropriation does not involve formal acquisition of lawful property rights, but rather interference with those rights. Today, domestic social reforms rarely require formal seizure of physical assets; instead, foreign investors' rights may be affected by State measures that confer the benefits of private property to the host State, not through formal taking but with equivalent effects (Maurizio, B., 2001, pp. 203-212).

Because the Iranian government adopted various formal and informal measures affecting U.S. investors' interests, the Tribunal was uniquely positioned to shape legal developments in this realm. Each of its three Chambers issued significant rulings concerning foreign investment. One claimant emphasized that the Tribunal's significance lay in its analysis of compensation amounts. However, the Tribunal's rulings were even more significant in determining the extent to which host-State interference constitutes expropriation under contemporary international law. There is no doubt that the actual seizure of property constitutes expropriation (Seddigh, H., & Aldrich, G. H., 2017, pp. 585-609). What remains unclear is whether informal actions affecting international investment constitute expropriation.

Indirect expropriation in intergovernmental claims before the Tribunal manifests in varied forms that defy a single, detailed definition. Traditional scholars distinguish among nationalization, requisition, and confiscation. Requisition is defined as the State taking possession of assets and rights held by a foreign national, usually promptly and with fair compensation. In contrast, nationalization is broader: the State acquires property to deploy natural resources and means of production for social purposes under economic and social reform initiatives. Confiscation refers to the State deliberately impounding property without adequate compensation, typically depriving owners of any right to restitution or damages.

Interference with private property thus includes various asset types and revenue streams, with core property rights differing across jurisdictions. For tangible property, the most direct instances involve U.S. citizens suing Iranian state-controlled banks that, despite holding the property, refused to honor checks amid U.S.-Iran tensions. Although Iran argued there was no intent to expropriate, the Tribunal emphasized that "the State's intent is less significant than the effect on the property owner, and the form of interference is less important than its actual impact".

Regarding intangible property, the Tribunal adjudicated cases where Iran had nationalized U.S.-owned shares in Iranian companies—such as AIG's 35 % stake in an Iranian insurer—without timely compensation, as well as instances where a U.S. oil company purchased shares in a state-owned enterprise but never received delivery .

1.2 Principle of Actual Deprivation

These cases largely arose from Iran's social revolution, during which the new government implemented a series of expropriatory measures targeting U.S.-affiliated interests. Iran rarely formally nationalized U.S. assets; rather, it assumed control over U.S. government or private assets, which produced effects indistinguishable from direct expropriation. However, unlike direct takings, the Tribunal did not deem these state actions—purportedly taken for public interest—to justify prompt, full and effective compensation, and thus it often disregarded treaty-violation claims made by either party. A typical example is Chamber Two's case involving ITT Industrial Holdings, Inc., wholly owned by Sweden's IKO Company, which held a 25 % stake in IKO Iran. In December 1980, the Iranian government appointed four board members to IKO Iran, and shortly thereafter the fifth, displacing five shareholder-elected directors, including those chosen by the claimant.

Before the claim was resolved, ITT argued that this de facto control amounted to interference with its interests and warranted prompt, full and effective compensation. Iran responded that the takeover was temporary, and thus did not constitute compensable expropriation. It cited an amendment to the Industrial Protection and Development Act, which established a five-member committee to determine final ownership of government-supervised companies. The Tribunal found that Sweden's IKO had been deprived of management rights and access to financial information regarding IKO Iran. The Tribunal noted that state-appointed officials owed no fiduciary duty to shareholders and managed the company to the detriment of shareholder interests. In a concurring opinion, arbitrator Aldrich articulated the appropriate standard for expropriation:

"While governmental control over property does not in itself warrant a conclusion that the property has been taken by the government requiring compensation under international law, once events show that an owner has been deprived of fundamental ownership—and such deprivation appears not merely temporary—there is justification for drawing that conclusion. The state's intent is less important than the effect on the owner, and the form of control or interference is less significant than its real impact."

Clearly, the Tribunal avoided assessing the legality of state actions, focusing instead on whether actual harm had occurred to determine expropriation and award compensation. Chamber Two's adoption of the actual deprivation principle does not afford the host State sufficient liberty to govern its economy in pursuit of development. Though the standard may reassure investors by extending protection, it is unlikely to reduce the frequency of coercive state measures—a concern commonly referred to as the "police powers doctrine." When a host State's sovereign acts are interfered with, this can cause tension with investors (Li, Z. R., 2021, pp. 19-39). Accordingly, Chamber Two prioritized the investor's actual loss over whether the State intentionally deprived property. The Tribunal's reliance on the

actual-deprivation standard aligns with its goal of encouraging investment. If host States were certain their actions—even those taken for public interest—would trigger compensation, the international investment climate could suffer significantly.

2. Legal Basis and Standards of Expropriation

2.1 Legal Basis and Fundamental Standards

Renowned European scholar Christoph Schroeder states in an article on expropriation that: "Under international law, expropriation is not per se unlawful. Undoubtedly, a State has the right and authority in principle to expropriate the property of nationals and foreigners. However, lawful expropriation of foreign-owned property is subject to certain conditions—commonly referred to as public purpose, non-discrimination, due process of law, and prompt, adequate and effective compensation."

The legal foundations of expropriation in both domestic and international law converge in requiring that expropriation serve a public purpose, but diverge fundamentally due to domestic legislation being based on sovereign prerogative, whereas international law is premised upon reciprocal negotiation between states (Rudolf, D., 2002).

Although the 1968 establishment of the Iran-U.S. Claims Tribunal catalyzed interest in indirect expropriation, international conventions on expropriation had already been drafted in 1961. For example, the Harvard Draft Convention on State Responsibility for Injury to Foreigners provides that when there is "unreasonable interference with the use, enjoyment or disposal of property, so as to justify the inference that its owner will be unable to exercise those rights within a reasonable time after the interference began," foreign private property is deemed expropriated (Christoph Schreuer. The Concept of Expropriation under the ECT and Other Investment Protection Treaties, CL-0272, revised 20 May 2005).

A more prominent example is Article 1 of the European Convention on Human Rights, which enshrines the principle that everyone has the right to peaceful enjoyment of their possessions, and that no one shall be deprived of those possessions except in the public interest and under conditions provided for by law and by general principles of international law. It adds that such provisions must not impair a State's right to enforce laws governing property use or to collect taxes or other contributions.

From this comparative perspective, the primary justification for expropriation remains public purpose, yet the Convention also emphasizes domestic enforcement powers, underscoring that the protection of private property—even for foreign investors—is ultimately premised on respect for State sovereignty.

Of course, these are early treaty provisions. Since the 1980s, the proliferation of indirect expropriation cases—arising from diverse government regulations that adversely affect foreign investors—has shifted the central conflict to be between the protection of private property and the principle of sovereignty.

In principle, the principal distinction between direct and indirect expropriation is that in the latter the investor retains legal title to the investment, whereas in direct expropriation the title itself is lost. Nevertheless, in certain circumstances—especially in cases of gradual or creeping expropriation—the

boundary between direct and indirect expropriation is not always clear.

2.2 Principle of Public Purpose

The principle of public purpose has often been sidelined in discussions of indirect expropriation, although host States frequently invoke it—arguing that when state action is justified by public purpose, foreign investors must bear the resultant loss risk, and thus compensation becomes contentious. NAFTA's expropriation provision illustrates this:

"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 ('expropriation'), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law; and (d) on payment of compensation."

Does indirect expropriation require consideration of public purpose? Because invoking public purpose may immunize state measures from illegality under expropriation provisions, the issue becomes one of compensation rather than unlawfulness. Under international investment law principles and practice, foreign investment inherently carries the risk of host-state regulatory or political shifts—precisely the driver behind most indirect expropriation claims. For example, in a 1998 dispute by a U.S. environmental services company against Mexico, Mexico declared an environmental emergency and without adequate compensation designated the area as an ecological reserve, halting the company's project. The tribunal found this constituted indirect expropriation and proceeded without any reference to public purpose (Reisman, W. M., & Sloane, R. D., 2004).

Similarly, the Iran-U.S. Claims Tribunal sidestepped Iran's claimed intent and, like the Mexico tribunal, did not exempt measures taken for public purpose from liability; in both contexts, the result was State liability for compensation. These parallel findings suggest that whether public purpose applies is not a factor in determining the existence of indirect expropriation. Once a measure is found to equate to direct expropriation, the focus shifts to whether it meets public purpose—a question tribunals typically avoid, as it treads on core sovereign prerogatives. Consequently, international investment tribunals have consistently prioritized the effects-based approach. If one were to accept that the Iran-U.S. Claims Tribunal overlooked public purpose because of Iran's exceptional political situation, then in more stable jurisdictions, allowing public purpose to excuse investor harm would place States entirely on the defensive. While some modern instruments incorporate a "proportionality test"—emphasizing state intent—such tests, in essence, restrict sovereign discretion and ultimately increase state risk under BITs (Rosalyn, H., 1982).

Indeed, many BITs contain vague or no provisions on indirect expropriation. One notable exception is the U.S.-Uruguay BIT (Annex B, Article 4), which clearly defines indirect expropriation: "Indirect expropriation means a situation where an action or series of actions of a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure." Moreover, it provides that: "Except in rare circumstances, non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not

constitute indirect expropriation." This clause transforms public purpose from a defense to an affirmative exclusion—a more balanced model. However, because it grants interpretative authority to the host State regarding public welfare objectives, the investor may remain disadvantaged (Wen, L., 2022, pp. 73-90). If "do not constitute" were replaced by a requirement for State-investor consultation, the U.S.-Uruguay model would embody a more mutually equitable approach—legally precise and practically cooperative.

Therefore, the critical issue in BITs concerning indirect expropriation lies in how both parties refine the expropriation clause. Merely acknowledging a State's sovereign right to regulate is insufficient for defining indirect expropriation. Regulation is not prohibited, but when it causes substantial harm, compensation must be provided. Similarly, a presumption favoring certain regulatory actions is not enough; it must be explicitly stated that some measures—such as police powers measures—regardless of their adverse impact on investment, do not constitute expropriation. Clear definitions excluding police powers measures would offer greater legal certainty for host States and foreign investors.

Accordingly, drafting a clause that defines standards for police powers measures would clarify the concept. Developing a non-exhaustive list of factors for tribunals to consider in determining indirect expropriation represents a constructive step—but it should avoid vague references to an investor's "legitimate or reasonable expectations," and instead specify what constitutes the "nature" of a measure. Where potentially irreconcilable standards arise—such as between economic impact and the nature of the measure—implementing a hierarchical test would be advantageous (Dan, W. H., & Zhang, S., 2008, pp. 1-15, p. 21).

Ideally, a comprehensive renegotiation of existing BITs should incorporate these new clarifications and exclusionary provisions to enhance legal certainty and balance between regulatory prerogatives and investment protection.

2.3 NAFTA Case Analysis: Metalclad v. Mexico and Tecmed v. Mexico

Under NAFTA jurisprudence, Metalclad Corp. v. Mexico (2000) and Tecnicas Medioambientales Tecmed S.A. v. Mexico (2003) provide landmark guidance on the contours of indirect expropriation. In Metalclad, a U.S. waste-management firm secured federal approval to build a hazardous-waste landfill in Guadalcázar, yet municipal authorities withheld the local construction permit and reclassified the site under an ecological decree. This covert interference, the tribunal held, effectively deprived the investor of both operational use and expected economic returns. Relying on NAFTA Article 1110's "economic impact test", the ICSID tribunal concluded that such non-formal regulatory measures could indeed amount to expropriation and awarded approximately USD 16.7 million in damages. The tribunal emphasized that legal title or formal transfer was not necessary where the economic substance of state action substantially interfered with the investment.

Similarly, in Tecmed, the tribunal found that Mexico's refusal to renew a landfill permit permanently stripped away the economic value of the investor's facility. While acknowledging the regulatory nature of the measure, the tribunal introduced a proportionality analysis, critiquing the state's actions for

lacking transparency, proportionality, and respect for the investor's legitimate expectations. As a result, the measure was deemed expropriatory, reinforcing that police-powers defenses must be scrutinized through proportionality and fairness lenses. These cases collectively affirm that indirect expropriation hinges on economic substance rather than formal acts; that investors' legitimate expectations—especially those grounded in regulatory assurances—must be protected; and that invoking public‐interest regulation does not guarantee immunity when proportionality or transparency is absent. They complement the jurisprudence of the Iran-U.S. Claims Tribunal and the treaty-based analysis, underscoring the need for investment treaties to clearly delineate between permissible regulation and compensable expropriation. This suggests a treaty design that includes explicit carve‐outs for bona fide regulatory measures, introduces a proportionality framework, and mandates pre‐regulatory consultation mechanisms, all of which balance state regulatory autonomy with investor protection.

2.4 Challenges in Determining State Action

The party responsible for expropriation is always a State. Aside from the public purpose criterion, determining indirect expropriation under international law is inherently challenging because it requires distinguishing between legitimate regulatory action and expropriatory conduct. The former, lawful under international law as a manifestation of sovereign authority, is known as police powers, while the latter—though its legality may be set aside—triggers the State's obligation to compensate. Whether and how much compensation is owed thus becomes the central point of dispute.

The Iran-United States Claims Tribunal, favoring an effects-based test, has applied the police powers doctrine—though mostly in investor-State cases rather than inter-State disputes. A notable example involves an Iranian claimant whose liquor license and restaurant were seized by the U.S. Internal Revenue Service to cover unpaid employment withholding taxes exceeding USD 70,000. The claimant sought compensation for losses resulting from forced asset disposals. The Tribunal observed that the IRS admitted seizing both the premises and the license to recover legitimate tax debts, and stressed that a State should not be liable for economic loss caused by lawful, non-discriminatory tax measures or other actions falling within recognized police powers (James, D. W., 2014). The claimant presented no evidence that the seizure targeted him because of his nationality or that it was intended to permanently strip him of his assets. The Tribunal dismissed the claim, noting that the claimant failed to demonstrate that the IRS acted beyond its authority or outside the scope of legitimate tax enforcement.

Amid tense U.S.-Iran relations, the same claimant later alleged the U.S. failed to protect his property in Turlock, California, from acts of anti-Iranian violence. The Tribunal dismissed this claim as well, stating that a State cannot guarantee the safety of foreign nationals or their property. It further held that State liability for police or fire protection arises only if protection falls below minimal reasonable standards, considering resources available. The claimant failed to show that local authorities did not meet these standards.

Thus, the Tribunal articulated a robust application of the police powers doctrine: States are not responsible under international law for economic loss arising from bona fide exercise of police powers.

While benign regulation under police powers is more controllable than policy reforms or economic restructuring, the term "regulation" remains broad. If domestic legislation does not clarify the applicability of regulatory measures to foreign investors, differentiating between regulation and expropriation remains difficult.

For example, China's 《Foreign Investment Law》 provides detailed regulatory mechanisms and mandates prior consultation before policy adjustments, without invoking expropriation except under narrow public purpose exceptions, aligning with international practice. Such legislative clarity helps avoid confusion between regulatory action and expropriation beyond relying solely on arbitration or State-to-State dialogue.

3. Risks of Calvoism

3.1 Overview of Calvoism

The doctrine of diplomatic protection originated from relations between Latin America and the United States. In other regions, such as Africa and Asia, extraterritorial jurisdiction was also used to uphold foreign nationals' rights—for example, Ottoman-era capitulations in which certain European nationals benefited, or Sudan's allowance for foreigners to be subject to their own laws. However, diplomatic protection as a practice was not exclusive to Latin America and the U.S.; it was later adopted by Western European states as well (Fabian, T., 2018, pp. 778-789).

The first articulation of diplomatic protection in the modern sense emerged in Argentina through jurist Carlos Calvo and thus became known as the "Calvo Doctrine." He introduced the standard of national treatment, grounded in the principles of non-intervention and sovereign equality, reinforcing the principle of non-discrimination. Calvo did not reject international standards outright; rather, he contended that both host-state nationals and foreign nationals should receive protection under the host-state's domestic law.

In his treatise Derecho internacional teórico y práctico de Europa y América (1868), Calvo argued that rules governing jurisdiction over foreign nationals and claims for compensation should be applied equally to all nations, regardless of power. He further asserted that foreign property holders in Latin American countries should first seek remedies in local courts before resorting to diplomatic protection or armed intervention. This prevents powerful states from exploiting weaker nations—a stance solidified in the famous Calvo doctrine: jurisdiction lies with the state where the investment is located, and no diplomatic or armed intervention should occur before local remedies are exhausted.

Professor Sonaraja of the National University of Singapore summarizes Calvoism thus: "Foreign investment and the legal claims to protect it were viewed as tools through which the United States could maintain economic dominance in the region. The notion of supranational norms protecting foreign investors outraged Latin American jurists, who believed that protection should be found only

within the host-state's domestic law."

Calvoism can be distilled into three core tenets: (1) rejection of supranational standards of treatment, (2) exclusive domestic jurisdiction, and (3) denial of diplomatic protection. This doctrine emerged from the early-stage tensions between developed (capital-exporting) and developing (capital-importing) countries in the international investment legal regime. Despite the leverage of developed nations—through treaty negotiations or exportation of privatized property ideologies—the structural imbalance meant that developing countries remained vulnerable to expropriation without adequate recourse. As globalization and assertions of sovereign control over natural resources intensified, Calvoism gradually waned.

3.2 Impact of Calvoism on the International Legal Order

nterpreting Calvoism as implying that a host State fully abandons recourse to international protection for acts constituting international wrongdoing, or that a foreigner's injury is directly linked to their nationality, is challenging to reconcile with international law. If one accepts that rights protected under diplomatic protection are those of the individual—rather than those of the protecting State—then objections against the "Calvo clause" grounded in general international law lose much of their force.

Professor James D. Wilets of Nova Southeastern University describes international law as functioning through a process of transnational legal harmonization (TLH). Although primarily descriptive, this concept frames globalization legally: cross-border legal harmonization involves coordinating rules rather than applying international norms through hierarchical supranational bodies. TLH includes standardized rules, definitions, or terms—developed by entities such as the ICC or UNIDROIT—that business actors worldwide integrate into contracts, rendering them legally binding in transnational transactions. Illustrative examples include Incoterms 2000 in international trade contracts and the UCP 600 for documentary credits. Moreover, the ICC has facilitated harmonization in areas like e-commerce, telecom, finance, insurance, tax, trade, investment, transport, anti-bribery, arbitration, and customs.

Despite these harmonization efforts, indirect expropriation disputes between investors and host States reveal limitations. International organization agreements and conventions—though not issued by a central authority—are driven by collective will; however, bilateral investment treaties (BITs), which define investor eligibility and dispute resolution mechanisms, remain the regime's main operative instruments. BITs are fundamental for investors insofar as they mitigate market access barriers in host States, enabling better market penetration and profit realization (Hallam, D., 2011, pp. 91-98).

Once an investor enters another State's sovereign territory, issues of fair treatment inevitably arise—this is a principal driver of indirect expropriation claims under investment arbitration. BITs protect investors' property and prescribe risk and treatment clauses; crafting these clauses is often a matter of up to investor States and host States, making them contractual and based on the parties' subjective intentions.

Investment involves not only capital and goods, but also cultural and social implications. Critics of globalization argue that its socio-cultural impact threatens stability and local cultures, particularly in developing countries. Conversely, when developed nations perceive that the spread of private property norms impinges upon their sovereignty beyond tolerable limits, they may impose barriers—representing a backlash against globalization. While globalization has altered the sovereign order, it has not fully eroded it.

In the investment law domain, the tension between sovereignty and private property protection means that if Calvoism—or similar sovereignty-first legal orders—dominates, then transnational legal harmonization and globally coordinated rule-making will face significant obstacles. This is especially true when developed nations, such as the U.S., no longer grant investors equal rights under treatment guarantees. In such an environment, indirect expropriation becomes a frequent issue, undermining the global investment landscape. To address this, States need to incorporate detailed indirect expropriation provisions or robust consultation mechanisms in BITs or multilateral agreements (Seddigh, H., 2001, pp. 631-684).

4. Conclusion

The Iran-United States Claims Tribunal, while offering a resolution paradigm for indirect expropriation, also revealed the breadth and complexity of such issues in international investment. The Tribunal did not rely solely on the effects-based approach; its incorporation of the police powers doctrine afforded host States some regulatory space. Determining whether a State's action constitutes expropriation hinges on the degree of interference rather than its legal type. Many State regulations and taxation measures are legitimate exercises of sovereign authority, yet they can still impact foreign direct investment.

Currently, the evolution of international investment law revolves around finding a balance between a State's sovereign regulatory domain and the protection of private property. Therefore, aside from sufficient emphasis and clarification in investment treaties, domestic legal frameworks regarding foreign investor treatment play a critical role—providing significant convenience in arbitral proceedings.

There are few clear legal rules or customary principles on indirect expropriation; their ambiguity offers little help in resolving issues and undermines predictability. As a result, practice is essential to establish sound bilateral and multilateral investment frameworks. Regarding treaty drafting, signatory States should agree on precise definitions of indirect expropriation—particularly concerning widely applied regulatory norms. Indeed, it is the lack of a clear definition that allows divergent interpretations. Although identifying a fixed definition is difficult given its infinite potential applications, States can redraft provisions to clearly delineate the role and priority of the harmful effects test and other criteria. They may also consider adopting a sovereign grant standard alongside the effects test. Whether through eligibility criteria or explicit exceptions, new provisions should be clearer and more effective than

those in recent treaties.

Ultimately, assessing whether a State measure constitutes indirect expropriation requires balancing the private rights of investors and the sovereign rights of the host State. Investors undoubtedly have the right to protect their assets, but States must retain sufficient capacity to safeguard the public interest as guarantors. International law may struggle to provide universally specific rules for indirect expropriation, but it is possible to achieve a more equitable balance between these interests. Indeed, international investment law has evolved partly through disputes that affirmed the primacy of private investor rights over a host State's discretionary regulatory authority. However, as the field continues to develop, it becomes increasingly clear that the law must be rebalanced, now recognizing both the public interest of the host State and the economic rights of investors.

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