

An Analysis on Expropriation of Property in Indonesia Applying International Law Rules

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ABSTRACT

This research aims to evaluate and analyze the enforcement of arbitration awards and the resulting solutions in international trade and investment law. The minor remedial measures provided for therein, their nature, objectives and impact on Member States; The conclusions of this research will suggest possible changes to the settlement efforts regulated in the WTO Dispute Settlement Mechanism. This will enable member states whose trade has been severely impacted by illegal acts to rebuild their sectors and ensure the Organization's goal of protecting and promoting trade liberalization. The academic success of law has been measured within the framework of the doctrinal methodology, which includes tracking legal precedents and legislative interpretations. The doctrinal method is simply scholarship rather than a separate research methodology

INTRODUCTION

Over the years, as modern trade and investment have begun to flourish, international law develops certain principles that bind countries to protect the property of foreigners acquired under the rubric of "State Responsibility for Foreigner Injuries". The legal rules provided by the laws of the states are clearly granted protection against the rights derived from foreign employers and, for their offenses, the recipient State was deemed delinquent and responsible for reparations (Nicholson, 2017).

Expropriation is the taking of foreign property by the state, whether for public interest or for any other reason. Historical examples of expropriation include direct property acquisition, but now the expropriation is largely the result of indirect government measures that have an effect equivalent to formal property taking. International law protecting foreigners from taking their property began to be incorporated into treaties in the 19th and 20th centuries. Meanwhile, the judicial statement, especially after World War II, paved the way for customary international law on the issue. Currently, the framework of international law to regulate the right to take on foreign property is largely contained in international investment agreements (IIAs). The IIA incorporates minimum standards for legitimate expropriation actions developed under customary international law, but also provides additional rules on the type of protected property, the requirements for such protection, and the actions of the protected property. One of the biggest questions faced by an international investment court that interprets IIA is the difference between indirect and compensated takings and legitimate and unenforceable regulatory measures. The arbitral tribunal also has not agreed on the principles for calculating compensation and criteria for assessing acquired property. Much of the literature in this view is devoted to these thorny issues (Baetens). The law of expropriation and nationalization in times of peace developed in consonance with the evolution of the status of aliens in the host State (Ruzza, 2018).

At the ground level, expropriations can be divided into direct and indirect expropriations. Direct expropriation is where the state exercises its sovereignty over the project either individually or as part of a broader scale nationalization program. Generally, a direct expropriation is a clear act by the state that transfers the project title from the investor to the country and thereby provides a clear reason for the deprived investors to seek compensation from the state. In other words, investors and lenders have specific actions and time points from which they can measure state obligations (Barratt, 2010).

On the basis of State practice, doctrine and arbitration awards, cumulative indirect expropriation is characterized by the following elements:

- a) An act attributable to the State;
- b) Disturbance property rights or other legal interests are protected;
- c) With a level such that the rights or interests of the relevant lose all or most of its value or its owners lose control over investment;
- d) Although the owner retains legal rights or remain in the physical possession (UNCTAD, 2012).

Until relatively recently, many scholars and international courts and municipalities have affirmed that traditional international norms regulate the ability of states to take possession of foreign properties. According to article 1110 of NAFTA, this classical standard requires that (1) taking for public purposes, (2) non-discriminatory take on foreigners, and (3) the state providing rapid and full compensation in a form that can be realized effectively. However, in recent years this norm has been the target of considerable attacks, especially from developing countries such as Indonesia. The Bulk of the controversy has been recognized on the classic standard compensation requirements (O'Connor, 1983). Determining the amount of compensation to be awarded is highly debatable and a big issue wherever it may be. In essence, of course, each party will do its utmost to take the first step of examining in detail and complete the investment litigation, in accordance with the needs and interests of the parties themselves, to prove and convince the court that in fact the expropriation itself has occurred or not. Then if it is known that the expropriation has taken place, then the compensation valuation method used will have a profound effect on the value of the compensation to be given. It is at this point that the applicable and applied rules are often vague and incomplete (Nikiema, 2013).

Economic development and prosperity are necessities in order to national development and bringing the State of Indonesia into an alternative choice, namely to build and bring in foreign capital. Foreign investment shall be in the form of a limited liability company with the status of a company incorporated in the Indonesian law so that foreign investors shall be assertive of the legal status of the company they are exercising and obtaining assertiveness about the invested capital listed in Article 5 paragraph (2) of Investment Act 25 2007 regarding investment (UU Nomor 25 Tahun 2007). However, the condition under Indonesian Law on Expropriation of foreign property does not seem to comply with International law. The legal problem of expropriation in Indonesian investment law is the absence of explanation and understanding what is expropriation, indirect expropriation, and equivalent expropriation action. In addition, the investment law in Indonesia also does not completely govern the terms of legal expropriation as regulated more specifically in international law.

Protection of the indirect acquisition of the assets by the host country has been set forth in various international instruments. Literally, the whole agreement and the relevant draft agreement provides indirect waiver or similar measures against takeover. However, much of what happens in practice completely silent on the treatment of regulatory action that cannot be compensated for the takeover indirectly, with the exception of the European Convention on Human Rights and Fundamental Freedoms (hereinafter the European Convention on Human Rights) have recently discontinued US Free Trade Agreement and a new model of the US and Canadian Bilateral Investment Agreement (BITs). OECD Draft Convention on the Protection of Foreign Property and OECD draft Multilateral Agreement on Investment, they are silent about the arrangements that are not compensated, accompanied by a commentary which discusses (OECD, 2004). In Article 10 (5) of Harvard Draft Convention on the

International Responsibility of States for Injuries to Aliens, the existence of a category of non - compensable takings:

Expropriation of non-compensable alien property or seizure of the use or enjoyment of foreign property resulting from the implementation of the tax law; of general changes in value of the currency; of action the competent authorities of the State in the maintenance of public order, health or morality; or from the exercise of the legitimate and recognized war or inadvertently against the normal operating state law will not be considered wrong and do not violate the rules (Sohn and Baxter, 1961). On the other hand, Investors will consider where their capital will be invested with some consideration that host country candidates should be able to provide assurance for legal certainty and protection, simple and consistent bureaucracy, and the availability of adequate facilities and infrastructure. In contrast, host countries also want to avoid increased market concentration, excessive repatriation of profits, transfer pricing, inappropriate technological transfer, and unwanted dependence on foreign countries (Dewi, 2011).

THEORETICAL REVIEW

Direct and indirect expropriation by the host country has long been a strongly debated issue especially in international investment law and the most severe form of interference with property rights, as it destroys an investor's legitimate expectations relating to its investment (Leon, 2015). Under international law, only a total and permanent deprivation of the ownership may cause a claim for expropriation. The Concepts (sometimes referred to international standards of fairness) confirms that no rights are created and defined by international law that can be asserted against the State by or on behalf of foreigners which includes the rights of foreigners to the criminal justice process or fair (not subject to rejection justice), for proper treatment if imprisoned, and for the protection of disorder, violence, and deportation rude manner, and to enjoy their property unless taken for a public purpose with just compensation (Bernhardt and Smith, 1997) .

In any case where the issue of compensation raises controversy, the national jurisdiction of the State takes such measures to be exhausted. However, by agreement by sovereign nations and other interested parties, settlement of the dispute should be made through arbitration or international adjudication (General Assembly Resolution, 1962). The protection of the foreign property such as compensation is the most important thing for protecting investment. For instance, once compensation is achieved, complete satisfaction and assistance does not always result for the owner. Very often the subjective value of property to the owner is much higher than the actual market value. In particular owners often attach sentimental value to their properties and enjoy unique features that are different from others and then this is not considered in the objective approach to determining compensation (Rayman and Lavictoire, 2011).

On the other hand, from foreign jurisdiction particularly in Indonesia as a developing country must be structured and safeguarded by foreign investors. This is the most important form of protection for investors seeking to invest in high-risk jurisdictions (Ocampo, et al, 2009). Two decades ago, disputes before the courts and discussions in the academic literature were focused primarily on the standard provisions of compensation and measured value measurement. The differences that exist from developed and developing countries are more to raise issues about the formation and evolution of customary law. At this time, more positive attitudes from countries around the world to foreign investment and the proliferation of bilateral agreements and other investment agreements that require prompt, adequate and effective compensation for foreign investment expropriation have largely eliminated the debate about the practical meaning for foreign investors (OECD, 2004).

Bilateral Investment Treaties ('BIT's) provide fair and equal treatment of foreign investment in the host country and for the full protection and security for foreign investment, without risk of expropriation and compensation in case of loss (Onetto, 2018). Fair and Equitable Treatment and Full Protection provide basic standards that are not related to the domestic law of the host country and serves as an additional element in the interpretation of treaties and trade agreements on investment. While this principle does not give rise to any liability for the host country, but it serves to reinforce the obligations it has taken the parties themselves 'and provide a common standard for the host country' to conduct due diligence in the protection of foreign investment (Onetto, 2018).

Indonesia only has a few BIT's as International standard for compensation. However, this is not enough for investors who want to invest in Indonesia because the Methods for Assessing the Value of the Investment such as going concern, discounted cash flow, liquidation, replacement and net book value are not included in BIT's when claim for full compensation come up to the court. In addition, Indonesia Investment Law does not regulate the terms of legal expropriation as regulated specifically in international law (Dunoff, et al, 2015). Compensation will be given only if the foreign investor is deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. It can be said that which is adequate and appropriate compensation, the agreements most often refer to the fair market value of investment (Barrat, 2010)

METHODOLOGY

The academic success of law has been measured within the framework of the doctrinal methodology, which includes tracking legal precedents and legislative interpretations. The essential features of doctrinal scholarship involve 'critical conceptual analysis of all relevant law and case law to disclose legal statements relevant to the issue under investigation (Hutchinson, 2015).' The doctrinal method is simply scholarship rather than a separate research methodology (Hutchinson and Duncan, 2012). The Doctrinal methodology which by many is considered the most appropriate lawyers depict a clear legal approach to research. Legal research skills have been identified as core skills for the practice of law, and in the professions, such skills are regarded as synonymous with doctrinal research methods. Good legal research skill is an important step in achieving the ability to "think like a lawyer" and achieve results valid legal reasoning. For lawyers, therefore, doctrinal method is intuitive aspects of employment law (Hutchinson, 2013). Thus this method is appropriate because the doctrinal process has been described within a problem framework with a number of linear steps including assembling the facts, identifying the legal issues, analyzing the issues with a view to searching for the law, undertaking background reading and then locating primary material, synthesizing all the issues in context, and coming with a tentative conclusion (Hutchinson, 2013)

RESULTS

Brownlie has stated, "state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation (Brownlie, 2003)" Although in the Police Power Doctrine, host States may enforce their laws against the foreign investors without being liable of any wrongdoing, but such action should not be taken for granted, it should consider some things so that a sense of justice can be created (Aceris Arbitration, 2017). As follows A national treatment clause, meaning that each party will giving equal treatment to the parties, namely the host party and the parties investor. Then no tendency to discriminate between countries with each other (Sembiring, 2007). The principle of A most favored nation clause, meaning the host or foreign investment, will not get the less treatment compared with other parties. This is also to ensure the certainty of other countries investing in their own country, and the potential injustice in investing in other countries can be overcome (Sembiring, 2007).

In addition, according to Sole effects doctrine, the result of actions taken by the government towards an investment is the most important factor which must be considered very well when it will state that an indirect expropriation has occurred or not (Mostofa, 2008), then the Hull Formula, requiring the payment of “prompt, adequate, and effective” compensation for the otherwise lawful taking of alien property by the state, represents or has ever represented the customary international law standard should be applied (Mendelson, 1985). This has to do with Calvo Doctrine, sovereign states have the right freely to the extent of all other forms of interference and that foreigners are not entitled to any rights or privileges not granted to citizens in other words the rights of citizens and foreigners are absolutely different, and therefore they may seek redress only from local authorities (Shea, 1995)

DISCUSSION

Expropriation shall be the expropriation of the ownership of a foreign investor or certain legal entity whereby the ownership interest of the assets of the foreign investor or legal entity shall be transferred to the acting expropriator or the third party appointed by that country. Expropriation involves the transfer of ownership rights to the physical seizure of such foreign ownership. Generally, expropriation is performed to benefit the expropriating country, or third party designated by the expropriation country (UNCATD). Direct expropriation is where the state runs its sovereignty over the project either individually or as part of a broader scale nationalization. Generally direct takeover is a clear action by the state to transfer title of the project from investors to the country and thus provide a clear reason for investors seized to seek compensation from the state (Fulbright, 2010).

In general terms, indirect expropriation occurs where a State takes measures which substantially interfere with property rights of an investor without necessarily affecting the legal title of the said property (Chitsove, 2014). From the European Convention of Human Rights , it is said that the duty to compensate is not applicable to normal regulation (non - compensable measures): ‘Every natural or legal person is entitled to the peaceful enjoyment of its possessions. No one should be deprived of his possession except in the public interest and subject to the provisions laid down by law and by the general principles of international law (OECD, 2005).’

Legal protection provided by the Indonesian government for increasing foreign investor confidence in investing capital, being to make bilateral agreements with various countries of origin of investors. Investment agreements created to apply principles that are generally applicable in international association. These principles include: the principle of A national treatment clause, meaning that each party will be giving equal treatment to the parties, namely the host party and the parties investor. Second, the principle of A most favored nation (MFN) clause, meaning the host or foreign investment, will not get the lesser treatment compared to other parties (Sembiring, 2007)

The fair and equitable compensation standard included a duty to protect the legitimate expectations of an investor, whether or not the standard was construed as an autonomous treaty standard or a reflection of the international minimum standard (Barbados, 2016).

CONCLUSIONS AND RECOMMENDATIONS

Concluding the significance difference terms of Expropriation in International Law compared to Indonesian Law. The more positive attitude of countries around the world toward foreign investment and the proliferation of bilateral treaties and other investment agreement requiring prompt, adequate and effective compensation for expropriation of foreign investments have been of practical significance for foreign investors and is what needs to be examined and applied where feasible in Indonesia. In addition, the prospect of Indonesia being able to adopt international law rules that will benefit foreign investors in the country is important. This will provide investors with greater confidence in investing in Indonesia knowing that the government is ready to compensate investors for inadvertent expropriation of foreign owned property.

FURTHER STUDY

Wealth of information is contained in legal and sociological database. However, law and literature particularly on expropriation in Indonesia is hard to come by. There is also insufficient explanation from Indonesian Statutes and Journal articles.

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