Judicial Expropriations: Difficulties in Drawing the Line Between Adjudication and Expropriation

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Abstract

When foreign investors complain of measures that adversely impact their investment, the authorities from which these measures originate often pertain to very different government branches. At first glance, it appears that investment treaties

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and the pertinent rules of state responsibility take this fact into account because they provide for equal application of investment protection rules to acts of all branches of a state. However, when it comes to acts of the judiciary, the situation is somewhat more complex. First, cases dealing with violations of expropriation standards by the judiciary are comparably scarce. Second, important structural differences between the judiciary and other branches of government trigger the question whether the traditional and generally formulated concept of expropriation can accommodate these differences. The need for clarification is evident and may be remedied by examining investment arbitration cases that have dealt with the concept of judicial expropriations and its difficulties. They range from deciding when judicial acts constitute an expropriation, what grounds of lawfulness are to be considered when courts expropriate and most critically, whether only judicial acts of courts of last instance count as judicial expropriations in light of a potential substantive application of the exhaustion rule. As claims of judicial expropriations increase, these unsettled inquiries seem worth investigating.

**Keywords**

Judicial expropriation · Investment arbitration · Expropriation by courts · National courts in investment arbitration · Expropriation · Denial of justice · Due process · Commercial arbitration · Expropriation of awards · Expropriation of contracts

**Introduction**

Investment arbitration tribunals do not discriminate between branches of government. In fact, a wide range of state organs and agencies have been found responsible for breaches of investment protection standards – regardless of their affiliation to a certain branch of the state. However, the vast majority of decisions holding states liable for mistreating foreign property happen to arise out of measures taken by the legislative or executive branch.1 Arbitration tribunals have been reluctant – or hesitant – to find violations of treatment standards through acts of the judiciary.2 Nonetheless, it remains undisputed that national courts may bring about the inter-

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1See specifically with respect to expropriations: Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award of 29 July 2008, para 702. (“Whereas most cases of expropriation result from action by the executive or legislative arm of a State, a taking by the judicial arm of the State may also amount to an expropriation.”)

2See Amicus Curiae submission by the United States in Eli Lilly v. Canada, para 204 (“According to the United States, under international law, the actions of domestic courts are accorded a greater presumption of regularity than legislative or administrative acts are.”), with respect to general international obligations, see Jiménez de Aréchaga E (1978) International law in the past third of a century. Recueil des Cours 159, p 278.
national responsibility of their state, as accepted both in general international law\(^3\) and specifically in investment arbitration.\(^4\) And while international agreements and their provisions formally apply to organs of all branches of government, the structural and regulatory differences under which the distinct branches operate may not be sufficiently accommodated by such universally formulated protection standards.

This becomes strikingly evident in the context of expropriations of foreign property, especially with regard to the conditions of unlawfulness of such takings. In the long-standing tradition of bilateral investment treaties and arbitral awards, the legality of a taking has been measured by more or less four factors: the payment of adequate compensation, the measure’s public purpose, compliance with due process, and non-discrimination.\(^5\) Although the language of investment treaties establishes these criteria without distinction as to who (within a state) expropriated,\(^6\) their direct application appears rather difficult when it comes to expropriation by courts: Are we to measure the lawfulness of a judicial expropriation by the compensation offered? This would lead to the paradox of requiring courts to compensate for judgments that were intended to cure a legal imbalance in their own right. And with court judgments not regularly being accompanied by compensation for the judgment debtor, it becomes evident that the traditional conditions of lawfulness may not be appropriate to measure the legality of all types of expropriations.

This piece examines specific issues arising in the context of judicial expropriations in international investment law. While it is common for national courts to be


\(^6\)See, Argentina-US BIT (1991), Article IV (“Investments shall not be expropriated or nationalized either directly or indirectly [. . .] except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law. . .”); Germany-Pakistan BIT (1959), Article 3(2) (“Nationals or companies of either Party shall not be subjected to expropriation of their investments in the territory of the other Party except for public benefit against compensation [. . .]”; Kazakhstan-Sweden BIT (2004), Article 4(1) (“Neither Contracting Party shall take any measures depriving, directly or indirectly, an investor of the other Contracting Party of on investment unless the following conditions are complied with [. . .]”).
found in violation of investment protection standards (most prominently, the guarantee of fair and equitable treatment) by way of a denial of justice, the question when judicial acts may also constitute unlawful expropriations remains largely unresolved. The issue of expropriations caused by national courts has become relevant in several recent arbitration cases, but it has received little attention in academic writing; despite the many complex conceptual and practical questions it poses.

### Conceptual Problems of Judicial Expropriations

#### Can Courts Expropriate?

Despite the relative lack of “precedent” affirming judicial expropriations, there are still a solid number of investment arbitration cases dealing with allegations of expropriation by courts. While the approaches taken vary, most of the awards accept the premise that a national court may be capable of effecting expropriations in breach of investment protection standards. One of the more elaborate discussions of judicial expropriations as a new development may be found in the *Tatneft v. Ukraine* award. The tribunal there noted that, in principle, the law of expropriations was predominantly concerned with legislative or administrative acts and while judicial acts rarely play a role, they are not in general exempted under either international law or BITs. Although, in that case, the tribunal was undecided about whether the expropriation claim on the merits, *Tatneft* provides some insight into the treatment of judicial expropriations by tribunals. Indeed, the length at which the *Tatneft* tribunal discussed

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9*OAO Tatneft v. Ukraine*, PCA UNCITRAL, Award on the Merits of 29 July 2014, para 459 (“The issue of an act of expropriation can also originate in the judiciary […] is not a common occurrence […]”); *Rumeli v. Kazakhstan*, (note 1), para 702 (“Whereas most cases of expropriation result from action by the executive or legislative arm of a State, a taking by the judicial arm of the State may also amount to an expropriation”).

10*OAO Tatneft v. Ukraine*, para 459.
past jurisprudence on judicial expropriations and the tests applied gives away the somewhat novel character it attached to the concept.

Investment tribunals are not alone in this confusion about this “novel” claim. Constitutional protections against expropriations also exist in domestic laws, leading the United States Supreme Court having to pronounce itself on a claim of judicial taking too. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environment Protection*, a nonprofit corporation of beachfront property owners alleged that the Florida Supreme Court expropriated their littoral rights when it held that those rights were not “vested property rights.” The plurality opinion reveals that the Supreme Court discussed at length, and without reaching consensus, the issue whether it is even possible for judicial acts to violate the Takings Clause of the Fifth Amendment to the US Constitution. While the opinion confirmed that no judicial taking had taken place in the particular case, it emphasized that the Takings Clause does not differentiate between branches of government but focuses on the act rather than the actor. It would “be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.” The opinion therefore concludes that when “a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it [. . .].” The Supreme Court’s treatment of the issue, and particularly the fact that no majority could be reached on it, confirms the premise that the concept of judicial expropriations causes at least some initial perplexity in courts and tribunals. The following chapters will demonstrate why they can certainly not be blamed.

### The (Unclear) Line Between Expropriation and Its Unlawfulness

When deciding whether a measure qualifies as an expropriation in breach of a treaty, arbitrators and scholars often adopt a three-step examination. After firstly determining what interests are protected under the treaty, the test moves on to assess if an expropriation has occurred and, finally, whether that expropriation met the conditions of the treaty (in which case it would still be lawful). With judicial expropriations, the line between determining the occurrence of an expropriation and its

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11 *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, p. 712 (2010).
12 Ibid., pp. 713–14, 719.
13 The Takings Clause stipulates: “nor shall private property be taken for public use, without just compensation,” see U.S. Constitution, Amendment 5.
14 *Stop the Beach Renourishment*, pp. 713–14.
15 Id.
16 Justice Kennedy was rather averse to take, what he calls, “the bold and risky step of holding that the Takings Clause applies to judicial action.” See *Stop the Beach Renourishment*, p. 719.
unlawfulness seems to be somewhat blurred. Usually, the main characteristic exposing direct expropriations is the transfer of legal title, while in case of indirect expropriations, the title is left untouched but the investor may prove an expropriation by showing that he or she has essentially been deprived of a “meaningful possibility to utilize its investment.”18 Nevertheless, both types of expropriations will have in common that there was a deprivation of property rights qualifying as an investment and that this deprivation was substantial.19 Applying this standard in abstracto to judicial expropriations will reveal that they are very easily at risk of meeting the first threshold: Every court decision awarding property or rights of economic value to one party (e.g., private or state) and dispossessing the other party (e.g., an investor) of them could technically be considered to have deprived the judgment debtor of them.20 This risk, as oversimplified as it may seem, could explain the hesitation of many to take a stand on judicial expropriations: The effect “on the ground” would be enormous if every national court judgment were to come under the scrutiny of expropriation standards in investment law. The implications would become even more wide-ranging considering jurisprudence that does not find it necessary that an expropriation’s benefit go to the state.21 If no link of the benefit to the state is required, every private dispute between the investor and another private party that is “wrongly adjudicated” by a national court could, theoretically, constitute a judicial expropriation.22 With this much being at stake, it appears that some tribunals attempted to mitigate the damage by treating judicial expropriations differently. For instance, some tribunals have – deliberately or not – smudged the line between the finding of an expropriation and the conditions of its unlawfulness. These awards, among them Saipem v. Bangladesh, appear to require not only a substantial deprivation of protected rights but also an additional element of impropriety for a court’s act to be considered an expropriation in the first place. An act by a national court causing a substantial deprivation of property would therefore normally not be considered an expropriation, unless certain serious factors accompany the measure. This group of tribunals appears to justify such departures from the usual “modus operandi” of finding an expropriation through the exceptional character of

19Ibid., p. 104.
20See similarly, Saipem v. Bangladesh, (note 13), para 133 (“If this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds”).
22This was, however, one of the doubts the Tatneft tribunal had about the expropriation at issue there, stating: “[w]hile there are cases in which it has been held that expropriation need not result in the transfer of title to property to the State, these are not common occurrences.”OAO Tatneft v. Ukraine, para 467.
expropriations by the judiciary. Another (earlier) example of such cases is *Middle East Cement v. Egypt*, where the tribunal dealt with, among other things, a court-ordered seizure and auction of an investor’s ship that was not properly notified to him.23 The tribunal held that both measures would usually not qualify as a taking, but if not taken “under due process of law,” they could be considered measures tantamount to expropriation.24 It is interesting how in the case of courts, *Middle East Cement* required, for the purpose of finding an expropriation, and not for determining its unlawfulness, an additional element of impropriety. Another formulation in line with this “additional factor of seriousness/illegality” argumentation, albeit more drastic, is found in *Rumeli v. Kazakhstan*, where the tribunal held that a court-ordered transfer of property rights to a third party will amount to an expropriation only if the judicial process was instigated by the State.25 Although these tribunals seem to have applied the same adaption of the traditional test, the *Saipem* tribunal was more outspoken about this introduction of another element to the test for finding an expropriation.26

Then again, other tribunals did things quite differently. They only briefly address whether an expropriation has occurred and apply the usual “substantive deprivation” test for that inquiry. However, they then engage in a rather lengthy discussion on the elements of unlawfulness, the most predominant in the context of judicial acts being due process. While in these cases, the lines between finding an expropriation and examining its lawfulness are therefore drawn more clearly, the next issue arises quite inevitably. More often than not, an examination of the traditional conditions for lawfulness will lead to the compensation requirement, creating an awkward situation for tribunals that only a few have managed elegantly, while others either made only passing reference to it, or skipped it altogether (Chap. 4). This article therefore suggests that both the definition of a judicial expropriation and the conditions of unlawfulness applied in arbitral practice are not yet uniform. However, significant contributions to clarify the situation have already been made and shall be discussed below (Chap. 3).

**Why the Dismay?**

This conceptual discussion allows some preliminary conclusions on judicial expropriations. The first is that, generally, tribunals appear to agree that judicial

24 Ibid., para 139.
26 *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, paras 133–134 (“That said, given the very peculiar circumstances of the present interference, the Tribunal agrees with the parties that the substantial deprivation of Saipem’s ability to enjoy the benefits of the ICC Award is not sufficient to conclude that the Bangladeshi courts’ intervention is tantamount to an expropriation.”)
Expropriations are a legal possibility, even if some would apply a heightened threshold of seriousness or illegality to them. The creativity of tribunals in dealing with judicial expropriations might arguably stem from a general reluctance to consider wrongdoing by the judiciary an occurrence just as likely as by the executive or legislative. This leads to the second preliminary conclusion that there is something about judicial expropriations causing considerable dismay in scholars and arbitrators alike.

Two issues are likely to be at the root of that dismay. A first concern voiced very early on in both *Loewen v. United States* and *Azinian v. Mexico* is that when allowing claims of judicial expropriations, a form of international review of domestic rulings would be tolerated under the pretense of seeking compliance with investment standards, in other words, judicial review “through the backdoor.” However, this contention seems equally applicable to any other investment protection standard that stipulates an international standard for the administration of justice by domestic courts (i.e., denial of justice, FET). The real crux (and second root) of the dismay appears to lie in the fear that lower courts may face expropriation allegations in investment arbitration too. A claim of denial of justice is only successful if, as a substantive requirement, local remedies have been exhausted (Chap. 4). For many, the rise of claims alleging judicial expropriations in lieu of a denial of justice is motivated by the desire to circumvent the exhaustion requirement. Some tribunals and scholars have therefore argued that courts may only violate investment treaties through a denial of justice, while others ruled out that court measures are exclusively relevant in the context of denial of justice. These two concerns will be kept in mind in the following survey of cases and taken up again in Chap. 4.

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27 In *Loewen v. US*, the criticism departs from the assumption that this form of “international review” of domestic rulings would ultimately lead to “put[ting] the label of international wrong on what is a domestic error.” *Loewen Group, Inc. v. the United States*, ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003, para 242; *Azinian v. Mexico*, para 99.


30 *Eli Lilly and Company v. Canada*, Case No. UNCT/14/2, Award of 16 March 2017, para 223 (“[... ] the Tribunal is unwilling to shut the door to the possibility that judicial conduct characterized other than as a denial of justice may engage a respondent’s obligations under NAFTA Article 1105.”)
Factual Scenarios of Judicial Expropriations

What characteristics must a measure affecting property rights possess in order to amount to a judicial expropriation? Before looking at a technical answer to this question, it appears appropriate to briefly mention the theoretical divide between the approaches of the “police powers” vis-à-vis the “sole effects” doctrine. In determining whether a governmental measure constitutes an expropriation, the “sole effects” doctrine considers only its effect on the property, while the “police powers” doctrine takes the purpose of the measure into account – and hence allows for more deference to a state’s right to regulate. The choice of doctrine will decide whether a measure is ultimately viewed as a compensable expropriation or as a non-compensable regulation. In the context of judicial expropriations, the police powers approach would therefore suggest that a measure by the judiciary, despite having expropriatory effect, would not trigger an obligation to compensate, as it may be considered a state’s legitimate exercise of its regulatory power.

The technical response to the inquiry into the requisite characteristics of a judicial expropriation, on the other hand, will require an examination of the rather manageable pool of pertinent cases. Awards dealing with judicial expropriations include the following (non-exhaustive) scenarios of allegedly expropriatory measures by national courts:

- Set aside or vacating of commercial awards (Saipem v. Bangladesh)
- Invalidation of arbitration agreements (ATA v. Jordan)
- Invalidation of contracts (Sistem v. Kyrgyzstan, Karkey Karadeniz v. Pakistan, Krederi v. Ukraine)
- Termination of contracts (Swisslion v. Macedonia, İckale v. Turkmenistan)
- Redemption of shares (Rumeli v. Kazakhstan, Tatneft v. Ukraine)

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32Saluka Investments B.V. v. Czech Republic, UNCITRAL, Partial Award of 17 March 2006, para 263 (“In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.”)

33In Weinstein v. Iran, a US Court of Appeals rejected that there was an expropriation, based on the fact that the judgment ordering payment of compensation originated from the entity’s “unlawful actions in support of terrorism” and hence confirms the relevance of the public purpose for which the damages were granted in the determination of an expropriation. See United States Court of Appeals (2nd Circuit), Weinstein v. Iran, 609 F.3d 43 (2010), 54. To the contrary, in Infinito Gold v. Costa Rica, an investor argued that “[t]he sole effects doctrine applies to judicial expropriations in the same manner as it does to other expropriatory measures.” See Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, para 163.
• Seizure, auction, or transfer of assets (*Middle East Cement v. Egypt, Garanti Koza v. Turkmenistan, Standard Chartered Bank v. Tanzania II*)
• Revocation or invalidation of patents or licenses (*Eli Lilly v. Canada; Liman Caspian Oil v. Kazakhstan*)

These specific examples may be categorized into interferences by national courts of four types: interferences with commercial arbitration (Section “Interferences with Commercial Arbitration”), interferences with contracts (Section “Interference with Contracts”), interferences through seizure or transfer of assets (Section “Seizures or Transfers of Assets”), and interferences through revocation or invalidation of patents or licenses (Section “Revocation of Patents or Licenses”).

**Interferences with Commercial Arbitration**

A number of claims alleging judicial expropriation arise out of acts by national courts in relation to an arbitration agreement, an arbitration, or the resulting award. A quite succinct expression of the main problem at issue here may be found in this general statement made in a treatise: “In international commercial arbitration, most of the time parties and arbitrators do not want interference from a court.” However, with the system of commercial arbitration heavily relying on national courts for matters such as judicial assistance, setting aside or enforcing an award, such interferences are bound to occur. When an action in these courts has ended in an unfair result for the investor, international investment protection standards regulating judicial conduct seem to be an all too welcome avenue. This was the case in the most prominent investment award in the context of judicial expropriations, *Saipem v. Bangladesh*, which dealt with the domestic “nullification” of a commercial arbitration award.

**The Many Legacies of Saipem**

As a dispute arose between the investor and the state-owned corporation Petrobangla in relation to their concession contract, Saipem initiated arbitration under the International Chamber of Commerce (ICC) Rules in accordance with the arbitration agreement contained in that contract. Petrobangla brought several actions in Bangladeshi courts against the ICC arbitration, which resulted in interferences with it by the national courts in various forms, ranging from anti-arbitration injunctions to revocations of the arbitral tribunal’s authority. After Petrobangla requested a set aside of the ICC award rendered in favor of Saipem, the Bangladeshi Supreme Court – in line with the lower courts – ultimately held that the arbitration was conducted “illegally” and that the tribunal’s authority had been revoked. Consequently, it found

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that the resulting ICC award was a “nullity in the eyes of the law” and thus would not even need to be set aside.35

The ICSID tribunal classified these interventions by Bangladesh’s courts as an indirect expropriation. In doing so, it held that the injunctions and the “nullification” had “substantially depriv[ed] Saipem of the benefit” of contractual rights incorporated in the award and therefore constituted a measure tantamount to expropriation.36 The tribunal, despite denying it, indeed departed from the “sole effects doctrine” discussed above, when it opined that a factual and substantial deprivation would not be sufficient to give rise to a claim of judicial expropriation – the actions must also have been “illegal.”37 In *Saipem*, this illegality was on the one hand derived from an abuse of rights by the domestic court as it issued a ruling with no foundation in evidence.38 On the other hand, the actions were considered illegal because the Bangladeshi courts had, by revoking the arbitrators’ authority, de facto prevented the arbitration and thus “completely frustrat[ed]” its obligation under Article II of the New York Convention to recognize and respect arbitration agreements.39

The significance of the tribunal’s decision in *Saipem v. Bangladesh* not only lies in its finding – among the first40 – in favor of an investor’s claim to have been expropriated by a court. It also considers, for the purposes of determining the illegality, a violation of international law that is not necessarily connected to procedural impropriety but rather lies in a violation of an international treaty other than the BIT at issue.41 The more lasting contribution of *Saipem* is, however, its impact for the category of judicial expropriations defined here: In light of the decision in *Saipem*, the interaction between commercial arbitration and investment protection could reach interesting dynamics. Claiming a judicial expropriation before an investment arbitration tribunal could accordingly provide a remedy against

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35 *Saipem v. Bangladesh*, para 50.
36 Ibid., para 129.
37 Ibid., para 133–134.
39 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 10 June 1958, 330 UNTS 38, Article II (1) (“Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not, concerning a subject-matter capable of settlement by arbitration.”); *Saipem v. Bangladesh*, para 167.
40 See, however, *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran and National Iranian Oil Company*, IUSCT Case No. 43, Award (Award No. 258-43-1), 8 October 1986, para 43.
a set aside or a refusal to enforce an award if there were major irregularities. Yet, the precedential value of the Saipem award is limited to some extent by the fact that Petrobangla did not have any assets outside of Bangladesh, making the refusal to enforce in Bangladesh a real and permanent deprivation of the investment and because of jurisdictional limitations valid in that case.

**Awards or Arbitration Agreements as Assets Protected Under BITs**

An essential prerequisite for the success of such judicial expropriation claims is that the respective commercial award qualifies as a protected right or an asset under the BIT. In both general and investment law, it is widely recognized that intangible property such as contractual rights can be expropriated and that they qualify as investments either because they are directly listed in the respective BITs or because they generally qualify as “assets.” The tribunal in *Saipem v. Bangladesh* indirectly applied that premise by not focusing on whether a commercial arbitration award may generally qualify as an investment under the treaty but rather by making clear that the rights embodied in the award were not created by the award, but arose out of the underlying contract. The final qualification of a commercial award as an investment may therefore also depend on whether the treaty protects contractual rights.

Further guidance on the treatment of arbitration agreements under BITs may be found in *ATA v. Jordan*. In that case, the tribunal was faced with an allegation of a judicial expropriation due to the annulment of an award and the invalidation of an arbitration agreement. After a dike constructed by Claimant collapsed, a commercial arbitration was initiated under the contract between ATA and the governmental contracting party (APC). The award found that ATA was not liable for the collapse and awarded compensation to it for its counterclaim. APC then turned to Jordanian

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43 *Saipem v. Bangladesh*, para 130 (‘It is true that one could object - Bangladesh did not - that in theory Saipem can still benefit from the ICC Award […]. Yet, Bangladesh itself acknowledges that Petrobangla has “no assets outside Bangladesh”’).

44 *Saipem v. Bangladesh*, para 97 (‘As already mentioned in the Decision of Jurisdiction, Article 9 (1) of the BIT contemplates the possibility of recourse to the jurisdiction of ICSID with respect to […] “disputes […] relating to compensation for expropriation, nationalization, requisition or similar measures […]”’).


46 *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 127 (“This said, the rights embodied in the ICC Award were not created by the Award, but arise out of the Contract. The ICC Award crystallized the parties’ rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by the Award constitute an investment within Article 1(1)(c) of the BIT.”).

47 *Saipem v. Bangladesh*, para 128 (“Turning first to the identification of the property at stake, the Tribunal considers that the allegedly expropriated property is Saipem’s residual contractual rights under the investment as crystallised in the ICC Award.”)
courts which not only annulled the award but also voided the arbitration agreement based on a new Jordanian Arbitration law that entered into force only after the arbitration agreement was concluded. While the ICSID tribunal did not discuss the annulment of the award due to jurisdictional constraints, it dealt with the claim on extinction of the arbitration agreement based on the retroactive application of the law and thereby offered some insight as to how an arbitration agreement might qualify under a BIT. The tribunal eventually did not find an expropriation, but it considered the “right to arbitration” an “asset under the treaty,” because it qualified as “claims to [. . .] any other rights to legitimate performance having financial value related to an investment.”

It then held that this particular right was not annulled with the enactment of the new arbitration law, but upon the decision of the Jordanian courts, because “the Jordanian Court of Appeal and Court of Cassation could have complied with their duty in this case by refusing to apply retroactively the new rule.”

Saipem and ATA not only show that rights related to commercial arbitration, be it the resulting award or the arbitration agreement, qualify as an “expropriable” asset under (at least the respective) BITs. They also exemplify that interferences with arbitrations seem to serve as a regular cause for complaints of judicial expropriations. Violations of standards for setting aside, vacating, or refusing to enforce awards pursuant to the New York Convention may therefore be causal for the unlawful character of that judicial expropriation. However, the tribunals’ treatment of such judicial expropriations is still somewhat inconsistent. While Saipem confirmed an expropriation of an award, ATA dealt with the extinction of an arbitration agreement under the realm of the FET standard incorporated through a Most-Favored Nation clause. Particularly the Saipem award, however, has been widely cited and endorsed in the context of judicial expropriations. The potential effect Saipem’s finding could have on interactions between commercial arbitration and investment arbitration may be one of many reasons why the tribunal attempted to introduce a heightened “illegality” requirement into the expropriation test (Section “The (Unclear) Line Between Expropriation and Its Unlawfulness”, Chap. 4). With more cases asserting judicial expropriations in such context, jurisprudence on the issue will still be evolving. In a recent decision, for instance, another tribunal was confronted with a claim that domestic courts expropriated an investor’s “contractual right to damages” because of the nonenforcement (or alleged delays in the enforcement) of an award. It remains to be seen to what extent investment arbitration

49 Ibid., para 128.
50 Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Award of 2 July 2018, para 707; Eli Lilly v. Canada, para 181.
51 The claim was eventually rejected because the deprivation of the value of the investment was found not to be permanent and not to have been significant enough as the investor had recovered substantial parts of it already. See Anglia Auto Accessories Limited v. The Czech Republic, SCC Case No. 2014/181, Final Award, 10 March 2017, para 291.
tribunals consider themselves competent and willing to rule on the treatment of commercial awards by national courts.

**Interference with Contracts**

A second category of scenarios often alleged to constitute judicial expropriations deals with situations where national courts interfere with contracts. These interferences may either consist in the invalidation, termination, or transfer of contracts or rights arising out of contracts. Now, dockets of domestic courts do not exactly suffer from a scarcity of contract-related cases, which, together with the fact that contractual rights are clearly recognized as assets or investments, projects wide-ranging implications for expropriations by national courts.

**Invalidation of Contracts**

A national court expropriated an investment through the invalidation of a contract in *Sistem v. Kyrgyzstan*. The investor, who was active in the hotel industry, concluded share purchase agreements with a state-owned Kyrgyz company after it was declared bankrupt. When the Kyrgyz courts later reversed the declaration of bankruptcy, they also invalidated the share purchase agreements which the investor had concluded with the liquidator. The voiding of the contracts was ultimately upheld by the Kyrgyz Supreme Court. The arbitral tribunal held it was well-established that the abrogation of contractual rights by a state is tantamount to an expropriation of property and that the court’s decision “deprived the claimant of its property rights in the hotel just as surely as if the state had expropriated it by decree.”  

52 The tribunal in *Karkey Karadeniz v. Pakistan* came to a similar conclusion. A judgment by the Pakistani Supreme Court declared the investor’s rental power contract void ab initio, leading various organs of the State to treat it as invalid. The tribunal found that “Pakistan ha [d] expropriated Karkey’s investment through the Judgment” because it “deprived Karkey of the use and enjoyment of its contractual rights, including [its] right to terminate the Contract and [...] interfered with the free transfer of [its] investment.”  

54 And while the respondents had also attempted to exonerate themselves by arguing along the lines of the police powers doctrine, the tribunal stated that “[s] uch a deprivation cannot be considered as a legitimate regulatory taking as it stems from the arbitrary 30 March 2012 Judgment.”  

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52 *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award of 9 September 2009, para 118.

53 *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award of 22 August 2017, para 641.

54 In particular, Karkey lost post-termination rights under the contract, including rights to payment for outstanding invoices, termination charges, and demobilization charges. See *Karkey Karadeniz v. Pakistan*, paras 648–649.

55 Ibid., para 649.
On the other side of the spectrum of awards dealing with invalidated contracts and judicial expropriations lie more hesitant, sometimes even stricter, approaches. The rather strong insistence of the Sistem tribunal on the equally great potential of judicial acts to lead to expropriations may be contrasted to the hesitant approach in Tatneft v. Ukraine, where it seems like the tribunal was more comfortable tying the judicial acts to other measures to determine an expropriation. Similar as in Sistem, the tribunal here was also concerned with the court’s annulment of a share purchase agreement and an order to return shares. While confirming that the judicial decisions were the acts that eventually resulted in the “total deprivation” of the Claimant’s rights as a shareholder, the tribunal emphasized that the judicial conduct was not isolated but rather part of “the complex network of acts that led one way or another to the courts’ determinations.”

The judicial acts were ultimately discussed as part of a series of “composite acts,” which might not constitute an expropriation on their own, but could do so as an aggregate of acts. It seems as though it was rather the particular facts at issue in Tatneft that led to its conclusion on the aggregate nature of the expropriation, as other jurisprudence clearly suggests that judicial acts may indeed constitute expropriations on their own.

The strict approach may be represented by the Krederi v. Ukraine award. Claimant argued that the invalidation of contracts for the lease and sale of land plots in violation of due process and denial of justice guarantees constituted an unlawful judicial expropriation of its investment. While the tribunal did not generally reject the premise that judicial acts may constitute an expropriation, it considered such an occurrence “the exception rather than the norm.” The strictness of its approach is particularly reflected in the fact that the tribunal specifically discussed certain scenarios it did not consider judicial expropriations. Accordingly, private law disputes where ownership rights are confirmed for one side and not for the other constitute “judicial determinations” rather than expropriations. Moreover, the tribunal denied that cases in which transfers of ownership after “property transfers are held to be invalid” amount to expropriation. In the next step, the tribunal also endorsed Saipem’s “additional illegality” requirement as a prerequisite for the finding of a judicial expropriation and not for its unlawfulness. In that vein, the tribunal argues that it would be “necessary to ascertain whether an additional element of procedural illegality or denial of justice was present” as only in such case one could speak of an indirect expropriation.

56 In particular, violations of FET and the subsumed full protection and security and the complete and unconditional legal protection of the investment, for which compensation was awarded by the tribunal. OAO Tatneft v. Ukraine, para 465.
57 Ibid., para 462.
58 Krederi v. Ukraine, para 690.
59 Ibid., para 709.
60 Id.
61 Krederi v. Ukraine, para 713.
**Termination of Contracts**

Whether a court-confirmed termination of a contract may amount to an expropriation appears even more disputed than the invalidation of contracts. In *Swisslion v. FYR Macedonia*, the tribunal, while recognizing the possibility of judicial takings, warned that the regular exercise of a contracting party’s right to allege a breach or to terminate the contract should not be equated with expropriation.62 A similar stance was taken in *İçkale v. Turkmenistan*, where the investor claimed that the confirmation of a contract termination by a domestic court amounted to expropriation. The tribunal rejected this argument by clarifying that merely upholding terminations of a contract by a contracting party, regardless of whether they conform to the provisions of the contract, is not sufficient to find an expropriation; rather, a breach of the treaty would have to be proven.63

In contrast to these rejections of judicial expropriations through contract termination stands *Rumeli v. Kazakhstan*. In that case, contracts had been terminated by the government, but the crux of the expropriation was a compulsory redemption of the investor’s shares ordered by the Kazakh courts at a very low fixed value. The tribunal started off by observing that although “most cases of expropriation result from action by the executive or legislative arm of a State, a taking by the judicial arm of the State may also amount to an expropriation.”64 The arbitral tribunal found a creeping expropriation in this case and, after examining the traditional requirements for a lawful expropriation, held that the compensation offered for the shares was grossly inadequate and therefore unlawful.65 An additional reflection was offered on the question whether a transfer of rights to third parties could exclude the possibility of a state expropriation, which was denied for cases where a transfer to a third party was “instigated by the State.”66

These specific examples of judicial expropriations support the premise that an internationally unlawful abrogation of contractual rights may violate expropriation standards. While this has been mostly confirmed with respect to invalidation, caution is warranted when it comes to terminations of contracts, which ought not to be automatically equated with expropriation. The deciding factor will be the violation of international law that accompanies the termination or invalidation, which will be discussed in more detail below (Chap. 4.).

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63 *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award of 8 March 2016, para 350.
64 *Rumeli v. Kazakhstan*, para 702.
65 Ibid., para 705–706.
66 Ibid., para 704.
Seizures or Transfers of Assets

Seizures and auctions may be among the rather routine tasks of a court, and they do occur in great frequency. An important example of a judicial expropriation of movable assets is the *Middle East Cement v. Egypt* case. The Poseidon, a transporting ship, was taken from the investor by way of a court-ordered seizure and auction, and both acts were improperly notified to the investor. The tribunal concluded that although normally seizures and auctions by courts do not qualify as expropriations, they may constitute measures tantamount to expropriation if they violated the due process clause of the treaty. In case of the Poseidon, the award confirmed that the seizure and auctioning of the ship fell short of the due process requirements of the BIT because they should have been notified to the investor by direct communication.

One may note here that what the tribunal appears to be requiring is, as discussed earlier, an additional element of impropriety to find an expropriation in the first place. A similar position was taken by the tribunal in *Garanti Koza v. Turkmenistan*, where a factory and equipment were seized following default under a contract. The tribunal seems to follow suit with the heightened illegality standard set in *Saipem*, except that such illegality is expressly limited to the confines of procedural irregularities in *Garanti*. The tribunal accordingly started off by saying that a “seizure of property by a court as the result of normal domestic legal process does not amount to an expropriation under international law,” with the exception of seizures that occurred in a legal process tainted with “an element of serious and fundamental impropriety.” In that sense, the *Garanti* tribunal appears to have concurred with *Middle East Cement* in that seizures will only constitute expropriations if not taken under due process of law.

A more recent decision arising out of security and property rights was handed down in *Standard Chartered Bank v. Tanzania II*. The investor acquired a loan and the related security that had been provided to a power company, which in turn had contracted with governmental instrumentalities to operate a power plant. After the government-owned corporation failed to make payments, irregularities in the liquidation procedure of the power company led to a loss of the investor’s rights. In particular, after a petition for liquidation of the company was withdrawn, a local court ordered the transfer of all of the power company’s affairs, including the power contract and control of related facilities, to a third party rather than to the investor (and security holder). The tribunal first rebutted respondent’s argument that only legislation may effect expropriations; any organ of the state can be a “possible player” in the act of an expropriation. The issue of judicial expropriations was then approached with the usual disclaimer that judicial acts should not be called

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67 *Middle East Cement v. Egypt*, para 139.
68 *Id.*
70 *Id.*
judicial expropriation “simply because [they] were taken in error or may be considered aberrant.” Nevertheless, here too, the tribunal (as already observed in Section “Invalidation of Contracts”) attempted to tie expropriations by the judiciary to other branches of government, in the sense that if judicial acts “permit the actions or inactions of other branches of the State” and “deprive the investor of its, property or property rights,” they may amount to expropriation. A second notable feature of the tribunal’s discussion is the fact that it did not agree that a denial of justice will in all cases be necessary for a judicial expropriation to occur. Eventually, the tribunal found that although some court instances indeed acted questionably, the judiciary “as a whole, had not acted to deprive” the investor of the economic value of its investment, as “poor decisions or decisions without proper justifications do not rise to the standard of expropriation.”

**Revocation of Patents or Licenses**

The last strand of factual scenarios discernible from claims of judicial expropriations is interferences with government-issued patents or licenses. *Liman Caspian Oil v. Kazakhstan* discusses such a scenario, namely, where a license was invalidated through court decisions. In the opinion of the tribunal, the “mere fact that decisions of the Kazakh courts declared that Claimants did not prevail and were not holders of rights […]” would not be sufficient to constitute an expropriation. Even if the invalidation may have been incorrect as a matter of Kazakh law, since it could not find any indicia of “arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory” conduct or a lack of due process in the Kazakh court decisions, the invalidation of the transfer of the license would have to be accepted under international law.

The more recent and widely discussed award in *Eli Lilly v. Canada* found no NAFTA breaches by the Canadian courts when they revoked Eli Lilly’s Canadian patents. The tribunal emphasized that it is indeed possible that a judicial act (or omission) raises questions of expropriation, for instance, when “a judicial decision crystallizes a taking alleged to be contrary to NAFTA Article 1110.” For the purposes of defining when a judicial expropriation occurs, this rule of thumb by the *Eli Lilly* tribunal may not be very useful. Its hesitance toward judicial expropriations is also reflected in the disclaimer that a “NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of national judiciaries.” However, the significance of the award and the reason for its prominence lies in its rather liberal take when it comes to the conditions of (un)lawfulness, as shall be discussed below (Chap. 4).

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71 Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania, ICSID Case No. ARB/15/41, Award, 11 October 2019, para 279.
72 Ibid., para 320.
73 Ibid., para 430.
74 Ibid., para 431.
75 *Eli Lilly v. Canada*, para 221.
Unlawfulness of Judicial Expropriations

Our analysis of cases in the past chapter has not only shown the factual circumstances in which judicial expropriations may occur but also, to a certain extent, highlighted considerations of unlawfulness on which tribunals have focused. And while not all abovementioned tribunals clearly separated the finding of an expropriation from determining its unlawfulness (particularly in the context of the “additional illegality” requirement of finding an expropriation, Sections “The (Unclear) Line Between Expropriation and Its Unlawfulness” and “The Many Legacies of Saipem”), it is appropriate to do so for the purposes of this discussion. The awards dealing with court-ordered expropriations demonstrate that investment arbitration tribunals do not uniformly apply the “traditional” elements of unlawfulness. It might therefore be tempting to hinge the existence of a judicial expropriation on a denial of justice. Consequently, an expropriation may only be confirmed, if all requisite conditions for a denial of justice are fulfilled. This will necessarily confine the “illegalities” enacted by the courts to procedural improprieties, rather than violations of substantive international law.76 Some awards suggest, however, that a denial of justice is not a prerequisite to an expropriatory court ruling and that the unlawfulness of a judicial expropriation may be derived from circumstances independent from procedural propriety, for instance, from other rules of international law in sources such as treaties.77

The Grounds for Unlawfulness in Practice: Always the “Four,” Always a Denial of Justice?

As mentioned above, the traditional expropriation doctrine measures the lawfulness of an expropriation by examining the usual four suspects: payment of prompt, adequate, and effective compensation, public purpose, due process, and non-discrimination. While the prohibition of denial of justice is an autonomous customary law standard, it may also apply by virtue of incorporation in investment treaties, either directly or through the FET standard. Denial of justice is predominantly concerned with the procedural propriety as well as the nondiscriminatory and

76 An often drawn, but imprecise distinction is the one between “procedural” and “substantive” denial of justice. Paulsson quite rightly argues that “when national courts misapply international law, they commit substantive violations which should not be called denials of justice.” Paulsson J (2005) Denial of justice in international law. Cambridge University Press, Cambridge, p 4.
77 Amongst others, see Saipem v. Bangladesh, para 181 (“While the Tribunal concurs with the parties that expropriation by the courts presupposes that the courts’ intervention was illegal, this does not mean that expropriation by a court necessarily presupposes a denial of justice.”); Eli Lilly v. Canada, para 223 (“[. . .] the Tribunal is unwilling to shut the door to the possibility that judicial conduct characterized other than as a denial of justice may engage a respondent’s obligations under NAFTA Article 1105.”); Gharavi HG (2018) Discord over judicial expropriation. ICSID Rev 33 (2):349–357, 356.
independent adjudication of disputes before national courts. The situations where a denial of justice has been confirmed in international jurisprudence range from refusal of access to justice, unreasonable delay, interferences by state authorities in proceedings, and breaches of due process, to corruption, discrimination, and prejudice. Whenever a denial of justice is concerned, the exhaustion of local remedies becomes binding in a substantive sense: the wrong must have reached the highest instance of courts in order for the claim of a denial of justice to be completed on the merits. The way in which this condition may have caused interpretations of judicial expropriations as reflections of denial of justice shall be discussed in more detail below (Section “The Role of the Exhaustion Rule”).

To understand how tribunals identify the unlawfulness of judicial expropriations, the grounds of illegality named in the relevant investment awards discussed above shall be reconsidered. These grounds often stem from a denial of justice, but not in all cases, as exemplified by the following enumeration of reasons considered (but not necessarily confirmed) by tribunals:

- The four “classic” conditions of unlawfulness generally, (Sistem v. Bangladesh, Tatneft v. Ukraine, İlkale v. Turkmenistan) or specifically:
  - Undue process of law (Krederi v. Ukraine, Middle East Cement v. Egypt); such as through improper notice (Middle East Cement v. Egypt)
  - Lack of prompt and adequate compensation (Rumeli v. Kazakhstan, Tatneft v. Ukraine)
  - Public purpose (Tatneft v. Ukraine, Rumeli v. Kazakhstan)
  - Discrimination (Tatneft v. Ukraine)
- Denial of justice (Tatneft v. Ukraine, Krederi v. Ukraine)
- Decision not sufficiently founded on evidence (Karkey Karadeniz v. Pakistan)\(^{80}\)
- Excessiveness/lack of proportionality (dissent in İlkale v. Turkmenistan)\(^{81}\)
- Violation of general principle on the prohibition of abuse of rights (Saipem v. Bangladesh)


\(^{80}\)Karkey Karadeniz v. Pakistan, para 649 (‘Even if the Tribunal were to apply the “balance of probabilities” standard as proposed by Pakistan, the Tribunal finds that there is insufficient evidence to demonstrate that it was more likely than not that Karkey was involved in the practice of corruption.’)

\(^{81}\)İkale İnşaat Limited Şirketi v. Turkmenistan, Partially Dissenting Opinion of Carolyn B. Lamm, para 15 (“I disagree with the majority and conclude that the Supreme Court’s directive was in fact excessive and thus expropriatory, because it resulted in the seizure of all of Claimant’s machinery and equipment in Turkmenistan, significantly in excess of any penalties. The combined value of this machinery and equipment, which was deployed by Claimant to perform its investment, far exceeded any reasonable delay penalty that could have been imposed by the Supreme Court.”)
• Violations of a treaty other than the BIT (New York Convention) (*Saipem* v. *Bangladesh*, *ATA* v. *Jordan*)
  - Revocation of arbitral tribunal’s authority (*Saipem* v. *Bangladesh*)
  - Retroactive application of laws (*ATA* v. *Jordan*)

Many of these grounds of illegality are related to irregularities in the procedure before a national court. It is hence appropriate to say that the unlawfulness of the majority of judicial expropriations is derived from contraventions of due process or denial of justice (the choice of which will naturally depend on what protection standards the treaty grants and the investor claims). However, there are two facts about the grounds listed above that catch the eye. It is firstly striking, that many, but not all tribunals generally examine the classic four conditions of lawfulness in their analysis of expropriation claims, considering that they are usually stipulated as the standard by the investment treaty. While due process and nondiscrimination seem to be the most frequently discussed criteria of the four, certainly due to their usual relevance in the context of irregularities of the judicial process, the public purpose or compensation requirements are rarely discussed, and particularly the latter sometimes seems to be omitted entirely. *Sistem* and *Tatneft* are examples of cases where the lack of compensation is generally noted, but not discussed any further.82 The only case where the failure to pay prompt, adequate, and effective compensation was deemed to be at the center of the unlawfulness of the expropriation is *Rumeli* v. *Kazakhstan*. In fact, the case is among the few to examine all four of the classic conditions of lawfulness exhaustively. The tribunal consequently notes, for instance, that the decision was made for a public purpose, “namely the administration of justice and the execution of the laws of the host State.”83 After confirming that there is no indication of undue process of law, the tribunal emphasizes that the valuation of the shares was “manifestly and grossly inadequate”; not commensurate with what is required as adequate compensation under the BIT and therefore unlawful.84

The second point to note is that diverging opinions exist as to whether a judicial expropriation must always include a denial of justice. As demonstrated in the list above, some of the investment tribunals have asserted that the merits of a domestic court decision may also run contrary to international law, such as treaty law or general principles of law, without necessarily involving a procedural denial of justice. This seems to be the case with judicial expropriations in the context of

82Tatneft v. Ukraine, para 471 (“It is also to be noted that no compensation has been paid in the present case and that the situation is no different than a case of direct taking or one concerning the compulsory redemption of shares, as decided in *Rumeli* in respect of the latter.”); *Sistem* v. *Kyrgyzstan*, para 119 (“That abrogation of the Claimant’s property rights amounts to a breach of the Article III of the Turkey-Kyrgyz BIT, which forbids the expropriation of property unless it is done for a public purpose, in a non-discriminatory manner, and upon payment of prompt, adequate and effective compensation. Those conditions are not satisfied in this case: in particular, no compensation has been paid.”).


84Ibid., para 706.
nullifications of commercial awards or arbitration agreements that are internationally wrongful due to their incompatibility with the New York Convention (e.g., *Saipem* and *ATA*), as well as when it comes to the compensation requirement, which may be classified as a substantive right rather than a procedural requirement of expropriation (e.g., *Rumeli*).

The contrast in opinions on the necessity of a denial of justice for judicial expropriations is exemplified by the tribunals in *Eli Lilly v. Canada* and *Krederi v. Ukraine*. The award in *Eli Lilly v. Canada* breathed new life into *Saipem’s* conclusion that denial of justice and judicial expropriations are, in fact, separable concepts. The tribunal engaged in a discussion on the correlation between Articles 1105 (Minimum Standard of Treatment) and 1110 (Expropriation) of NAFTA. Article 1110(1)(c) stipulates that an expropriation is unlawful if it was not taken, inter alia, “in accordance with due process of law and Article 1105(1),” which in turn grants the minimum protection standard, including FET, for investments. The tribunal *firstly* emphasized that a distinction should be made between a denial of justice and “other conduct that may also be sufficiently egregious and shocking, such as manifest arbitrariness or blatant unfairness.”

*Secondly*, it continued by asserting that a claim that the customary international law minimum standard of treatment has been breached “may be properly a basis for a claim under NAFTA Article 1105 notwithstanding that it is not cast in denial of justice terms.” This statement seems to confirm the conclusion of *Saipem* that the threshold of unlawfulness for a judicial expropriation is not necessarily a denial of justice but may also consist of other violations of international law. The more recent award in *Standard Chartered Bank (Hong Kong) v. Tanzania* concurs that “[w]hile denial of justice could in some case result in expropriation, it does not follow that judicial expropriation could only occur if there is denial of justice.” This may be contrasted with the recent award in *Krederi v. Ukraine*. While the tribunal there endorsed the “additional illegality” requirement of *Saipem* to find an expropriation, it seemed to go a bit further than that by stating that it is “necessary to ascertain whether an additional element of *procedural* illegality or denial of justice was present” and that “[o]nly then may a judicial decision be qualified as a measure constituting or amounting to expropriation.”

**The Role of the Exhaustion Rule**

Notwithstanding this rather significant doctrinal dispute, the majority of awards have followed a common line of argumentation: For a judicial decision or conduct to bring about a violation of expropriation standards, serious flaws within the procedure or

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85 *Eli Lilly v. Canada*, para 223.
86 *Standard Chartered Bank v. Tanzania*, para 279.
87 *Krederi v. Ukraine*, para 713 (emphasis added).
the substance of the ruling must have occurred. Not in all cases, as discussed above, can these flaws be connected to a denial of justice, and the pressing question that arises is whether local remedies must still be exhausted for such an expropriation. *Saipem* appears to consider that the exhaustion rule does not constitute a substantive requirement of a finding of expropriation by a court.

In the *Ambatielos Claim* case, a quite prominent explanation was given for the rationale of the exhaustion rule. According to the arbitrators, it was “the whole system of legal protection [...] which must have been put to the test” before claims could be made on the international level. Looking at this rationale, but also at its historical context, arguments for both sides bear legitimacy. On the one hand, states should be given the full opportunity to remedy judicial injustices through their own legal systems. However, on the other hand, when a state has nowadays freely disposed of the application of the exhaustion rule by express waivers, such as those included in investment treaties, the situation becomes more complex.

As discussed above, for a denial of justice to be successful on the merits, the investor will usually have to have exhausted local remedies, as waivers in investment treaties typically relate to the procedural exhaustion rule, not the substantive prerequisite to a claim of denial of justice. The inherent question of the problem is thus the extent of the connection between denial of justice and judicial expropriations. *Saipem* states that an expropriation by a court must not necessarily presuppose a denial of justice and that “[a]ccordingly, it tends to consider that exhaustion of local remedies does not constitute a substantive requirement of a finding of expropriation by a court.” An *argumentum e contrario* derived from this assertion could mean that a substantial deprivation of the investment that is accompanied by treaty violations and not a denial of justice may amount to a judicial expropriation even if it was a decision by a lower court (as long as they fulfill the requirement of permanence). This may explain why tribunals are almost anxious to connect judicial expropriations to denial of justice. The other wave set into motion by this thought experiment is the complex discussion on the finality rule. Although often taken as identical to the exhaustion rule, “judicial finality” is a doctrinally different concept. While the discussion on the exhaustion rule addresses a procedural aspect of an investor’s right to bring a claim, the finality rule is arguably a substantive requirement for state
responsibility to arise for conduct of the judiciary.\textsuperscript{93} The finality rule was primarily discussed in the context of denial of justice, which traditionally constituted the only prominent area of internationally wrongful judicial conduct.\textsuperscript{94} \textit{Loewen v. United States} seems to be among the few cases that clearly distinguish between procedural exhaustion rule and substantive finality rule.\textsuperscript{95} Other tribunals, too, have confirmed the applicability of the finality rule to denial of justice.\textsuperscript{96} Any conclusion on the applicability of the rule on judicial expropriations will be contingent on two developments that have yet to occur. Firstly, against the background of the contrasting case law, it remains to be seen whether tribunals will necessarily frame the underlying improprieties of a judicial expropriation as a denial of justice and hence apply the exhaustion rule substantively. Secondly, if judicial expropriations are found to be independent of denial of justice, the role of the finality rule outside of denial of justice claims will require clarification too. As a matter of fact, that seems to have not yet been central to many of the discussions in case law, as in the majority of those cases the alleged judicial expropriation involved decisions by courts of last instance.\textsuperscript{97}

### Conclusion

What started off as a judicial “phenomenon” in the eyes of many has since \textit{Saipem} evolved into a legal claim of frequent occurrence and increasing interest in investment arbitration. Judicial expropriations are the subject of engaged discussions among practitioners and scholars alike, not only because they have wide-ranging practical implications for investment protection but also due to the complicated conceptual and practical issues they raise. It is safe to say that the practice of investment tribunals of the past decade confirms that expropriations by the judiciary may occur, both as a composite act of a creeping expropriation as well as in the form of an independent indirect expropriation. In the majority of cases, these judicial expropriations will entail a denial of justice, which consequently makes it necessary for tribunals to take a stand on the question whether the substantive requirement of exhausting of local remedies applies to judicial expropriations too. It is important to note, however, that in most cases of judicial expropriations (at least in the ones discussed here), the investor has already gone through considerable (unsuccessful) effort to remedy the situation domestically. Nevertheless, considering the variety of


\textsuperscript{95}\textit{Loewen Group, Inc. v. the United States}, ICSID Case No. ARB(AF)/98/3, Decision on Competence and Jurisdiction, para 68; \textit{Loewen Group v. United States} (Award), para 147.

\textsuperscript{96}\textit{Jan de Nul v. Egypt}, paras 255–261; \textit{Toto Costruzioni v. Lebanon}, para 164.

\textsuperscript{97}See for instance, \textit{Saipem v. Bangladesh}, para 182.
factual scenarios capable of constituting judicial expropriations, ranging from interferences with commercial arbitration and contracts to seizures of assets, an influx of jurisprudence on the issue may definitely be expected. Especially in the interaction between unsuccessful enforcement of arbitral awards and the remedies provided by investment arbitration, the concept of judicial expropriations could have significant bearing.

At the same time, caution is warranted. As demonstrated in this piece, there seems to be considerable confusion as to the requirements for an unlawful judicial expropriation as well as for the elements to be fulfilled to make a successful claim of judicial expropriation. For a clear stance on the issue of judicial expropriations, greater clarification as to the applicable standards will be necessary in adjudication by tribunals, but more importantly, in respective treaty language.

**Cross-References**

- Anti-Arbitration Injunctions and Abuse of Process
- Expropriation in International Investment Law
- Relationship between Domestic Courts and Investment Tribunals
- Right to Regulate: Latin American Perspectives
- The Concept of ‘Investment’: Treaty Definitions and Arbitration Interpretations
- The Standard of Fair and Equitable Treatment in the Investor-State Dispute Settlement Practice
- Tribunal Jurisdiction and the Relationship of Investment Arbitration with Municipal Courts and Tribunals