

Indirect expropriation and the right to regulate: revisiting proportionality analysis and the standard of review in investor-state arbitration.

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Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration

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Abstract

International investment tribunals considering claims of indirect expropriation have increasingly taken into account the host state's regulatory purpose in their analysis, alluding to the need for measures to achieve a balance between host state and investor interests. Some tribunals have attempted to employ proportionality analysis in their determination of claims, but their reasoning has been methodologically problematic and characterized by a stringent standard of review, diverging from the approach of other international and supranational fora hearing disputes concerning the exercise of public power affecting individual rights and interests. Investment tribunals should be more deferential in performing proportionality analysis, mindful of host state authorities' greater democratic legitimacy and proximity to host state communities, and tribunals' comparatively weak institutional capacity. Such an approach would entail greater deference to host states in evaluating the legitimacy of a measure's objective, the measure's suitability and necessity, and the ultimate balance between the interests of the host state and of the investor. An appropriately deferential use of proportionality analysis is a more coherent approach to indirect expropriation that provides greater space for host states to take measures in the public interest, yet provides sufficient scrutiny to control misuse of public power.

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