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# Indirect Expropriation and One Belt One Road Initiative: A Pivotal Issue for the Implementation of China's Refreshed Strategy for Foreign Investment

Yucong Wang*

*China's OBOR Initiative charts a path for trade and investment cooperation between China and States along the OBOR. Indirect expropriation stands as a crucial issue for the successful implementation of the OBOR initiative. This mainly owes to the large size of investment projects and investment funds, scant regulation of indirect expropriation in the IIAs signed between China and OBOR States, and the diverse political and economic environments of these many States. This article examines the definition and identification standards of indirect expropriation under OBOR IIAs. It will also reveal that indirect expropriation is poorly defined and insufficiently identified in most agreements. It is argued that OBOR IIAs should be revised to regulate indirect expropriation in such three aspects as preambular declaration of host State regulatory freedom, definitional clarity of indirect expropriation, and guidance for its identification. This approach would facilitate a more stable investment environment and contribute to the success of the OBOR initiative.*

**Keywords:** Indirect Expropriation, OBOR, IIAs, BITs, Foreign Investment

* LL.D. candidate of Kyushu University Law School. LL.B. (CUPL), LL.M. (Leiden / Kyushu). ORCID: http://orcid.org/0000-0002-0799-9510. The author can be contacted at: yucong.wang.615@gmail.com / Address: 14-10-5 Hakozaki, Higashi-ku, Fukuoka 812-0053 JAPAN.

# 1. Introduction: Expropriation

A perennial concern of foreign investors is expropriation. It is whether the potential for the property rights in their investments would be taken by host State governments or otherwise substantially devalued by the effect of host State regulatory measures. Expropriation not only remains a principal challenge to foreign investment, but also is a well-established topic in international law.[1] A foreign investment may be expropriated either directly or indirectly. Direct expropriation is "usually open and deliberate, with the State engaging in outright seizure of foreign-owned facilities or mandating an obligatory transfer of title."[2] Conversely, indirect expropriation can occur in far more complex or obscure circumstances where foreign investors are unable to benefit from their investments even though their legal titles to their investments remains intact.[3] Direct expropriation was the focus of early examination during the post-colonialism era from the early 1960s. At that time, there were frequent nationalizations that were "intended to regain control of national economies from the companies of the erstwhile colonial powers."[4] Compensation for foreign investors was the central issue debated in the period from 1960 to 1990.[5]

It is now rare for host States to adopt measures that obviously constitute direct expropriation.[6] Today, expropriation continues to occur indirectly. As a more common and disincentive to foreign investment than direct expropriation,[7] it has replaced direct expropriation[8] as a focal point on both theoretical and practical levels.[9] Martin Domke presciently foreshadowed this evolution of host State behavior in 1961:

> An outright transfer of title may no longer constitute the foremost type of 'taking' property in the technique of modern nationalization. There are various other means of … 'guised' nationalization through regulations of foreign governments.[10]

There are two principal reasons to explain why direct expropriation by host States now rarely occurs. First, international investment law has evolved to entitle foreign investors to potentially significant compensation payable by host States where foreign investments have been expropriated. Second, a host State measure that constitutes direct expropriation will bring unfavorable publicity and risk that