Preface

Prof. Dr. Jan Wouters, General Editor

As General Editor of the Leuven Global Governance Series I am delighted to write a short preface to this monograph written by my good friend and esteemed colleague Prof. Dr. Sebastián López Escarcena from the Pontificia Universidad Católica de Chile, Santiago.

As the reader will soon discover, this insightful and highly informative book on the problem of indirect takings provides a thorough examination of the international law of expropriation. Some may have thought that, with such a complex problématique, involving plenty of tricky and sensitive issues, with case-law spread over a large variety of international courts, from the Iran–US Claims Tribunal to the European Court of Human Rights, the book would be a rather dry and technical read. The contrary is the case: the book reads like a novel. Engaging in style and thought-provoking, it covers the shift in the international debate from the problem of compensation to that of indirect takings; the expropriation clause in friendship, commerce and navigation treaties, bilateral and plurilateral investment treaties, and the investment chapters of economic integration agreements; and the case-law of the main tribunals settling expropriation cases, including – apart from the ones indicated above – the Inter-American Court of Human Rights and arbitral panels in investment treaty arbitrations.

For sure, such a book could not have been written by a novice in international law. It deals with an awesome multitude of intersecting questions under the international law of expropriation, including the concept of property; the right to expropriate; the distinction between lawful and unlawful takings; the requirements of a lawful expropriation (public purpose, non-discrimination, payment of compensation, and now due process); the Hull formula; the distinction made by the European Court of Human Rights between deprivations, controls on the use of property and other interferences; the proportionality test; the margin of appreciation; the bilateral and plurilateral protection against expropriation; the failed attempts to regulate takings in a universal treaty; the soft-law instruments currently available on the issue; the effects and the

police-powers doctrine; the concept of substantial and permanent deprivation; the police-powers exception within the effects rule; the principle of respect for prior and distinct legitimate expectations; the interplay between the protection against expropriation and the fair and equitable treatment clause; the global administrative law theory and its approach to international investment law; the constant presence of the US regulatory takings doctrine in the international law of expropriation; the mutual influence of the case-law of the Iran-United States Claims Tribunal, the European Court of Human Rights, and investment treaty arbitrations; the relation between the protection of property in regional conventions of human rights and investment treaties; and the natural orientation of these treaties towards reducing political risk and promoting good governance through the encouragement of the rule of law.

This incisive and stimulating book studies the problem of indirect takings from the standpoint of the minimum standard of treatment offered at present by regional human rights conventions and investment treaties. It is well argued, coherent and bold in its scholarly and compelling support of a not particularly ‘trendy’ position in international law nowadays: the effects doctrine.

I should not let the reader wait any longer. This is a lucid and comprehensively researched book, offering a detailed analysis of the customary and conventional law of expropriation, as construed by international case-law and doctrine. It is an excellent and timely contribution to the understanding of a complex legal topic, for which we should be very grateful to Sebastián.

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