

Gates Opening for Expropriation Claims - Is the Bosphorus the Next Super-Project?

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28 March 2013

Generally described as “the power to take private property for public use or public interest “, the government’s right to expropriate is a highly debated legal issue. The laws in force in Turkey leave almost no doubt that there must be public interest in such use of the power of eminent domain and the government must pay just compensation as well as interest for the expropriated property when there is a physical interference with the right of ownership. This type of interference was recognized as an “expropriation” since 1950’s by virtue of the Court of Appeals’ rulings.

However the question as to what constitutes an expropriation remains unclear when there is no physical interference by public authorities with the private property. The Turkish Court of Appeals traditionally denied the right to compensation in the event of “legal interference” by the government with the private ownership. A “legal interference” was defined as depriving the owner of the right to freely enjoy the benefits of ownership (referred to as *usus*, *fructus* and *abusus* under the Roman Law) through zoning plans or other regulations that make it legally impossible to develop the tract of land in question.

The position taken by the Court of Appeals caused major criticism among the scholars and legal professionals. This was not only a violation of the provisions of the Turkish Constitution that protect private ownership but it also fell in contradiction with the government’s international commitments such as the Art.1 of the Protocol No.1 to the European Convention on Human Rights. Therefore Turkish citizens showed no hesitation in filing actions against Turkish government at the European Court of Human Rights for violation of those commitments and the European Court consistently rewarded damages in favor of those whose rights were breached.

After the government’s several unsuccessful attempts to defend cases before the Court of Human Rights, a groundbreaking decision of the *General Assembly of Civil Chambers* of the Court of Appeals changed the picture entirely, on December 15th 2010. The Court stated that any interference by the government that creates obstacles for the owner to develop the land, whether of legal or physical nature, shall be recognized as an expropriation *de facto* provided that (i) the application zoning plans (1/1000 scaled zoning plans) are in place, AND (ii) the government did not expropriate the property by paying just compensation within 5 years from the date of enactment of those plans. In other words, the Court held that the government must pay the fair market value of the property within 5 years of the making of the application plans if such property’s use is limited for public interest.

The change of position of the Turkish Court was followed by thousands of claims and actions filed against municipalities, governmental agencies and ministries. The estimated amount of claims in Bosphorus (Istanbul) only reached USD 130 Billion, almost 1/3 the foreign debt of the country. It is practically impossible to guess the amount of those claims in the entire country. The government had to take action or it would suffer terrible financial consequences.

The government was not late to react. The first step was to enact a law that required the plaintiffs/claimants to apply for a settlement before going to court. The Court of Appeals found the law inapplicable and began to condemn the government to compensation in the early lawsuits. The second step of the government was to force the plaintiffs to take their

cases to administrative courts instead of civil courts, which would give the government an extra 1-2 years due to procedural uncertainties. The Court of Appeals, who acts as the higher court for civil claims, again ruled that administrative courts do not have jurisdiction on those claims that have been within the jurisdiction of civil courts for over 50 years.

Today, with approximately fifty thousand cases before the courts, the government is still forcing the limits of “legislative creativity” to find a method to stop the lawsuits. However, it is apparent that there is no stepping back at this point, once the judiciary has taken clear stand against the long standing violation of the right to ownership.

The Bosphorus Case

The Bosphorus is a unique geographical area where two continents meet. It is known to be an extraordinary natural heritage for the future generations, not to mention its extreme geopolitical and commercial importance as a passage from the Black Sea to the Aegean. The Bosphorus is a 1st degree natural preservation site according to the decisions of the Regional Preservation Board (dated 1974) as well as the Metropolitan Municipality's *1/1000 scaled application plans* that were approved in 1983. It means that construction is strictly prohibited in the sea-side and the front-view areas, while very limited development would be permitted in the rear-view areas for touristic facilities subject to serious density limitations.

Although the Bosphorus is a preservation site, ownership rights remain untouched, and it is free to transfer title to real property. That being said, the limitations on use of real property constitute a major complication within the context of the above mentioned legal developments on expropriation law in Turkey. During the course of those developments, hundreds of land owners filed actions against the Metropolitan Municipality as well as the Ministry of Environment and Urban Development for just compensation for their properties located in the Bosphorus. Those cases will certainly force the government to resolve the problem in a very near future considering the fact that the *per sqm market value* of those properties is ranging between USD5000 – USD 20,000.

In line with the expectations of investors and current plaintiffs/owners to see a change in the zoning plans, the real estate market in the Bosphorus is witnessing an unprecedented hype. The world of investors is anticipating that the government will allow limited development in the Bosphorus, which means that the prices will break all-time records in a near future with the launch of high-end residential and/or hotel projects that will immediately follow the change in the zoning plans.

We should be ready to welcome a substantial transformation of the Bosphorus over the next few years both from legal and commercial perspectives.